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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1900

J. C. BANCROFT DAVIS

REPORTER

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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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.

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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, 1900.



## WASHBURN AND MOEN MANUFACTURING COMPANY *v.* RELIANCE MARINE INSURANCE COMPANY.

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

No. 6. Argued March 15, 16, 1899.—Decided October 15, 1900.

In marine insurance the general rule is firmly established in this court that the insurers are not liable upon memorandum articles except in case of actual total loss, and that there can be no actual total loss when a cargo of such articles has arrived in whole or in part, in specie, at the port of destination, but only when it is physically destroyed, or its value extinguished by a loss of identity.

In this case the entire cargo was warranted by the memorandum clause free from average unless general, and by a rider, free from particular average, but liable for absolute total loss of a part. Under these provisions the insurers were not liable for a constructive total loss, but only for an actual total loss of the whole, or of a distinct part.

The carrying vessel was stranded, and, having been got off in a shattered condition, was subsequently condemned and sold on libels for salvage; most of the cargo was saved, and reached the port of destination in specie, a portion damaged, and a substantial part wholly uninjured. *Held*, That the owner could not recover for a constructive total loss, nor for an actual total loss of the whole.

No right to abandon existed, and the insurers explicitly refused to accept

the abandonment tendered. If the cargo saved was carried from the port of distress to the port of destination by the insurers, which was denied, this was no more than, by the terms of the policy, they had the right to do without prejudice, and could not be held to amount to an acceptance.

The Circuit Court did not err in declining to leave the question of actual total loss of the entire cargo, or the question of acceptance, to the jury.

THIS was an action at law brought in the Superior Court of Massachusetts for the county of Suffolk, and thence removed into the Circuit Court of the United States for the District of Massachusetts, by the Washburn and Moen Manufacturing Company against the Reliance Marine Insurance Company (Limited) of London, England, on a policy of marine insurance taken out, March 15, 1893, in the sum of forty-eight thousand, eight hundred dollars, on a cargo of wire shipped from Boston to Velasco, Texas, on the schooner Benjamin Hale, John Hall, master.

The memorandum clause of the policy ran thus: "MEMORANDUM. It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent, unless general; and sugar, flax, flaxseed and bread are warranted by the assured free from average under seven per cent, unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent, unless general."

And on the margin the following was stamped or written: "Free of particular average, but liable for absolute total loss of a part if amounting to five (5%) per cent."

It was also provided: "And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, their factors, servants and assigns, to sue, labor, and travel for, in

and about the defence, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said assurers will contribute according to the rate and quantity of the sum herein insured."

The "Benjamin Hale" sailed for Velasco, March 31, 1893, and on April 15 ran ashore on Bahama Banks, but, after throwing overboard two hundred reels of barbed wire, floated and proceeded. On the night of April 19 the schooner again ran ashore, on Bird Key, near Dry Tortugas, and largely filled with water. Wreckers came on board April 21. The master went to Key West, and from thence telegraphed the Washburn and Moen Company, April 24, that the vessel was ashore, and he thought the loss was total. April 24, 25 or 26 the agent of that company told the agent of the insurance company, in Boston, "what he knew in regard to the troubles, and said that he wished to abandon the cargo to the underwriters." April 29 a written notice of abandonment was given, which the insurance company explicitly declined to accept. The master returned at once with further assistance, reaching the wreck the morning of April 25, and the vessel was floated April 29, and finally taken to Key West, arriving May 4. The captain testified that "from the time the vessel went ashore until she came off they were taking the cargo out as they could so as to get her off. . . . Think about one half of cargo was discharged on the reef, of which he thinks about thirteen hundred reels were dry." This was substantially all carried to Key West, where the unloading was completed May 10.

Captain Hall made a memorandum at Key West as to the condition of the cargo when landed there. From this it appeared that out of 13,051 reels of barbed wire, shipped from Boston, 12,277 (or 12,625) were landed at Key West, of which 989 were perfectly dry, and 10,448 had received "hardly perceptible" damage. Of plain wire, 1102 bundles were shipped, and all landed at Key West, and 464 were stated to be nearly

dry. Five reels of salamander wire and a wire rope were all landed and transhipped dry and unimpaired; also 243 kegs of staples out of 249; and 478 bundles of hay bands out of 1050.

Libels for salvage were filed against vessel and cargo at Key West, and the schooner condemned and sold, but the cargo was released and the amount decreed in respect thereof paid by the insurance company.

The goods were forwarded from Key West to Velasco on the schooner Cactus, where they were tendered to the Washburn and Moen Company, which refused to receive them. That company again abandoned, and the insurance company again declined to accept abandonment.

At this time a very large part of the goods existed in specie, and a considerable part was practically uninjured. There were no facilities for handling and no market for barbed wire at Key West, but there were at Velasco, which was also but sixty miles by rail from Houston, the headquarters of the general agent of the manufacturing company in Texas.

The goods were afterwards sold by order of court on the libel of the master of the Cactus for freight, demurrage and expenses, and realized $10,000. Plaintiff was not present and made no bid at the sale.

As the cost of saving the cargo and bringing it to Key West, and expenses there, exceeded the sum realized at forced sale, and the freight to Velasco added some hundreds of dollars to that, plaintiff contended that the cost was more than the value at Key West, and at Velasco.

In respect of the forwarding of the cargo from Key West to Velasco, the charter party was signed by Captain Hall as master of the Benjamin Hale. This was in Boston several days after Hall had left Key West, but there was evidence that he had previously authorized the agents of the vessel at Key West, and who paid for the discharge of the cargo there, to charter the "Cactus," and the second bill of lading was signed by one of them as attorney in fact for Captain Hall, and stated that the goods were shipped by him.

The agent for the board of underwriters testified that he instructed the agent at Key West to see that a vessel was secured

and the cargo properly shipped to Velasco according to the original bill of lading; that Hall authorized the "Cactus" to be chartered; and that he always insisted that Hall should forward the cargo; while Hall said that he received a request from defendant's agent to so forward.

The Circuit Court ruled that the defendant was not liable for a constructive total loss; that the transhipment of the cargo at Key West, though made by the underwriters as he thought it was, did not, under the circumstances, make them liable for the property as underwriters; and that "inasmuch as a portion of this cargo — a considerable portion, including the staples, and a very large percentage of the fencing wire — was at Key West in a condition to be transhipped, and did in fact arrive at Velasco in specie, and suitable for the purposes for which it was intended, although not so suitable as it would have been if it had not been submerged in the sea," there was no absolute total loss of the whole.

It was agreed that there was an actual total loss of parts of the cargo to the amount of $2500; and that, under the views expressed by the court, plaintiff was entitled to a finding that there was a constructive total loss.

Accordingly a verdict was directed for $2500, and a special verdict "that there was a constructive total loss."

Judgment was rendered in favor of plaintiff, and each party prosecuted a writ of error from the Circuit Court of Appeals.

That court concurred in the rulings of the Circuit Court, but was of opinion that the cargo was forwarded from Key West to Velasco under authority of the captain of the Benjamin Hale. 50 U. S. App. 231.

Judgment having been affirmed, the Washburn and Moen Manufacturing Company applied for and obtained a writ of certiorari from this court.

Errors were relied on by petitioner, in substance, that the Circuit Court erred in not ruling that plaintiff was entitled to recover for a constructive total loss under the policy; and in not allowing the question whether there was an absolute total loss to go to the jury; or the question whether defendant had accepted plaintiff's abandonment of the cargo.

Argument for Plaintiff.

*Mr. Eugene P. Carver* for the Washburn and Moen Manufacturing Company. *Mr. Edward E. Blodgett* was on his brief.

I. The plaintiff can recover for a constructive total loss under this policy.

There are two rules as to what is a constructive total loss under a policy of marine insurance. (1) The English rule is that, in the case of a vessel, if the amount of repairs caused by perils insured against is more than her value, or in the case of cargo, if the cost of saving and forwarding the same amounts to more than the value of the same at the port of destination, then, if there is an abandonment seasonably made, there can be a recovery for a total loss. (2) The rule in the United States in the case of both vessel and cargo is that, if the damage by perils insured against is in excess of one half of the value, and an abandonment is seasonably made, there is a constructive total loss.

This doctrine was first laid down in this form in Massachusetts in 1810 by Parsons, C. J., in *Wood* v. *Lincoln & Kennebeck Ins. Co.*, 6 Mass. 479.

It is true that in an early case in regard to the English rule, *Cocking* v. *Fraser*, 4 Doug. 295, Lord Mansfield said, "absolute destruction of the goods by the wreck of the ship" would amount to a total loss on articles insured "free of average," even at an intermediate port, but this case has been overruled in England. See 2 Arnold on Insurance, Perkins' ed. 1026. If, therefore, in the case at bar there were no restrictive clauses, there could be a recovery for a constructive total loss, as the abandonment was seasonably made.

The law in the United States, by a long list of decisions relating to both vessel and cargo, has been settled in this regard. Under the usual form of policy the assured can recover for a constructive total loss of cargo, provided there has been an abandonment duly made, if the loss or injury sustained amounts to fifty per cent of the value fixed in the policy, or provided the property will not bring fifty per cent of such valuation in case of cargo. *Kettell* v. *Alliance Ins. Co.*, 10 Gray, 144; *Del-*

*aware Ins. Co.* v. *Winter*, 38 Penn. St. 176; *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 604; *Moses* v. *Columbian Ins. Co.*, 6 Johns. 219.

In determining the damage or injury to the property, the cost of saving the property, or raising it, if submerged, and bringing into port, will be taken as a part of the damage or injury in order to make up the necessary fifty per cent. *Ellicott* v. *The Alliance Ins. Co.*, 14 Gray, 318; *Wallace* v. *Thames & Mersey Ins. Co.*, 22 Fed. Rep. 66 (by Mr. Justice Matthews, late of U. S. Supreme Court); *Tudor* v. *New England Mutual Marine Ins. Co.*, 12 Cush. 554.

From an examination of the cases it is clear that the cases in the Supreme Court of Massachusetts and in the Supreme Court of the United States are not in conflict, and that the rule established by both of these courts can be thus briefly stated: That if the goods are insured "free of particular average," "free of partial loss," "against total loss only," or "warranted free from average unless general," there can be a recovery for a constructive total loss, provided there is a seasonable abandonment and a loss by perils insured against amounting to more than fifty per cent of the valuation of the goods insured; that in case no abandonment is made until after the goods have arrived at the port of destination, the abandonment is not seasonably made, and the plaintiff cannot recover; that in the case of common memorandum articles, perishable in their own nature, there can be no recovery for deterioration of the articles at a port of call, or by mere delay in the voyage is all that the cases in the Supreme Court of the United States decide, and the court, in its decisions, by express language clearly distinguishes between articles perishable in their own nature and articles not so perishable.

II. It was a question of fact for the jury as to whether on all the evidence the defendant company had not accepted the abandonment.

It is true that the agent of the defendant company, on May 1, 1893, wrote a letter in which he declined to accept the abandonment. He uses, however, these words in addition, "I await protest for particulars, after receipt of which can judge better re-

garding the loss." Which clause shows that he desired to have the matter remain open. An abandonment is to be governed by the facts existing at the time it is made. This doctrine has often been stated by the Supreme Court of the United States. *Orient Ins. Co.* v. *Adams*, 123 U. S. 67.

III. There is sufficient evidence to warrant a jury in finding an actual loss of cargo.

IV. The contract in this case should be governed by the law of Massachusetts.

*Mr. Frederic Jessup Stimson* for the Reliance Marine Insurance Company.

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

By the memorandum, wire of all kinds was expressly "warranted by the assured free from average unless general;" and by the rider, "free of particular average but liable for absolute total loss of a part if amounting to five per cent."

The memorandum and marginal clauses were *in pari materia* and to be read together. They were not contradictory, and the rider merely operated to qualify the memorandum by allowing recovery for an actual total loss in part, which could not otherwise be had. In other words, the qualification was manifestly inserted so that, while conceding that under the memorandum clause no liability was undertaken for a constructive total loss, but only a liability for an actual total loss, the insurers might be held for an actual total loss of a part.

The contracting parties thus recognized the rule that articles warranted free of particular average, or free from average unless general, are insured only against an actual total loss.

The warranty or memorandum clause was introduced into policies for the protection of the insurer from liability for any partial loss whatever on certain enumerated articles, regarded as perishable in their nature, and upon certain others none under a given rate per cent. This was about 1749, and since then in the growth of commerce, the list of articles freed by the stipulation from particular average has been enlarged so as to em-

brace many, which, though they may not be inherently perishable, are in their nature peculiarly susceptible to damage.

The early form ran as follows: "Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per cent; and all other goods, and also the ship and freight, are warranted free from average under three pounds per cent unless general or the ship be stranded."

In 1764, Lord Mansfield, in *Wilson* v. *Smith*, 3 Burrow, 1550, held that the word "unless" meant the same as "except," and that "the words 'free from average *unless general*' can never mean to leave the insurers liable to any *particular* average."

In *Cocking* v. *Fraser*, 4 Douglas, 295 (1785), the Court of King's Bench held, Lord Mansfield and Mr. Justice Buller speaking, that the insurer was secured against all damage to memorandum articles unless they were completely and actually destroyed so as no longer physically to exist.

Chancellor Kent in his Commentaries commended this rule as "very salutary, by reason of its simplicity and certainty," "considering the difficulty of ascertaining how much of the loss arose by the perils of the sea, and how much by the perishable nature of the commodity, and the impositions to which insurers would be liable in consequence of that difficulty;" and declared that notwithstanding the authority of *Cocking* v. *Fraser* had been shaken in England, the weight of authority in this country was "in favor of the doctrine that in order to charge the insurer, the memorandum articles must be specifically and physically destroyed and must not exist in specie." He added, however, that it had been "frequently a vexed point in the discussions, whether the insurer was holden, if the memorandum articles physically existed, though they were absolutely of no value." 3 Kent (1st ed. 1828), 244; 12th ed. *296.

The general rule is firmly established in this court that the insurers are not liable on memorandum articles except in case of actual total loss, and that there can be no actual total loss

where a cargo of such articles has arrived, in whole or in part, in specie, at the port of destination, but only when it is physically destroyed, or its value extinguished by a loss of identity. *Biays* v. *Chesapeake Ins. Co.* (1813), 7 Cranch, 415; *Marcardier* v. *Chesapeake Ins. Co.* (1814), 8 Cranch, 39; *Morean* v. *United States Ins. Co.* (1816), 1 Wheat. 219; *Hugg* v. *Augusta Ins. &c. Co.* (1849), 7 How. 595; *Insurance Co.* v. *Fogarty* (1873), 19 Wall. 640. And see *Robinson* v. *Insurance Co.*, 3 Sumner, 220; *Morean* v. *United States Insurance Co.*, 3 Wash. Cir. Ct. Rep. 256.

*Biays* v. *Chesapeake Ins. Co.* was a case of insurance upon hides, of which some were totally lost; some were saved in a damaged condition; and some were uninjured. This court overruled the contention that there could be a total loss as to some of them, notwithstanding the memorandum clause, and Mr. Justice Livingston said:

"Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality; or whatever ambiguity may once have existed from the term *average* being used in different senses, that is as signifying *a contribution to a general loss*, and also a *particular or partial injury* falling on the subject insured, it is well understood at the present day, with respect to such [memorandum] articles, that underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average.

"It only remains then to examine, and so the question has properly been treated at bar, whether the hides, which were sunk and not reclaimed, constituted a total or partial loss within the meaning of this policy. It has been considered as total by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite eight hundred were lost, making in point of value somewhat less than one-sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as

in that case he might have done, it is perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue, (which in this case amounts to much the greatest part), arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so, as long as a part continues to be less than the whole. This loss then being a particular loss only, and not resulting from a general average, the court is of opinion that the defendants are not liable for it."

In *Marcardier* v. *Chesapeake Ins. Co.*, some of the goods insured were warranted "free from average, unless general," and damages were claimed for a constructive total loss of these goods, but the claim was disallowed. After stating the American rule that a damage of ordinary goods exceeding fifty per cent entitles the insured to recover for a constructive total loss, Mr. Justice Story continued:

"But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed."

In *Robinson* v. *Commonwealth Ins. Co.*, 3 Sumner, 220, where a clause in the policy exempted the insurers from liability for any partial loss on goods esteemed perishable in their own nature, and the goods insured were held to be perishable, the same eminent judge charged the jury:

"The principle of law is very clear, that, as this is an insurance on a perishable cargo, the plaintiff is not entitled to re-

cover, unless there has been a total loss of the cargo by some peril insured against. If the schooner had arrived at the port of destination, with the cargo on board, physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been ninety-nine per cent, or in truth even if the cargo had there been of no real value."

Part of the cargo in *Morean* v. *United States Ins. Co.* was warranted free from average, unless general, and Mr. Justice Washington said:

"All considerations connected with the loss of the cargo, in respect to quantity or value, may, at once, be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss. . . . The only question that can possibly arise, in relation to memorandum articles, is, whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagements; everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy."

In *Hugg* v. *Augusta Ins. Co.*, the insurance was upon freight on a cargo of jerked beef, perishable articles being warranted free from average, and it was held that defendant was not liable for a total loss of freight unless it appeared that the entire cargo was destroyed in specie. The memorandum clause is

given in the margin.[1] Mr. Justice Nelson, delivering the opinion of the court, made these, among other, observations:

"What constitutes a total loss of a memorandum article has been the subject of frequent discussion, both in the courts of England and this country, and in the former of some diversity of opinion; but, in most of the cases, the decisions have been uniform, and the principle governing the question regarded as settled; and that is, so long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial. . . .

"The only doubt that has been expressed in respect to the soundness of this rule is, whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction in specie. . . . In this country the rule has been uniform, that there must be a destruction of the article in specie, as will be seen by a reference to the following authorities. . . .

"Whether the test of liability is made to depend upon the destruction in specie, or in value, would, we are inclined to think, as a general rule, make practically very little, if any, difference; for while the goods remain in specie, and are capable of being carried on in that condition to the destined port, it will rarely happen that on their arrival they will be of no value to the owner or consignee. The proposition assumes a complete de-

[1] "It is also agreed, that bar and sheet iron, wire, tin plates, salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise), cheese, dry fish, vegetables and roots, hempen yarn, cotton bagging, pleasure carriages, household furniture, furs, skins, and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp free from average under twenty per cent, unless general; and sugar, flax, flaxseed, and bread are warranted by the assured free from average under seven per cent, unless general; and coffee in bags or bulk, and pepper in bags or bulk, free from average under ten per cent, unless general."

struction in value, otherwise the uncertainty attending it would be an insuperable objection; and, in that view, it may be a question even if the degree of deterioration would not be greater to constitute a total loss than is required under the present rule.

"The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriter against the strong temptation that may frequently exist, on the part of the master and shipper, to convert a partial into a total loss."

The case came up on a certificate of division, and the answer to the first question certified was:

"That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination."

The cases in this court are reviewed and applied by Mr. Justice Miller in *Insurance Co.* v. *Fogarty*, in which it was ruled that where certain machinery had been so injured as to have lost its identity as such, recovery for total loss might be sustained.

The same conclusion has been announced in many of the state courts. *Brooke* v. *Louisiana Ins. Co.*, 5 Mart. N. S. 530, 535; *Skinner* v. *Western Ins. Co.*, 19 La. *273; *Gould* v. *Louisiana Mut. Ins. Co.*, 20 La. Ann. 259; *Williams* v. *Kennebec Ins. Co.*, 31 Maine, 455; *Waln* v. *Thompson*, 9 Serg. & R. 115; *Willard* v. *Manufacturers' Ins. Co.*, 24 Mo. 561; *Wadsworth* v. *Pacific Ins. Co.*, 4 Wend. 33; *De Peyster* v. *Sun Ins. Co.*, 19 N. Y. 272; *Burt* v. *Brewers' Ins. Co.*, 9 Hun, 383; *S. C.* 78 N. Y. 400; *Chadsey* v. *Guion*, 97 N. Y. 333; *Merchants' S. S. Co.* v. *Commercial Mutual Ins. Co.*, 19 Jones & S. 444; *Carr* v. *Security Ins. Co.*, 109 N. Y. 504.

It is said that a different rule has been laid down in Massachusetts by the Supreme Judicial Court of that Commonwealth. *Kettell* v. *Alliance Ins. Co.*, 10 Gray, 144; *Mayo* v. *India Mut. Ins. Co.*, 152 Mass. 172.

Even if this were absolutely so we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. The policy was a Massachusetts contract, it is true, but its construction depended on questions of general commercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the state decisions as in matters of purely local law.

We are not, however, persuaded that the cases cited justify the asserted conclusion as respects articles specifically included in the memorandum.

In *Kettell* v. *Alliance Ins. Co.*, the memorandum clause of the policy provided that the insurers should not be liable for any partial loss on, among other articles, "salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent on the whole aggregate value of such articles, and happen by stranding." At the end of the last paragraph of the policy, next before the formal conclusion, were printed these words: "Partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates, is excepted."

The shipment consisted of five hundred boxes of tin plates, invoiced and valued together at one sum. The vessel was wrecked; all the plates damaged more or less; and some of them totally destroyed. Chief Justice Shaw ruled, for the court, that the exception did not come under the memorandum clause; that it recognized a distinction between tin and brass goods liable to tarnish, and memorandum articles liable to decay; and that the natural construction of the exception was "that it leaves the insurer liable for all total losses; but it makes no distinction between absolute and constructive total losses; and in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature." The insurers were held liable for a constructive total loss under the fifty per cent rule.

In the case before us wire of all kinds was specifically exempted by the memorandum clause, and the exemption was relaxed by the rider in respect of absolute, that is, actual, loss of a part.

If the contract in that case had been in terms and arrangement the same as the contract in this, it does not follow that the same result would have been reached.

But we must not be understood as accepting the views expressed in *Kettell's* case, great as is the weight attaching to the utterances of the distinguished judge who delivered the opinion. We do not think the words, "partial loss excepted," had any other meaning as applied to tin plates than if applied to articles having an inherent tendency to decay. Tin plates may not be perishable in their nature in the sense of liability to corporeal destruction, but their original character as tin plates is perishable by reason of liability to corrosion and rust. And this may explain why the words, "and happen by stranding," were omitted from the exception. It appears to us that the natural meaning of the exception was to exempt the underwriters from liability for an actual partial loss, and, therefore, for a constructive total loss, which involves an actual partial loss, and a remainder transferred by abandonment.

*Mayo* v. *India Ins. Co.*, 152 Mass. 172, follows the prior case, but the court expressly refused to decide "whether in this Commonwealth there can be no total loss of a memorandum article, if any part of it arrives at the port of discharge in specie."

It would subserve no useful purpose to attempt a review of the English cases on this subject. If in England a plaintiff may recover for a constructive total loss of memorandum articles, it is when they are so injured as to be of no substantial value when brought to the port of destination.

In the United States (and herein is a material difference between the jurisprudence of the two countries), the general rule is that a damage exceeding fifty per cent justifies abandonment and recovery as for constructive total loss. *Marcardier* v. *Chesapeake Insurance Company*, *supra*; Le Guidon (Paris, 1831), chap. VII, art. I; chap. V, art. VIII. But this principle is not applicable to memorandum articles in respect of which the exception of particular average excludes a constructive total loss.

There is no pretence here that this wire, with some small exceptions duly allowed for, did not exist at Key West and did not arrive at Velasco in specie, and as to a large part with its

original character unimpaired. Abandonment is necessary when the loss is only constructively total, and under this policy no right of abandonment existed at the time of the disaster or afterwards, by the exercise of which the assured could turn this partial loss in fact into a total loss by construction.

The salvage charges at Key West were paid by the underwriters as incurred to avert an impending actual total loss of the whole subject of the insurance. It was to their particular interest, as well as to the general public interest, that the goods should be saved, and it is apparent that plaintiff could not injure their market by refusing to receive them, and then claim that their value was determined by the price they brought at forced sale.

Counsel conceded that the cargo was damaged to an amount exceeding fifty per cent, and that, therefore, there was a constructive total loss according to the American rule applicable to non-memorandum articles. But there was not an actual loss of the whole, and by the memorandum and rider the insurance company was exempted from liability except for the actual loss of a specific part, and for that plaintiff has duly recovered.

The Circuit Court correctly ruled that under the terms of the policy plaintiff could not recover for a constructive total loss of the goods insured; and, inasmuch as a large part of the goods reached Velasco in specie, a substantial part of them being wholly uninjured, was right in declining to permit the jury to pass on the question of actual total loss.

There is nothing taking the case out of the general rule. The forced sale certainly does not affect it.

After some previous jettison the cargo passed through the wreck, and the bulk of the wire, some damaged and much uninjured, arrived at the port of destination.

The consignee, which was also the manufacturer, refused to accept it, and declined to put an end to the proceedings which were instituted to its knowledge. If there had been a constructive total loss and a sufficient abandonment prior to the sale, defendant was then liable. As there was not, and no right to abandon or acceptance of abandonment, the goods were at

plaintiff's risk, and defendant was not responsible for any loss plaintiff sustained by the sale.

But, although, as we have seen, plaintiff had no right to abandon, and although defendant specifically refused to accept an abandonment, it is contended that defendant transhipped the wire, and that such transhipment amounted to an acceptance of abandonment.

The Circuit Court of Appeals was of opinion that the forwarding from Key West to Velasco was done under the authority and with the approval of the captain of the "Benjamin Hale." As the cargo was in a condition for transhipment, and there was opportunity to effect it, defendant rightfully insisted that it was the duty of the master to forward it to the destined port.

Yet even if the underwriters chartered the "Cactus" and forwarded the cargo, we agree with both courts that neither that nor any other act disclosed by the evidence would have authorized the jury to find that defendant had accepted the attempted cession of the cargo.

The sue and labor clause expressly provided that acts of the insurer in recovering, saving and preserving the property insured, in case of disaster, were not to be considered an acceptance of abandonment. Whether regarded as embodying a common-law principle, or as new in itself, the clause must receive a liberal application, for the public interest requires both insured and insurer to labor for the preservation of the property. And to that end provision is made that this may be done without prejudice.

The Circuit Court of Appeal well points out that at Key West there was no agent of the assured; no adequate means of protection, and no market; while at Velasco there were excellent facilities for protection and handling of cargo; easy access to the company's head agency; and a good market; and it was the port of destination.

If then it was the insurer that carried the property, to be preserved and carried, to Velasco, where it was offered to the consignees, such labor and care rendered in good faith did not operate as an acceptance of abandonment, and especially as there was no right to abandon and a distinct refusal to accept.

Syllabus.

Acts of the insurer are sometimes construed as an acceptance, when the intention to accept is fairly deducible from particular conduct, in the absence of explicit refusal. Silence may give rise to ambiguity solvable by acts performed. Here, however, defendant refused to accept, and there was no ambiguity in its attitude; and what was done, if done by it, was no more than it had the right to do without incurring a liability expressly disavowed. There was nothing to be left to the jury on this branch of the case.

Some further suggestions are made, but they call for no particular consideration.

*Judgment affirmed.*

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## SAXLEHNER *v.* EISNER & MENDELSON COMPANY.

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

No. 29. Argued March 22, 23, 1900.—Decided October 15, 1900.

In 1862, plaintiff's husband discovered a spring of bitter water in Hungary, and was granted by the Municipal Council of Buda permission to sell such water, and to give the spring the name of "Hunyadi Spring." He put up these waters in bottles of a certain shape and with a peculiar label, and opened a large trade in the same under the name of "Hunyadi Janos." In 1872, one Markus discovered a spring of similar water and petitioned the Council of Buda for permission to sell the water under the name of "Hunyadi Matyas." This was denied upon the protest of Saxlehner; but in 1873 the action of the Council was reversed by the Minister of Agriculture, and permission given Markus to sell water under the name of "Hunyadi Matyas." Other proprietors seized upon the word "Hunyadi" which became generic as applied to bitter waters. This continued for over twenty years when, in 1895, a new law was adopted, and Saxlehner succeeded in the Hungarian courts in vindicating his exclusive right to the use of the word "Hunyadi." In 1897 he began this suit.

*Held:* That the name "Hunyadi" having become public property in Hungary, it also became, under our treaty with the Austro-Hungarian Empire in 1872, public property here; that the court could not take notice of the

Statement of the Case.

law of Hungary of 1895 reinstating the exclusive right of Saxlehner, and that the name having also become public property here, his right to an exclusive appropriation was lost.

*Held also:* That even if this were not so, he, knowing the name "Hunyadi" had become of common use in Hungary, was also chargeable with knowledge that it had become common property here, and that he was guilty of laches in not instituting suits, and vindicating his exclusive right to the word, if any such he had.

*Held also:* That acts tending to show an abandonment of a trade-mark being insufficient, unless they also show an actual intent to abandon, there was but slight evidence of any personal intent on the part of Saxlehner to abandon his exclusive right to the name "Hunyadi," and that a company, to whom he had given the exclusive right to sell his waters in America, was not thereby made his agent and could not bind him by its admissions.

*Held also:* That the fact that he registered the trade-mark "Hunyadi Janos" did not estop him from subsequently registering the word "Hunyadi" alone.

*Held also:* That the appropriation by other parties of his bottle and label, being without justification or excuse, was an active and continuing fraud upon his rights, and that the defence of laches was not maintained.

*Held also:* That the adoption by the defendant of a small additional label, distinguishing its importation from others did not relieve it from the charge of infringement, inasmuch as the peculiar bottles and labels of the plaintiff were retained.

This was a bill in equity filed in the Circuit Court for the Southern District of New York by the widow of Andreas Saxlehner, deceased, a resident of Buda-Pesth and a subject of the King of Hungary, against the Eisner and Mendelson Company, importers and wholesale dealers, to enjoin the defendant from selling any water under a name in which the word "Hunyadi" occurs, or making use in the sale of bitter waters of labels, in form, color, design and general appearance, imitating the labels used by plaintiff in the sale of Hunyadi Janos water.

The bill averred in substance that plaintiff's husband, Andreas Saxlehner, was, until May 24, 1889, the proprietor of a certain well within the city limits of Buda-Pesth, and that in 1863 he began to sell the waters of the same in the market under the name or trade-mark of "Hunyadi Janos;" that as his business increased he acquired additional territory, opened new wells, adopted a novel style of bottles and a peculiar label, and that the waters soon became known in all the markets of the world

under the name of "Hunyadi Janos," or in England and the United States under the name of "Hunyadi" alone; that in March, 1876, Saxlehner entered into a contract with the Apollinaris Company of London, under which such company was given the exclusive right to sell this water in Great Britain and the United States, and that such contract was not terminated until March, 1896; that this company used a label of similar design but of different color, and that large quantities of this water were exported by Saxlehner through such company and sold in the United States under the name of "Hunyadi" water; that Saxlehner died May 24, 1889, and plaintiff succeeded him in the business; that prior to his death Saxlehner obtained the registration in the Patent Office of the name "Hunyadi" as his trade-mark; that the defendant, knowing of these facts, had unlawfully imported and sold bitter water, not coming from plaintiff's wells, in bottles of identical shape and size as those used by plaintiff, and with labels in "close and fraudulent simulation of your orator's trade-mark," but under the name of "Hunyadi Laszlo" or "Hunyadi Matyas"—all in defiance of plaintiff's right, and with the design of imposing the waters upon the public as those of the plaintiff.

The answer denied the material allegations of the bill, and averred that in the year 1873, one Ignatius Markus, being the proprietor of a certain well within the limits of Buda-Pesth, applied to the proper authorities and was granted the registration of the name "Hunyadi Matyas" as a denomination of the waters of his spring, such authorities holding that the name was distinguished from that of the "Hunyadi Janos;" that "Hunyadi Janos," when anglicised, is John Hunyadi, the name of a celebrated Hungarian hero, and that the name "Hunyadi" is a common one in Hungary, and means of or from Hunyad, and that for this reason it is of itself incapable of exclusive appropriation by any one, being a common descriptive personal name, and also used to designate certain districts and towns in Hungary; that in the year 1889 the word had become a generic term, describing a kind of bitter aperient water, the peculiar product of a large number of wells in Hungary; that the shape of the bottle and the peculiarities of the label have be-

come common property, and were adopted by every one who sold the Hunyadi water, whether under the name of "Hunyadi Janos," "Laszlo," "Matyas," "Arpad," etc., and that to the time of his death Saxlehner had never asserted or made any claim to the exclusive use of his style of bottle, or capsules, or labels; that in 1886 or 1887 the Apollinaris Company brought suit against the American agents of several of these waters and obtained temporary injunctions, which were subsequently dissolved upon evidence that the word "Hunyadi" was used in Hungary as part of the name of a number of different mineral waters, that Saxlehner refused to join with or aid the Apollinaris Company in opposing a dissolution of such injunctions, and that thereafter these waters were sold freely, openly and continuously in competition with the "Hunyadi Janos" in the bottles and with the labels and capsules affixed thereto as before stated, with the knowledge, consent and acquiescence of Saxlehner and his agents; that defendant, a Pennsylvania corporation, entered into a contract with the owners of the "Hunyadi Matyas" spring, and obtained the exclusive right to import their waters into the United States for the term of twenty-five years; that in 1890 it began to sell this water in like bottles and with like capsules and labels affixed thereto as now claimed by the plaintiff herein to be in violation of her claimed rights, which bottles, capsules and labels were similar to those in which the said "Hunyadi Matyas" water had been first imported, and that this was done with the consent of the American agent of the Apollinaris Company, who expressly stated that he had no objection to the label used by the defendant, nor to the way in which it was advertising the "Hunyadi Matyas" water; that in 1889 it also became the agent for sale in the United States of the "Hunyadi Arpad," "Hunyadi Laszlo" and "Hunyadi Bela" waters, and began to sell the same in large quantities; that these waters were put up for sale and sold in bottles similar to those of the "Hunyadi Janos," with like capsules and labels; that these waters were sold in open competition with the "Hunyadi Janos" until some time in 1893, when plaintiff stopped said competition in part by purchasing the Arpad and Bela springs, and thereupon revoked the agency of the defend-

ant to sell such waters; that in 1877 Saxlehner applied to the Commissioner of Patents for the registration of the words "Hunyadi Janos" as a trade-mark; that such trade-mark was registered September 11, 1877, by which proceeding he abandoned all claim and assertion of right to the word "Hunyadi" in and of itself, and that it had for many years previously been a generic term to designate this class of waters. The answer further alleged that the defendant, in order to designate the waters sold by it and to secure additional protection to the label used by it, registered the trade-mark "Hunyadi Matyas," since which time the defendant has used such trade-mark as stated therein, and in accordance therewith.

As the case depended almost wholly upon questions of fact, a somewhat elaborate statement of the evidence becomes necessary.

In 1862, Andreas Saxlehner discovered within the city limits of Buda-Pesth, Hungary, in a valley surrounded on all sides by hills acting as a natural barrier, secluding it from the outer world, a spring, which was named by him the "Hunyadi" spring, and on January 19, 1863, the Municipal Council of Buda-Pesth granted him permission to sell water taken from such spring and to give the spring the name of "Hunyadi," upon the payment of a small sum of money for hospital purposes. Soon after this he began to bottle the water of his spring and to sell it under the arbitrary name or trade-mark of "Hunyadi Janos;" in other words, John Hunyadi, a Hungarian hero of the fifteenth century. Several wells were subsequently sunk by him in the same valley to the number of about one hundred and twelve, all of which produced water, substantially of the same chemical combination, which is led through a system of pipes to large subterranean cisterns, from which it is taken and bottled. It soon began to be exported beyond the limits of Hungary to other European countries, and also to the United States.

Saxlehner was not, however, the first one in Hungary to put up the bitter waters with which that kingdom abounds, but others were already sold in the market, one of them being called "Hildegarde," and another "Franz Deak." Different

bottles and labels were used for these waters, when Saxlehner adopted, in conjunction with the distinctive name of "Hunyadi Janos," a novel style of bottle of straight shape with a short neck, to the top of which was attached a metal capsule bearing the inscription "Hunyadi Janos, Budai Keserüviz Forrás," meaning "Hunyadi Janos, bitter water of Buda," together with a supposed portrait of the hero stamped thereon. He also adopted a peculiar label covering almost the whole body of the bottle, divided into three longitudinal panels, the middle one of which bore the same portrait in a medallion, with the name of "Hunyadi Janos" written in large letters on the top of the label, the color of the middle panel being a reddish brown and the outer panels white. As this water was exported to and sold in the various countries of the world, a different custom concerning its appellation sprung up in different countries, the Latin races using the word "Janos" as the common appellation of the water, it being known as "Eau de Janos" or "Aqua di Janos," while in England and the United States of America the name of "Hunyadi" became its common appellation, it being known as Hunyadi water.

In 1872, it seems that one Ignatius Markus discovered a spring upon a plot of ground leased by him, which also produced bitter water of similar quality, and shortly thereafter petitioned the Municipal Council of Buda-Pesth not only for permission to sell the water, which was unconditionally granted upon the report of the town physician concerning the quality of the water found, but also to be allowed to name this spring "Hunyadi Matyas," and to bring the water into commerce under that name. This was denied, upon the petition and protest of Saxlehner, who claimed the exclusive right to the use of the name "Hunyadi." It was said that the granting of the denomination "Hunyadi Matyas" to another spring "would very likely, nay certainly, lead both between the owners of the two springs and among the consuming public, to unpleasant misunderstandings, which it is the duty of the authorities to avoid and even to prevent. And further, the fact that petitioner, notwithstanding the many designations at his disposal, seeks to apply the name 'Hunyadi' to his spring, undoubtedly shows the not very noble intention

on his part to avail himself of the great diffusion and good renown enjoyed by the Saxlehner Hunyadi Bitter Spring, both at home and abroad, which, however, cannot be tolerated by the authorities, and in the present case all the less, as it is a well-known fact that Mr. Saxlehner was able to secure this good renown to his spring only through many years' labor and at considerable expense."

On a petition in appeal, however, to the Minister of Agriculture, in 1873, the decision of the Council, which denied to Markus the permission to use the name "Hunyadi Matyas," was reversed, because of certain omissions by Saxlehner to conform to the local laws, and also because "Hunyadi Janos" and "Hunyadi Matyas" "represent two quite clearly different names, which may stand without any infringement to each other." This spring was afterwards registered in Buda-Pesth by the name of "Hunyadi Matyas," and thereupon the proprietors of other wells began to sell their waters in Europe under the name of Hunyadi with an added name, and also with the use of a close imitation of the red and white labels. It did not appear, however, that Markus sold any water or made use of the permission granted to him by the Minister, or obtained a license from the local authorities; but, in 1876, the firm of Mattoni & Wille became the purchasers of the plot of ground leased by Markus and several other adjoining plots containing springs, and in that year registered a separate trade-mark and name for each of the six springs which they then acquired, among which was a trade-mark bearing the name "Hunyadi Matyas." In 1877 they began selling these waters in Hungary, claiming certain specific differences of composition of the various waters which recommended them for different purposes.

In February, 1876, Saxlehner made a contract with the Apollinaris Company, Limited, of London, by which that company agreed to purchase a certain quantity yearly, and Saxlehner bound himself for a term, which finally expired in 1896, to give the company the exclusive right to sell his "Hunyadi Janos" water in Great Britain, United States and other transmarine countries. The company agreed to purchase at least 100,000 bottles yearly until 1878, and at least 150,000 bottles

thereafter at a stated price. In addition to this Saxlehner agreed not to fill any orders coming from the territory granted to the company, but to make them over to the company. A special label was designed to be used on the bottles sold by the company of substantially the same contents and characteristics, but of a different color, the body of the label being a dark blue, with a red or reddish brown central field. A narrow strip on the top of the label contained the name of the Apollinaris Company as the importer, and from the making of this contract large quantities of water bearing this label were exported and sold in the United States under the name of "Hunyadi Janos," or the shorter name "Hunyadi."

After April, 1889, and until the cancellation of the contract in 1896, this company placed upon each bottle of Janos water which it sold in this country a red diamond containing these words: "The red diamond is the trade-mark of the Apollinaris Company, Limited, and is meant only to indicate that the mineral waters so marked are sold by the Apollinaris Company, Limited."

In 1887, Saxlehner caused the name "Hunyadi" to be registered separately from "Janos" as a trade-mark in the United States Patent Office. In the statement accompanying this registration he was again careful to refer to the red and white or red and blue label upon which said trade-mark was used by him, and to repeat the caution that he did not in anywise intend by said registration to abridge his right to the exclusive use of said label as a whole, or to any of its features.

The Apollinaris Company embarked in the business of selling Hunyadi Janos water in the United States, but met with competition from one Scherer, who imported the water under the red and white label from Europe, buying it from parties who had purchased it from Saxlehner. The company sought to enjoin Scherer from so selling upon the ground of its exclusive right within the United States, but failed in the suit. The case was decided in 1886, and reported in 27 Fed. Rep. 18.

In the same year Mattoni & Wille of Buda-Pesth consigned to one Andres in New York one hundred and twenty-one cases of Hunyadi Matyas water taken from one of four springs pur-

chased by them, one of which was the original Markus spring above mentioned.

About the same time the firm of Ignatz Ungar & Son began to sell waters from a spring owned by them, which was designated "Hunyadi Arpad," through one Joseph Ungar as their agent. This water was put up in an imitation of Saxlehner's red and blue labels. The Matyas water was also put up in red and white labels of similar design. Suits were brought against them in 1886, in the Circuit Court of the United States, by the Apollinaris Company to enjoin the use of the name "Hunyadi" and of the labels. These suits were, however, withdrawn for want of jurisdiction, and two other cases, one against Andres and the other against Ungar, were brought by the Apollinaris Company in the Supreme Court of the State. *Ex parte* injunctions were issued in each case in February, 1887, and remained in force until July, 1888, when the injunction in the Ungar suit was dissolved upon application of the defendant, and soon thereafter the Andres suit was voluntarily discontinued. Saxlehner appeared to have had no knowledge of these suits, although an effort was made, which the court below found to have been unsuccessful, to show that he was notified of the motion to dissolve the injunction, and refused to assist in opposing it. The defendants in these suits seem to have relied largely upon the fact that, under the laws of Hungary, as they then were, they had a right to make use of the word "Hunyadi," provided they annexed thereto as a suffix a word different from "Janos," as for instance, "Matyas" or "Arpad," and that, having obtained permission by royal grant to make use of these names in Hungary, they were entitled to make use of the same names in other countries.

In the mean time, however, and in 1887, Saxlehner instituted another suit in Hungary to enjoin the use of the name "Hunyadi" as applied to a water sold there called the "Hunyadi Josef." He was again unsuccessful, not only in preventing the use of the word "Hunyadi," but even in preventing the use of colorable imitations of his red and white label, apparently on account of the lack of efficient statutes upon the subject of trademarks. As one of the witnesses, Saxlehner's son, states, he was

advised by his lawyer that before 1890 there was a statute which gave protection against so-called counterfeit or imitation labels and against literal imitations, but not imitations which were similar merely.

In 1890, a statute was passed which gave a protection to pictorial trade-marks only, but not to trade-marks designated by name. Plaintiff, whose husband died in 1889, at once took advantage of this statute, and instituted suits against Mattoni & Wille, as well as a number of other infringers. In 1895, another act was passed giving protection to verbal trade-marks. The suit against Mattoni & Wille resulted in an order of the Minister of Commerce, November 26, 1894, cancelling the several trade-marks of Hunyadi Matyas water, "because, according to the opinion of three experts consulted by the chamber, such trade-marks are similar in composition, design and color, and also for general impression to the trade-marks previously registered for the firm Saxlehner, and have been found to be imitations of the same and apt to mislead the public."

A similar suit instituted by plaintiff against the "Compagnie Générale d'Eaux Universelles et de Bains de Mer" resulted in a similar decree canceling the Hunyadi Laszlo label, "because of the three experts consulted, two have pronounced same to be entirely similar to the trade-mark registered for Saxlehner, and the danger of misleading is greatly augmented by the fact that on this trade-mark the name Hunyadi is applied in a prominent place."

The sale of the Hunyadi Laszlo water seems to have been practically stopped by this decree, but notwithstanding the decree against them of November 26, 1894, Mattoni & Wille continued to use the name of Hunyadi Matyas separate from the label, and exported water as before to the defendant in this suit with red and blue labels, which were not registered in Hungary.

In 1895, however, another act was passed in Hungary for the registration of words or names as trade-marks. Plaintiff took advantage of this, registered the name "Hunyadi" as a trade-mark, and promptly instituted another suit against Mattoni & Wille, which resulted, in 1896, in another decree cancelling, not

only the illustrated trade-marks, but the verbal trade-mark Hunyadi Matyas, and awarding to the plaintiff a priority of right to the exclusive use of the words "Hunyadi Janos" and "Hunyadi" alone, both as a commercial denomination as well as a trade-mark. In the decree of the Minister the prior decree of the Minister of Agriculture of the year 1873, legalizing the use of Hunyadi Matyas, was referred to and treated as superseded by the laws of 1890 and 1895. "There is," says he, "therefore absolutely no connection between that decision and the case now under consideration." Similar decrees were rendered the same year against other defendants who sought to appropriate the name Hunyadi, including "Hunyadi Josef," against which Saxlehner had been unsuccessful in 1887; "Hunyadi Lajos," and also "Uj Hunyadi," or new Hunyadi, whose litigation against Saxlehner seems to have been carried on in the interest of the Apollinaris Company.

In fact, this litigation seems to have resulted in a complete vindication of the right of Saxlehner to the use of the word "Hunyadi."

Promptly upon the rendition of these decrees, and early in 1897, this suit, as well as the others hereinafter mentioned, was instituted.

The case came on for hearing before the Circuit Court upon pleadings and proofs, and resulted in a decree enjoining the defendant from selling, or offering for sale, any bitter water not coming from the "Hunyadi Janos" wells of the plaintiff in bottles of a straight shape, with a short neck, and bearing labels in color, size, shape and general design so closely similar to plaintiff's said label as to be calculated to deceive, but permitting the defendant to make use of the name "Hunyadi" as a prefix to some other name than "Janos," and denying the injunction demanded by the plaintiff against the use of the name "Hunyadi." 88 Fed. Rep. 61.

On appeal to the Circuit Court of Appeals, the decree of the Circuit Court was affirmed as to the name "Hunyadi," but reversed as to the label, and the bill dismissed. 63 U. S. App. 139, 145.

*Mr. Antonio Knauth* and *Mr. John G. Johnson*, for Saxlehner. *Mr. Arthur von Briesen* was on their brief.

*Mr. Charles G. Coe* and *Mr. Edmund Wetmore* for respondents.

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

This case involves the question of plaintiff's exclusive right to the use of the name "Hunyadi" as a trade-mark for Hungarian bitter waters, as well as her right to the red and blue label and its characteristic features used by her upon the bottles in which she has been accustomed to sell "Hunyadi Janos" water.

From the foregoing summary of the facts it appears:

1. That Saxlehner was the first to appropriate and use the name "Hunyadi" as a trade-mark for bitter waters, and that such name being neither descriptive nor geographical, but purely arbitrary and fanciful as applied to medicinal waters, was the proper subject of a trade-mark;

2. That in the shape of his bottles, the design of his capsules and his labels, he was originally entitled to be protected against a fraudulent imitation;

3. That the defendant is selling a water under the name of "Hunyadi Matyas" in bottles of the same size and shape as the plaintiff's, containing a label in three parallel panels of the same colors, size and general design as those of the plaintiff, that their general appearance is such as to deceive the casual purchaser, and that such bottles and labels were evidently designed for the purpose of imposing the defendant's waters upon the public as those of the plaintiff. A moment's comparison of the two labels will show that, while the printed matter upon each is different from that upon the other, their general resemblance is such as would be likely to mislead the public into the purchasing of one for the other. While the proprietors of the "Hunyadi Matyas" water undoubtedly found a justification for their use of the word "Hunyadi" in the decision of the Min-

ister of Agriculture of 1873, that decision did not cover the use of the simulated label, the adoption of which seems to have been an act of undisguised piracy.

Practically, the only defences pressed upon our attention are those of abandonment and laches.

1. To establish the defence of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed. *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 186; *Moore* v. *Stevenson*, 27 Conn. 13; *Livermore* v. *White*, 74 Maine, 452; *Judson* v. *Malloy*, 40 California, 299; *Hickman* v. *Link*, 116 Missouri, 123. And in a recent English case this doctrine has been applied to a case of trade-marks. *Mouson* v. *Boehm*, 26 Ch. Div. 398. With regard to the defence of abandonment, it may with confidence be said that there is but very slight evidence of any personal intention on the part of Andreas Saxlehner or his wife to abandon the use of the word "Hunyadi" or dedicate the same to the public, and none at all of an intent to abandon the peculiar bottles and labels in connection with which he sold his waters. In fact, Saxlehner's whole life was a constant protest against the use by others of the name "Hunyadi." He discovered his spring in 1862, and in 1863 obtained permission to give it the name of Hunyadi Spring. He carried on an uninterrupted trade under that name until 1872. It also appears from the certificate of the Chamber of Commerce and Industry that the trade-mark "Hunyadi Janos" was, on December 12, 1872, registered, and that previously to such registration no trade-mark was entered in which the name "Hunyadi" or "Janos" was contained. It further appears that Ignatius Markus had no sooner petitioned the town council for a license to apply to his spring the name of "Hunyadi Matyas" than Saxlehner entered his protest, and was at first successful, but was finally defeated, and that upon the strength of this decision other springs were opened by various parties under trade-marks, of which the word "Hunyadi" was the principal component. At that time, owing to the inefficacy of the Hungarian

laws upon the subject of trade-marks, he could do no more. In 1877 he registered the trade-mark "Hunyadi Janos" in the Patent Office of the United States. In 1884 he registered both his red and white and red and blue labels in the Buda-Pesth Chamber of Commerce, the latter being intended for use by the Apollinaris Company. In 1887 he instituted an unsuccessful suit in Hungary against the use of the words "Hunyadi Josef." Upon the passage of the Hungarian law of 1890, legalizing the use of pictorial trade-marks, the plaintiff again registered the three labels, and in the following year instituted suits against all infringers in Hungary, which finally resulted in a complete establishment of her rights to the name Hunyadi. In 1887 Saxlehner registered the word "Hunyadi" as his trade-mark in the Patent Office of the United States, and in 1895, when the act for the protection of verbal trade-marks was enacted, plaintiff registered the same word in Hungary. Saxlehner appears, however, to have successfully protested against Mattoni & Wille's registration of "Hunyadi Matyas" in Germany. In June, 1896, plaintiff also instituted a suit against the Apollinaris Company in England, and obtained a final injunction against the illegal use of the name "Hunyadi." In the decree of the Court of Chancery, which is reproduced, it was ordered that the Apollinaris Company deliver up to the plaintiff for destruction all labels, trade documents and capsules in their possession which, by reason of their exhibiting the name "Hunyadi," are capable of being used for business in the United Kingdom for any Hungarian Bitter Water not being Hunyadi Janos water. Immediately upon the determination of the Hungarian litigation, and in the spring of 1897, plaintiff began these suits.

There is nothing in these facts tending to show an abandonment by Saxlehner or the plaintiff of their rights either in the name of Hunyadi or in the labels, unless it be the fact that the trade-mark registered in the United States in 1887 contained the words "Hunyadi Janos," which, it is insisted, was a waiver of a right thereafter to register the name "Hunyadi" alone. That position, however, assumes that, in the absence of such re-registration, other dealers would have the right to seize upon and appropriate the principal word "Hunyadi" of the prior

trade-mark, provided they changed the final word and substituted another. We are not prepared to indorse this contention. It is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article. It was said by Vice Chancellor Shadwell, in 1857, that if a thing contained twenty-five parts, and one only was taken, such imitation would be sufficient to contribute to a deception, and the law would hold those responsible who had contributed to the fraud. *Guinness* v. *Ullmer*, 10 Law Times, 127. While this may be a somewhat exaggerated statement, the reports are full of cases where bills have been sustained for the infringement of one of several words of a trade-mark. *Shrimpton* v. *Laight*, 18 Beav. 164; *Clement* v. *Maddick*, 1 Giff. 98; *Hostetter* v. *Vonwinkle*, 1 Dill. 329; *Morse* v. *Worrell*, 9 Am. Law Review, 368; *Grillon* v. *Guenin*, Weekly Notes (1877), 14; *American Grocer Pub. Association* v. *Grocer Pub. Co.*, 25 Hun, 398. It would seem that the registration in 1887 of the single word "Hunyadi" was really unnecessary for the protection of Saxlehner's rights, though we see no reason for holding the former registration an estoppel. The evidence shows that these Hungarian bitter waters were largely known in this country as Hunyadi waters, and that in a certain sense Hunyadi had become a generic word for them. Of course, if it became such with the assent and acquiescence of Saxlehner, he could not thereafter assert his right to its exclusive use. But as this appropriation was made against his constant protest, and as he apparently made every effort in his power to put a stop to the use of it, it ought not to be charged up against his claim that the word had become generic.

It is contended, however, that the conduct of the Apollinaris Company was such as to show an abandonment both of the name and label, and that plaintiff is estopped by their act in further asserting title to them. This defence presupposes that the Apollinaris Company had power to bind Saxlehner by its admission and contract. Certainly the contract gave it no such power in express terms. Saxlehner did not purport to make

the company his agent. He agreed to sell the company a certain number of cases of his water at a certain price, and also agreed to sell to no one else during the pendency of the contract. It was agreed that their consignments should carry the label "Sole importers, Apollinaris Company, Limited, 19 Regent street, London, S. W." The company agreed not to compete with Saxlehner upon the continent, and upon his part he agreed to make over to the company all orders arising from countries reserved to it, as well as to refuse such orders where he had good reason to suppose they were intended for such countries. This is practically all there is of the contract. No agreement was made with respect to the trade-mark or the good will of the business, and the company reserved the right, which it subsequently exercised, of cancelling the contract upon notice. While such contract may have authorized the company to prosecute infringers here, and in the conduct of those particular suits Saxlehner may have been bound, it did not agree to do so or preclude the institution of other suits by him, nor was there any authority on the part of the company to bind him by its admissions.

The conduct of the Apollinaris Company, relied upon as evidence of abandonment, consists principally in the discontinuance of the two suits against Ungar and Andres after preliminary injunctions had been obtained (Saxlehner was not shown to have had knowledge of these suits); of a conversation between Mendelson, treasurer of the defendant company, and Steinkopf, a director of the Apollinaris Company in London, in which Mendelson spoke of his intention to sell the Hunyadi Matyas water, of which he had obtained control, and Steinkopf stated "that he could have no objection to that; that there were other Hunyadi waters," and of some other statements equally unimportant. There is little in any of these indicative of an intent on the part of the Apollinaris Company to abandon its exclusive right to the use of the word "Hunyadi" in America. Certainly, nothing indicative of such an intent on the part of Saxlehner, whose conduct in Hungary was wholly inconsistent with that theory. Evidence that the Apollinaris Company intended to abandon an exclusive right to the name "Hunyadi" might be

sufficient as against them to defeat a suit for an injunction, but would not be binding upon the plaintiff unless done with her knowledge and acquiescence.

2. The defence of laches depends upon somewhat different considerations, and, so far as it applies to the use of the word "Hunyadi," we think it is established. It appears that after the decision of the Minister of Agriculture in 1873 sustaining the claim of Markus to the trade-mark "Hunyadi Matyas," other springs were opened whose waters were bottled under different trade-marks, in all of which the word "Hunyadi" was a component, and as early as 1886 these waters found their way to the United States, and were put on sale here with the knowledge of the Apollinaris Company. There is no evidence that Saxlehner had personal knowledge of these infringements, and while something may be said in his favor in view of his persistent efforts to establish his rights in Hungary, he was bound to know the law in this country, and to take steps within a reasonable time to vindicate his rights. The infringers were making use of their trade-marks under licenses from the Hungarian Government, and we see no reason to doubt that they were proceeding in good faith to dispose of their waters under the trade-marks registered in Hungary. Under these circumstances, if Saxlehner had intended to assert his rights under the laws of this country, to the exclusive use of the word "Hunyadi," he was bound to act with reasonable promptness. It is true that he may have supposed the Apollinaris Company would assert his rights in that particular for their own benefit; but if, as we have already held, he was not bound by their admissions, he is in no position to take advantage of their inaction, and, as against traders who were selling bitter waters under trade-marks legalized by the Hungarian Government, he should not have waited until the name "Hunyadi" had become generic in this country, and indicative of this whole class of medicinal waters.

We do not find it necessary to decide exactly what effect shall be given to the various decrees of the Hungarian ministers and courts. It is quite sufficient to observe that the use of the words "Hunyadi Matyas" was expressly sanctioned

within the Kingdom of Hungary by the Minister of Agriculture in 1873, and it would seem that under our treaty with the Austro-Hungarian Empire of June 1, 1872, 17 Stat. 917, the right to use the word became available in the United States. By the first article of this treaty "every reproduction of trademarks which, in the countries or territories of the one of the contracting parties, are affixed to certain merchandise . . . is forbidden in the countries or territories of the other of the contracting parties;" and by the same article, "If the trademark has become public property in the country of its origin, it shall be equally free to all in the countries or territories of the other of the two contracting parties." In view of the decision of the Minister of Agriculture of 1873, sustaining the trade-mark "Hunyadi Matyas," and the subsequent adoption of the word "Hunyadi" in connection with some other word by numerous proprietors of similar waters, it seems to be clear that the word became and continued to be for twenty years public property in the Kingdom of Hungary, and it is difficult to escape the conclusion that it also became so here. It is true the law of Hungary was subsequently changed in this particular, and that the courts of that country held the plaintiff entitled to the benefit of that change; but it needs no argument to show that, if the word once became public property here, a subsequent change in the law in her own country would not enure to the advantage of the plaintiff here. The right to individual appropriation once lost is gone forever.

If, upon the other hand, we assume that the case can be decided without reference to the law of Hungary or the decisions of its officers and courts, the plaintiff is still at a disadvantage by reason of not instituting her suits more promptly. Saxlehner knew as a matter of fact that the Minister of Agriculture had overruled his protest, and that the word "Hunyadi" had become public property in the Kingdom of Hungary. He knew that a large number of dealers would appropriate the word, and that he was himself selling a large quantity of bitter water in the United States. He must also have known, or at least had good reason to know, that his competitors were doing the same thing. Under such circumstances he should have instituted

inquiries upon his own account, and, regardless of his contract with the Apollinaris Company, have seen to it that his own interests were protected. If the Apollinaris Company were not his agent for the protection of his rights in the United States, then it was incumbent upon him to assert such rights personally or through some other recognized medium. In now invoking our laws, his successor is bound to show that she has complied with our requirements of diligence and promptness in instituting suit. She has failed in this particular. By twenty years of inaction she has permitted the use of the word by numerous other importers, and it is now too late to resuscitate her original title.

3. This argument, however, has but a limited application to the appropriation of the bottles and red and blue labels covering them, which appear to have been seized upon by the proprietors of the Matyas spring as well as by others, without a shadow of justification and in fraud of plaintiff's rights. As already stated, Saxlehner, when he began selling his water, adopted not only the name "Hunyadi Janos," but a straight bottle with a short neck, to the top of which was attached a metal capsule with an inscription, as well as a peculiar label, covering almost the whole body of the bottle, divided into three rectangular panels of red and white, which at the time of his contract with the Apollinaris Company was changed to red and blue, so far as it applied to waters sold to that company for the American market. A narrow strip on the top of the label was added, containing the imprint of the Apollinaris Company as importers, and from 1876, the date of the contract, until 1886, the business was carried on by the Apollinaris Company in this country without any important competitors. In 1886, however, Mattoni & Wille began to consign "Hunyadi Matyas" bitter water to New York, put up in bottles bearing a red and white label. In 1889 the Eisner & Mendelson Company, defendant herein, made a contract with Mattoni & Wille, by which it obtained the sole agency for the United States and Canada for the sale of their bitter waters for the term of twenty years. During 1889 and 1890 defendant imported some twenty thousand bottles under the name of "Royal

Hungarian Bitter Water," under a red and white label devised by themselves. In 1890 the defendant took a new lease for five years, with an option for a renewal for twenty years, from Mattoni of the Hunyadi Matyas spring. The Circuit Court found in this connection that "the reason which induced Eisner to make this lease was his desire to control the American label, so that neither Mattoni & Wille nor European producers could interfere with the American trade. A new label was therefore forthwith devised by Eisner, which was a reddish brown and blue label, and is described in the complaint containing the name 'Hunyadi Matyas,' 'Buda Keserüviz' and a medallion portrait of King Stephen in the center of the red division. He intentionally simulated the Saxlehner United States label for the purpose of obtaining, by means of the simulation, part of the good will which the Janos water had gained."

We are pointed to no decision of the Hungarian authorities authorizing the use of Saxlehner's label by other parties.

The petition of Markus did not ask for permission to use it. The decision of 1873 did not grant it. The decree favorable to Saxlehner did not mention it, but dealt only with the name "Hunyadi." Notwithstanding repeated violations of his label, he seems to have been unable to obtain redress on account of the inefficacy of the laws until 1896, when a competitive trade-mark was ordered to be canceled in his favor by reason of its resemblance to Saxlehner's label, as well as by the use of the word "Hunyadi." In all his applications, both in Hungary and the United States, for the registration of his trade-mark name, there is an express reservation of his right to the medallion head of Hunyadi and to his label. Indeed, we find no authority whatever for the appropriation of this label by any of Saxlehner's competitors, and nothing to show that it was not a case of undisguised piracy. The only justification for its appropriation now insisted upon is the fact that, by general use in this country for the past ten years, it has come to be recognized as a kind of generic label applicable to all Hungarian bitter waters, and if Saxlehner had originally an exclusive right to make use of it, that right has been lost by his acquiescence and that of the Apollinaris Company in its general use by other

importers. But in cases of actual fraud, as we have repeatedly held, notably in the recent case of *McIntyre* v. *Pryor*, 173 U. S. 38, the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishing principle that, where actual fraud is proven, the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. Indeed, in a case of an active and continuing fraud like this we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence.

As applicable to trade-marks, two cases in this court are illustrative of this principle. In *McLean* v. *Fleming*, 96 U. S. 245, there had been apparently a delay of about twenty years in instituting proceedings, but the court observed that "equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits." An injunction was granted in this case, but it was held that by reason of inexcusable laches, the complainant was not entitled to an account of gains or profits. See also *Harrison* v. *Taylor*, 11 Jurist (N. S.), 408. An effort was made in *Menendez* v. *Holt*, 128 U. S. 514, to obtain a reconsideration of the principle of *McLean* v. *Fleming*, so far as it was therein held that an injunction might be awarded, though the complainant were precluded by his delay from obtaining an account of gains and profits. But the Chief Justice observed: "The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself, . . . nor will the issue of an injunction

against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right." *Fullwood* v. *Fullwood*, 9 Chan. Div. 176. ". . . So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

In the case under consideration we do not see how it is possible to wring an abandonment on the part of Saxlehner or the plaintiff from the repeated and persistent efforts made by them in Hungary to assert their rights. But it was not until the law was amended in 1895 that these efforts were successful. It can scarcely be wondered at that, in view of the disabilities under which he labored in his own country, Saxlehner should have thought it futile to undertake the prosecution of his rights in a distant land. As the defendant is unable to call to his assistance any authority from the home government for the use of these simulated labels, and as they and their vendors in Hungary seized upon these labels with knowledge of Saxlehner's rights, it is no hardship to enjoin their further use, and to hold defendant liable for such profits as it may have realized or for such damages as the plaintiff may have sustained by reason of the illegal use.

It seems, however, that in 1893 the defendant company began to affix to their bottles of Matyas water an additional label, consisting of a red seal upon a white ground, and containing the words, "Ask for the Seal brand. This label has been adopted to protect the public from imitation and as a guarantee of the genuineness of the Hunyadi Matyas Water imported solely by Eisner and Mendelson Co., New York." The attention of druggists was called to this seal brand by advertisements in the trade papers. The Circuit Court was of opinion that, as the word "Hunyadi" had become generic, and was no longer subject to individual appropriation, this label was a sufficient attempt on the part of defendant to assert that it was the seller of the

Matyas water, and that from its adoption it freed the defendant from the charge, which before that time was true, that it was cajoling or deceiving the ordinary purchaser into the belief that he was buying the Janos water; and in its decree refused to enjoin the defendant from selling such water under the red and blue label bearing the name "Hunyadi Matyas" in connection with the Seal brand label.

We are of opinion, however, that as defendant's bottle and label are a clear infringement upon those of the plaintiff, it would be destructive to her just rights to permit the use of such bottles and labels by the defendant, notwithstanding the affixing of the Seal brand, which is a mere private mark of the importer. The injury to her is in the simulation of her bottle and label, and she has the right to require that her competitors shall be forced to adopt a style of bottle which no one with the exercise of ordinary care can mistake for hers. While this label may have been adopted in good faith, we do not think its employment would prevent the casual customer from purchasing this water as that of the plaintiff, and that the injunction should also go against its use and that plaintiff should recover her damages therefor.

*We are therefore of opinion that the decree of the Circuit Court of Appeals must be reversed, and the case remanded to the Circuit Court for the Southern District of New York, with directions to reinstate its decree of April* 29, 1898, *except so far as it denies to the plaintiff an injunction against the use of the Seal brand labels and damages sustained by such use, and for further proceedings not inconsistent with the opinion of this court.*

# SAXLEHNER *v.* SIEGEL-COOPER COMPANY. SAXLEHNER *v.* GIES. SAXLEHNER *v.* MARQUET.

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

Nos. 30, 31, 32. Argued March 22, 23, 1900. — Decided October 15, 1900.

These cases were argued with No. 29, *ante*, 40. The answer in them was substantially the same as in that case, and the same record of proofs was used. *Held* that an injunction should issue against all the defendants, but as the Siegel-Cooper Company acted in good faith it should not be required to account for gains and profits.

THE case is stated in the opinion.

Counsel were the same as in No. 29.

MR. JUSTICE BROWN delivered the opinion of the court.

These three cases were brought against retail dealers, and defended by the Eisner and Mendelson Company, who imported and furnished the defendants with the water sold by them. The bills charged the defendants generally with unlawfully selling bitter water under labels simulating Saxlehner's blue and red label, and under the name "Hunyadi." The answer was substantially the same as that in the main case, and the same record of proofs was used.

In the case against the Siegel-Cooper Company there was no charge of an intentional fraud, and the court found there was no evidence of fraudulent conduct on its part, and dismissed the bill as to that company. As to the other two cases the court found that the clerks in charge of their stores, in response to special requests for Janos water, wrapped up and delivered Matyas water purchased of the Eisner and Mendelson Company. In other words that they had palmed off the one for the other.

We think that an injunction should issue against all these defendants, but that, as the Siegel-Cooper Company appears to

have acted in good faith, and the sales of the others were small, they should not be required to account for gains and profits. The fact that the Siegel-Cooper Company acted innocently does not exonerate it from the charge of infringement. *Moet v. Couston*, 33 Beav. 578; *Millington* v. *Fox*, 3 Myl. & Cr. 338; *Edelsten* v. *Edelsten*, 1 De Gex, J. & S. 185; Brown on Trade Marks, § 386.

*The decree of the Circuit Court of Appeals in these cases are also reversed, and the cases remanded to the Circuit Court for the Southern District of New York for further proceedings, etc.*

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## SAXLEHNER *v.* NIELSEN.

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

No. 33. Argued and submitted March 22, 23, 1900. — Decided October 15, 1900.

Defendant was prosecuted for selling bitter waters under the name of "Hunyadi Lajos." *Held*, That although the proof of laches on the part of plaintiff was not as complete as in the former case the same result must follow, and that the bill must be dismissed as to the word "Hunyadi" and sustained as to the infringement of the bottles and labels.

This was a bill of similar character to those involved in the prior cases, and was brought to enjoin the defendant from selling water under the name of "Hunyadi Lajos," or any other name in which the word "Hunyadi" occurs, as well as selling such water in bottles or under capsules or labels resembling those of the plaintiff upon her bottles of "Hunyadi Janos" water. The answer pleaded abandonment and laches. The Circuit Court made a similar decree to that in the Eisner and Mendelson suit, enjoining the infringement of plaintiff's red and blue label, requiring an accounting for damages, and denying relief against the use of the name "Hunyadi." The Circuit

Court of Appeals reversed this decree, and ordered the bill to be dismissed.

*Mr. Antonio Knauth* and *Mr. John G. Johnson* for petitioner. *Mr. Arthur von Briesen* was on their brief.

*Mr. Louis C. Raegener*, for respondent submitted on his brief.

Mr. Justice Brown delivered the opinion of the court.

The evidence in this case is much less complete than that in the cases just decided, although its general tendency is much the same. Plaintiff proved the adoption of the name "Hunyadi" by certificate of the Municipal Council of Buda-Pesth, dated January 19, 1863, authorizing Saxlehner to give his spring the name of "Hunyadi Spring," and by other certificates of a similar character.

It was shown that Andreas Saxlehner had used uninterruptedly the trade-mark "Hunyadi Janos," ever since 1865; that in 1873 he had registered this trade-mark in Hungary, and that plaintiff had re-registered the same in 1890. It was admitted that, if the plaintiff had not been guilty of laches, acquiescence or abandonment, she would undoubtedly be entitled to the exclusive enjoyment of both name and label.

But the contract with the Apollinaris Company was also put in evidence, together with testimony showing that from 1886, when the Hunyadi Arpad water began to be imported, some fourteen different Hunyadi waters were put upon the American market without opposition on the part of Saxlehner or the Apollinaris Company, and that the name "Hunyadi" had become widely known in this country as applicable to Hungarian bitter waters. Of some of these waters the importations were as high as six or seven thousand cases a year. As stated in the former opinion, the use of the name "Hunyadi" had become generic in Hungary, and Saxlehner could not have beeu ignorant of this fact, or of the further fact that exportations of these waters were constantly being made to foreign countries. He

was, at least, put upon inquiry as to whether these waters were not being sold in America in competition with his own, and he should have either instructed the Apollinaris Company to prosecute the infringements, or instituted proceedings himself to vindicate his proprietary interest in the name. Under such circumstances we think it too late now to maintain an exclusive title on the part of the plaintiff to the name "Hunyadi," and that she has been guilty of laches which preclude her right to an injunction.

So far as the question of label is concerned, plaintiff's witnesses proved sales of the Hunyadi Janos water in this country since about 1870, first under a red and white label and afterwards under the red and blue label. Defendant's water does not come from the neighborhood of Buda-Pesth, but from a spring situated at Kocs, more than a hundred miles from that place, though the water is apparently of similar character. His label appears to have been designed originally by one Schmidthauer, in Hungary, where it was registered as a trademark in July, 1892, and introduced the same year into this country. The label is so obviously an imitation of the Saxlehner label that defendant makes no argument to the contrary, and the appearance of the two is so nearly alike that a casual purchaser would easily suppose he was purchasing the Hunyadi Janos water in buying that of the defendant. The record also shows that the trade-mark registered by Schmidthauer in July, 1892, as above stated, was canceled by the Gyor Chamber of Commerce and Industry on March 24, 1897. There seems to have been no excuse for the adoption of this label except the fact that so many dealers of bitter water in Hungary had seized upon Saxlehner's name and label that it was treated as public property. For the reasons stated in the former case, we think that defendant should be held accountable for this misappropriation.

*The decree of the Circuit Court of Appeals will therefore be reversed, and the case remanded to the Circuit Court for the Eastern District of New York with direction to reinstate its decree of July 18, 1898, and for further proceedings consonant with this opinion.*

# LOOKER *v.* MAYNARD.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 4. Submitted December 2, 1898. Decided October 15, 1900.

A power reserved by the constitution of a state to its legislature, to alter, amend or repeal future acts of incorporation, authorizes the legislature, in order "to secure the minority of stockholders, in corporations organized under general laws, the power of electing a representative membership in boards of directors," to permit each stockholder to cumulate his votes upon any one or more candidates for directors.

THIS was an information in the nature of a *quo warranto*, filed August 1, 1896, in the Supreme Court of the State of Michigan, by Fred A. Maynard, Attorney General of the State, at the relation of Joseph W. Dusenbury and Will J. Dusenbury, against Oscar R. Looker, Charles A. Kent, Will S. Green, William A. Moore, Louis H. Chamberlain, William C. Colburn, Benjamin J. Conrad, John J. Mooney and Michael J. Mooney, to try the rights of the defendants and of the relators respectively to the offices of members of the board of directors of the Michigan Mutual Life Insurance Company. The right to those offices was claimed by the defendants under the original articles of association of the company under the general laws of Michigan; and by the relators under a statute subsequently enacted by the legislature of the State, which the defendants contended to be unconstitutional and void as impairing the obligation of the contract made between the State and the corporation by its original organization.

The Constitution of Michigan, adopted in 1850, art. 15, sec. 1, is as follows: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed." 1 Charters and Constitutions, 1008.

The general law of Michigan of March 30, 1869, entitled

"An act in relation to life insurance companies transacting business within this State," contained the following provisions:

By § 1, "Any number of persons not less than thirteen may associate together and form an incorporated company for the purpose of making insurance upon the lives of individuals, and every insurance pertaining thereto, and to grant, purchase and dispose of annuities."

By § 2, "The persons so associating shall subscribe articles of association, which shall contain"—"4. The manner in which the corporate powers are to be exercised, the number of directors and other officers, and the manner of electing the same, and how many of the directors shall constitute a quorum, and the manner of filling all vacancies." "7. Any terms and conditions of membership therein, which the corporators may have agreed upon, and which they may deem important to have set forth in such articles."

By § 5, "The articles of association shall be submitted to the attorney general for his examination, and if found by him to be in compliance with this act, he shall so certify to the secretary of state." Stat. 1889, c. 77; 1 Laws of Michigan of 1869, p. 124.

Under that statute, the Michigan Mutual Life Insurance Company was duly organized July 3, 1870, with articles of association, the fourth of which provided as follows:

"The corporate powers of the company shall be exercised by a board of directors, which shall consist of twenty-one members, which may be increased at the option of the board to not more than forty. The first meeting for the election of directors shall be called by the present officers, and held as soon as practicable after these articles shall take effect. No person shall be eligible who is not owner of at least ten shares of the guarantee capital of the company, and at least two thirds of the directors shall be residents of the State of Michigan. The board, at their first meeting, shall divide themselves by lot into three equal classes, as near as may be, whose terms of office shall expire at the end of one, two and three years respectively, and thereafter one third of the directors shall be chosen annually for the class whose term then expires, who shall hold office for three years,

or until their successors are elected; but the first board of directors, whose terms shall not have expired previous to the last Tuesday in January, shall continue in office until the last Tuesday in January following. The election of directors shall be had at the annual meeting of the company, which shall be held on the last Tuesday in January at the office of the company in Detroit. They shall be chosen by ballot, and a majority of all the votes cast shall elect. Every shareholder shall be entitled to one vote for directors for every share of guarantee capital standing in his name on the books of the company and may vote in person or by proxy. And every policy-holder insured in this company for the period of his natural life in the sum of not less than five thousand dollars shall also be entitled to one vote in the annual election of directors, which vote must be given in person."

In 1885 the legislature of Michigan passed an act entitled "An act to secure the minority of stockholders, in corporations organized under general laws, the power of electing a representative membership in boards of directors," the first section of which provided as follows: "In all elections for directors of any corporation organized under any general law of this State, other than municipal, every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him for as many persons as there may be directors to be elected; or to cumulate said shares, and give one candidate as many votes as will equal the number of directors multiplied by the number of shares of his stock; or to distribute them on the same principles among as many candidates as he shall think fit. All such corporations shall elect their directors annually, and the entire number of directors shall be balloted for at one and the same time, and not separately." Stat. 1885, c. 112; Public Acts of 1885, p. 116.

Directors were elected in accordance with the articles of association until the annual meeting of January 28, 1896, when, the whole number of directors being twenty-seven, of whom nine were elected annually, the whole number of votes for directors was 4893; the nine defendants received 3655 votes each; and Joseph W. Dusenbury, representing in his own right or by proxy

1238 shares, undertook, under the statute of 1885, to multiply the number of his shares by nine, making the number 11,142, and, dividing this number equally, cast 5571 votes for himself and 5571 for Will J. Dusenbury; and, if his claim had been allowed, they two, the relators in this case, would have been elected directors. But his claim was rejected, his vote was allowed on 1238 shares only, and the nine defendants were declared elected, and assumed and since exercised the offices of directors.

The Supreme Court of Michigan held the statute of 1885 to be constitutional and valid, and adjudged that the relators were elected directors, and should have been so declared. 111 Michigan, 498. The defendants sued out this writ of error.

*Mr. C. A. Kent* for plaintiff in error.

I. The articles of association of the Michigan Company as to the method of electing directors constituted a legal contract between the original stockholders, binding on their successors, protected by the Constitution of the United States against state interference, except so far as the power to change the contract has been reserved.

This law is unusual. Generally, the statute provides for the government of corporations by mandatory provisions. Here, the matter is designedly and explicitly left to the agreement of the corporators, and this offer of the power of agreement is made for the benefit of the corporators to induce them to engage in a proposed enterprise. Articles of association are generally contracts by the members. Cook on Stock and Stockholders, sec. 492; *Zabriskie* v. *Hackensack R. R. Co.*, 18 N. J. Eq. 178; *Snook* v. *Georgia Improvement Co.*, 83 Ga. 61; 1 Morawetz on Corporations, sec. 43 and *seq.*

It is uniformly held, that where the charter of a company provides a method of electing directors and there is no reservation of a power to change, the legislature has no power to change such provisions in favor of minority representation. If this is true when the provision is embodied in a contract with the state, it must be more true when the contract is be-

tween the corporators. *Hays* v. *Commonwealth*, 82 Penn. St. 518; *Baker's Appeal*, 107 Penn. St. 461; *Missouri* v. *Greer*, 78 Missouri, 188; *Smith* v. *Atchison, Topeka & Santa Fé Railroad Co.*, 64 Fed. Rep. 272.

II. The power to change the method by which directors are elected is not reserved in the statute. It is claimed under a general provision in the State Constitution.

The repeal or amendment of the law would not affect the contract between the corporators as to management of their property. It would only take away their powers to continue the business of insurance as a corporation. Unless forbidden the stockholders could continue the business of life insurance as a partnership. At any rate, they could wind up the business in the name of the corporation, and the method of electing directors would continue as before. *Bewick* v. *Alpena Harbor Improvement Co.*, 39 Mich. 700.

Any amendment of the law like an amendment to any other law would not affect lawful contracts entered into before the amendment. The amendment might forbid new corporations to make agreements except in accordance with the minority representation statute; but the power to amend does not cover the power to change pre-existing contracts. The provision in state constitutions authorizing the amendment or repeal of all laws for the formation of corporations, is intended simply to protect the public against corporation monopolies and corporation abuses. It is not designed to affect the contracts of the corporators among themselves as to the control of their interests in the property.

III. I have found no cases in conflict with the view I seek to maintain, though there may be some which appear to do so; citing *Sherman* v. *Smith*, 1 Black, 587; *In re Lee & Co. Bank*, 21 N. Y. 9; *The Reciprocity Bank*, 22 N. Y. 9; *Close* v. *Glenwood Cemetery*, 107 U. S. 466; *Pennsylvania College Cases*, 13 Wall. 190; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Greenwood v. Freight Co.*, 105 U. S. 13.

IV. See also *Orr* v. *Bracken County*, 81 Kentucky, 593; *Zabriskie* v. *Hackensack & New York Railroad Co.*, 18 N. J. Eq. 178; *Snook* v. *Georgia Improvement Co.*, 83 Georgia, 61;

*Fisher* v. *Patton*, 33 S. W. Rep. 451; *Detroit* v. *Detroit & Howell Plank Road Co.*, 43 Mich. 140; *People* v. *O'Brien*, 111 N. Y. 1; *Hill* v. *Glasgow Railroad Co.*, 41 Fed. Rep. 610; *Southern Pacific Railroad Co.* v. *Board of Railroad Commissioners of California*, 78 Fed. Rep. 236; *Tomlinson* v. *Jessup*, 15 Wall. 454; *Shields* v. *Ohio*, 95 U. S. 319.

V. Another error alleged is that the judgment of the court below deprives respondents and other stockholders of their right to participate in the management of their property, according to their agreement, without due process of law, in violation of the fourteenth amendment. The subject of vested rights in the control of property is so ably argued in three dissenting opinions in the *Sinking Fund Cases*, that I need only to refer to them, 99 U. S. 700, 731, and *seq.*

Though the majority of the court did not agree with the dissenting judges in the decision of that case, yet the difference was probably not in the principles advocated but in their application to the case then at bar.

No brief was filed for the defendants in error.

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

The single question in this case is whether a power, reserved by the constitution of a State to its legislature, to alter, amend or repeal future acts of incorporation, authorizes the legislature, in order (as declared in the title of the statute of Michigan now in question) "to secure the minority of stockholders, in corporations organized under general laws, the power of electing a representative membership in boards of directors," to permit each stockholder to cumulate his votes upon any one or more candidates for directors.

By the decision in the leading case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, it was established that a charter from the State to a private corporation created a contract, within the meaning of the clause in the Constitution of the United States forbidding any State to pass any law impairing

the obligation of contracts; and consequently that a statute of the State of New Hampshire, increasing the number of the trustees of Dartmouth College as fixed by its charter, and providing for the appointment of a majority of the trustees by the executive government of New Hampshire, instead of by the board of trustees as the charter provided, was unconstitutional and void.

Mr. Justice Story, in his concurring opinion in that case, after declaring that in his judgment it was "perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter," took occasion to add: "If the legislature mean to claim such an authority, it must be reserved in the grant." 4 Wheat. 712.

After that decision, many a State of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the legislature. See *Greenwood* v. *Freight Co.*, 105 U. S. 13, 20, 21. The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs. *Sherman* v. *Smith*, 1 Black, 587; *Miller* v. *State*, 15 Wall. 478; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Sinking Fund Cases*, 99 U. S. 700, 720, 721; *Close* v. *Glenwood Cemetery*, 107 U. S. 466; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *New York & New England Railroad* v. *Bristol*, 151 U. S. 556.

As illustrations of the right of the legislature, exercising such a reserved power, to alter for the future the liability of stockholders to creditors of the corporation, or the mode of computing the votes of stockholders for directors, it will be sufficient to state two of the cases just cited.

The case of *Sherman* v. *Smith*, 1 Black, 587, was as follows: The general banking act of New York of 1838, c. 260, provided, in § 15, that any number of persons might associate to establish a bank, upon the terms and conditions, and subject to the liabilities prescribed in this act; in § 23, that no shareholder of any association formed under this act should be individually liable for its debts, unless the articles of association signed by him should declare that the shareholder should be liable; and, in § 32, that the legislature might at any time alter or repeal this act. The articles of association of a corporation organized under this act in 1844 expressly provided that the shareholders should not be individually liable for its debts. By provisions of the constitution of New York of 1846, art. 8, sec. 2, and of the general statute of 1849, c. 226, the shareholders of all banks were made liable for debts contracted by the bank after January 1, 1850. This court unanimously held that these provisions were not unconstitutional as impairing the obligation of a contract.

The case of *Miller* v. *State*, 15 Wall. 478, was this: By the Revised Statutes of New York of 1828, c. 18, tit. 3, it was enacted that "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." The constitution of New York of 1846, art. 8, sec. 1, ordained as follows: "Corporations may be formed under general laws but shall not be created by special act," except in certain cases. "All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." 2 Charters and Constitutions, 1363. In 1850 the legislature passed a general railroad act authorizing the formation of railroad corporations with thirteen directors, and providing that the subscribers to the articles of association and all who should become stockholders in the company should become a corporation, and "be subject to

the provisions contained in" the aforesaid title of the Revised Statutes. Stat. 1850, c. 140, § 1. In the same year, a railroad corporation was organized under that act for the construction of a railroad from the city of Rochester to the town of Portage; and in 1851, by a statute amending the charter of the city of Rochester, that city was authorized to become a stockholder in the corporation, and to appoint four of the thirteen directors. Stat. 1851, c. 389, § 24. In 1867, the legislature passed another statute, authorizing the city to appoint seven of the thirteen directors. Stat. 1867, c. 59. This court upheld the validity of the latter statute, upon the ground that the reservation in the constitution of 1846, and in the statutes of 1828 and 1850, of the power to alter or repeal the charter, clearly authorized the legislature to augment or diminish the number, or to change the apportionment, of the directors as the ends of justice or the best interests of all concerned might require. 15 Wall. 492, 498. The full extent and effect of the decision are clearly brought out by the opinion of two justices who dissented for the very reason that the agreement with respect to the number of directors which the city should elect was not a part of the charter of the company, but was an agreement between third parties, outside of and collateral to the charter, and which the legislature could not reserve the power to alter or repeal. 15 Wall. 499. That case cannot be distingnished in principle from the case at bar.

Remembering that the *Dartmouth College case*, (which was the cause of the general introduction into the legislation of the several States of a provision reserving the power to alter, amend or repeal acts of incorporation,) concerned the right of a legislature to make a change in the number and mode of appointment of the trustees or managers of a corporation, we cannot assent to the theory that an express reservation of the general power does not secure to the legislature the right to exercise it in this respect.

*Judgment affirmed.*

# OREGON RAILROAD AND NAVIGATION COMPANY *v.* BALFOUR.

# OREGON RAILWAY AND NAVIGATION COMPANY *v.* BALFOUR.

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

Nos. 73, 74. Submitted October 9, 1900. Decided October 22, 1900.

Proceedings to limit the liability of ship-owners are admiralty cases; the decrees of the Circuit Courts of Appeal therein are made final by the sixth section of the judiciary act of March 3, 1891; and appeals to this court therefrom will not lie.

MOTION to dimiss.

*Mr. George H. Williams* and *Mr. C. E. S. Wood* for the motion.

*Mr. A. B. Browne* and *Mr. W. W. Cotton* opposing.

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

These were petitions for a limitation of liability of ship-owners, filed in the District Court of the United States for the District of Oregon, sitting in admiralty, which proceeded to decree in that court. From this decree appeals were prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit and the decree affirmed. 90 Fed. Rep. 295. From that decree appeals were taken to this court, which appellees now move to dismiss.

By the sixth section of the judiciary act of March 3, 1891, it is provided that the judgments or decrees of the Circuit Courts of Appeals in admiralty cases shall be final; and no appeal to this court lies therefrom. If, then, proceedings under the act

of Congress to limit the liability of ship-owners, and the rules of this court in that regard, are admiralty cases, it follows that the motions to dismiss must be sustained.

By the second section of article three of the Constitution, the judicial power extends "to all cases of admiralty and maritime jurisdiction," the word "maritime" having been added, out of abundant caution, to preclude a narrow interpretation of the word "admiralty."

The jurisdiction to limit the liability of ship-owners was conferred upon the District Courts by the act of Congress of March 3, 1851, 9 Stat. 635, c. 43, carried forward into sections 4282 to 4289 of the Revised Statutes.

It was not until December term, 1871, in the case of the *Norwich Transportation Company* v. *Wright*, 13 Wall. 104, that the court was called upon to interpret the act, and to adopt some general rules for the purpose of carrying it into effect, and this was done at that term. 13 Wall. XII, XIII; Rules of Practice in Admiralty, 54–58.

The power of Congress to pass the act of 1851 and the power of this court to prescribe rules regulating proceedings thereunder were maintained in that case, and were recognized and reaffirmed in many subsequent cases. *The Benefactor*, 103 U. S. 239; *The Scotland*, 105 U. S. 24; *Providence & N. Y. Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527; *In re Morrison, Petitioner*, 147 U. S. 14, 34. In the latter case the proceeding is styled "an equitable action," but not in any sense as inconsistent with the admiralty jurisdiction.

In these cases the provisions of the act and of the rules are fully set forth, explained, and commented on, and need not be repeated. As decisive of the question before us it will be sufficient to give the following extracts from the opinion of the court, delivered by Mr. Justice Bradley, in *Providence Steamship Co.* v. *Manufacturing Company:*

"The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time im-

memorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rule thus adopted by Congress, and for securing to ship owners its benefits, was therefore strictly within the powers conferred upon this court; and where the general regulations adopted by this court do not cover the entire ground, it is undoubtedly within the power of the district and circuit courts, as courts of admiralty, to supplement them by additional rules of their own. . . . In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of ship owners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the ship owners from being harassed by litigation in other tribunals. . . . We see no reason to modify these views, and, in our judgment, the proper District Court, designated by the rules, or otherwise indicated by circumstances, has full jurisdiction and plenary power, as a court of admiralty, to entertain and carry on all proper proceedings for the due execution of the law, in all its parts."

Clearly then these were admiralty cases; the decrees of the Circuit Court of Appeals were made final by the statute; and the appeals must be

*Dismissed.*

# WILEY *v.* SINKLER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 2. Argued December 8, 1899.—Decided October 15, 1900.

The right to vote for members of Congress is not derived merely from the constitution and laws of the State in which they are chosen, but has its foundation in the Constitution and laws of the United States.

The Circuit Court of the United States has jurisdiction of an action brought against election officers of a State to recover damages, alleged to exceed the sum of $2,000, for refusing the plaintiff's vote for a member of Congress.

In an action against election officers of the State of South Carolina for refusing the plaintiff's vote at an election, the declaration must allege that the plaintiff was a registered voter, as is required by the constitution and laws of the State.

THIS was an action, brought March 11, 1895, in the Circuit Court of the United States for the District of South Carolina, by a resident of the city of Charleston in that State, against the board of managers of a general election at a ward and precinct in that city, to recover damages in the sum of $2500 for wrongfully and wilfully rejecting his vote for a member of the House of Representatives of the United States for the State of South Carolina on November 6, 1894. The allegations of the complaint were as follows:

"I. That the plaintiff is and was on the 6th day of November, 1894, a resident of the city and county of Charleston in the State of South Carolina; and that he had been a resident of said State for a period of more than twelve months next preceding said 6th day of November, 1894, and a resident of said city and county for more than sixty days next preceding said day; and that under the constitution and laws of the said State of South Carolina and the Constitution and laws of the United States the said plaintiff is and was at the time aforesaid twenty-one years of age, and is and was in every other respect a duly qualified elector of said State, and is and was on the said 6th day

Statement of the Case.

of November, 1894, entitled to vote for a member of the House of Representatives of the United States from said State of South Carolina.

"II. That the defendants were on the day and year aforesaid the board of managers of the Federal election at the first election precinct in the sixth ward of said city of Charleston in said county and State; that, as the plaintiff has been informed and believes, the said defendants were duly appointed and qualified as such managers; and that they were present at the polling place in the said election precinct on the said 6th day of November, 1894, and during all the time the polls were open on said day were there, acting as such board of managers of the Federal election.

"III. That the proper election precinct at which the said plaintiff was entitled to vote is the said first precinct in the sixth ward of the city and county of Charleston in the State aforesaid; and that on the said 6th day of November, 1894, and while the polls were open for voting purposes, the said plaintiff presented himself at the polling place in said election precinct, and then and there offered to vote and cast his ballot for one of the candidates for the office of member of the House of Representatives of the United States for the State of South Carolina in the Fifty-fourth Congress; and the plaintiff further avers that he then and there had ready the proof of his qualifications as such Federal elector as aforesaid.

"IV. That the said defendants unlawfully, wilfully and injuriously refused to permit the said plaintiff to vote at said precinct and at said Federal election which was there held according to law, on said 6th day of November, 1894, for one of the candidates for member of said House of Representatives of the United States for the State aforesaid; and wrongfully and wilfully, and without any lawful cause or excuse, rejected the plaintiff's said vote; to his damage two thousand and five hundred dollars.

"Wherefore the plaintiff demands judgment against the defendants for the said sum of two thousand and five hundred dollars, and for the costs of this action."

The defendants demurred to the complaint, upon the following grounds:

Statement of the Case.

First. That the court had no jurisdiction of the action, because it did not affirmatively appear on the face of the complaint that a Federal question was involved; and because it appeared on the face of the complaint that a verdict for $2000 would be so excessive that the court would be required to set it aside.

Second. That the complaint did not state facts sufficient to constitute a cause of action, because by section 2008 of the Revised Statutes of the United States an action must be brought for a penalty, and not for damages; and because the complaint did not state facts sufficient to constitute a cause of action, either under that statute, or at common law.

The court, without considering the other grounds, sustained the demurrer, and dismissed the complaint, because it did not state facts sufficient to constitute a cause of action, in that it failed to state that the plaintiff was a duly registered voter of the State of South Carolina. The plaintiff sued out a writ of error from this court.

The material parts of the constitution and laws of South Carolina, referred to in argument, are stated in the margin.[1]

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[1] In the constitution of 1868, the first article, entitled "Declaration of Rights," contains the following provisions:

"SECT. 31. All elections shall be free and open, and every inhabitant of this Commonwealth, possessing the qualifications provided for in this constitution, shall have an equal right to elect officers and be elected to fill public office."

"SECT. 33. The right of suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult or improper conduct."

The eighth article of the same constitution, entitled "Rights of Suffrage," contains the following provisions:

"SECT. 2. Every male citizen of the United States, at the age of twenty-one years and upwards, not laboring under the disabilities named in this constitution, without distinction of race, color or former condition, who shall be a resident of this State at the time of the adoption of this constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote sixty days, next preceding any election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the electors at any elections: Provided, that no person shall be allowed to vote or hold office who is now or hereafter may be disqualified therefor by the Consti-

*Mr. Charles A. Douglass* for plaintiff in error.

*Mr. William A. Barber* for defendants in error.

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

This case involves the construction and application of the Constitution of the United States, and is therefore rightly brought directly from the Circuit Court of the United States

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tution of the United States until such disqualification shall be removed by the Congress of the United States: Provided, further, that no person, while kept in any almshouse or asylum, or of unsound mind, or confined in any public prison, shall be allowed to vote or hold office.

"Sect. 3. It shall be the duty of the general assembly to provide from time to time for the registration of all electors."

"Sect. 7. Every person entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the county where he shall have resided sixty days previous to such election, except as otherwise provided in this constitution or the Constitution and laws of the United States.

"Sect. 8. The general assembly shall never pass any law that will deprive any of the citizens of this State of the right of suffrage, except for treason, murder, robbery or duelling, whereof the person shall have been duly tried and convicted." This section was amended in 1882 by substituting, for the word "robbery," the words "burglary, larceny, perjury, forgery, or any other infamous crime."

The Revised Statutes of South Carolina of 1893 contain the following provisions:

"Sec. 162. The general elections for Federal, State and county officers in this State shall be held on the first Tuesday following the first Monday in November in every second year, reckoning from the year one thousand eight hundred and seventy."

"Sec. 131. Every male citizen of the United States, of the age of twenty-one years and upwards, not laboring under the disabilities named in the constitution, without distinction of race, color or former condition, who shall have been a resident of the State for one year, and in the county in which he offers to vote for sixty days, next preceding any general election, shall be entitled to vote: Provided, that no person, while kept in any almshouse or asylum, or of unsound mind, or confined in any public prison, or who shall have been convicted of treason, murder, burglary, larceny, perjury, forgery, or any other infamous crime, or duelling, shall be allowed to vote.

to this Court, under the act of March 3, 1891, c. 517, § 5, cl. 4. 26 Stat. 828.

The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States.

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"SEC. 132. All electors of the State shall be registered; and no person shall be allowed to vote at any election hereafter to be held, unless he shall have been heretofore registered in conformity with the requirements of chapter 7 of the General Statutes of 1882, and acts amendatory thereof, or shall be registered as herein required."

Sections 133–136 provide for the appointment of a supervisor and two assistant supervisors of registration in each county, and establish registration precincts.

"SEC. 137. After every general election, the registration books shall be opened, for registration of such persons as shall thereafter become entitled to register, on the first Monday in each month, until the first day of July preceding a general election, when the same shall be closed until such general election shall have taken place."

Section 138 requires the books of registration to be deposited and safely kept in the office of a certain clerk or registrar.

"SEC. 139. The supervisor shall determine as to the legal qualifications of all applicants for registration by summary process, requiring oath, evidence, or both, if he deem proper, subject to revision by the assistant supervisors and himself in all cases where he has refused to register an applicant. From their decision any applicant who is rejected shall have the right to a review thereof by the circuit court, provided he give notice in writing to the supervisor of his application for such review, and the grounds thereof, within five days from the date of his rejection, and commence his proceedings within ten days from the service of said notice.

"SEC. 140. Any person coming of age, and otherwise qualified as an elector, may appear before the supervisor on any day on which the books are opened as aforesaid, and make oath (which the supervisor is hereby authorized to administer) as to his name, age, occupation and place of residence; and if the supervisor find him qualified, he shall enter his name upon the registration book of the precinct in which he resides. Such persons shall have the right of appeal, as provided in the last section, if the supervisor shall not find him qualified.

"SEC. 141. In case a person shall not be of age to qualify him as an elector on the day of the closing of the books of registration before any general election, but shall be of such age as will qualify him as such elector before the said general election, and shall appear before the supervisor of registration and take oath thereto, the supervisor, if he shall find him qualified, shall enter his name upon the registration book as aforesaid."

This is clearly and amply set forth in *Ex parte Yarbrough*, 110 U. S. 651, in which this court, speaking by Mr. Justice Miller, upheld a conviction in a Circuit Court of the United States under sections 5508 and 5520 of the Revised Statutes for a conspiracy to intimidate a citizen of the United States in the exercise of his right to vote for a member of Congress; and answered the proposition "that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each State respectively," as follows:

"But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election. Its language is 'The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislature.' Art. 1, sec. 2. The States, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and

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Section 142 provides that "each elector registered as aforesaid shall thereupon be furnished by the supervisor with a certificate, which shall contain a statement of his age, occupation and place of residence, as entered in the said registration book, and which certificate shall be signed by the said supervisor; and no person shall be allowed to vote at any other precinct than the one for which he is registered, nor unless he produces and exhibits to the managers of election such certificate;" and the form of such certificate is prescribed.

By sections 146–149 an elector who changes his place of residence must surrender his certificate of registration and take out a new certificate; and by section 50, if an elector loses his certificate, he may, upon application made at least thirty days before the next general election, and upon complying with certain stringent provisions as to proof of the loss, obtain a new certificate.

the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the State." 110 U. S. 663.

The court then, referring to the statement of Chief Justice Waite in *Minor* v. *Happersett*, 21 Wall. 162, 178, that "the Constitution of the United States does not confer the right of suffrage upon any one," explained that statement as follows: "But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts, as the qualification of voters for members of Congress, that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. But the court did not intend to say that, when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors." 110 U. S. 664.

The Circuit Court of the United States has jurisdiction, concurrent with the courts of the State, of any action under the Constitution, laws or treaties of the United States, in which the matter in dispute exceeds the sum or value of $2000. Act of August 13, 1888, c. 866; 25 Stat. 433.

This action is brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States. The complaint, by alleging that the plaintiff was at the time, under the constitution and laws of the State of South Carolina and the Constitution and laws of the United States, a duly qualified

elector of the State, shows that the action is brought under the Constitution and laws of the United States.

The damages are laid at the sum of $2500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court. *Barry* v. *Edmunds*, 116 U. S. 550; *Scott* v. *Donald*, 165 U. S. 58, 89; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 468, 472; *North American Co.* v. *Morrison*, 178 U. S. 262, 267.

The Circuit Court therefore clearly had jurisdiction of this action, and we are brought to the consideration of the other objections presented by the demurrer to the complaint.

The objection that the only remedy in that court was by suit for a penalty under section 2008 of the Revised Statutes is answered by the repeal of that section, before this action was brought, by the act of Congress of February 8, 1894, c. 25. 28 Stat. 36.

But the objection that the complaint failed to state that the plaintiff was a duly registered voter of the State of South Carolina (which was the ground of the judgment below in favor of the defendants) is a more serious one.

By the constitution of South Carolina, every male citizen, of the age of twenty-one years and upwards, who has resided in the State for one year, and in the county where he offers to vote for sixty days, next preceding any election, and is not disqualified by the Constitution of the United States, nor a lunatic or a prisoner, nor been convicted of an infamous crime or of duelling, is entitled to vote for all officers elected by the people. Art. 1, § 31; art. 8, §§ 2, 8. That constitition, in art. 8, § 3, also makes it the duty of the legislature to provide from time to time for the registration of all electors.

The Revised Statutes of South Carolina of 1893 provide, in § 131, that every man, not laboring under the disabilities named in the constitution of the State (repeating all the qualifications and the disabilities mentioned in that constitution) shall be entitled to vote; and further provide, in § 132, that all electors of

the State shall be registered, and that no person shall be allowed to vote at any election unless theretofore registered as required by those statutes or by previous laws.

The constitution of the laws of the State thus require that, in order to entitle any one to have his vote received at any election, he must not only have the requisite qualifications of an elector, but he must have been registered. By elementary rules of pleading, both these essential requisites must be distinctly alleged by the plaintiff in any action against the managers of an election for refusing his vote. *Murphy* v. *Ramsey*, 114 U. S. 15, 37; *Blanchard* v. *Stearns*, 5 Met. 298, 302.

The complaint in this case alleges that the plaintiff was a duly qualified elector; but it contains no allegation that he was ever registered as such. Because of this omission, the complaint does not state facts sufficient to constitute a cause of action.

It was argued, in behalf of the plaintiff, that the registration act of South Carolina was unconstitutional, because it allowed for registration only one day in each month between the day of a general election in November and the first day of July before the next general election; required the registration books to be closed from such first day of July for four months, until the ensuing election day; and thus in effect required each voter to reside in the county for one hundred and twenty days (whereas the constitution required only sixty days) before the election, and otherwise unreasonably impeded the exercise of the constitutional right of voting; that the only exception allowed was in the case of voters coming of age during those four months, and there was no exception in the case of electors who, by reason of sickness or absence or other good and sufficient cause, did not or could not have registered before the first day of July.

In the case in the Supreme Court of South Carolina of *Butler* v. *Ellerbe*, 44 So. Car. 256, cited at the bar, the Chief Justice expressed his opinion that the registration act of the State was unconstitutional; but the majority of the judges declined to express any opinion upon that question, because they thought it unnecessary for the decision. Nor should this court undertake to decide it in the present case.

Passing by the difficulty of subjecting election officers to an

action for damages for refusing a vote which the statute under which they are appointed forbids them to receive, it is by no means clear, taking into consideration all the constitutional and statutory provisions upon the subject, that the construction contended for is the true construction of the statute.

But, even upon that construction, the plaintiff does not show that he is in a position to impugn the constitutionality of the statute. It is only on the day when this vote was refused, that he alleges that he had resided in the State for a year and in the county for sixty days, and was of age and otherwise a qualified elector. He does not allege when he first became qualified. So far as appears, he may have become of age and otherwise qualified but a few days before the election day on which he tendered his vote, in which case he would confessedly, by the specific provision of § 141, have been entitled to apply for registration. Yet he does not allege that he ever was registered, or made any application to be registered.

The provisions of the statutes of 1893 requiring registered voters to obtain certificates from the supervisors, the provisions for registration in earlier statutes, and the provisions of the statute of December 24, 1894, for calling a constitutional convention, enacted since the date of the election here in question, were largely commented on, and their validity impugned, in the argument for the plaintiff in error. But the validity of none of those provisions is involved in the decision of this case.

*Judgment affirmed.*

# SULLY *v.* AMERICAN NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 266 of October Term, 1899. Submitted October 9, 1900.—Decided October 22, 1900.

For reasons stated in the opinion of the court a motion to retax costs in this case is granted and the costs modified accordingly.

THIS was a motion to retax the costs in this case.

*Mr. Samuel C. Williams* for the motion.

*Mr. R. E. Mountcastle* opposing.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is in substance a motion to retax costs in this case.

Upon the day of the final adjournment of the court, May 28, 1900, the cause was decided, and a decree entered reversing the judgment of the Supreme Court of Tennessee as to the plaintiff in error Carhart, who was one of several plaintiffs in error, with costs to be paid by the American National Bank. Subsequently to the adjournment all the costs of this court were taxed against the bank, which now prays for a retaxation.

The decree of this court has been misinterpreted. It does not mean that all the costs in this court are to be paid by the bank, but only the costs of the plaintiff in error Carhart, in regard to whom alone the judgment of the court below was reversed.

*The motion to retax the costs is granted, and the taxation modified to that extent.*

*Mr. E. J. Baxter* for the motion.

*Mr. R. E. L. Mountcastle* opposing.

*Mr. Samuel C. Williams* opposing.

# KNOTT *v.* BOTANY MILLS.

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

No. 5. Argued October 12, 13, 1899.—Decided October 22, 1900.

Bales of wool were stowed on a steamship, with proper dunnage, between decks and forward of a temporary wooden bulkhead. At a subsequent port, wet sugar (from which there is always drainage) was stowed aft of that bulkhead, with proper dunnage, but without any provision for carrying off the drainage in case it ran forward. The ship was then down by the stern, and all drainage from the sugar was carried off by the scuppers. At a third port, other cargo was discharged, so as to trim the vessel two feet by the head; and the drainage from the sugar found its way through the bulkhead, and damaged the wool, through negligence of those in charge of the ship and cargo. *Held*: That the damage to the wool was through fault in the proper loading or stowage of the cargo, within section 1 of the act of February 13, 1893, c. 105, known as the Harter Act, and not from fault in the navigation or management of the vessel, within section 3 of that act.

The words, in section 1 of the Harter Act, "any vessel transporting merchandise or property from or between ports of the United States and foreign ports," include a foreign vessel transporting merchandise from a foreign port to a port of the United States; and such a vessel and its owner are therefore liable for negligence in proper loading or stowage of the cargo, notwithstanding any stipulations in the bill of lading that they shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag.

THE case is stated in the opinion of the court.

*Mr. J. Parker Kirlin* for the petitioner.

*Mr. Wilhelmus Mynderse* for the respondents. *Mr. Lawrence Kneeland* filed a brief for same.

MR. JUSTICE GRAY delivered the opinion of the court.

The Botany Worsted Mills, a corporation of New Jersey, and Winter and Smillie, a firm of merchants in the city of New York,

respectively owners of two separate lots of bales of wool, shipped at Buenos Ayres for New York on board the steamship Portuguese Prince, severally filed libels in admiralty *in personam* in the District Court of the United States for the Southern District of New York, against James Knott, the owner of the vessel, to recover for damage caused to the wool by contact with drainage from wet sugar which also formed part of her cargo.

The Portuguese Prince was a British vessel, belonging to a line trading between New York and ports in the River Plata, Brazil, and the West Indies, loading and discharging cargo and having a resident agent at each port. The bills of lading of the wool, signed at Buenos Ayres, December 21, 1894, gave her liberty to call at any port or ports to receive and discharge cargo, and for any other purpose whatever; and purported to exempt the carrier from liability for "negligence of masters or mariners;" "sweating, rust, natural decay, leakage or breakage, and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell or evaporation from them;" "or any other peril of the seas, rivers, navigation, or of land transit, of whatsoever nature or kind; and whether any of the perils, causes or things above mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable; or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." Each bill of lading also contained the following clause: "This contract shall be governed by the law of the flag of the ship carrying the goods, except that general average shall be adjusted according to York-Antwerp Rules, 1890."

The facts of the case are substantially undisputed. The bales of wool of the libellants were taken on board at Buenos Ayres, December 21–24, 1894, and were stowed on end, with proper dunnage, between decks near the bow, and forward of a tem-

porary wooden bulkhead, which was not tight. The vessel, after touching at other ports, touched on February 19, 1895, at Pernambuco, and there took on board two hundred tons of wet sugar, (from which there is always drainage,) which was stowed, with proper dunnage, between decks, aft of the wooden bulkhead. At that time the vessel was trimmed by the stern, and all drainage from the sugar, flowing aft, was carried off by the scuppers, which were sufficient for the purpose when the vessel was down by the stern, or on even keel in calm weather. There was no provision for carrying off the drainage in case it ran forward. She discharged other cargo at Para; and on March 10, when she left that port, she was two feet down by the head. She continued in this trim until she took on additional cargo at Port of Spain, where the error in trim was corrected, and she left that port on March 18, loaded one foot by the stern. It was agreed by the parties that there was no damage to the wool by sugar drainage until she was trimmed by the head at Para; that the wool was damaged, by sugar drainage finding its way through the bulkhead and reaching the wool, at Para, or between Para and Port of Spain, and not afterwards; that, after she was again trimmed by the stern at Port of Spain, none of the drainage from the sugar found its way forward; and that the court might draw inferences.

The District Court entered a decree for the libellants. 76 Fed. Rep. 582. That decree was affirmed by the Circuit Court of Appeals. 51 U. S. App. 467. The appellant then obtained a writ of certiorari from this court. 168 U. S. 711.

Before the act of Congress of February 13, 1893, c. 105, (27 Stat. 445,) known as the Harter Act, it was the settled law of this country, as declared by this court, that common carriers, by land or sea, could not by any form of contract exempt themselves from responsibility for loss or damage arising from negligence of their servants, and that any stipulation for such exemption was void as against public policy; although the courts in England and in some of the States held otherwise. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397; *Compania La Flecha* v. *Brauer*, 168 U. S. 104, 117, 118. In many lower courts of the United States

it has been held, independently of the Harter Act, that a stipulation that a contract should be governed by the law of England in this respect was void, and could not be enforced in a court of the United States; but the point has not been decided by this court. Nor is it necessary for us now to decide that point, because these bills of lading were issued since the Harter Act, and we are of opinion that the case is governed by the express provisions of that act.

Upon the facts of this case, there can be no doubt that the ship was seaworthy, and that the damage to the wool was caused by drainage from the wet sugar through negligence of those in charge of the ship and cargo. The questions upon which the decision of the case turns are two:

First. Whether this damage to the wool was "loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of cargo, within the first section of the Harter Act; or was "damage or loss resulting from faults or errors in navigation or in the management of said vessel," within the third section of that act?

Second. Do the words, in the first section, "any vessel transporting merchandise or property from or between ports of the United States and foreign ports," include a foreign vessel transporting merchandise from a foreign port to a port of the United States?

Section 1 of that act is as follows: "It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import, inserted in bills of lading or shipping receipts, shall be null and void and of no effect." This section, in all cases coming within its provisions, overrides and nullifies any such stipulations in a bill of lading. *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272.

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By section 3, on the other hand, "if the owner of any vessel transporting merchandise or property to or from any port in the United States" shall exercise due diligence to make her in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor her owner, agent or charterer "shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," etc. This section does but relax the warranty of seaworthiness in the particulars specified in the section. *The Carib Prince*, 170 U. S. 655; *The Irrawaddy*, 171 U. S. 187.

We fully concur with the courts below that the damage in question arose from negligence in loading or stowage of the cargo, and not from fault or error in the navigation or management of the ship—for the reasons stated by the District Judge, and approved by the Circuit Court of Appeals, as follows:

"The primary cause of the damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole, or as respects the juxtaposition of wet sugar and wool bales placed far forward. The wool should not have been stowed forward of the wet sugar, unless care was taken in the other loading, and in all subsequent changes in the loading, to see that the ship should not get down by the head. There was no fault or defect in the vessel herself. She was constructed in the usual way, and was sufficient. But on sailing from Para she was a little down by the head, through inattention, during the changes in the loading, to the effect these changes made in the trim of the ship and in the flow of the sugar drainage. She was not down by the head more than frequently happens. It in no way affected her sea-going qualities; nor did the vessel herself cause any damage to the wool. The damage was caused by the drainage of the wet sugar alone. So that no question of the unseaworthiness of the ship arises. The ship herself was as seaworthy when she left Para, as when she sailed from Pernambuco. The negligence consisted in stowing the wool far forward, without taking care subsequently that no changes of loading should bring the ship down by the head. I must, therefore, regard the question as solely a question of negligence in the stowage and disposition of cargo, and of damage consequent

thereon, though brought about by the effect of these negligent changes in loading on the trim of the ship." "The change of trim was merely incidental, the mere negligent result of the changes in the loading, no attention being given to the effect on the ship's trim, or on the sugar drainage." "Since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading falls within the first section. The ship and owner must, therefore, answer for this damage, and the third section is inapplicable." 76 Fed. Rep. 583-585; 51 U. S. App. 473.

In *The Glenochil* (1896) Prob. 10, on which the appellant much relied, the negligence which was held to be within the third section of the Harter Act was, as said by Sir Francis Jeune, "a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening arising because part of her cargo had been taken out of her." He pointed out that the first and third sections of the act might be reconciled by the construction, "first, that the act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or management of the vessel and not with the cargo." And he added that the court had had the same sort of question before it in the case of *The Ferro*, (1893) Prob. 38, and he adhered to what he there said, "that mere stowage is an altogether different matter from the management of the vessel." And Sir Gorell Barnes delivered a concurring opinion to the same effect.

The like distinction was recognized by this court in the recent case of *The Silvia*, 171 U. S. 462, 466.

The remaining question is whether the first section of the Harter Act applies to a foreign vessel on a voyage from a foreign port to a port in the United States.

The power of Congress to include such cases in this enactment cannot be denied in a court of the United States. The point in

controversy is whether, upon the proper construction of the act, Congress has done so. That the third section does extend to such a vessel on such a voyage has been already decided by this court. *The Silvia*, above cited; *The Chattahoochee*, 173 U. S. 540, 550, 551.

It is true that the words of that section are not exactly the same in this respect, being "any vessel transporting merchandise or property to or from any port in the United States," whereas the corresponding words in the first section are "any vessel transporting merchandise or property from or between ports of the United States and foreign ports."

But the two phrases, as applied to the subject-matter, are precisely equivalent, and are both equally applicable to a foreign voyage that ends, and to one that begins, in this country. In their usual and natural meaning, the words "from any port in the United States" include all voyages, whether domestic or foreign, which begin in this country; the words "to any port in the United States" include all voyages, whether domestic or foreign, which end in this country; and the words "between ports of the United States and foreign ports" include all foreign voyages which either begin or end here. The words of the third section, "to or from any port in the United States" express in the simplest and most direct form the intention to include voyages hither as well as voyages hence. And we find insuperable difficulty in the way of giving a different meaning to the words of the first section, "from or between ports of the United States and foreign ports." The words "from ports of the United States" would of themselves be sufficient to cover all voyages which begin here, whether they end in a domestic or in a foreign port; and the words "between ports of the United States and foreign ports" no more appropriately designate foreign voyages beginning here, than such voyages beginning abroad. The phrase of the first section is slightly elliptical; but it appears to us to have exactly the same meaning as if the ellipsis had been supplied by repeating the words "ports of the United States," so as to read "any vessel transporting merchandise or property from ports of the United States, or between ports of the United States and foreign ports." And

no reason has been suggested why a foreign vessel should come within the benefit of the third section relaxing the warranty of seaworthiness, and not come within the prohibition of the first section affirming the unlawfulness of stipulations against liability for negligence.

Attention was called at the bar to the fact that in the act, as originally passed by the House of Representatives, the words of the third section were "any vessel transporting merchandise or property between ports in the United States of America and foreign ports," and that for those words the Senate substituted the words as they now stand in the act; and it was argued that the change in this section, leaving unchanged the corresponding clauses in the first and other sections of the act, showed that those sections were not supposed or intended to include vessels bound from foreign ports to ports of the United States. But the argument fails to notice that the third section, as it originally stood, did not contain the words "from or," but covered only voyages "between ports in the United States and foreign ports;" and the more reasonable inference is that the change was made for the purpose of bringing domestic voyages within this section. See 24 Congr. Rec. 147–149, 173, 1181, 1291, 1292.

Attention was also called to the fourth section of the act, which makes it the duty of the owner, master or agent of "any vessel transporting merchandise or property from or between ports of the United States" to issue to shippers bills of lading containing a certain description of the goods; and to the fifth section, which provides that, "for a violation of any of the provisions of this act, the agent, owner or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars," and the amount of the fine and costs shall be a lien upon the vessel, and she may be libelled therefor in any District Court of the United States within whose jurisdiction she may be found. It was argued that this provision imposing a penalty would cover a refusal to give a bill of lading without the clauses prohibited by the first section; and could not extend to acts done in a foreign port out of the

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jurisdiction of the United States. But whether that be so or not, (which we are not required in this case to decide,) it affords no sufficient reason for refusing to give full effect, according to what appears to us to be their manifest meaning, to the positive words of the first section, which enact, as to "any vessel" transporting merchandise or property "between ports of the United States and foreign ports," that all stipulations relieving the carrier from liability for loss or damage arising from negligence in the loading or stowage of the cargo shall not only be unlawful, but "shall be null and void and of no effect."

This express provision of the act of Congress overrides and nullifies the stipulations of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag.

*Decree affirmed.*

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## HUBBELL *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No 19. Argued January 9, 10, 1899.—Decided October 22, 1900.

An examination of the history of the appellant's claim shows that in order to get his patent he was compelled to accept one with a narrower claim than that contained in his original application; and it is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office, or disclosed by prior devices.

This court concurs with the court below in holding that the cartridges made and used by the United States were not within the description contained in the appellant's claim.

On December 28, 1878, William Wheeler Hubbell filed, in the United States Patent Office, an application for a patent for an improvement in metallic cartridges, and on February 18, 1879, letters patent No. 212,313 were granted and issued to him.

Counsel for Parties.

On April 19, 1883, Hubbell, the patentee, filed a petition in the Court of Claims against the United States, alleging that the latter were using his patented methods in circumstances that warranted a claim for compensation. This case was numbered in the Court of Claims as No. 13,793, and was so proceeded in that on June 1, 1885, judgment was entered in the Court of Claims dismissing the petition. 20 C. Cl. 354. In August, 1885, an application for allowance of an appeal from that judgment to this court was filed. Pending this application Hubbell brought another suit against the United States in the Court of Claims by filing a petition, No. 16,261, on June 11, 1888, presenting substantially similar issues to those asserted in the first suit.

On December 23, 1895, judgment was entered by the Court of Claims dismissing the petition in the second case. 31 C. Cl. 464. On March 20, 1896, an application for allowance of an appeal from this judgment to this court was filed, and on July 6, 1896, this appeal was allowed. On May 31, 1898, the judgment of the Court of Claims, dismissing the petition in the second case, was approved by this court. 171 U. S. 203.

On June 7, 1898, the application for allowance of appeal in the first case was allowed, and on May 31, 1898, a petition was allowed to be filed in this court for a rehearing in the second case. The appeal in the first case and the petition for a rehearing in the second case were argued together in this court on January 9, 10, 1900.

*Mr. Frederic D. McKenney* and *Mr. George S. Boutwell* for appellant. *Mr. F. P. Dewees* and *Mr. J. Nota McGill* were on their briefs.

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

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

It is contended, on behalf of the appellant, that we should

regard the present case and the case disposed of upon the former appeal, in 171 U. S. 203, as constituting substantially one controversy, and that we should give the appellant the benefit of the new or additional facts which, it is claimed, were made to appear by the amended findings in the first case. It is claimed, on the part of the United States, that the former decision of this court was a final adjudication of the controversy, that its finality was not affected by the subsequent allowance by the trial court of an appeal from the former judgment, and that, at all events, the additional findings were, in substance, not different from those previously made, and, even if now considered, show no sufficient grounds for reversing the judgment of the Court of Claims in the present case, or that of this court on the first appeal.

Whether if the additional findings of the trial court had presented a new and meritorious case, this would afford a sufficient reason for this court to set aside its previous judgment, and to enter upon a consideration of the controversy *de novo*, we do not decide, as, even upon such an assumption, we agree with the court below in thinking that the new findings did not make a new or different case, or impair the legal foundation of the judgment rendered in the case in which they were made.

Those findings, as we find them printed in the record of the case, No. 198 of the October term, 1897, of this court, consist partly of matters connected with the claim on account of the manufacture and use of the cup-anvil cartridge, and as the claimant filed a waiver of that claim such parts of the findings have no relevancy now. Other portions of the additional findings bear on the number of cartridges made by the United States, so as to afford a basis for estimating the damages, if the claimant should recover, and do not affect the legal questions involved. Other of the findings allowed reference to certain drawings filed by the claimant in previous applications made by him in the Patent Office, which may have some relevancy as disclosing the history of the art, but do not appear to materially affect the construction of the claim finally allowed by the Patent Office, and the same may be said of some verbal amendments allowed to the findings previously made.

An examination of the history of the appellant's claim, as disclosed in the file wrapper and contents, shows that in order to get his patent he was compelled to accept one with a narrower claim than that contained in his original application; and it is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. *Leggett* v. *Avery*, 101 U. S. 256; *Shepard* v. *Carrigan*, 116 U. S. 593; *Knapp* v. *Morss*, 150 U. S. 221, 227.

It is quite true that, where the differences between the claim as made and as allowed consist of mere changes of expression, having substantially the same meaning, such changes, made to meet the views of the examiners, ought not to be permitted to defeat a meritorious claimant. While not allowed to revive a rejected claim, by a broad construction of the claim allowed, yet the patentee is entitled to a fair construction of the terms of his claim as actually granted. The specification, as amended, contained the following description:

"The distinguishing feature of my invention is the organized construction to carry into complete effect the expressed principles of operation of the fulminate of mercury or detonating powder and the powder charge. In this organization the fulminate, although the superior explosive force, is contracted into a diminished or small central chamber, and fills it. The flange and head of the metallic case are solid, all in one piece. This chamber at its sides or outer extreme edges communicates directly and exclusively with the powder charge, so that the explosive force of the fulminate is not allowed to expand under a larger area of the anvil plate and blow it out, but is compelled to diffuse its explosive force, not in a central stream, but in a diffused body into the base of the powder charge. To effect this, the central anvil piece has no central aperture, is as wide as the fulminate-filled chamber, and the perforations are at the extreme outer sides of this fulminate, for two purposes: one is to diffuse the fire from this center most thoroughly; the other is to have an unperforated anvil over and against the fulminate, as it rests solid in its chamber, to receive the central blow of a

striker and obtain complete resistance by the anvil bar, and yet have free escapement for the explosive force at once from beneath the anvil plate without any chamber or space for it to expand into under the plate. This assures a certain ignition, security of the anvil plate to keep its position, and a complete combustion of the powder charge, from the base forward, as it impels the bullet out of the gun."

The claims made in the application were as follows:

"1st. The circular plate E, constructed with central solid resisting piece *i*, and two or more side perforations *k k*, substantially as described, applied within a metal case, with cylinder and rear end solid and tight, thereby requiring the insertion of the plate and charge and priming from the front, igniting the charge and remaining firetight in firing as described.

"2d. The circular plate E, constructed as described, in combination with the circular disc D, and metal solid firetight case A, substantially as shown and described.

"3d. A circular metallic tight-fitting plate, perforated into a central fulminate chamber, leaving a central solid or unperforated bar over the fulminate chamber, within a solid firetight metal case, substantially as set forth."

The examiners rejected these claims on reference to prior patents. Thereupon the claimant, having amended his specification as above, substituted for the three claims above copied the following:

"What I claim as new and desire to secure by letters patent is —

"The construction and arrangement of the chamber of fulminate, anvil, plate, perforations and case, with the central constructed filled chamber of fulminate powder in contact and between the base of the case and the circular anvil plate, with central anvil bar and two or more side perforations, extending from the extreme sides of the chamber of fulminate into the base of the powder charge, whereby the smallest area of resistance is presented to the fulminate explosion, and the fire is diffused in the base of the charge of powder, and the greatest resistance is presented by the front face of the plate to the powder

charge, consuming the powder and securing the plate as and by the means described."

The examiners held that the construction described in the amended specification involved patentable novelty, and that a specific and well defined claim might be allowed, but not the amended claim, it being "vague, indefinite and ambiguous." The claimant thereupon withdrew the above amended claim, and substituted another, which was finally allowed, in the following terms:

"What I claim as new and desire to secure by letters patent is —

"In the bottom of a solid metallic flange cartridge case or shell the combination of a circular base inclosing a central chamber of fulminate provided with two or more openings, whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge, substantially as described."

It is obvious that this is a claim for a combination, none of the elements or constituent parts of which are claimed to be new, but whose merit consists in such an adjustment and relation of the parts as to produce the desired effect.

"In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality." *Fay* v. *Cordesman*, 109 U. S. 408.

"In patents for combinations of mechanism, limitations and provisoes, imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon in the nature of disclaimers." *Sargeant* v. *Hall Safe & Lock Co.*, 114 U. S. 63.

Opinion of the Court.

"If an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he is bound by it. If dissatisfied with the decision rejecting his application, he should pursue his remedy by appeal." *Shepard* v. *Carrigan*, 116 U. S. 593.

When the rejected claims and the one finally allowed are compared, it will be perceived that they all describe the combination as consisting of a circular base, containing a central chamber of fulminate, the anvil over it, with two or more perforations to permit the fire or explosive force of the fulminate to be communicated to the powder charge. What, then, was the difference or modification which resulted in the allowance of a claim? We agree with the court below in finding that difference in the position of the apertures or vents. The examiners refused to allow the claim until the claimant distinctly located the vents as "openings whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge," thereby making the relative position of the vents and the walls of the fulminate chamber a material part of the claimant's patent. Breach-loading metallic cartridges were not new, and it was the opinion of the examiners that, in merely claiming "a circular metallic tight-fitting plate perforated with a central fulminate chamber, leaving a central solid or unperforated bar over the fulminate chamber, within a solid firetight metal case," the claimant was anticipated by the patents of Moffat, 53,168, March 13, 1866; of Tibbals, 90,607, May 25, 1869, and by an English patent, 2906, 1865. It was not until the claimant specifically claimed, as part of his combination, "an anvil over the fulminate provided with two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge," that the patent was allowed. Whether the examiners were right or wrong in so holding we are not to inquire, as the claimant did not appeal, but amended his claim and accepted a grant thereof; thereby putting himself within the range of the authorities which hold that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, es-

pecially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers.

"It may be observed that the courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material. Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, he cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim." Per Mr. Justice Bradley in *Water Meter Company* v. *Desper*, 101 U. S. 332, 337; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, 429.

With these principles of construction in view, we are constrained to concur with the court below in holding that the cartridges made and used by the Government were not within the description contained in the appellant's claim.

The Government cartridges alleged to be within the appellant's patent are of two kinds, one called the "cup-anvil cartridge," the other the "reloading cartridge." As the appellant has withdrawn his claim for infringment of the former, we have only to do with the latter or reloading cartridge. It is thus described in the sixth finding of the court below:

"This cartridge is a hollow metallic shell, rimmed around the base, with a pocket in the exterior of the center of the base; through the center of the top of this pocket, supposing the cartridge to be stood upon its base or closed end, is pierced a single aperture or hole to carry the fulminate flame to the black powder chamber. This cartridge contains only the black powder and the bullet. Any one of the several kinds of primers may be used in it. The one used by the United States and alleged to infringe claimant's rights is a circular metallic cup, into which is put the fulminate; above this is fastened a disk or cover having a groove on its upper side, being the diameter of the circle; at each end of this grove a small piece or notch is cut out of it; through the holes thus formed the flame from the fulminate escapes; if this primer is placed in the chamber of the reloading

cartridge, with the closed end of the cup outwards and the grooved end against the top of the chamber, the flame from the fulminate when exploded would pass through these holes or notches, thence along the groove to the central aperture in the cartridge case or shell, thence to the black powder chamber through this single aperture. The entire area of each of the holes or notches in the disk is over the fulminate chamber, and the portion of the disk between the holes is the anvil."

This finding is claimed by the appellant to be incorrect in several respects, and particularly in its statement that "the portion of the disk between the holes is the anvil."

But even if we were permitted as an appellate court to depart from the findings of fact made by the trial court, we do not perceive that the particulars in which this finding is objected to really affect the case as presented to us. Even if we were to adopt the description of the Government's cartridge given by the appellant, it still appears that there is an essential difference between the two types of cartridge. Without accepting or rejecting the Government's contention that the Government's cartridge is outside primed and the appellant's inside primed, and wherein it is claimed that for reloading purposes an outside primed cartridge is superior, it is sufficient to say that the difference in the shape and position of the vents, whereby the explosive force of the fulminate is communicated to the powder charge, is obvious.

The distinguishing feature of the appellant's cartridge is that the anvil plate has two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate; but in the reloading cartridge of the Government the vents are wholly over the fulminate chamber, do not lead directly to the powder chamber, but lead to a channel cut across the upper face of the anvil, and by this to a hole in the base of the powder chamber.

By this latter construction the explosive force of the fulminate enters the powder chamber in a central stream. But the appellant specifies, as a distinguishing feature, that the fulminate "chamber at its sides or outer extreme edges communicates directly and exclusively with the powder charge, so that the explosive force of the fulminate is not allowed to expand under a

larger area of the anvil plate and blow it out, but is compelled to diffuse its explosive force, not in a central stream, but in a diffused body into the base of the powder charge."

It may be, as the appellant contends, that his method of communicating the explosive force of the fulminate to the powder charge is an improvement on previous methods, and is superior in efficacy to that used in the Government's cartridges; but our inquiry is not as to the merits of the patent in suit, but is confined to the question whether it covers, in legal contemplation, the defendant's cartridge.

Some contention is made, in argument, that because it is stated that some grains of powder may and do fall down through the base of the defendant's powder chamber, and lie loosely in the groove across the upper face of the anvil, therefore it must be concluded that such loose grains of powder come directly in contact with the flame of the fulminate before the latter enters the powder chamber. But such a fact, if it be a fact, appears to be immaterial. It is not pretended that these few loose grains of powder are relied on, or in fact operate, as a means of igniting the charge in the powder chamber.

Nor can we accept the contention that these two combinations are identical because they are intended to obtain the same result. What we have to consider is not whether the end sought to be effected is the same, but whether the devices or mechanical means by which the desired result is secured are the same.

We do not consider it necessary to consider a further suggestion, contained in the opinion of the court below, that, even if the relative position of the vents and the wall of the fulminate chamber be not a material part of the claimant's patent, still the claimant cannot recover because the other characteristics of his invention, found in the cartridge now used by the defendants, were introduced by them prior to the application for or issue of the patent.

The decree of the Court of Claims, dismissing the claimant's petition, is

*Affirmed.*

No. 198.—October Term, 1897. HUBBELL *v.* UNITED STATES. Appeal from the Court of Claims. The petition in the above-entitled case, for a rehearing, is denied.

# GOOD SHOT *v.* UNITED STATES.

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

No. 447. Submitted October 22, 1900.—Decided October 29, 1900.

A Circuit Court of Appeals has no jurisdiction to review upon writ of error the trial, judgment and sentence of an Indian to imprisonment for life founded upon a verdict rendered on a trial of an indictment of the Indian for murder, by which verdict the jury find the defendant "guilty as charged in the indictment, without capital punishment."

THE case is stated in the opinion.

*Mr. Melvin Grigsby* and *Mr. S. H. Wright* for Good Shot.

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

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

Good Shot, an Indian, was indicted in the District Court of the United States for the District of South Dakota for the murder of Emily Good Shot, and, the indictment having been remitted to the Circuit Court, was arraigned and pleaded not guilty; was tried; found "guilty as charged in the indictment, without capital punishment;" was sentenced to imprisonment at hard labor in the penitentiary at Sioux Falls, in the State of South Dakota for life; and a writ of error was duly sued out of the Circuit Court of Appeals for the Eighth Circuit to review the judgment of the Circuit Court. The United States moved to dismiss the writ for want of jurisdiction, whereupon the Circuit Court of Appeals certified to this court, on facts stated, the following question: "Has this Circuit Court of Appeals jurisdiction to review upon writ of error the trial, judgment and sentence of an Indian to imprisonment for life founded upon a verdict rendered on a trial of an indictment of the Indian for murder, by which verdict the jury find the defendant

'guilty as charged in the indictment, without capital punishment.'"

The certificate was duly transmitted to the clerk of this court, but not filed until October 15, 1900; and on October 17, Good Shot filed a petition praying that a certiorari might be issued requiring the entire record and cause to be sent up from the Circuit Court of Appeals. On the same day a certified transcript of an order of the Circuit Court of Appeals, entered October 15, purporting to vacate and annul the order certifying the case, and to recall the certificate, in view of the decision of this court in *Fitzpatrick* v. *United States*, 178 U. S. 304, was filed.

In the case referred to we held that a conviction for murder, punishable with death, was not the less a conviction for a capital crime by reason of the fact that the jury, in a particular case, qualified the punishment, and that, in such circumstances, this court had jurisdiction under section 5 of the judiciary act of March 3, 1891, providing therefor "in cases of conviction of a capital crime." It followed that Circuit Courts of Appeals did not have jurisdiction.

If we should dismiss the certificate because of the action of the Circuit Court of Appeals on October 15, or if we answer the question certified, the same result is reached, namely, the dismissal of the writ of error below. And in the posture of the case disclosed by the record, we think the better course is to answer the question, which we do necessarily in the negative.

As the Circuit Court of Appeals did not have jurisdiction, the application for a certiorari must be denied. That writ may be issued by this court to the Circuit Courts of Appeals under section 6 of the act of March 3, 1891, on application, and ordinarily after judgment, in cases in which judgments are made final in those courts by the section, and also where questions of law have been certified to this court by those courts for their guidance in disposing of such cases.

In this case there is no judgment in the Circuit Court of Appeals, and the sole question certified relates to the jurisdiction of that court, and it having been determined that jurisdiction does not exist, the writ of certiorari cannot properly be issued

to require the court to send up a cause over which it has no jurisdiction for determination on the merits. The remedy is by writ of error from this court to the Circuit Court.

*The question certified will be answered in the negative, and the petition for certiorari will be denied. So ordered.*

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## AMERICAN SUGAR REFINING COMPANY *v.* LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No 38. Submitted October 10, 1900.—Decided November 5, 1900.

A state statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax "planters and farmers grinding and refining their own sugar and molasses," deny sugar refiners the equal protection of the laws within the Fourteenth Amendment.

THIS was a petition filed in the Civil District Court for the Parish of Orleans by John Brewster, tax collector, against the American Sugar Refining Company, a corporation engaged in the business of refining sugar and molasses, to recover the sum of $3500 per year as a state license tax for the years 1892 to 1897, inclusive, alleged to be due under the act of July 9, 1890, of the State of Louisiana, enacted in 1890, entitled "An act to levy, collect and enforce payment of an annual license tax upon all persons, associations of persons or business firms and corporations pursuing any trade, profession, vocation, calling or business, except those who are expressly excepted from such license tax by articles 206 and 207 of the constitution."

By the ninth section it is enacted "that for carrying on each business of . . . refining sugar and molasses . . . the license shall be based on the gross annual receipts of each person, association of persons, business firm or corporation engaged in said business, as follows: Provided, that this section shall not apply to *planters and farmers grinding and refining their own*

*sugar and molasses;* . . . And provided further, that it shall not apply to those planters who granulate syrup for other planters during the rolling season."

First class. When the said gross actual receipts are $2,500,000 and over, the license shall be $3500.

This act was passed in pursuance of Article 206 of the state constitution of 1879, which reads as follows:

"ART. 206. The general assembly may levy a license tax, and in such case shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions, vocations and callings. All persons, associations of persons and corporations pursuing any trade, profession, business or calling, may be rendered liable to such tax, except clerks, laborers, clergymen, school teachers, those engaged in agricultural, horticultural, mechanical and mining pursuits, and *manufacturers* other than those of distilled alcoholic or malt liquors, tobacco and cigars and cotton seed oil. No political corporation shall impose a greater license tax than is imposed by the general assembly for state purposes."

Defence: First, that the business of refining sugar and molasses is exempt from the payment of any license tax, because it is one of those *manufactures* enumerated in Article 206 as entitled to exemption. Second, that the act of 1890 "violates the Constitution of the United States, and is void in so far as it attempts to impose a license tax on this defendant, because said act denies to this defendant the equal protection of the laws of the State, inasmuch as said act does not impose equally a license tax on all persons engaged in the business of refining sugar and molasses, but discriminates in favor of planters who refine their own sugar and molasses, and in favor of planters who granulate syrups for other planters during the rolling season."

The court, being of opinion that the business carried on by the defendant company was that of a manufacturer, dismissed the petition. On appeal to the Supreme Court, that court was of opinion that the defendant was not entitled to exemption under Article 207 of the constitution, (not now in question,) which exempted certain manufacturers, and ordered a judg-

ment for $3500 with interest and costs for the license tax for the year 1897. But, upon the attention of the court being called by a petition for rehearing to Article 206 of the constitution, above quoted, that court delivered a new opinion to the effect that the defendant was not a manufacturer, and therefore not entitled to an exemption by Article 206, and that the exemption of planters who refine their own sugar did not deprive the defendant of the equal protection of the laws. It further revised its judgment, and held the State entitled to recover for each of the years from 1892 to 1897, and rendered judgment for the sum of $3500, for each of said years. Whereupon defendant sued out a writ of error from this court.

*Mr. John E. Parsons*, *Mr. Charles Carroll*, *Mr. Joseph W. Carroll* and *Mr. H. B. Closson* for plaintiffs in error.

*Mr. E. Howard McCaleb* for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

Motion was made to dismiss this writ of error upon the ground that the case did not present a Federal question, inasmuch as the question of illegal discrimination "was not the principal matter litigated, but was put in the record for the purpose of obtaining this writ of error." As, however, the protection of the Fourteenth Amendment was invoked in the answer, and, as this defence is at least plausible upon its face, the motion to dismiss must be denied; but, the case having also been submitted upon the merits, we shall proceed to discuss the constitutional objection to the act.

It is scarcely necessary to say that the question whether the defendant were a *manufacturer* within the meaning of the Louisiana constitution is one dependent upon the construction of that constitution, and that the interpretation given to it by the state Supreme Court, raising as it does no question of contract, is obligatory upon this court; but as that court held the defendant liable upon the ground that it was engaged in the business of refining sugar, the further question is presented

whether it is denied the equal protection of the laws because of the exemption from the tax of planters grinding and refining their own sugar and molasses.

The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production. The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate product of the cane, and the various steps taken to perfect such product are but incident to the original growth.

With reference to the analogous right of importation, it was said by this court at an early day in *Brown* v. *Maryland*, 12 Wheat. 419, that the right to sell was an incident to the right to import foreign goods, and that a license tax upon the sale of imported goods, while still in the hands of the importer in

their original packages, was in conflict with that provision of the Constitution which prohibits a State from laying an impost or duty upon imports.

Congress, too, has repeatedly acted upon the principle of the Louisiana statute. Thus, after having imposed by act of August 2, 1813, a license tax upon the retailers of wines and spirits, for the purpose of providing for the expense of the war with Great Britain, it was further enacted by an act of February 8, 1815, c. 40, 3 Stat. 205, that it should not be construed "to extend to vine dressers who sell at the place where the same is made, wine of their own growth, nor shall any vine dresser for vending solely where the same is made, wine of his own growth, be compelled to take out a license as a retailer of wines." So, too, in the Internal Revenue Act of July 1, 1862, c. 119, 12 Stat. 432, a license tax was imposed (sec. 64) upon retail dealers in all goods, wares and merchandise, but with a proviso, in section 66, that the act should not be construed "to require a license for the sale of goods, wares and merchandise made or produced and sold by the manufacturer or producer at the manufactory or place where the same is made or produced; to vinters who sell, at the place where the same is made, wine of their own growth; nor to apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or making of medicines for lame, sick or diseased persons." Another paragraph of the same section (64) exempts distillers, who sell the products of their own stills, from a tax as wholesale dealers in liquors. While no question of the power of Congress is involved, these instances show that its general policy does not differ from that of the act in question, and that the discrimination is based upon reasonable grounds.

So, too, this court has had repeated occasion to sustain discriminations founded upon reasons much more obscure than this. Thus in *Railroad Company* v. *Richmond*, 96 U. S. 521, a municipal ordinance was sustained declaring that no car or vehicle of any kind "belonging to or used by the Richmond, Fredericksburg and Potomac Railroad Company shall be drawn or propelled by steam" upon a certain street, although no other company was named in the ordinance, the court held

that as no other corporation had the right to run locomotives in that street, no other corporation could be in a like situation, and that the ordinance, while apparently limited in its operation, was general in its effect, as it applied to all who could do what was prohibited. "All laws should be general in their operation, and all places within the same city do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street, or even from one part of a street, it would be unreasonable to exclude them from all." In *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, it was decided that the equal protection clause did not prohibit a State from requiring, for the admission within its limits of a corporation of another State, such conditions as it chooses, though in that case it exacted a license tax from such corporations, which it did not exact from corporations of its own creation. In *Missouri Railroad Co.* v. *Mackey*, 127 U. S. 205, it was said that this clause did not forbid special legislation, "and when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." To the same effect is *Walston* v. *Nevin*, 128 U. S. 578.

The power of taxation under this provision was fully considered in *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, in which it was said not to have been intended to prevent a State from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only and not securities; may allow or not allow deductions for indebtedness. "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the State in framing their constitution." See also *Home*

*Insurance Company* v. *New York*, 134 U. S. 594; *St. Louis &c. Railway* v. *St. Paul*, 173 U. S. 404.

In *Pacific Express Company* v. *Seibert*, 142 U. S. 339, a state statute defining an express company to be such as carried on the business of transportation on contracts for hire with railroad or steamboat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matter in vehicles of their own. This case is specially pertinent to the one under consideration. See also *Giozza* v. *Tiernan*, 148 U. S. 857; *Columbus Railroad* v. *Wright*, 151 U. S. 470; *Duncan* v. *Missouri*, 152 U. S. 377; *Western Union Telegraph Co.* v. *Indiana*, 165 U. S. 304; *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194.

The constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to the exemption it must appear (1) that he is a farmer or a planter; (2) that he grinds the cane as well as refines the sugar and molasses; (3) that he refines his own sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws.

The judgment of the Supreme Court of the State of Louisiana is

*Affirmed.*

Mr. Justice Harlan concurred in the result.

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

# UNITED STATES *v.* ANDREWS.

APPEAL FROM THE COURT OF CLAIMS.

No. 423. Submitted October 15, 1900.—Decided November 5, 1900.

By the treaty with the Kiowa and Comanche Indians of August, 1868, the Indians agreed not to attack any persons at home or travelling, and not to molest any persons at home or travelling, or molest any wagon trains, coaches, mules or cattle belonging to the people of the United States, or persons friendly therewith; and the United States agreed that no persons except those authorized by the treaty to do so, and officers, etc., of the Government should be permitted to pass over the Indian Territory described in the treaty. In 1877 Andrews passed over the territory with a large number of cattle, travelling over the Chishom trail, the same being an established trail *en route* from Texas to a market in Kansas. He being convicted on trial for a violation of the treaty, appeal was taken to this court. *Held:*

(1) That the finding of the court below was equivalent to a finding that the trail was a lawfully established trail permitted by the laws of the United States;

(2) That as the plaintiff was lawfully within the territory, he was not a trespasser at the time his property was taken.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Thompson* and *Mr. Assistant Attorney Finn* for the United States.

*Mr. Silas Hare* for Andrews.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The claimant, Thomas C. Andrews, filed his claim in the Court of Claims against the United States and the above-named Indians to recover the value of certain cattle destroyed by the latter in June, 1877, in the Indian Territory. The claim was filed pursuant to the provisions of the act of Congress of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations."

26 Stat. 851. The property was alleged to have been of the value of $9225.

The only defence set up was that the claimant at the date of the alleged depredation was wrongfully and unlawfully within the Indian country and was a trespasser, and therefore could not recover.

After a trial, judgment was given against the United States and the Indians for the sum of $8300, and the court made the following finding:

"In June, 1877, while the claimant, with a large number of cattle, was travelling over the Chisom trail, the same being an established trail, *en route* from Texas to a market in Kansas, and while camped on the Washita River, on the Kiowa and Comanche Indian reservation, in the Indian Territory, Indians belonging to the Kiowa and Comanche tribe of Indians took and drove away property of the kind and character described in the petition, the property of the claimant, which was then and there reasonably worth the sum of $8300.

"Said property was taken as aforesaid, without just cause or provocation on the part of the owner or the agent in charge, and has never been returned or paid for."

The Government contends that the claimant was a trespasser by reason of the provisions of the treaty between the United States and these Indians, proclaimed August 25, 1868, 15 Stat. 581, and because by section 17 of the act of 1834, 4 Stat. 729, it is provided that the liability of the Government for property taken by Indians, in the Indian Territory, shall arise only when the owner of the property taken was *lawfully* within such territory.

The second article of the treaty, after describing certain lands in the Indian Territory thereby set apart for the absolute and undisturbed use and occupation of the tribes named, provides as follows:

"And the United States now solemnly agrees that no persons except those herein authorized so to do, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over,

settle upon or reside in the territory described in this article, or in such territory as may be added to this reservation, for the use of said Indians."

By the eleventh article it is, among other things, provided that—

"In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement . . . further expressly agree—

"3d. That they will not attack any persons at home, nor travelling, nor molest any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

* * * * * * * *

"6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte River and westward to the Pacific Ocean; and they will not, in future, object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribes whatever amount of damage may be assessed by three disinterested commissioners, to be appointed by the President for that purpose; one of said commissioners to be a chief or headman of the tribes."

The question now before us is, whether upon the facts found by the Court of Claims the claimant was lawfully within the territory at the time the Indians destroyed or took away his property.

While the Government, by the second article of the treaty of 1868, agreed that no one should be permitted to pass over, settle upon or reside in the territory described in that article, yet in the subsequent article (XI) exceptions were made. By the third and sixth subdivisions of that article the Indian tribes agreed not to attack persons or cattle, and not to oppose the construction of roads or other works of utility or necessity which might be permitted by the laws of the United States. When

they took the property of the claimant, consisting of cattle, they violated their agreement.

The finding of the court below, that the property of the claimant was taken and carried away while he was travelling in the Indian reservation, over the Chisom trail, the same being an established trail *en route* from Texas to a market in Kansas, is equivalent to a finding that the trail was a lawfully established trail permitted by the laws of the United States.

We understand that by the use in the finding of the word "trail," in connection with the balance of the finding, is meant a way, road or path suitable for the purpose of driving cattle over or along on their way to a market. In the territory named, a trail along which to drive cattle from Texas to Kansas would certainly be a work of utility or necessity within the meaning of article eleventh, subdivision six, of the treaty. It would be a road which the Government would naturally seek to provide and obtain permission to lay out or to keep in use for the convenience of its citizens who would have occasion to use it for the purpose indicated in the finding. In order to reverse this judgment we would have to presume that the court in using the words "established trail," meant a trail that was not legally or properly established; this we cannot do, nor can we presume that the trail was established by a user which did not amount to a legal user, and so did not establish a legal trail. Being properly established, it was properly used by the claimant for the purpose stated.

While the finding might have been more definite and therefore more satisfactory, yet within the well-known rules governing the construction of findings of facts by trial courts, we cannot so construe it as to render the result arrived at by the court below erroneous, when another construction much more reasonable and natural may be given it, and the judgment thus rendered valid. An established trail, in this case, means a legally established trail, and we must presume the court below so intended. The claimant was, therefore, lawfully within the territory, and was not a trespasser at the time his property was taken.

*Judgment affirmed.*

Counsel.

## CROSSMAN *v.* BURRILL.

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

No. 22. Argued March 14, 1900.—Decided November 26, 1900.



In a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the ship owner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate.

By a charter-party, the charterers agreed to pay a stipulated rate of freight on proper delivery of the cargo at the port of destination, and to discharge the cargo at that port, at the rate of an average amount daily; and the charter-party contained these clauses: "The bills of lading to be signed as presented, without prejudice to the charter." "Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed." The bills of lading provided that the cargo should be delivered to the charterers or their assigns, "they paying freight as per charter-party, and average accustomed;" but did not mention demurrage.

*Held:* That the cesser clause did not affect the liability of the charterers to the ship owners for demurrage according to the charter-party.

A provision in a charter-party, obliging the charterers to discharge the cargo at the port of destination at the average rate of a certain amount per day, and requiring them to pay a certain sum for every day's detention "by default of" the charterers, does not make them liable for a detention caused by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, rendering the discharge of the cargo dangerous and impossible.

THE case is stated in the opinion.

*Mr. Everett P. Wheeler*, for Crossman, cited *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127, *S. C.* 5 Q. B. 544; *Cunningham* v. *Dunn*, L. R. 3 C. P. Div. 443; *Dahl* v. *Nelson*, 6 App. Cas. 38; *Carsanego* v. *Wheeler*, 16 Fed. Rep. 248; *The Spartan*, 25 Fed. Rep. 44; *White* v. *Steamship Winchester Co.*, 23 Scottish L. R. 342; *Gates* v. *Goodloe*, 101 U. S. 612; *Geismer* v. *Lake Shore & Michigan Southern Railroad*, 102 N. Y. 563; *In re Young & Harston's Contract*, L. R. 31 Ch. Div. 168; *Caffavini* v. *Walker*, 9 Irish Rep. C. L. 431; *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180;

Counsel.

*Price* v. *Hartshorn*, 44 N. Y. 94; *1600 tons Nitrate of Soda*, 15 U. S. App. 369; *Waugh* v. *Morris*, L. R. 8 Q. B. 202; *Cargo* ex *Argos*, L. R. 5 P. C. 134; *Davies* v. *McVeagh*, 4 Ex. Div. 265; *Leer* v. *Yates*, 3 Taunt. 387; *Postlethwaite* v. *Freeland*, 5 App. Cas. 599; *Grant* v. *Coverdale*, 9 App. Cas. 470; *Budgett* v. *Binnington*, L. R. 25 Q. B. D. 320; *Davis* v. *Wallace*, 3 Cliff. 123; *Clink* v. *Radford*, 1891, 1 Q. B. 625; *McLean* v. *Fleming*, 2 H. L. Sc. App. 128; *Gledstanes* v. *Allen*, (1852) 12 C. B. 202; *Insurance Co.* v. *Dutcher*, 95 U. S. 269; *Chicago* v. *Sheldon*, 9 Wall. 50; *Gen. Mut. Ins. Co.* v. *Sherwood*, 14 How. 351; *Woolsey* v. *Funke*, 121 N. Y. 87; *Reid* v. *Sprague*, 72 N. Y. 457; *Nicoll* v. *Sands*, 131 N. Y. 19; *Watteau* v. *Fenwick*, L. R. 1 Q. B. 346 (1893); *Hubbard* v. *Tenbrook*, 124 Penn. St. 291; *Cummings* v. *Sargent*, 9 Met. (Mass.) 172; *Bergenthal* v. *Fiebrantz*, 48 Wisconsin, 435; *Minor* v. *Mechanics' Bank*, 1 Pet. 46; *Bridenbecker* v. *Lowell*, 32 Barb. 9; *New Orleans Railroad Co.* v. *Hanning*, 15 Wall. 649; *Baltimore Trust & Guarantee Co.* v. *Hambleton*, 40 L. R. Ann. 216; *The Edward H. Blake*, 63 U. S. App. 507; *Alexander* v. *Dowie*, 1 Hurlst. & N. 152; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96; *Penn. Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685; *Palmerton* v. *Huxford*, 4 Denio, 166; *Nassoiy* v. *Tomlinson*, 148 N. Y. 326; *Boffinger* v. *Tuyes*, 120 U. S. 198; *United States* v. *Child*, 12 Wall. 232; *Fuller* v. *Kemp*, 138 N. Y. 231; *Laycock* v. *Pickles*, 4 B. & S. 497; *Wilson* v. *Frisbie*, 57 Georgia, 269; *Quinlan* v. *Keiser*, 66 Missouri, 603; *Linville* v. *State*, 130 Indiana, 210.

*Mr. Lawrence Kneeland*, for Burrill, cited *Hanson* v. *Harrold*, 1 Q. B. (1894) 612; *In re bags of Linseed*, 1 Black, 108; *The H. G. Johnson*, 48 Fed. Rep. 696; *Chappel* v. *Comfort*, 10 C. B. N. S. 810; *Smith* v. *Sieveking*, 5 E. & B. 589; *Fry* v. *Bank of India*, L. R. 1 C. P. 689; *Gray* v. *Carr*, L. R. 6 Q. B. 522; *Dayton* v. *Parke*, 142 N. Y. 391; *Porteus* v. *Watney*, L. R. 3 Q. B. D. 534; *Clink* v. *Radford*, (1891) 1 Q. B. 625; *Brankelow S. S. Co.* v. *Canton Ins. Co.*, 2 Q. B. (1899) 178; *Ogden* v. *Graham*, 1 Best & Smith, 773; *Sleeper* v. *Puig*, 17 Blatchford, 36; *Sixteen hundred tons of Nitrate of Soda*

v. *McLeod*, 61 Fed. Rep. 849; *Booge* v. *Cargo of Dry Boards*, 42 Fed. Rep. 335; *Budgett* v. *Binnington*, 25 Q. B. D. 320; *Hall* v. *Eastwick*, 1 Lowell, 456; *Postlethwaite* v. *Freeland*, 5 App. Cas. 599; *Davis* v. *Wallace*, 3 Clifford, 123; *Cargo* ex *Argos*, L. R. 5 P. C. 134; *Thiis* v. *Byers*, 1 Q. B. D. 244; *Davies* v. *McVeagh*, 4 Ex. Div. 265; *Leer* v. *Yates*, 3 Taunt. 387; *Barker* v. *Hodgson*, 3 Maule & Sel. 267; *Barret* v. *Dutton*, 4 Camp. 333; *Grant* v. *Coverdale*, 9 App. Cases, 470; *Perkins* v. *Hart*, 11 Wheat. 237; *Harden* v. *Gordon*, 2 Mason, 541.

Mr. Justice Gray delivered the opinion of the court.

This case comes up by writ of certiorari issued by this court to review a decree in admiralty of the Circuit Court of Appeals for the Second Circuit, which reversed a decree of the District Court of the United States for the Southern District of New York; and appears by the record to have been in substance as follows:

A libel in admiralty *in personam* was filed in the District Court of the United States for the Southern District of New York by the owners of the bark Kate Burrill against her charterers to recover fifty-three days' demurrage for her detention at Rio Janeiro in Brazil, in unloading a cargo of lumber shipped for that port from Pensacola in Florida, under a charter-party dated March 7, 1893, by which the charterers were to pay a stipulated rate of freight on proper delivery of the cargo at the port of discharge, and which contained these other provisions:

"Cargo to be furnished at port of loading at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted; and to be discharged at port of destination at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted.

"Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent, fifty-nine $\frac{46}{100}$ dollars United States gold (or its equivalent) per day, day by day, shall be paid by the said party of the

second part, or agent, to the said party of the first part, or agent.

"The cargo to be received at the port of loading within reach of ship's tackles, and to be delivered at port of discharge according to the custom of said port. Vessel to discharge at safe anchorage ground in Rio Bay designated by charterers.

"The bills of lading to be signed as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage. Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed."

The libel alleged, in the fourth article, that the vessel was loaded with the cargo of lumber at Pensacola, and sailed thence for Rio Janeiro, where she arrived about August 30, 1893; and, in the fifth article, "that on September 4, 1893, notice in writing that the vessel was ready to discharge her said cargo was duly given by the master of said vessel or her duly authorized agents to the Companhia Industrial do Brazil, the agent of the respondents at said port of Rio, who received the said cargo;" but that the vessel did not complete the discharge until November 28, 1893, being a period of fifty-three days beyond the twenty-six days, Sundays exclusive, allowed for the discharge by the charter.

The libel was allowed to be amended in the Circuit Court of Appeals, by alleging "that at the time of giving the notice of her readiness to discharge her cargo, mentioned in the fifth article, the said vessel was in fact ready to discharge upon the charterers designating a safe anchorage for that purpose;" by setting forth more particularly the times of the delay and suspension of the discharge of the cargo, and by alleging that during all those times the vessel was ready and willing to discharge the same; and by further alleging that there had been no payment or accord and satisfaction of the claim for demurrage.

Among the defences set up in the District Court, and more fully, but with no substantial difference, in an amended answer filed by leave in the Circuit Court of Appeals, and to the sufficiency of each of which defences the libellant filed exceptions in either court, were those which are here numbered, for convenience, as the exceptions were numbered in the Circuit Court of Appeals, and which were stated in the amended answer as follows:

Second. "That the charter-party referred to in the libel contained a clause providing that the vessel should have an absolute lien upon the cargo for freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading; that said vessel was fully laden, as alleged in the fourth article of the libel, and that thereafter, and long prior to September 4, 1893, (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready to discharge her cargo,) bills of lading of similar tenor for the whole of said cargo were duly signed by the master of said vessel, a copy of which is annexed hereto, and made part hereof; and said bills of lading were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to Messrs. Manoel da Cruz & Filho, who thereby became the consignees of said cargo; and that thereupon all liability of these respondents to the owners of said vessel under said charter-party ceased, and it became the duty of the master and owner of said vessel, upon the failure, alleged in the fifth article of said libel, of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid, in accordance with the terms of said charter-party." The bills of lading (as appears by the copy annexed to the answer) state that the lumber had been shipped by the respondents, and was to be delivered "unto order or to their assigns, they paying freight for the said lumber as per charter-party dated March 7, 1893, and average accustomed.

Third. "That when said vessel arrived at Rio Janeiro, the

owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom; that the libellants were prevented from discharging the same, and the respondents were prevented from receiving the same, any sooner than they did, by reason of the acts of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received; that the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy, and not by any default of the respondents; that the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in the said delay, and recognized the necessity therefor.

Fourth. "That when the said cargo was delivered, the said agents of the libellants accepted and received from the said consignee, the sum of five hundred and fifteen pounds, six shillings and five pence, British sterling, in full satisfaction and payment of all claim or demand under the said charter-party, and an account was made and stated between the said agents of the libellants and the said consignees respecting all claims under the charter-party aforesaid, and the balance due upon the said accounting was paid by the said consignee to the said agents, and accepted and received by them in full satisfaction thereof."

The District Court, understanding the facts stated in the answer to have been admitted, sustained the second exception, overruled the third and fourth exceptions, denied a motion to withdraw these exceptions and to amend the libel, and dismissed the libel. 65 Fed. Rep. 104.

The libellants appealed to the Circuit Court of Appeals, which, after allowing amendments of the libel and answer, sustained the second and third exceptions, and overruled the fourth exception, and authorized proofs to be taken upon the defence of

payment and accord and satisfaction; and afterwards, being satisfied upon proofs so taken that there had been no payment or accord and satisfaction of the claim for demurrage, entered a decree for the libellants. 35 U. S. App. 608; 62 U. S. App. 368.

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

The libellants' claim for demurrage is based on the provisions of the charter-party by which, after the vessel is ready to discharge her cargo of lumber at the port of destination, and written notice thereof given to the charterers, they agree to discharge the lumber "at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted," and to pay a certain sum, by way of demurrage, "for each and every day's detention by default of" the charterers or their agents.

The charter-party further requires "the bills of lading to be signed as presented, without prejudice to this charter," and contains these clauses: "Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterers' responsibility to cease when vessel is loaded and bills of lading are signed."

After the vessel had been loaded, bills of lading were duly signed by the master, by the terms of which the cargo was to be delivered to the charterers or their assigns, "they paying freight as per charter-party," "and average accustomed"— referring to the charter by its date, but not mentioning demurrage.

The first question to be considered is how far the claim of the ship owners against the charterers for demurrage is affected by what is commonly called the cesser clause in the charter-party, "Charterers' responsibility to cease when vessel is loaded and bills of lading are signed."

The Circuit Court of Appeals, approving and adopting in this particular the opinion of the District Judge, held that the cesser clause afforded no defence to the libel; and we have no doubt of the correctness of that conclusion.

The charter-party, like many mercantile instruments in com-

mon use, is drawn up in brief and disjointed sentences; and must be construed according to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause, taken by itself.

The question here is how the clause providing that the charterers' responsibility shall cease when the vessel is loaded and bills of lading are signed is to be reconciled with the other provisions of the charter, which not only require the charterers to pay freight on delivery of the cargo, and demurrage for any delay in such delivery by fault of the charterers or their agent, but declare that the vessel is to have an absolute lien upon the cargo for both freight and demurrage.

The true rule of construction of the cesser clause, in such a connection, has been settled by a series of English decisions in which that excellent commercial lawyer, Lord Esher, lately Master of the Rolls, took a leading part; and is well summed up, with the reasons supporting it, by himself and other judges, in two recent cases in the Court of Appeal. *Clink* v. *Radford*, (1891) 1 Q. B. 625; *Hansen* v. *Harrold*, (1894) 1 Q. B. 612.

In *Clink* v. *Radford*, Lord Esher said: "In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract." Lord Justice Bowen said: "There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the courts, are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien. There is a principle of reason

which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility, which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability." And Lord Justice Fry added: "The rule that we are *prima facie* to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as co-extensive. If that were not so, we should have this extraordinary result: there would be a clause in the charter-party the breach of which would create a legal liability, there would then be a cesser clause destroying that liability, and there would then come a lien clause which did not recreate that liability in anybody else." (1891) 1 Q. B. 627, 629, 632.

In *Hansen* v. *Harrold*, Lord Esher said that he thought that *Clink* v. *Radford* "was a right decision based upon sound mercantile reasons;" and, after quoting the passages above cited from the opinions in that case, added: "It seems to me that this reasoning has not been and cannot be answered. Therefore the proposition is true, that where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter-party the charterers are able to create, is not equivalent to the liability of the charterers. Where, in such a case, the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability." (1894) 1 Q. B. 617, 618.

In short, in a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate.

In the case at bar, the provision of the charter-party, which

requires "the bills of lading to be signed as presented, without prejudice to this charter," while it obliges the master to sign bills of lading upon request of the charterers, does not mean that the bills of lading, or the consignee holding them, shall be subject to all the provisions of the charter; but only that the obligations of the charterers to the ship and her owners are not to be affected by the bill of lading so signed. *Gledstanes* v. *Allen*, (1852) 12 C. B. 202. The bills of lading, as already mentioned, provide only for "paying freight for said lumber as per charter-party dated 7th March, 1893, and average accustomed." They do not mention demurrage, or refer to any provisions of the charter, other than those concerning freight and average. It is well settled that a bills of lading in such a form does not subject an indorsee thereof, who receives the goods under it, to any of those other provisions of the charter. It does not give him notice of, or render him liable to, the specific provisions of the charter, which require a discharge of a certain quantity of lumber per day, or, in default thereof, the payment of a specific sum for a longer detention of the vessel; but he is entitled to take the goods within a reasonable time after arrival, and is liable to pay damages for undue delay in taking them, according to the ordinary rules of law which govern in the absence of specific agreement. *Chappel* v. *Comfort*, (1861) 10 C. B. (N. S.) 801; *Gray* v. *Carr*, (1871) L. R. 6 Q. B. 522; *Porteus* v. *Watney*, (1878) 3 Q. B. D. 534, 537; *Serraino* v. *Campbell*, (1891) 1 Q. B. 283; *Dayton* v. *Parke*, (1894) 142 N. Y. 391.

In *McLean* v. *Fleming*, (1871) L. R. 2 H. L. Sc. 128, on which the charterers relied at the argument in this court, the sole ground on which the indorsees of the bills of lading were held to be bound by the provisions of the charter-party was that they were the persons who had originally authorized the chartering of the ship. See L. R. 2 H. L. Sc. 133, 134, 136; *S. C.* L. R. 6 Q. B. 559, 560. No such fact was pleaded in the case at bar.

The only facts stated in the answer upon this point are that, after the vessel was fully laden, and long before the notice to the charterers that she was ready to discharge, bills of lading, acknowledging that the lumber had been shipped by the re-

spondents, and was to be delivered to their order or assigns, "they paying freight for the said lumber as per charter-party," were signed by the master of the vessel, and "were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to" the partnership of da Cruz and Filho, "who thereby became consignees of the cargo."

Upon this state of facts, the rights of the ship owners against those consignees depended altogether on the contract created by the bills of lading, except so far as that contract referred to the charter-party. *Bags of Linseed*, (1861) 1 Black, 108. As observed by Mr. Justice Peckham, when delivering a judgment of the Court of Appeals of the State of New York, in regard to a bill of lading containing a clause exactly like that in the bills of lading in the case at bar, "It would be a wide stretch to hold that by this language of the bill of lading, which plainly referred only to the provisions of the charter-party as to the freight money, a consignee would become liable to demurrage if he accepted the cargo under such a bill." *Dayton* v. *Parke*, 142 N. Y. 391, 400.

The necessary consequence is that the responsibility of the charterers to the ship owners for demurrage according to the charter-party is not affected by the cesser clause.

The other principal question is of the validity of the defence that the delay in discharging the cargo was caused by the acts of the public enemy, and not by any default of the charterers.

Upon this question, the courts below differed in opinion, the District Court holding that the defence pleaded was a good one, and the Circuit Court of Appeals holding that it was not.

This defence, as set up in the amended answer filed in the Circuit Court of Appeals, is that, when the vessel arrived at Rio Janeiro, the owners of the cargo used all reasonable diligence in and about receiving and removing it; that the ship owners were prevented from discharging the cargo, and the respondents were prevented from receiving it, any sooner than they did, "by reason of the acts of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the

firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received; that the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy and not by any default of the respondents."

We are of opinion that, under a charter-party expressed in such terms, the defence of *vis major*, as thus pleaded, affords a complete answer to the claim for demurrage.

It is to be remembered that by the terms of this charter-party it is only for "detention by default of" the charterers or their agent, that they agree to pay the amount of demurrage specified in the charter.

A detention which is caused, not by any act of the ship owners or of the charterers, but wholly by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the cargo dangerous and impossible, cannot be considered as caused by "default" of the charterers, in any just sense of the word.

In *Towle* v. *Kettell*, (1849) 5 Cush. 18, the Supreme Judicial Court of Massachusetts, in an opinion delivered by Mr. Justice Fletcher, with the concurrence of Chief Justice Shaw and Justices Wilde and Dewey, held that, under a similar provision in a charter-party, the charterers were not liable for demurrage while the vessel was detained in quarantine by order of a foreign government.

The Circuit Court of Appeals, in support of the opposite conclusion, quoted from an opinion delivered by Mr. Justice Clifford, in the Circuit Court of the United States for the District of Massachusetts, the following passage: "The settled rule is that, where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that if so detained it shall be considered as the delay of the freighter, even where it was not occasioned by his fault, but was inevitable. Where the contract is that the ship shall be

unladen within a certain number of days, it is no defence to an action for demurrage that the overdelay was occasioned by the crowded state of the docks, or by port regulations or government restraints." *Davis* v. *Wallace*, (1868) 3 Clifford, 123, 131. But in none of the authorities cited, either by the learned justice in that case, or by the Circuit Court of Appeals in this, in support of this general statement, was the liability of the charterers for demurrage restricted to the case of their default. In *Davis* v. *Wallace*, indeed, their liability was so restricted; but the defence was a crowded state of the docks, and no question of port regulations or government restraints was before the court.

In *Thatcher* v. *Boston Gas Light Co.*, (1875) 2 Lowell, 361, 363, Judge Lowell, while following that decision in a similar case, said that the decisions in *Towle* v. *Kettell*, and in *Davis* v. *Wallace* "are not inconsistent with each other; and they mean that the proviso intends to exonerate the charterer from delay occasioned by superior force acting directly upon the discharge of that cargo, and not from the indirect action of such force, which by its operation upon other vessels has caused a crowded state of the docks." And he distinctly recognized that a failure of contract on the part of the charterer, "caused by a direct and immediate *vis major*, or something like it," would not be a "default," within the meaning of the charter-party.

In *Davis* v. *Pendergast*, (1879) 16 Blatchford, 565, 567, Chief Justice Waite, speaking of a similar provision, said: "The respondents, in effect, agreed that no more than forty-five running days should be occupied in loading and discharging the cargo, unless it was occasioned by some fault of the vessel, or some unusual and extraordinary interruption that could not have been anticipated when the contract was made."

The case of *Nitrate of Soda*, (1894) 15 U. S. App. 369, in the Circuit Court of Appeals for the Ninth Circuit, upon which these libellants much rely, falls far short of supporting their claim. In that case, the clause in question was in the same words as in this case; the charterers sent the vessel, for the purpose of loading a cargo of nitrate of soda which they had purchased, to a port in Chili, during the existence of a civil war

there, and while the port was in the possession of the insurgents; the sellers declined for a time to deliver the cargo, because they feared that if the export duty, which by the law of Chili was payable upon all such cargoes, was paid by them to the insurgents, they might remain liable for it to the rightful government. It was held that the charterers were liable for the stipulated demurrage during the delay so occasioned. The court, speaking of the word "default" in the charter, said: "The most that can be claimed for its effect is that it excludes liability of the charterers for delay in loading or discharging, if the delay result from a sudden or unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers." "But there was no interference upon the part of the Chilian government, or upon the part of any armed force, to prevent their obtaining possession of the cargo, or handling or moving the same, or placing it within reach of the vessel's tackle." 15 U. S. App. 374, 376.

In the case at bar, the defence of *vis major*, as pleaded in the answer, was that the ship owners were prevented from discharging the cargo, and the charterers were prevented from receiving it, any sooner than they did, by reason of acts of the public enemy, to wit, certain vessels of war, then in the harbor of Rio Janeiro, were engaged in firing upon the forts in the harbor and in making war upon the government of Brazil; that the firing between those vessels and those forts made it impossible to discharge or to receive the cargo from the vessel any sooner than it was discharged or received; and that the detention alleged in the libel was caused by those acts of the public enemy, and not by any default of the charterers.

The *vis major*, so pleaded, was, in the words of opinions above cited, a "superior force, acting directly upon the discharge of the cargo;" "a direct and immediate *vis major;*" an "unusual and extraordinary interruption that could not have been anticipated when the contract was made;" "a sudden and unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault

of the charterers," and an "interference on the part of an armed force, preventing the handling or moving of the cargo."

Upon principle, and according to the general current of authority, the detention alleged was not caused by default of the charterers, and did not render them responsible for demurrage, under this charter-party.

The Circuit Court of Appeals therefore erred in sustaining the exception, in the nature of a demurrer, to that article of the answer which set up the defence of *vis major;* and for this reason its decree for the libellants must be reversed. The decree of the District Court, which dismissed the libel, must also be reversed, and the case remanded to the District Court, in order that both parties may have an opportunity to introduce proofs upon the issue presented by that article.

In the brief of the libellants in this court, it is suggested that the allegations of that article of the answer were not in fact true; and reference is made to the master's deposition, taken after the delivery of the principal opinion in the Circuit Court of Appeals, in which he testified that during all the time that the vessel lay at the wharf, and until the completion of the discharge, there was no firing in the harbor or other act of hostilities, which prevented her discharge of the cargo or its reception by the consignees.

But on the same page of the brief it is admitted that "this question having been heard on the exception to the sufficiency of the defence, the question as to the truth of the allegations of the answer was not before the court." And this is conclusively established by its opinions and decrees. The principal opinion shows that it took up, in the first instance, the questions of law raised by the exceptions to the answer, because their determination might relieve the parties from the delay and expense of introducing proof. 35 U. S. App. 620. By the decree thereupon made, and set out in the record, the third exception, as well as the second, was sustained, upon the ground that the article of the answer to which it related was "insufficient in the law to constitute a defence;" and the fourth exception was overruled. In short, the defences of the cesser clause and of *vis major* were both held to be insufficient as matter of

law, so that no evidence in support of either of them was competent, and no evidence to contradict either was necessary or material.

The only questions of fact, left open for the introduction of proofs, were those of payment and of accord and satisfaction, presented by the remaining article of the answer. That the Circuit Court of Appeals understood such to be the condition of the case is apparent from its supplemental opinion, after proofs had been taken, in which it observed that "most of the questions arising upon this appeal have been disposed of by this court upon a former occasion, and it remains to be considered whether the defences of payment and accord and satisfaction are sustained by the proofs;" and then proceeded, upon an examination of the proofs, to hold that those defences were not sustained as to the claim for demurrage, and to enter a decree for the libellants in accordance with its former opinion. 62 U. S. App. 368.

The questions of payment, and of accord and satisfaction, need no extended notice. They are pure questions of fact, depending on conflicting evidence and on the peculiar circumstances of the case; upon which, had they been the only questions presented by the record, a writ of certiorari would not have been granted; which appear to this court, upon examination of the proofs, to have been rightfully decided by the Circuit Court of Appeals; and which it would serve no useful purpose to discuss.

But for the reasons above stated, in considering the effect of the defence of *vis major*,

*The decrees of the Circuit Court of Appeals and of the District Court are reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this court.*

Mr. Justice McKenna was not present at the argument and took no part in the decision of this case.

Counsel for Parties.

## SIGAFUS *v.* PORTER.

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

No. 8. Argued November 15, 16, 1899.—Decided October 29, 1900.

The defendant in the court below moved to dismiss this case on the ground that the contract in relation to the property in question was with Griffith alone, and, that motion being denied, proceeded to offer evidence. *Held* that he could not assign the refusal to dismiss as error.

In *Smith* v. *Bolles*, 132 U. S. 125, it was held that, "in an action in the nature of an action on the case to recover from the defendant damages which the plaintiff has suffered by reason of the purchase of stock in a corporation which he was induced to purchase on the faith of false and fraudulent representations made to him by the defendant, the measure of damages is the loss which the plaintiff sustained by reason of those representations, such as the money which he paid out and interest, and all outlays legitimately attributable to the defendant's fraudulent conduct; but it does not include the expected fruits of an unrealized speculation; and further that, in applying the general rule that 'the damage to be recovered must always be the natural and proximate consequence of the act complained of' those results are to be considered proximate which the wrong-doer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract." In this case that decision is affirmed and applied to the facts and issues here, and it is *held* that, upon the assumption that the property was not worth what the plaintiffs agreed to give for it, they were entitled, a verdict being rendered in their favor, and if the evidence sustained the allegation of false and fraudulent representations upon which they relied and were entitled to rely, to have a verdict and judgment, representing in damages the difference between the real value of the property at the date of its sale to the plaintiffs and the price paid for it, with interest from that date, and, in addition, such outlays as were legitimately attributable to the defendant's conduct, but not damages covering "the expected fruits of an unrealized speculation."

THE case is stated in the opinion of the court.

*Mr. Edmund Wetmore* for plaintiff in error. *Mr. Henry B. Johnson* was on his brief.

*Mr. Albert Stickney* for defendants in error.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought to recover damages for deceit alleged to have been practiced by Sigafus, the plaintiff in error, upon Porter, Hobson and Morse, the defendants in error, in the sale by the former to the latter of a gold mine in California, known as the Good Hope Consolidated Gold Lode Mining Claim (consisting of the San Jacinto and Good Hope Quartz locations), and as the Annex, adjoining the Good Hope mine on the south.

The complaint alleged that the defendant Sigafus was president of the Good Hope Consolidated Gold Mining Company, a corporation of California possessing the legal title to the property in question, and that with the exception of a few shares standing in the name of his son-in-law he owned its entire capital stock, and was in fact the sole beneficial owner of the mine and the lands and property appurtenant thereto;

That prior to December 28, 1893, the defendant representing his own interests and those of the company as well as those of his son-in-law, and acting by one William H. Griffith, entered into negotiations with the plaintiffs for the sale of the mine, mining claims and their appurtenances;

That in the course of such negotiations the defendant falsely and fraudulently and with intent to deceive and defraud the plaintiffs, represented to them that the lands and mines and mining claims contained a large and valuable vein of gold-bearing ore, large and valuable deposits of gold, and that all of the gold-bearing quartz would average in milling more than $16 per ton;

That he laid before the plaintiffs a false and fraudulent report or statement in writing in regard to the lands and mines and mining claims, made by one Burnham, who was therein represented to be an independent and disinterested mining engineer and expert, and to have made a careful and complete examination in the premises, which report or statement in substance stated that the pay streak in the mine had an average width of two feet, that 2434 tons of ore from the mine had been milled and yielded an average value in gold of $23.78 per ton, that the mine had been operated and the ore taken therefrom had been

milled for two years or more and had yielded, in gold, an average of $23.78 per ton; that the value of the bullion produced from the mine for the twelve months ending with January, 1892, inclusive, was $57,879.78, and the total expense of production $15,500; that the estimated total bullion product from the mine after its discovery down to on or about February 1, 1892, was $317,879.78; that beyond all doubt the ore averaged at least $18 per ton in gold; that the mine contained 44,733 tons of gold ore in reserve, of the net value of $805,186, and also 37,333 tons of gold ore in sight, of the net value of $761,094, and that the mines and mining claims had a very large prospective value in addition thereto; that the gold-bearing vein in the mine was a permanent and lasting one, and that the property under energetic management should produce from $30,000 to $40,000 per month net, and keep the development even with the output; together with other statements of fact in regard to the property, each and all of which were false and fraudulent, representing said report to be just, accurate and true, although knowing the same to be false and fraudulent;

That during the course of a mill run of the mine made by the plaintiffs for the purpose of testing the value of the ores contained therein, the defendant falsely and fraudulently, and with intent thereby to deceive and defraud them, placed and caused to be placed, in and among the ores to be reduced in the mill run, exceptionally rich specimens of ore that were not part of the ordinary production of the mine, and placed and caused to be placed therein large quantities of exceptionally rich ore that had been mined on the premises, but reserved by him over a long period of time, and which contained gold far in excess of the average amount carried by the ore produced from the mine, and caused false and fraudulent representations to be made as to the amount of ore run through the mill at that time, understating the same, with the intent and result, that a much larger production of gold might seem to be produced from the ore reduced than was just and true; and,

That the defendant falsely and fraudulently, and with the intent thereby to deceive and defraud the plaintiffs, represented to them that certain portions of the mine, from which all the

valuable ore had been extracted, were still solid and untouched, and blocked up the entrance to such excavations with timber, which he falsely and fraudulently stated was placed in the mine for the purpose of support, and that it was dangerous to remove the same, with the intent and result of thereby preventing the plaintiffs and their representatives from investigating the condition of the mine; and falsely and fraudulently, and with the intent to thereby deceive and defraud the plaintiffs, changed certain bullion returns as to past production, misstating the quantities of ore producing the bullion so as to show a much larger and richer production of gold from the ore mined than had in fact been made.

It was alleged that all these representations were made and all these acts were done and caused to be done in the full knowledge that they were false and fraudulent and calculated to deceive and defraud, and with the intent and result that the same should be communicated to the plaintiffs, and thereby deceive and defraud them, inducing the belief that the land, mine and mining claim were worth at least the sum of $1,000,000.

The complaint further alleged that if said representations, reports and mill run had been true and accurate, the property would have been reasonably worth $1,000,000, whereas, as the defendants knew at the time, it was worth practically little or nothing; that, relying upon the representations, reports and mill run mentioned, the plaintiffs purchased the property for the sum of $400,000, paying $150,000 in cash, and executing notes and mortgages upon the property to the amount of $225,000, as part of the price; and had paid, laid out and expended large sums of money on the property in the attempt to develop it.

The plaintiffs therefore claimed that they had suffered damage to the amount of $1,000,000, for which they prayed judgment.

The defendant denied each and every allegation of the complaint. He specifically denied that he ever made any representations to the plaintiffs, directly or indirectly, through Griffith or at all, in reference to the property, or that he ever sold it to or received any money from them on account of it.

Opinion of the Court.

It may be here stated that there was evidence in the case tending to show that the negotiations for the property were between the plaintiffs and Griffith, and it was a question whether Griffith was to be deemed in any sense an agent of Sigafus in the sale of the property to the plaintiffs. It was also a question whether the defendant did or caused to be done anything that was calculated to mislead and deceive, or did in fact mislead and deceive the plaintiffs in their preliminary examination of the property by an expert, whereby they were induced to think that it had a value which, within the defendant's knowledge, it did not really possess.

There was a verdict in favor of the plaintiffs for $330,275. A motion for new trial having been denied, judgment was entered for the amount of the verdict. The case was carried to the Circuit Court of Appeals, and that court, while sustaining the rulings of the trial court on questions involving the admission and exclusion of evidence, left certain points undisposed of in order that the question raised by them could be certified to this court. The Circuit Court of Appeals — Judge Lacombe delivering the opinion of the court — among other things said: "The only remaining assignments of error are the twenty-sixth, to so much of the charge as instructed the jury that the 'measure of damages is the difference between the value of the property as it proved to be and as it would have been as represented,' and the twenty-eighth, to the refusal to charge substantially that the measure of damages is the money plaintiffs had paid out for the mine with interest and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it. In view of the recent opinion in *Smith* v. *Bolles*, 132 U. S. 125, this court desires the instruction of the Supreme Court for its proper decision of the question arising upon these two assignments of error. A certificate in the form required by the act of March 3, 1891, has therefore been prepared and will be forwarded to the Supreme Court. The fact that instructions are thus desired as to a single question out of the many arising upon this writ of error affords no sufficient ground for withholding the decision of this court as to the other questions in the cause. *Compton* v. *Wabash*

*Railroad*, 31 U. S. App. 486. This opinion is therefore placed on file, and when instructions are received as to the questions certified the cause will be finally disposed of." 51 U. S. App. 693; 84 Fed Rep. 430, 439.

This case was heard here upon the question certified from the Circuit Court of Appeals. But after it was argued and submitted, this court directed the entire record to be sent up, and the case is now before us upon writ of certiorari.

1. At the trial in the Circuit Court, the evidence in behalf of the plaintiffs being closed, the defendant moved to dismiss the complaint upon several grounds, one of which was that the contract in relation to the property in question was alone with Griffith. That motion was denied, and the defendant then introduced evidence in his behalf. The Circuit Court of Appeals properly held that as the defendant did not rest upon the denial of his motion to dismiss, but introduced evidence, he could not assign the refusal to dismiss as error. *Columbia & Puget Sound Railroad* v. *Hawthorne*, 144 U. S. 202; *Union Pacific Railway* v. *Daniels*, 152 U. S. 684; *Runkle* v. *Burnham*, 153 U. S. 216.

2. After calling attention to the material issues of fact, and after stating the general propositions of law upon which, when applied to the evidence, the rights of the parties depended, the Circuit Court charged the jury:

"The measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented. You may find that the plaintiffs were influenced by one or more and not by all of the representations, and to the extent that the plaintiffs have been injured by one of several misrepresentations, they are entitled to recover for that; that is, if you find the various issues of fact which I have left for your consideration in favor of the plaintiffs."

To the giving of this instruction the defendant took an exception.

The defendant asked that the jury be instructed as follows:

"If the jury find for the plaintiffs, they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of

the defendant, and the value of the mine, if the same had been as represented, affords no proper element of recovery. The value of the mine when plaintiffs bought it must be applied in reducing and extinguishing the plaintiffs' loss."

The Circuit Court refused to give this instruction, and to such refusal the defendant took an exception.

The question presented by the charge to the jury touching the measure of damages has been heretofore determined by this court in *Smith* v. *Bolles*, 132 U. S. 125, 129. That was an action to recover damages for alleged fraudulent representations in the sale of four thousand shares of mining stock at the price of $1.50 per share, that is, $6000. The petition alleged that the stock was wholly worthless, but would have been worth at least ten dollars per share, that is, $40,000, if it had been as represented by defendant. The prayer was for $40,000 as damages arising from the sale of shares of stock for which only $6000 was paid. The trial court instructed the jury that "the measure of recovery is generally the difference between the contract price and the reasonable market value if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence."

This court held that instruction to be erroneous. Speaking by the Chief Justice we said: "The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was

guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery."

These principles have been applied in numerous cases in the Federal courts. *Atwater* v. *Whiteman*, 41 Fed. Rep. 427, 428; *Glaspell* v. *Northern Pacific Railway Co.*, 43 Fed. Rep. 900, 904; *The Normannia*, 62 Fed. Rep. 469, 481; *Wilson* v. *New United States Cattle Ranch Co.*, 73 Fed. Rep. 994, 997; *Rockefeller* v. *Merritt*, 40 U. S. App. 666, 674. In the case last cited Judge Sanborn said: "The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction. It excludes all speculation, and is limited to compensation."

Substantially the rule announced in *Smith* v. *Bolles* has been applied in the following cases in state courts: *Reynolds* v. *Franklin*, 44 Minnesota, 30, 31; *Redding* v. *Godwin*, 44 Minnesota, 355, 358; *Wallace* v. *Hallowell*, 56 Minnesota, 501, 507; *Woolenslagle* v. *Runals*, 76 Michigan, 545, 553; *Buschman & Cook* v. *Codd*, 52 Maryland, 202, 209; *Greenwood* v. *Pierce*, 58 Texas, 130, 133; *Howes* v. *Axtell*, 74 Iowa, 400, 402; *High* v. *Berret*, 148 Penn. St. 261. In the last named case — which was an action to recover damages for deceit in the sale of shares of stock in a mining corporation — the Supreme Court of Pennsylvania said: "The remaining question is, what is the proper measure of the plaintiff's damages. His damages should equal the loss which the deceit, which the jury have found was prac-

ticed upon him, inflicted. The loss, in the transaction before us, is the difference between the real value of the stock at the time of the sale, and the fictitious value at which the buyer was induced to purchase. . . . His actual loss does not include the extravagant dreams which prove illusory, but the money he has parted with without receiving an equivalent therefor."

The same principle was recognized by the English Court of Appeal in the leading case of *Peek* v. *Derry*, 37 Ch. Div. 541, 591, 594. That was an action to recover damages for the fraudulent representations of the defendant whereby the plaintiff was induced to take shares in a certain company at the price of £4000. The question of the proper measure of damages in such a case was directly presented and considered. Lord Justice Cotton said: "The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4000, and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants, was having the shares, instead of having in his pocket the £4000. The loss, therefore, must be the difference between his £4000 and the then value of the shares." Sir James Hannen, referring to the question of damages, said in the same case: "The question is, how much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares he would have had his £4000 in his pocket. To ascertain his loss we must deduct from that amount the real value of the thing he got." Lord Justice Lopes said: "The question in this case is, what is the loss which the plaintiff has sustained by acting on the mere representation of the defendants, and what is the true measure of his damage? In my opinion, it is the difference between the £4000 he paid and the real value of the shares after they were allotted." The case having been carried to the House of Lords, the judgment therein was reversed, but not upon grounds at all affecting the ruling made in the Court of Appeal upon the question of the proper measure of damages. *Derry* v. *Peek*, 14 App. 337.

Opinion of the Court.

There are adjudged cases holding to the broad doctrine that in an action for deceit, based upon the fraudulent representations of a defendant as to the property sold by him, the plaintiff is entitled to recover, by way of damages, not simply the difference between its real, actual value at the time of purchase, and the amount paid for it by the seller, but the difference, however great, between such actual value and the value (in excess of what was paid) at which the property could have been fairly valued if the seller's representations concerning it had been true. So, in the present case, (taking it to be as set out in the plaintiff's pleadings,) although the defendant agreed to take, and the plaintiff agreed to pay, $400,000 for the property in question, the latter—according to some cases, interpreting literally the words used in them—could retain the property and recover by way of damages the difference between its real value at the date of purchase and the sum of $1,000,000, which the plaintiff alleged it would have been worth at that time if the representations of the defendant concerning it had been true. We held in *Smith* v. *Bolles* that such was not the proper measure of damages, that case being like this in that the plaintiff sought damages covering alleged losses of a speculative character. We adhere to the doctrine of *Smith* v. *Bolles*. Upon the assumption that the property was not worth what the plaintiffs agreed to give for it, they were entitled to have—if the evidence sustained the allegation of false and fraudulent representations upon which they were entitled to rely and upon which they in fact relied—a verdict and judgment representing in damages the difference between the real value of the property at the date of its sale to the plaintiffs and the price paid for it, with interest from that date, and, in addition, such outlays as were legitimately attributable to the defendant's conduct, but not damages covering "the expected fruits of an unrealized speculation." If the plaintiffs were inveigled by the fraud of the defendant into purchasing this mining property, a judgment of the character just indicated would make them whole on account of the loss they sustained. More they are not entitled to have at the hands of the law in this action.

Many other questions have been discussed by counsel, but as

they may not arise upon another trial, we deem it unnecessary now to consider them.

*It results that the trial court erred upon the question of the measure of damages applicable to the case. Its judgment must be reversed with directions for a new trial and for further proceedings consistent with the principles of this opinion, and it is so ordered.*

MR. JUSTICE BROWN and MR. JUSTICE PECKHAM dissented.

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## *In re* VIDAL.

ORIGINAL.

No Number. Submitted April 23, 1900.—Decided November 12, 1900.

Section 716, Rev. Stat., does not empower this Court to review the proceedings of military tribunals by certiorari.

The act of April 12, 1900, c. 191, having discontinued the tribunal established under that act, and created a successor, authorized to take possession of its records and to take jurisdiction of all cases and proceedings pending therein, this Court has no jurisdiction to review its proceedings.

Such tribunals are not courts with jurisdiction in law or equity, within the meaning of those terms as used in Article Three of the Constitution.

*Mr. Frederic D. McKenney*, *Mr. Francis H. Dexter* and *Mr. Wayne Mac Veagh* for petitioners.

*Mr. Solicitor General* for the United States.

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

This was an application for leave to file a petition for certiorari to review the proceedings of a tribunal established by a General Order, numbered 88, of Brigadier-General Davis, of the United States Army, then commanding the department of Porto Rico and the supreme military authority in that island, in the nature of a *quo warranto* to oust Vidal and others from

the municipal offices of the town of Guayama. The application was submitted April 23, 1900, and, as usual, time was given for a brief in opposition, which was presented April 30.

Section 716 of the Revised Statutes brought forward from section 14 of the Judiciary Act of 1789, provides: "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

This court is not thereby empowered to review the proceedings of military tribunals by certiorari. Nor are such tribunals courts with jurisdiction in law or equity within the meaning of those terms as used in the third Article of the Constitution, and the question of the issue of the writ of certiorari in the exercise of inherent general power cannot arise in respect of them.

By act of Congress of April 12, 1900, 31 Stat. 77, c. 191, taking effect by its terms on the first of May, the tribunal in question was, as the act states, discontinued, and a United States District Court established as its successor, authorized to take possession of its records and to take jurisdiction of all cases and proceedings pending therein.

The result is, from either point of view, that this application cannot be entertained.

*Leave denied.*

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## CHAPIN *v.* FYE.

ERROR TO THE CIRCUIT COURT OF KALAMAZOO COUNTY, MICHIGAN.

No. 182. Submitted October 29, 1900.—Decided November 19, 1900.

An assignment of error in this court that the decision of a state Supreme Court was inconsistent with certain paragraphs of an alleged brief putting forward a Federal question, does not amount to a compliance with the requirements of § 709 of the Revised Statutes.

Where a Federal question is raised in the state courts, the party who brings the case to this court cannot raise here another Federal question, which was not raised below.

MOTION to dismiss or affirm. The case is stated in the opinion of the court.

*Mr. Victor M. Gore* for the motion.

*Mr. N. H. Stewart* and *Mr. Benton Hanchett* opposing.

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

This was an action of trespass on the case to recover for personal injuries inflicted on Ruth I. Fye by a dog owned and kept by Chapin; and was based on a statute of the State of Michigan, approved March 28, 1850, which provided that the owner or keeper of any dog injuring any person as set forth should be liable to the person injured "in double the amount of damages sustained, to be recovered in an action of trespass, or on the case;" and also that "if it shall appear to the satisfaction of the court by the evidence, that the defendant is justly liable for the damages complained of under the provisions of this act, the court shall render judgment against such defendant for double the amount of damages proved and costs of suit."

The declaration counted on the statute, and asked to have plaintiff's damages doubled by virtue thereof; and the trial having resulted in a verdict of $10,000 in plaintiff's favor, the Circuit Court, on motion of her counsel, entered judgment for double the amount, namely, $20,000. Defendant moved for a new trial, and assigned among various grounds therefor that the statute in question was unconstitutional because in violation of the constitution of Michigan, and "in violation of the constitutional rights of citizens to have public trial in civil cases in courts of record." The motion for new trial was denied, and defendant filed twenty-two exceptions, the eighteenth and nineteenth of which were that the statute was in violation of the Fifth and Seventh Amendments to the Constitution of the United States. The case was then carried to the Supreme Court of the State and ninety-eight errors were assigned, the ninety-fourth, ninety-fifth and ninety-sixth being to the effect that the statute was inconsistent with the ordinance of 1787 for the govern-

ment of the Northwest Territory, and with the Fifth and Sixth Amendments, securing due process of law and the right of trial by jury.

The Supreme Court required plaintiff to remit $10,000, and, this being done, affirmed the judgment, as so modified, for $10,000.

As to the contention that the act was unconstitutional, "in that it confers upon the Circuit Judge power to act as a chancellor in a suit at law in so far as he exercises the authority to double the damages," the Supreme Court, without referring to the Federal Constitution, held that it was competent for the legislature to provide for doubling damages in this class of cases, and that the latter portion of the section should be construed to mean that the court, acting through all of its instrumentalities, which included the jury, should ascertain the damages as in ordinary cases, and that as so construed the act was valid. 80 N. W. 797.

This writ of error was then allowed and errors assigned in this court, embracing alleged errors committed by the Supreme Court in disregarding certain paragraphs of the brief of counsel in that court which, it was said, asserted the statute to be in contravention of the Fourteenth Amendment. Motions to dismiss or affirm were submitted.

The validity of the provision creating the liability for double damages is not denied, but the contention seems to be that the statute authorizes the trial judge to determine independently "the amount of the damages proved," and is therefore unconstitutional. But this need not be discussed, as we think the writ must be dismissed for want of jurisdiction. If a party to an action in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare. In this case plaintiff, after judgment, excepted to the denial of his motion for a new trial on the ground, among others, that the statute in question was in violation of the Fifth and Seventh Amendments to the Constitution, and repeated that contention in the assignment of errors in the Supreme Court, adding also that the statute was inconsistent

with the ordinance of 1787. But the ordinance of 1787 was superseded by the adoption of the Constitution of the United States, and of the State, and the Fifth and Seventh Amendments were intended to operate solely on the Federal government and contain no restrictions on the powers of the State. The only reference to the Fourteenth Amendment is in the assignment of errors in this court, where it is stated that the state Supreme Court disregarded certain portions of counsel's brief alleged to have treated of that subject. This did not meet the requirements of section 709 of the Revised Statutes. *Zadig* v. *Baldwin*, 166 U. S. 485; *Miller* v. *Railroad Company*, 168 U. S. 131; *Dewey* v. *Des Moines*, 173 U. S. 193; *Keokuk* v. *Hamilton Bridge Company*, 175 U. S. 633.

*Writ of error dismissed.*

Mr. Justice Brown, dissenting.

It appears in this case that defendant intended to claim the benefit of the "due process of law" clause of the Fourteenth Amendment, but inadvertently pitched his claim upon the Fifth Amendment, which also contains a similar clause, but is only applicable to proceedings in the Federal courts. The mistake is so obvious I think the court should have disregarded it, and passed upon the merits.

# CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* DIXON.

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

No. 40. Argued October 10, 1900. — Decided November 19, 1900.

Where the right of removal depends upon the existence of a separable controversy, the question is to be determined by the condition of the record in the state court at the time of the filing of the petition to remove.

In an action of tort, the cause of action is whatever the plaintiff declares it to be in his pleading, and matters of defence cannot be availed of as ground of removal.

When concurrent negligence is charged, the controversy is not separable, and as the complaint in this case, reasonably construed, charged concurrent negligence, the court declines to hold that the state courts erred in retaining jurisdiction.

October 19, 1894, Lucy Dixon, as administratrix of Alexander Dixon, brought her action against the Chesapeake and Ohio Railway Company, R. H. Chalkey and William Sidles in the circuit court of Boyd County, Kentucky, by petition, which alleged—

"That Alexander Dixon departed this life intestate on the 22d day of September, 1894, while a resident of and domiciled in Boyd county, Kentucky; that by an order of the Boyd county court, made and entered on the —— day of September, 1894, plaintiff was appointed administratrix of his estate, and gave bond and duly qualified, and is now acting as the administratrix of the said estate. A copy of said order is filed herewith as part hereof, marked 'A.'

"She says that the defendant The Chesapeake and Ohio Railway Company is and at the time hereinafter stated was a corporation and common carrier of freight and passengers for hire, and said defendant, by its locomotives, cars, and other appurtenances, now operates and at the times hereinafter stated operated lines of railway extending into the county of Boyd and State of Kentucky. She says that on the 22d day of Septem-

ber, 1894, while crossing the track of the defendant at the crossing of the Ashland and Catlettsburg Turnpike road and within the corporate limits of said town, the said intestate, Alexander Dixon, was by the negligence of the defendant The Chesapeake and Ohio Railway Company and of its agents and servants, R. H. Chalkey and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains while on its way from Catlettsburg to Ashland, Boyd county, Kentucky, whereby she has been damaged in the sum of thirty thousand dollars.

"At the time and place when and where plaintiff's intestate was injured, as aforesaid, the defendants R. H. Chalkey and Wm. Sidles were and for a long time theretofore had been servants of the corporate defendants, in charge and control of said train, and then and there were and for a long time theretofore had continuously been respectively engineer and fireman of said train, and said negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants."

On the 30th of January, 1895, the railway company filed its petition for the removal of the cause to the District Court of the United States for the District of Kentucky, and tendered therewith a bond, as required by law.

The petition read as follows:

"Your petitioner, Chesapeake and Ohio Railway Company, respectfully shows that it is one of the defendants in the above entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and cost, exceeds the sum or value of $2000.

"Your petitioner further shows that the said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between your said petitioner, The Chesapeake and Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized, and existing under and by virtue of the laws of the State of Virginia

Statement of the Case.

and a citizen of the said State of Virginia, and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, your petitioner avers, was then and still is a citizen of the State of Kentucky; that the said controversy is of the following nature, viz:

"Whether your petitioner is liable to the said plaintiff for damages on account of the death of said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto and other of its servants then and there in its employment and who are not named, it being claimed by said plaintiff that because thereof your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy.

"Your petitioner further states that the defendants R. H. Chalkey and William Sidles are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the Circuit Court of the United States for the District of Kentucky, and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States."

The Boyd Circuit Court adjudged the bond sufficient, but overruled the petition.

Separate answers by the company and by Chalkey and Sidles were thereupon filed, and issue joined thereon; trial was had, resulting in a verdict and judgment in favor of plaintiff; and the judgment was affirmed, on appeal, by the Court of Appeals of Kentucky. 47 S. W. Rep. 615.

In the opinion of that court it was said, among other things:

"The main ground for reversal is the refusal of the lower court to sustain the petition of the appellant the Chesapeake and Ohio Railroad Company for a transfer of this case to the United States court for the District of Kentucky.

"The ground upon which the transfer was sought, as alleged in the petition asking it, is that the action is wholly between citizens of different States, the Chesapeake and Ohio Railroad Company being a corporation created under the laws of the

Counsel for Parties.

State of Virginia, and a citizen thereof, while appellee, Lucy Dixon, is and was a citizen of the State of Kentucky. As appellants Chalkey and Sidles were, when this action was commenced, citizens of Kentucky, the Boyd Circuit Court had jurisdiction of the persons of all the defendants, as well as of the subject of the action, if the defendants were jointly guilty of the negligence alleged to have been the cause of the death of Alexander Dixon, and jointly liable therefor.

"It is alleged by appellee in her petition, and, so far from the contrary being shown by appellant the Chesapeake and Ohio Railroad Company, is clearly proved by the evidence in this case that appellants Chalkey and Sidles, as engineer and fireman of said train, were guilty of the negligence causing said death, and that the Chesapeake and Ohio Railroad Company, through its said employés, was also guilty of said negligence; and therefore they were jointly liable for the destruction of the life of said Dixon, caused thereby.

"It is not material that, as alleged in the petition for a transfer of this case, Chalkey and Sidles were made parties defendant for the single purpose of preventing the removal of the case by the Chesapeake and Ohio Railroad Company to the Circuit Court of the United States for the District of Kentucky, or what may have been the motive of the plaintiff for bringing a joint action, unless they were wrongfully and illegally joined; and such is the doctrine as settled by the Supreme Court of the United States.

"As, therefore, the appellant Chesapeake and Ohio Railroad Company neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower court properly refused to make the transfer."

To review the judgment of the Court of Appeals this writ of error was allowed.

*Mr. W. H. Wadsworth* for plaintiff in error. *Mr. A. M. J. Cochran* and *Mr. C. B. Simrall* were on his brief.

*Mr. James Andrew Scott* for defendant in error. *Mr. John H. Hager* and *Mr. R. S. Dinkle* were on his brief.

Opinion of the Court.

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

The question to be determined is whether the Court of Appeals of Kentucky erred in affirming the action of the Boyd circuit court in denying the application to remove. And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkey and Sidles was immaterial. The petition for removal did not charge fraud in that regard or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry.

By section 241 of the constitution of Kentucky it is provided that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."

Section 6 of the Kentucky statutes provides: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

The cause of action thus created is independent of any right of action the deceased may have had, or would have had if he had survived the injury; and in this case the Court of Appeals held that the company and its engineer and fireman were jointly liable for Dixon's death, if caused by the negligence of those employés; and that the cause of action as alleged against all the defendants was an entire cause of action. The court also held that such cause of action was sufficiently proven, but we are dealing with the pleadings alone.

Counsel for plaintiff in error contends, however, that plain-

tiff's complaint does not state a joint cause of action against the corporate and individual defendants, but states a separate cause of action against the railway company and a separate cause of action against the other defendants.

It is conceded that if an action be brought on a joint cause of action it makes no difference that separate causes of action may have existed on which separate actions might have been brought, and furthermore that it makes no difference that in an action on a joint cause of action a separate recovery may be had against either of the defendants; while it is insisted that if two or more separable controversies appear from the averments it is not material whether they have been properly or improperly joined.

If the liability was not joint then separable controversies existed, and the argument is that the averment that the negligence complained of "was the joint negligence of all the defendants" merely stated the conclusion of law that the company and its employés were jointly liable in the action for the injury inflicted through the negligence of the latter in the course of and within the scope of their employment, and this conclusion is denied on the ground that the liability of the company as alleged rested on a wholly different basis from that of the liability of its servants.

In *Warax* v. *Cincinnati, N. O. & T. P. Railway Company*, 72 Fed. Rep. 637, Taft, J., held that there were separable controversies in such cases, because the liability of the master for the negligence of his servants in his absence, and without his concurrence or express direction, arises solely from the policy of the law which requires that he shall be held responsible for the acts of those he employs, done in and about his business, while the liability of the servant arises wholly from his personal act in doing the wrong.

This view of the ground of the master's liability is expressed by Mr. Pollock in his work on Torts, (Amer. ed. 89, 90,) thus: "I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others."

So it was said by Lord Brougham in *Duncan* v. *Findlater*, 6 Clark & Fin. 894, 910: "The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

By Lord Cranworth in *Barton's Hill Coal Company* v. *Reid*, 3 McQueen, 266, 283: "He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business."

And by Chief Justice Shaw in *Farwell* v. *Boston & Worcester Railroad Company*, 4 Met. 49: "This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*."

Whatever its sources or the principles on which it rests, the rule itself is firmly established; and many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action, although other courts have reached the opposite conclusion.[1] As remarked by Mr. Justice Gray, then Chief Justice of Massachusetts, in *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, the question is "a somewhat nice one," the determination of which by the highest court of Kentucky we are not called upon to revise as the disposition of this case turns on other considerations.

In respect of the removal of actions of tort on the ground of separable controversy, certain matters must be regarded as not open to dispute. In *Powers* v. *Chesapeake & Ohio Railway Company*, 169 U. S. 92, it was said:

"It is well settled that an action of tort, which might have

[1] See cases collected in 15 Encyc. Pleading and Practice, 560.

been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville Railroad* v. *Wangelin*, 132 U. S. 599; *Torrence* v. *Shedd*, 144 U. S. 527, 530; *Connell* v. *Smiley*, 156 U. S. 335, 340."

In *Railroad Company* v. *Wangelin* it was said to be equally well settled "that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner — unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court." In that case the declaration charged two corporations with having jointly trespassed on the plaintiff's land, and it was insisted that one of the corporations was not in existence at the time of the alleged trespass, but that was held to be a question on the merits.

And in *Provident Savings Life Assurance Society* v. *Ford*, 114 U. S. 635, it was held that the question of a colorable assignment was matter of defence and not ground for removal.

The contention of counsel is that this complaint charged neither direct nor concurrent nor concerted action on the part

of all the defendants, but counted merely on the negligence of the employés.

If the complaint should be so construed, the question would still remain whether the cause of action was not entire as the case stood, and the objection of the difference in the character of the liability matter of defense, which might force an election, or defeat the action as to one of the parties.

The cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse. And on the principle of the identification of the master with the servant, it would seem that there was no fact which the company could traverse which its codefendants, being its employés, could not. At all events a judgment against all could not afterwards be attacked for the first time on this ground.

But does the complaint bear the construction the company puts upon it?

The pleader did not set forth, and, according to the decision of the Court of Appeals, this was not material, the specific acts of negligence complained of. It was stated that the "negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants." Assuming this averment to be inconsistent with a charge of direct action by the company, it may nevertheless be held to amount to a charge of concurrent action when coupled with the previous averment that Dixon was killed while crossing the track at a turnpike crossing by the negligence of the company and the other defendants in charge of the train. The negligence may have consisted in that the train was run at too great speed, and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined. And where concurrent negligence is charged the controversy is not separable.

In *Whitcomb* v. *Smithson*, 175 U. S. 635, the action was brought in the state court against one railway company and the receivers of another to recover for personal injuries inflicted by concurrent negligence. The cause was removed to the Circuit Court and remanded because there was no separable controversy. At the close of the evidence on the subsequent trial the company moved that the jury be instructed to return a verdict in its favor, which was resisted by plaintiff, but granted by the court, and a verdict returned accordingly. The other defendants, the receivers, then applied for a removal, which was denied. We held the ruling in favor of the company was a ruling on the merits and not a ruling on the question of jurisdiction, and sustained the action of the state courts.

*Chicago, Rock Island &c. Company* v. *Martin*, 178 U. S. 245, is another case in which an action for concurrent negligence was held not to present a separable controversy.

In *Powers* v. *Chesapeake & Ohio Railway Company*, *supra*, where the company and its employés had been jointly sued as in the case at bar, the case had been remanded on removal for want of separable controversy. Plaintiff subsequently discontinued the action as to all the defendants except the company, and the company again made application to remove. This was denied by the state court but granted by the Circuit Court, and the judgment of the latter was affirmed by this court, the question of separable controversy being necessarily not passed on here. 169 U. S. 92.

*Plymouth Gold Mining Company* v. *Amador & Sacramento Canal Company*, 118 U. S. 264, and *Connell* v. *Utica &c. Railroad Co.*, 13 Fed. Rep. 241, are more in point on the precise question sought to be raised, and in the latter case Mr. Justice Blatchford expressed the opinion that it was proper for the Federal courts to follow the decisions of the state courts that a cause of action was entire.

Our conclusion is that it cannot properly be held that it appeared on the face of this pleading, as matter of law, that the cause of action was not entire, or that a separable controversy was presented.

*Judgment affirmed.*

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

MR. JUSTICE MCKENNA, not having heard the argument, took no part in the disposition of the case.

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## SCRANTON *v.* WHEELER.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 9. Argued October 16, 1899.—Decided November 12, 1900.

The prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has no application to the case of an owner of land bordering on a public navigable river, whose access from his land to navigability is permanently lost by reason of the construction, under authority of Congress, of a pier resting on submerged lands away from, but in front of his upland, and which pier was erected by the United States, not with any intent to impair the right of riparian owners, but for the purpose only of improving the navigation of such river.

It was not intended, by that provision in the Constitution, that the paramount authority of Congress to improve the navigation of the public waters of the United States should be crippled by compelling the Government to make compensation for an injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress.

The state courts of Michigan having recognized this action as a proper one under the laws of that State for the relief sought by the plaintiff, this court has jurisdiction to consider the questions of a Federal nature decided herein.

THIS writ of error brings up for review a final judgment of the Supreme Court of Michigan holding that the United States is not required to compensate an owner of land fronting on a public navigable river when his right of access from the shore to the navigable part of such river is permanently obstructed by a pier erected in the river under the authority of Congress for the purpose only of improving navigation.

Omitting any reference to immaterial matters, the case as made by the pleadings and evidence is as follows:

Statement of the Case.

By an act of Congress approved September 26, 1850, c. 71, providing for the examination and settlement of claims for land at the Sault Ste. Marie in Michigan, the local register and receiver of the land office were authorized to report upon claims to lots at that place under instructions to be given by the Commissioner of the General Land Office. 9 Stat. 469.

In conformity with proceedings under that act the heirs of Franklin Newcomb and Samuel Peck were confirmed in their claim jointly to premises known as Private Land Claim No. 3, and a patent was issued to them by the United States on the 6th day of October, 1874. The premises were at the west or upper end of the St. Mary's Falls Ship Canal, and one of the boundaries, as shown by the field notes, was "along the right bank of the Ste. Marie River." By mesne conveyances from the heirs of Franklin Newcomb the plaintiff, Scranton, became the owner of an undivided half of the land in question.

By an act approved August 26, 1852, c. 92, Congress granted to the State of Michigan the right to locate a canal through the public lands in that State known as the military reservation at the Falls of St. Mary's River, and four hundred feet of land in width extending along the line of the canal was granted for the construction and convenience of the canal and the appurtenances thereto, the use being vested in the State for such purposes and no other. The act provided that the canal should be located on the line of the survey made for that purpose or on such other route between the waters above and below the Falls as might be selected with the approval of the Secretary of War. In aid of the construction and completion of the canal Congress also granted to the State seven hundred and fifty thousand acres of public lands, and it was provided that the canal should be and remain a public highway for the use of the United States, free from toll or other charge upon the vessels of the Government engaged in the public service or upon vessels employed in the transportation of property or troops of the United States. 10 Stat. 35.

The construction of the canal was begun by Michigan in 1853 and completed in 1855. It was owned and operated by the State until the year 1881, when it was transferred to the United

Statement of the Case.

States in conformity with the River and Harbor Act of June 14, 1880, c. 211, by which $250,000 was appropriated for improving and operating the river and the canal, and by which also the Secretary of War was authorized to accept on behalf of the United States from the State of Michigan the St. Mary's Canal and the public works thereon—the transfer to be so made as to leave the United States free from all debts, claims or liability of any character whatsoever, and the canal after the transfer to be free for public use. By the same act the Secretary of War was authorized, such transfer being made, to draw from time to time his warrant on the Treasury to pay the actual expenses of operating and keeping the canal in repair. 21 Stat. 180, 189.

Prior to the transfer Congress had made large appropriations for the repair, preservation, improvement and completion of the canal. 16 Stat. 224, c. 240; 16 Stat. 402, c. 34; 18 Stat. 238, c. 457; 18 Stat. 456, c. 134; 19 Stat. 136, c. 267; 20 Stat. 156, c. 264; 20 Stat. 369, c. 181; 21 Stat. 189, c. 211.

As originally constructed, a pier extended from the west end of the canal into the water, curving to the north. This pier was opposite to a part of Private Land Claim No. 3, but left at that time a riparian frontage for those premises of from three to four hundred feet.

In 1877 the United States commenced and in 1881 completed the construction in the water of what is known as the New South Pier, which extended across the entire front of Private Land Claim No. 3 and was within the riparian ownership of the plaintiff as projected from the land towards the middle thread of the stream. The effect of the construction of this new pier was to exclude the plaintiff altogether from access from his land within the lateral lines of his riparian ownership, projected as aforesaid, to the navigable water or to the channel of the river that was navigable. On both sides of the space included within such projected lines of the plaintiff's riparian ownership and between the new pier and the bank of the river, the water was only five feet in depth; so that by reason of the construction and maintenance of the pier the plaintiff was prevented from reaching navigable water of greater depth than five feet.

The plaintiff desired to land freight on the New South Pier,

and thus convey it to the lot in question. But he was prevented from doing so by the defendant Wheeler, superintendent of the property, who was in possession of and exercised exclusive control over the canal and the pier as an officer or agent of the United States, and not otherwise.

No part of the pier in question in front of Private Land Claim No. 3 rests upon the fast land within that claim, but entirely upon submerged lands in front of or opposite to the fast land. The water between the pier and dry land is very shoal.

St. Mary's River forms a part of the boundary line between the United States and Canada, and where navigable forms, with the Great Lakes, a highway for interstate and international commerce. Near the point in question the river was not originally navigable, owing to the falls, and the canal was built around the falls to connect its navigable parts above and below, and was used in connection therewith for the purposes of such commerce.

The present action was brought by Scranton against Wheeler in the Circuit Court of Chippewa County, Michigan, the declaration alleging that the plaintiff was the owner in fee but was illegally deprived by the defendant of the possession of his interest in "Private Land Claim No. 3, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's River from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attaching thereto and being a part thereof;" which premises the plaintiff claimed in fee. The damages alleged were $35,000.

Upon the petition of Wheeler, the action was removed for trial into the Circuit Court of the United States on the ground that the Government of the United States was the real party in interest, and that the defence depended upon the construction of the laws of the United States. In that court there was a judgment in his favor. The case was then carried to the Circuit Court of Appeals, where the judgment was affirmed, an elaborate opinion being delivered by Judge Lurton. 16 U. S. App. 152; 57 Fed. Rep. 803. That court held: "That an officer of the

United States could be sued in ejectment by one claiming the title and the right of possession; that the case was properly removed to the Circuit Court for trial; that the Circuit Court of Appeals had jurisdiction under the act of March 3, 1891, c. 517, 26 Stat. 826, to review the judgment of the Circuit Court; and that as "an incident to ownership of lands on the margins of navigable streams, the law of Michigan attaches the legal title to the submerged lands under the stream comprehended within parallel lines extending perpendicular to the general trend of the shore along his land to the centre of the stream." After observing that although the plaintiff under the law of Michigan was seized of the legal title to the soil under the water, yet, in the very nature of the property, such seizure was of the bare technical title, the court proceeded: "It must, from these constitutional principles, follow that the State of Michigan held the soil beneath her navigable rivers under a high public trust, to forever preserve them free as public highways, subject only to the power of Congress to regulate commerce among the States. The legal title which, under her law, becomes vested in such proprietors, must be subject to the same public trusts, and therefore subordinate to the rights of navigation, and subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it. The right of Congress to regulate commerce, and, as an incident, navigation, remains unaffected by the question as to whether the title to the soil submerged is in the State or is in the owner of the shores. A distinction must be recognized between that which is *jus privatum* and that which is *jus publicum*. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it he takes such proprietary rights as are consistent with the public right of navigation, and the control of Congress over that right. . . . The significance of that case [*Willson* v. *Marsh Co.*, 2 Pet. 245], as it affects this, was the refusal to enjoin the erection of the bridge on the complaint of one owning land on the shores above, whose access to and use of the stream was thereby injured. His property had not been taken. The injury to him was consequential, and he was held to be without remedy. Here the

plaintiff has sustained an injury which is wholly a consequence of the erection of a structure by Congress in aid of the general and public right of navigation. If Congress may lawfully use the soil as a support for such structures without acquiring the naked title outstanding in the plaintiff, then, for such injuries as are merely consequential, it is a case of damage without an actionable injury. A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent Congressional legislation. In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312. In that case it was held that not only must the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in the case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken. The title in him was subject to the public uses. He held the soil under the river subservient to the purposes of navigation. The right to regulate commerce involved the right to regulate navigation, and this, in turn, involves the necessary uses of the submerged lands, in so far as such use was essential to the maintenance of the public highway. . . . The conclusion that we have reached is that there is no error in the judgment of the Circuit Court. The plaintiff has no such ownership of the *locus in quo* as makes its use for the purposes to which it has been devoted a taking of private property within the meaning of the Constitution."

Upon writ of error to this court the judgment of the Circuit Court of Appeals was reversed, upon the joint motion of the parties, with directions to remand the case to the state court for trial. The parties concurred in the opinion that the case was not removable from the state court — *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, and *Chappell* v. *Waterworth*, 155 U. S. 102, being cited by them in support of that view.

Statement of the Case.

At the trial in the state court the plaintiff asked the court to charge the jury —

That under the law of Michigan applicable to the facts in this case, the plaintiff was the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of the upland to the centre file of the stream, and running at right angles with the course of the stream in front of the upland, and therefore that the land and property described in the declaration belonged to and was owned by the plaintiff in fee simple, and so belonged to him when the action was brought;

That the pier or structure in question was constructed and was maintained by the defendant across plaintiff's land without his consent and against his rights in the premises;

That neither the defendant nor the United States had any lawful right to construct the pier on and across the premises in question, thus taking possession of the premises adversely to the plaintiff and excluding him from enjoyment thereof, and from all access from his land and premises to the navigable water of the river in front thereof, and from the navigable water of the river to his land;

That neither the Government of the United States nor the defendant had any lawful right to so construct the pier or to maintain the same as was being done at the time suit was brought, and as they were now doing, without their first having acquired the right to so construct and maintain the same from the owner of the fee, or without obtaining the right therefor by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor; and,

That under Article V of the Amendments to the Constitution of the United States the property in question could not lawfully be taken for the public use to which it was appropriated without just compensation having been made therefor to the owner or without due process of law.

The plaintiff also requested this instruction: "The construction of this pier was in violation, and the maintaining of the same was in violation of, said Article V of the Amendments to the Constitution of the United States in this, that it appears

from the testimony in the case that the same was appropriated without due process of law, and the same was taken and devoted to a public use without the consent of the owner thereof, and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said Article V; and that the taking possession of the land of the plaintiff and the construction of the pier thereon, in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable water, the natural navigable water of the stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said Article V of the Amendments to the Constitution of the United States, and as depriving the owner thereof of his property without due process of law, and without just compensation, and without his consent."

These instructions were severally refused, and to that action of the court the plaintiff excepted.

In charging the jury the court stated that the United States District Attorney had suggested in writing that the property in controversy, the title and possession of which were the subjects of this litigation, was and for many years had been in the possession of the United States through its officers and agents; that it was held for public uses in connection with the commerce and navigation of the Great Lakes; that the nominal defendant had no personal interest in the matter; that his physical possession of the premises was in his official capacity and in law the possession of the United States; that the United States had always held title to the said land, and now holds possession under its claim of title; that this action was in effect an action against the United States Government, which in its sovereign capacity could not be sued; and for these reasons the District Attorney asked that all proceedings be stayed and the suit dismissed.

A verdict for the defendant was directed on the ground that, in legal effect, the action was against the United States and that a judgment for the plaintiff would be one against the Government and its property.

Statement of the Case.

In the Supreme Court of the State the failure of the trial court to charge the jury as requested by the plaintiff, and the direction to the jury to return a verdict for the defendant, were assigned for error. That court, all the justices concurring, held that the action was not against the United States, but affirmed the judgment upon other grounds. It said: "When one in the actual possession of property defends his right of possession upon the ground that the Government, state or national, has placed him in possession, he must show that the right of the Government is paramount to the right of the plaintiff, or judgment will go against him. This point has been settled by the decision of the Supreme Court of the United States rendered May 10, 1897. *Tindal* v. *Wesley*, 167 U. S. 204. In that case the authorities upon this point are reviewed at length, including the case of *Stanley* v. *Schwalby*, 162 U. S. 255, upon which defendant mainly relies. The United States Government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them. That the improvements made were necessary to aid and protect this navigation is established beyond dispute. Had the Government the right to make these improvements upon the submerged land without compensation to the adjoining owner? It is conceded that under the law of Michigan the title to submerged land is in the adjoining owner to the thread of the stream. It is insisted in behalf of the plaintiff that the Government possesses no right to so use his land, although submerged, and although necessary to so use it in aid of navigation, as to cut off his access to the open water. It is contended on the other hand that this title to submerged lands along navigable waters, and the right of access thereto, are subject to the paramount right of the United States to use this land in such manner as they shall determine to be necessary in aid of navigation. The Court of Appeals was unanimous in its opinion against the plaintiff's claim. In a very able opinion delivered by Judge Lurton the facts are clearly stated, the authorities cited, and we think the conclusion there reached is the correct one. We therefore deem it unnecessary for us to enter into a long dis-

cussion of the law and the authorities. The case of *Hawkins Point Lighthouse*, 39 Fed. Rep. 77, appears to be exactly in point, and to rule the present case. We think the conclusion reached by the court below was a correct one, although it gave a wrong reason." 113 Mich. 565.

The *Hawkins Point Lighthouse* case referred to in the opinion of the state court was ejectment brought in a Circuit Court of the United States against a government keeper of a lighthouse to recover possession of such house, erected in the Patapsco River, a public navigable water of the United States, by the Lighthouse Board in pursuance of acts of Congress. There was no condemnation for public use of the lands upon which the lighthouse rested, nor was any compensation made to any one for the site. The plaintiff was the owner of the upland, but had not, in the exercise of his riparian right, improved out into the water in front of his land. The court, speaking by Judge Morris, held that the plaintiff was not entitled to recover, saying: "While the submerged land remains a part of the bed of the river it is not private property in the sense of the Fifth Amendment to the Federal Constitution. As was declared in *Gilman* v. *Philadelphia*, 3 Wall. 725, the navigable waters 'are the public property of the nation, and subject to all the requisite legislation by Congress.' In the hands of the State or of the state's grantee the bed of a navigable river remains subject to an easement of navigation, which the General Government can lawfully enforce, improve and protect. It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine, that, in order to develop the greatest public utility of a waterway, private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court. The following are cases all involving that proposition: *The Blackbird Creek Case*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Wisconsin* v. *Duluth*, 96 U. S. 379; *South Carolina* v. *Georgia*, 93 U. S. 4. If it were made apparent to Congress that any extension of the plaintiff's present shore line into the river tended to impair the navigability of

the stream or its use as a highway of commerce, Congress could authorize the agents of the United States to establish the present shore as the line beyond which no structures of any kind could be extended, and the plaintiff would have no claim for compensation. If the plaintiff could thus lawfully be prevented from appropriating to his private use any part of the submerged land lying in front of his shore line, and the whole of it be kept subservient to the easement of navigation, how can it be successfully claimed that he must be paid for the small portion covered by the lighthouse 200 feet from the shore, which has been taken for a use as strictly necessary to safe navigation as the improved channel itself? The Court of Appeals of Maryland, whenever called upon to declare the nature of the title of the State and its grantees in the land at the bottom of navigable streams, has uniformly held that the soil below high-water mark was as much a part of the *jus publicum* as the stream itself." 39 Fed. Rep. 77.

The plaintiff, Scranton, has assigned various grounds of error. These grounds are substantially those embodied in his requests for instructions in the trial court, and which were insisted upon in the Supreme Court of the State.

*Mr. John C. Donnelly* and *Mr. Harlow P. Davock* for plaintiff in error.

*Mr. Robert Howard* for defendant in error. *Mr. Solicitor General* was on his brief.

Mr. Justice Harlan delivered the opinion of the court. After stating the facts as above reported, he proceeded:

1. The Government insists that ejectment is not the proper remedy for a riparian owner to secure the removal of a structure that interferes with access by him from his fast land to navigable water. A sufficient answer to this objection is that the state court recognized the present action as a proper one under the laws of Michigan for the relief sought by the plaintiff. We have therefore to consider only the controlling questions of a

Federal nature presented by the record and decided by the state court.

2. The Supreme Court of the State correctly held that the trial court erred in directing a verdict for the defendant upon the ground that a judgment against him would in legal effect be a judgment against the United States. It is true the defendant Wheeler insisted that the action of which the plaintiff complained was taken by him under the authority of the United States. But this fact was not sufficient to defeat the suit. If the plaintiff was entitled to access from his land to navigable water, and if the defendant stood in the way of his enjoying that right, then the court was under a duty to inquire whether the defendant had or could have any authority in law to do what he had done; and the suit was not to be deemed one against the United States because in the consideration of that question it would become necessary to ascertain whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him. The issue, in point of law, was between the individual plaintiff and the individual defendant, and the United States not being a party of record a judgment against Wheeler will not prevent it from instituting a suit for the direct determination of its rights as against the plaintiff. This subject has been examined by the court in numerous cases, the most recent one being *Tindal* v. *Wesley*, 167 U. S. 204, 222, 223. In that case—which was a suit to recover real property in South Carolina held by the defendants, as they insisted, in their capacities as officers of the State and only for the State—it was said that "the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff." Again: "It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that as between the plaintiff and the defendants, the former is entitled to

possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

These principles are applicable to the present case, and show that it is not within the rule forbidding a suit against the United States except with its consent.

3. The vital question therefore is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States not with any intent to impair the rights of riparian owners but for the purpose only of improving the navigation of such river.

Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case. But what has been said in some cases involving the

general question will assist us in determining whether the present plaintiff has been denied the protection secured by the constitutional provision in question.

In *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 181, the court construed a provision of the constitution of Wisconsin declaring that "the property of no person shall be taken for public use without just compensation therefor;" observing that it was a provision almost identical in language with the one relating to the same subject in the Federal Constitution. In that case it appeared that a public improvement in a navigable water was made under local statutory authority, whereby the plaintiff's land was permanently overflowed and its use for every purpose destroyed. Referring to some adjudged cases which went, as the court observed, beyond sound principle, it was said that, "it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

That case was relied upon in *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642, as establishing the invalidity of certain municipal acts looking to the improvement of a public highway. But this court said that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority." It was observed in the same case that the extremest qualification of the doctrine was that found in *Pumpelly's* case, and that case was referred to as holding nothing more than that "the permanent flooding of private property may be regarded as a 'taking,'" because there would be in such case "a physical invasion of the real estate of the owner, and a practical ouster of his possession."

Opinion of the Court.

In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 341, 343, there was an actual taking of certain locks and dams which had been constructed and maintained, under competent authority, by a navigation company, and the question was whether the franchise to take tolls for the use of the locks was to be deemed a part of the property taken for which compensation must be made. This court held that it was, remarking: "The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the National Government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual." Again, in the same case: "It is also suggested that the Government does not take this franchise; that it does not need any authority from the State for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The Government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

But the case most analogous to the present one is that of *Gibson* v. *United States*, 166 U. S. 269, 271, 275, 276. That was an action in the Court of Claims to recover damages resulting from the construction of a dike by the United States in the Ohio River near the plaintiff's farm on Neville Island, a short distance below Pittsburg.

From the finding of facts in that case it appears that at the time the dike was constructed Mrs. Gibson's farm was in a high state of cultivation, with a frontage of 1000 feet on the main channel of the Ohio River, and had a landing that was used in shipping products from and in bringing supplies to it, and that there was no other landing on the farm which the owner could use in shipping products and in receiving supplies; that the dike was constructed under the authority of an act of Congress appropriating money for improving the Ohio River; that the owner was unable to use the landing for the shipment of products from and supplies to the farm for the greater part of the gardening season on account of the dike obstructing the passage of boats, and could only use the landing at a high stage of water; that after the dike was made she could not, during the ordinary stage of water, ship products from or receive supplies for her farm, without going over the farms of her neighbors to reach another landing; and that in consequence of the construction and maintenance of the dike the plaintiff's farm had been reduced in value from $600 to $150 or $200 per acre. It was further found that the plaintiff's access to the navigable part of the river was not entirely cut off; that at a nine-foot stage of water, which frequently occurred during November, December, March, April and May, she could get into her dock in any manner, while from a three-foot stage of water she could communicate with the navigable channel through a chute, and at any time haul out to the channel by wagon; that no water was thrown back on the land by the building of the dike; and that the dike itself did not come into physical contact with the land and was constructed in the exercise of a claimed right to improve the navigation of the river.

This court held that the plaintiff had no cause of action against the United States. It said: "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution" — citing *South Carolina* v. *Georgia*,

93 U. S. 4; *Shively* v. *Bowlby*, 152 U. S. 1; *Eldridge* v. *Trezevant*, 160 U. S. 452. Again, in the same case: "The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power." "Moreover," the court said, "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes."

In the light of these adjudications can it be held that Scranton, the plaintiff, is entitled, by reason of the construction of the pier in question, to compensation for the destruction of his right, as riparian owner, of access from his land to the navigable part of the river immediately in front of it?

It is said that he is so entitled in virtue of the decision in *Yates* v. *Milwaukee*, 10 Wall. 497, 504, 505. The report of that case shows that Yates owned a wharf on a navigable river within the limits of the city of Milwaukee and that the city by an ordinance declared the wharf to be a nuisance and ordered it to be abated. There was no proof whatever in the record that the wharf was in fact an obstruction to navigation or a nuisance except the declaration to that effect in the city ordinance; and Yates brought suit to enjoin interference with it by the city. This court held that the mere declaration by the city that Yates' wharf was a nuisance did not make it one, saying: "It is a doctrine not to be tolerated in this country that, a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it

is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself." This, as this court said in *Shively* v. *Bowlby*, 152 U. S. 1, 40, was quite sufficient to dispose of the case in Yates' favor, and indicated the point adjudged. A proper disposition of the case required nothing more to be said. But the opinion of the court went further, and after observing, upon the authority of *Dutton* v. *Strong*, 1 Black, 23, and *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, that a riparian owner is entitled to access to the navigable part of the river from the front of his lot, subject to such general rules and regulations as the legislature might prescribe for the protection of the rights of the public, said: "This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

The decision in *Yates* v. *Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner had in conformity with law erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation—a right never exercised by him in the construction of a wharf before the improvement in question was made by the Government.

While the present case differs in its facts from any case heretofore decided by this court, it is embraced by principles of constitutional law that have become firmly established.

Opinion of the Court.

The Constitution invests Congress with the power to regulate commerce with foreign nations and among the several States. This power includes the power to prescribe "the rule by which commerce is to be governed;" "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and "comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'" *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 197.

In *Gilman* v. *Philadelphia*, 3 Wall. 713, 724, the court said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."

In *South Carolina* v. *Georgia*, 93 U. S. 4, 11, 12, the court said that Congress "may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage."

In *Mobile County* v. *Kimball*, 102 U. S. 691, 696, the court, observing that the power of Congress to regulate commerce was without limitation, said: "It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries and between the citizens of the several States, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power."

In *Stockton* v. *Baltimore & N. Y. Railroad*, 32 Fed. Rep. 9, 20, Mr. Justice Bradley, holding the Circuit Court, said: "Such being the character of the state's ownership of the land under water—an ownership held, not for the purpose of emolument,

but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the Constitution. The Fifth Amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But, if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway, is at all a diversion of the property from its original public use. It is not so considered when sea walls, piers, wing-dams and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care. The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends, not only to the control of the naviga-

ble waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."

As much was said in argument about the decisions in New York it may be well here to refer to some of the rulings of the highest court of that State. In *Rumsey et al.* v. *New York and New England Railroad Co.*, 133 N. Y. 79, 85, 89, the Court of Appeals of New York, referring to the prior case of *Gould* v. *Hudson River Railroad Co.*, 6 N. Y. 522, said: "It was there held that the owner of lands on the Hudson River has no private right or property in the waters or the shore between high and low-water mark, and, therefore, is not entitled to compensation from a railroad company which, in pursuance of a grant from the legislature, constructs a railroad along the shore, between high and low-water mark, so as to cut off all communications between the land and the river otherwise than across the railroad. It is believed that this proposition is not supported by any other judicial decision in this State, and if we were dealing with the question now as an original one, it would not be difficult to show that the judgment in that case was a departure from precedent and contrary to reason and justice." Again, in the same case: "It must now, we think, be regarded as the law in this State that an owner of land on a public river is entitled to such damages as he may have sustained against a railroad company that constructs its road across his water front and deprives him of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. This principle cannot, of course, be extended so as to interfere with the right of the State to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the Federal Constitution."

But in a later case in New York relating to this subject—*Sage* v. *The Mayor*, 154 N. Y. 61, 69—the Court of Appeals, after observing that the court in *Rumsey et al.* v. *New York and New England Railroad Co.* had been careful to say that the principle announced by it was not to be extended so as to

interfere with the right of the State to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the Federal Constitution, said: "While we think it is a logical deduction from the decisions in this State that, as against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tidewater for the benefit of commerce, the principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of preëmption, when conferred by statute, and the right to wharfage, when protected by a grant and covenant on the part of the State, as in the *Langdon* [93 N. Y. 129] and *Williams* [105 N. Y. 419] cases. I think that the rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the State as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner. The implication springs from the title to the tideway, the nature of the subject of the grant and its relation to navigable tidewater, which has been aptly called the highway of the world. The common law recognizes navigation as an interest of paramount importance to the public."

All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guarantees prescribed by it for the security of private property must be respected by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly

within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the Government does not transcend the limits established by the supreme law of the land. Is the broad power with which Congress is invested burdened with the condition that a riparian owner whose land borders upon a navigable water of the United States shall be compensated for his right of access to navigability whenever such right ceases to be of value solely in consequence of the improvement of navigation by means of piers resting upon submerged lands away from the shore line? We think not. The question before us does not depend upon the inquiry whether the title to the submerged lands on which the New South Pier rests is in the State or in the riparian owner. It is the settled rule in Michigan that "the title of the riparian owner extends to the middle line of the lake or stream of the inland waters." *Webber* v. *The Pere Marquette Boom Co.*, 62 Mich. 626, and authorities there cited. But it is equally well settled in that State that the rights of the riparian owner are subject to the public easement or servitude of navigation. *Lorman* v. *Benson*, 8 Mich. 18, 32; *Ryan* v. *Brown*, 18 Mich. 196, 207. So that whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman* v. *Benson*, above cited, the Supreme Court of Michigan, speaking by Justice Campbell, declared the right of navigation to be one

to which all others were subservient. The learned counsel for the plaintiff frankly states that compensation cannot be demanded for the *appropriation* of the submerged lands in question and that the United States under the power to regulate commerce has an unquestioned right to *occupy* them for a lawful purpose and in a lawful manner. This must be so—certainly in every case where the use of the submerged lands is necessary or appropriate in improving navigation. But the contention is that compensation must be made for the loss of the plaintiff's access from his upland to navigability incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We cannot assent to this view. If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a *taking* of *private* property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case, "in due subjection to the rights of the public"—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the pier in question, the Government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by

compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question so as to meet the wants of the vast commerce passing and to pass over them. Consequently the agents designated to perform the work ordered or authorized by Congress had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability.

It follows from what has been said that the pier in question was the property of the United States, and that when the defendant refused to plaintiff the privilege of using it as a wharf or landing place he violated no right secured to the latter by the Constitution.

We are of opinion that the court below correctly held that the plaintiff had no such right of property in the submerged lands on which the pier in question rests as entitles him, under the Constitution, to be compensated for any loss of access from his upland to navigability resulting from the erection and maintenance of such pier by the United States in order to improve and which manifestly did improve the navigation of a public navigable water.

The judgment of the Supreme Court of Michigan is therefore

*Affirmed.*

MR. JUSTICE BREWER concurred in the result.

MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE GRAY and MR. JUSTICE PECKHAM, dissenting.

Gilmore G. Scranton, the plaintiff in error, derived his title to a tract of land, known as Private Land Claim No. 3, and fronting on the St. Mary's River, a stream naturally navigable, under a patent of the United States granted on October 6, 1874.

It must be regarded as the settled law of this court that grants

by Congress of portions of the public lands, bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution of the United States.

In *Shively* v. *Bowlby*, 152 U. S. 1, there was a controversy between parties claiming under a patent of the United States for a donation land claim bounded by the Columbia River, and parties claiming under deeds from the State of Oregon for lands between the lines of low and ordinary high tide of the Columbia River. It was held by the Supreme Court of Oregon, 22 Oregon, 427, that the lands in question, lying between the uplands and the navigable channel of the Columbia River, belonged to the State of Oregon, and that its deed to such lands conveyed a valid title.

The case was brought to this court, where the judgment of the Supreme Court of Oregon was affirmed. The opinion of this court contains an elaborate review of the English authorities expounding the common law, of decisions of the several States, and of the previous decisions of this court. The conclusion reached was that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution. The theory on which Congress has acted in this matter was thus stated by the court:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case

of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The reasoning and conclusions of this case were followed and applied in the subsequent cases of *Mann* v. *Tacoma Land Co.*, 153 U. S. 273; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349; and *Morris* v. *United States*, 174 U. S. 196.

It cannot be said that any title to the submerged land became vested in the plaintiff in error, as against the State or its grantees, by reason of the fact that it is the law in Michigan, in the case of lands abutting on navigable streams, titles to which are derived from the State, that such titles extend to and embrace submerged lands as far as the thread of the stream. It has never been held in Michigan that that doctrine applied to the case of titles derived from the United States.

*Shively* v. *Bowlby*, and *Mann* v. *Tacoma Land Company*, above cited, were both cases in which it was held that titles derived under grants by the United States to lands abutting on navigable waters did not avail as against the State and subsequent grantees.

It is not pretended that the State of Michigan ever made any grant of these submerged lands to the plaintiff in error; but, on the contrary, the State in 1881, transferred all its rights in the St. Mary's Canal and the public works thereon, with all its appurtenances, to the United States. Howell's Stat. sec. 5502.

This would seem to dispose of the claim to the land occupied by the pier in the river in front of Private Land Claim No. 3. And, indeed, the counsel for the plaintiff in error, in their briefs filed of record in this court, conceded that, under the facts of this case, compensation could not be demanded for the appro-

priation of the submerged lands, and restricted their argument to the question of the plaintiff's right of access to the navigable stream bounding his property. But the opinion in this case, while correctly stating that the question before us is as to the right of the plaintiff in error to be indemnified for the total destruction of his access to the river, does not confine the discussion to that question. Not regarding the fact that the plaintiff in error has failed to show any title to the submerged land, and that no such claim is urged on his behalf in this court, it is said in the opinion that—

"The question before us does not depend upon the inquiry whether the title to the submerged lands on which the New South Pier rests is in the State or in the riparian owner. It is the settled rule in Michigan that 'the title of the riparian owner extends to the middle line of the lake or stream of the inland waters.' *Webber* v. *Pere Marquette Boom Co.*, 62 Mich. 636, and authorities there cited. But it is equally well settled in that State that the rights of the riparian owner are subject to the public easement or servitude of navigation. *Lowman* v. *Benson*, 8 Mich. 18; *Ryan* v. *Brown*, 18 Mich. 195.

"So that whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, such title was taken subject to the rights which the public have in the navigation of the waters in question. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is strictly consistent with such use, and infringes no right of the riparian owner. Whatever the interest of a riparian owner in the submerged lands in front of his upland, his title is not as full and complete as his title acquired to fast land which has no direct connection with the navigation of the river or water on which it borders. It is not a title at his absolute disposal, but is to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as is consistent with or demanded by the public right of navigation. The learned counsel for the plaintiff frankly states that compensation cannot be demanded for the appropriation of the submerged lands in question, and that the United States, under the

power to regulate commerce, has an unquestioned right to occupy them for a lawful purpose and in a lawful manner. This must be so—certainly in every case where the use of the submerged lands is necessary for the improvement of navigation."

It is, I think, impossible to read this language, particularly when read in connection with other passages in the opinion, without understanding it to assert that where the riparian owner has a title to lands under navigable waters adjacent to his upland, such land may be taken into the exclusive possession of the Government by the erection of a public work without compensation; and that, even if the state court should hold that the riparian owner had a title to the submerged lands, and was entitled to be compensated for their appropriation for a public purpose connected with navigation, it would be the duty of this court to overrule such a decision.

As, for the reasons already mentioned, no such question is now before us, and, therefore, those portions of the opinion of the majority cannot justly be hereafter regarded as furnishing a rule of decision in such a case, yet I must be permitted to disavow such a proposition. When the case does arise, I incline to think it can be shown, upon principle and authority, that private property in submerged lands cannot be taken and exclusively occupied for a public purpose without just compensation. At all events, I submit that it will be in time to decide so important a question when it necessarily arises, and when the rights of the owner of the property have been asserted and defended in argument.

The real question then in this case is whether an owner of land abutting on a public navigable river, but whose title does not extend beyond the high-water line, is entitled to compensation "because of the permanent and total obstruction of his right of access to navigability resulting from the maintenance of a pier constructed by the United States in the river opposite such land for the purpose of improving navigation."

To answer such a question, the *nature* of the riparian right of access must be first determined. That he has such a right all must admit. But does his right constitute "private property" within the meaning of the Constitution, or is it in the

nature of a license, or prescription, of which he can be deprived for the benefit of the public without being entitled to compensation?

The term "property," standing alone, includes everything that is the subject of ownership. It is a *nomen generalissimum*, extending to every species of valuable right and interest, including things real and personal, easements, franchises, and other incorporeal hereditaments. *Boston R. R. Co.* v. *Salem*, 2 Gray, 35; Shaw, C. J.

"The term 'property,' as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory, as well as those which are executed." *Soulard et al.* v. *United States*, 4 Pet. 511; Marshall, C. J.

Private property is that which is one's own; something that belongs or inheres exclusively in an individual person.

The right which a riparian owner has in a navigable stream when traveling upon it, or using it for the purpose of navigation, must be distinguished from his right to reach navigable water from his land and to reach his land from the water. The former right is one which belongs to him as one of the public, and its protection is found in indictments at the suit of the public—sometimes, in special circumstances, in proceedings in equity for the use of all concerned. Being a public right, compensation cannot be had by private parties for any injury affecting it. The latter right is a private one, incident to the ownership of the abutting property, in the enjoyment of which such owner is entitled to the protection of private remedies afforded by the law against wrongdoers, and for which, if it is taken from him for the benefit of the public, he is entitled to compensation.

This distinction has always been recognized by the English courts.

*Rose* v. *Groves*, 5 M. & G. 613, was a case where an innkeeper was held entitled to recover damages against a defendant for wrongfully preventing the access of guests to his home situated on the river Thames by placing timbers in the river opposite the inn, and wherein, meeting the contention that the plaintiff had no private right of action, but that his remedy was by pro-

ceedings for a public nuisance, Chief Justice Tindal said: "This is not an action for obstructing the river, but for obstructing the access to the plaintiff's home on the river."

In *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662, Lord Cairns said:

"As I understand the judgment in *Rose* v. *Groves*, it went not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with. The plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the defendant had placed in the river; and it would be the height of absurdity to say that a private right was not interfered with, when a man who has been accustomed to enter his house from a highway finds his doorway made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. Chief Justice Tindal, in *Rose* v. *Groves*, put the case distinctly upon the footing of an infringement of a private right. He says: 'A private right is set up on the part of the plaintiff, and to that he complains that an injury has been done;' and then, after stating the facts, adds: 'It appears to me, therefore, that the plaintiff is not complaining of a public injury.'"

Elsewhere, in the same case, Lord Cairns said:

"Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land into a highway is something quite different from the public right of using the highway.

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank; nor is it a right which *per se* he enjoys in a manner different from any other member of the public.

"But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very

different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction. It is, as was decided by the House of Lords in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be 'an injurious affecting of the land,' that is to say, the occasioning to the land of an *injuria*, or an infringement of right. The taking away of river frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation, but it is not the less an injury to the owner of the wharf, which, in the absence of parliamentary authority, would be compensated by damages or altogether prevented." 1 App. Cas. 671.

This distinction between the right of immediate access from the abutter's property to and from a highway, whether a street or a navigable stream, and an injury arising after he reaches it and which is common to him and the rest of the public, is recognized by the courts of the States, and the former right is held to be a valuable one, which cannot be destroyed without compensation.

Thus, in *Haskell* v. *New Bedford*, 108 Mass. 208, it was held that where a sewer constructed by the city of New Bedford discharged filth into the dock of the plaintiff obstructing his use of it, it created a private nuisance to the plaintiff upon his own land for which he could maintain an action for the special damages thereby occasioned to him, without regard to the question whether it was also a nuisance to the public, Mr. Justice Gray, now a justice of this court, saying: "The plaintiff's title extended, by virtue of the statute of 1806, to the channel of the river; and the filling up of the dock impaired his use and enjoyment of it for the purpose for which it had been constructed and actually used; and the injury thus done to him differed, not only in degree but in kind, from the injury to the public by interference with navigation. Neither this special injury to him, nor that occasioned to his premises by making them offen-

sive and unhealthy was merged in the common nuisance"— and citing, among other cases, *Rose* v. *Groves*, one of the English cases above mentioned.

And in *Brayton* v. *Fall River*, 113 Mass. 218, it was held that while the owner of a wharf upon a tide-water creek cannot maintain an action for an illegal obstruction to the creek, that being a common damage to all who use it, yet for an obstruction adjoining the wharf which prevents vessels from lying in it in the accustomed manner, this being a particular damage, he can maintain an action.

In *Delaplaine* v. *Chicago & N. W. Railway*, 42 Wisconsin, 214, the Supreme Court of Wisconsin held that—

"While the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. . . .

"It is evident from the nature of the case that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authority, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore." "These riparian rights are undoubted elements in the value of property thus situated. If destroyed, can any one seriously claim that the plaintiffs have not suffered a special damage in respect to their property, different both in degree and kind from that sustained by the general public? It seems to us not."

In *Brisbane* v. *St. Paul &c. Railroad*, 23 Minnesota, 114, it

was held by the Supreme Court of Minnesota that the State could not give a railroad company the right to occupy a riparian front without making compensation for the injury to riparian rights. The court, after citing cases in this court, said:

"According to the doctrine of these decisions the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, etc. . . . The rights which thus belonged to him as riparian owner of the abutting premises were valuable property rights, of which he could not be divested, without authority, except by due process of law, and, if for public purposes, upon just compensation."

In *The Indiana &c. Railway Co.* v. *Eberle*, 110 Indiana, 445, the Supreme Court of Indiana said:

"Whatever may be the rule of decision elsewhere, nothing is better settled in this State than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of egress from and ingress to the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant and legally adhering to the contiguous grounds and the improvements thereon as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. It cannot, therefore, be perverted from the uses to which it was originally dedicated, nor devoted to uses inconsistent with street purposes, without the abutting owner's consent, until due compensation be first made according to law for any injury or damage which may directly result from such interference."

This right of the owner of a lot abutting on a street to free access to and from the street, which right is analogous to the one we are here considering, has been frequently considered by the state courts, and some of the conclusions reached are thus stated in Dillon's Municipal Corporations, vol. 2, sec. 656, (4th ed.):

JUSTICES SHIRAS, GRAY and PECKHAM, dissenting.

"The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand, and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussion thence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had in common with the rest of the public a right of passage. But it was further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relations of his lot to the street in front of it; and that these rights, whether the bare fee of the streets was in the lot owner or in the city, were rights of property, and as such ought to be and were as sacred from legislative invasion as his right to the lot itself. In cities the abutting owner's property is essentially dependent upon sewer, gas and water connections; for these such owner has to pay or contribute out of his own purse. He has also to pay or contribute towards the cost of sidewalks and pavements. These expenditures, as well as the relation of his lot to the street, give him a special interest in the street in front of him, distinct from that of the public at large. He may make, as of right, all proper uses of the street subject to the paramount right of the public for all street uses proper, and subject also to reasonable and proper municipal and police regulation. Such rights, being property rights, are like other property rights under the protection of the Constitution."

The courts of New York, which formerly took another view, now hold that right of access is a valuable property right and entitled to constitutional protection as such. *Steers* v. *Brooklyn*, 101 N. Y. 51; *Langdon* v. *New York*, 93 N. Y. 129.

It is true that, in the later case of *Sage* v. *The Mayor*, 154 N. Y. 61, it was held that the riparian rights of the owner of lots abutting on the Harlem River, a tidewater stream, are

subordinate to the rights of the city of New York, under its ancient charters supplemented by constitutional legislation and state grants, to fill in and make improvements, such as an exterior street, docks and bulkheads, from the high-water mark in front of his upland to and below low-water mark, essential to navigation and commerce, without compensation. But the opinion shows that the decision was put wholly upon the law of the State of New York, as declared in the authorities cited. Thus the language of Gerard in his work on Titles to Real Estate is adopted:

"It has been established in this State—New York—by judicial decision that the legislature of the State has an inherent right to control and regulate the navigable waters within the State. . . . The individual right of the riparian owner was considered as subject to the right of the State to abridge or destroy it at pleasure by a construction or filling in beyond his outer line, and that, too, without compensation made."

And again, the court says:

"In other States, some of the authorities are in accord, while others are opposed to the rule adopted in this State. The want of harmony is probably owing to the difference in the rule as to the ownership of the tideway, which is held in some jurisdictions to belong to the State, and in others to the riparian proprietors. This also accounts for the want of harmony in the Federal courts, as they follow the courts of the State where the case arose, unless some question arises under an act of Congress."

This case, therefore, must be regarded as an adjudication that, in the State of New York, the nature and extent of riparian rights are to be determined by the law of the State, and that the Federal courts, in passing upon such rights, follow that law.

In *Barkus* v. *Detroit*, 49 Michigan, 110, it was held by the Supreme Court of Michigan, per Cooley, J., that "the better and more substantial doctrine is that the land under the water in front of a riparian proprietor, though beyond the line of private ownership, cannot be taken and appropriated to a public use by a railway company under its right of eminent domain without making compensation to the riparian proprietor."

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Leaving the decisions of the state courts, let us turn to those of this court, and I shall not consider it necessary to advert to the earlier decisions, because they are referred to and considered in the later ones.

*Railroad Company* v. *Schurmeir*, 7 Wall. 272, was a case involving the right of the complainant, Schumeir, to enjoin the St. Paul &c. R. R. Company from taking possession and building its railroad upon certain ground in the city of St. Paul, Minnesota, bordering on the Mississippi River, and lying between lots of the complainant and that river. The railroad company claimed to own the land in fee under a congressional land grant of May 22, 1857. The Supreme Court of Minnesota held that the complainant was entitled to a decree as prayed for; and this court, on appeal, affirmed the judgment of the Supreme Court of Minnesota, holding that, under the case of *Dutton* v. *Strong*, 1 Black, 23, although riparian owners are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian properties bordering on navigable waters affected by the ebb and flow of the tide; and, speaking of the contention, on behalf of the railroad company, that the complainant had dedicated the premises to the public as a street, and had thus parted with his title to the same, this court said:

"Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defense to the suit, because it is nevertheless true, that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party making the dedication. They could not, nor could the State, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant."

In *Yates* v. *Milwaukee*, 10 Wall. 497, on appeal from the Circuit Court of the District of Wisconsin, it was *held* that the owner of land, bounded by a navigable river, has certain riparian rights, whether his title extend to the middle of the stream

or not; that among these are free access to the navigable part of the stream, and the right to make a landing, wharf or pier, for his own use, or for the use of the public; that those rights are valuable, and are property, and can be taken for the public good only when due compensation is made. In the opinion, per Miller, J., it was said:

"Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

Accordingly this court reversed the decree of the Circuit Court, and instructed it "to enter a decree enjoining the city of Milwaukee, defendant below, from interfering with plaintiff's wharf, reserving, however, the right of the city to remove or change it so far as may be necessary in the actual improvement of the navigability of the river, and upon due compensation made."

The opinion in *Yates* v. *Milwaukee*, like that of the majority in the present case, may be liable to the criticism made upon it in *Shively* v. *Bowlby*, 152 U. S. 1, 36, as having gone too far in saying that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, *independently of local law*, a right of property in the soil below high-water mark, and the right to build out wharves so far, at least, as to reach water really navigable. But so corrected, it is a direct authority for the proposition we are now considering, namely, that riparian rights, when recognized as existing by

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the law of the State, are a valuable property, and the subject of compensation when taken for public use.

In the case of *Weber* v. *Harbor Commissioners*, 18 Wall. 64, it was said:

"It is unnecessary for the disposition of this case to question the doctrine that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in *Yates* v. *Milwaukee*. On the contrary, we recognize the correctness of the doctrine as stated and affirmed in that case."

In *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 682, Mr. Justice Matthews, delivering the opinion of this court, quoted with approval the definition of a riparian owner and of his right of access to a navigable river in front of his lot, given by Mr. Justice Miller in *Yates* v. *Milwaukee*.

In *Illinois Central Railroad* v. *Illinois*, 146 U. S. 445, this court said: "The riparian proprietor is entitled, among other rights, as held in *Yates* v. *Milwaukee*, 10 Wall. 497, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the public. In the case cited the court held that this riparian right was property and valuable; and though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired."

In *Eldridge* v. *Trezevant*, 160 U. S. 452, it was again held by this court, following *Hardin* v. *Jordan*, 140 U. S. 371, 384, and *Shively* v. *Bowlby*, 152 U. S. 1, 58, that the nature and legal incidents of land abutting on navigable streams were declared by the law of the State wherein the land was situated. A bill was filed in the Circuit Court of the United States for the Western District of Louisiana by Eldridge, a citizen of Mississippi, against the board of engineers of the State of Louisiana

and one Trezevant, who had been employed by that board to construct a public levee through a plantation belonging to the complainant and situated in Carroll township, State of Louisiana, in pursuance of an act of the general assembly of the State. The Circuit Court dismissed the bill, and an appeal was taken to this court. It appeared, and indeed was conceded by the appellant, that under the law and constitution of the State, and under French law existing before the transfer of the territory to the United States, land for the construction of a public levee on the Mississippi River could be taken, without compensation, by reason of a servitude on such lands for such a purpose. But it was contended on behalf of the appellant that, because he was a citizen of another State, and because he derived his title through a patent of the United States, that whatever may have been the condition of the ancient grants, no such condition attached to his ownership, and that the lands, bordering on a navigable stream, were as much within the protection of the constitutional principle awarding compensation as other property.

After reviewing the provisions of the constitution and laws of the State and the decisions of the state court construing them, and citing the Federal decisions, this court said:

"These decisions not only dispose of the proposition that lands, situated within a State, but whose title is derived from the United States, are entitled to be exempted from local regulations admitted to be applicable to lands held by grant from the State, but also of the other proposition that the provisions of the Fourteenth Amendment extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a State to be valid under the constitution and laws of such State.

"The subject-matter of such rights and regulations falls within the control of the States, and the provisions of the Fourteenth Amendment of the Constitution of the United States are satisfied if, in cases like the present one, the state law, with its benefits and obligations, is impartially administered. *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Missouri* v. *Lewis*, 101 U. S. 22; *Hallinger* v. *Davis*, 146 U. S.

314. The plaintiff in error is, indeed, not a citizen of Louisiana, but he concedes that, as respects his property in that State, he has received the same measure of right as that awarded to its citizens, and we are unable to see, in the light of the Federal Constitution, that he has been deprived of his property without due process of law, or been denied the equal protection of the laws."

The case of *Gibson* v. *United States*, 166 U. S. 269, is cited and relied on in the majority opinion. In that case the owner of a farm fronting on the Ohio River filed a petition in the Court of Claims complaining of the construction by the United States of a dike in the bed of the river, and which the plaintiff alleged to interfere with her landing. The principal finding of the Court of Claims was as follows:

"Claimant's access to the navigable portion of the stream was not entirely cut off; at a 9-foot stage of the water, which frequently occurs during November, December, March, April and May, she could get into her dock in any manner; that from a 3-foot stage she could communicate with the navigable channel through the chute; that at any time she could haul out to the channel by wagon."

The only injury suffered, therefore, by the plaintiff was the inconvenience of having to haul her produce by wagon over and across the dike in such portions of the year when the water was below a 3-foot stage, and when, at that part of the Ohio River, navigation was almost wholly suspended. At other times, and when the stage of the water permitted navigation, the plaintiff had the use of her dock. The Court of Claims dismissed the petition, and its decree was affirmed by this court. There was no pretense that the dike in question touched the plaintiff's land at any point.

The Chief Justice, in the opinion, put the judgment chiefly on the decisions of the state court. He said: "By the established law of Pennsylvania, as observed by Mr. Justice Gray in *Shively* v. *Bowlby*, 'the owner of lands bounded by navigable water has the title in the soil between high and low-water mark, subject to the public right of navigation and the authority of the legislature to make public improvements upon it, and to

regulate his use of it.' " And after citing several Pennsylvania cases, the Chief Justice concluded his opinion by saying: "In short, the damage resulting from the prosecution of the improvement of a navigable highway, for the public good, was not the result of a taking of the appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject." It is obvious, therefore, that in this case the court applied the doctrine of *Eldridge* v. *Trezevant*, which was cited in the opinion, and that the servitude to which the plaintiff's lands were said to be subject was a servitude existing under the state law, and not a servitude created by Federal law.

In the States which originally formed this Union, or in those admitted since, it has never been held that the United States, through any of their departments, could impose servitudes upon the lands owned by the States or by their grantees. The cases are all the other way. *New Orleans* v. *United States*, 10 Pet. 662, 736; *Pollard* v. *Hagan*, 3 How. 212; *Barney* v. *Koekuk*, 94 U. S. 324; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 168; *Shively* v. *Bowlby*, 152 U. S. 1.

In the recent case of *Morris* v. *United States*, 174 U. S. 196, the question of the nature and extent of riparian rights on the Potomac River in front of the city of Washington was involved. The majority of the court held that, under the evidence, the title of the owners of lots in the city plans was bounded by Water Street, and that, therefore, such owners possessed no riparian rights entitled to compensation by the United States in carrying out a scheme of improvement of the waters of the river.

The opinion of the court proceeded on the assumption, as matter of law, that owners of land abutting on the river would be possessed of riparian rights, and entitled, therefore, to compensation, if such rights were impaired or destroyed by the improvements proposed by the Government, but held, as a conclusion from the evidence, that, as matter of fact, the owners of lots under the city plans did not have titles extending to the river, but that their lots were bounded by Water Street, the title to which was in the city, and therefore no compensation for

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exclusion from the river could be enforced. The case, therefore, may be properly regarded as an authority for the proposition that the owners of lots abutting on a navigable river are entitled to compensation if their riparian right of access is taken from them by improvements made by the Government to promote the navigability of the Potomac River. The long investigation by court and counsel was, indeed, labor in vain if, at last, riparian rights possessed by the lot owners, should be decided not to be private property within the protection of the Constitution.

If, then, by the law of the State in which the land is situated, the right of access to navigable streams is one of the incidents of abutting land, if such rights are held to be property and valuable as such, can the United States, under the incidental power arising out of their jurisdiction over interstate commerce, destroy such right of access without making compensation? I think that this question may well be answered in the words of Gould in his work on Waters (2d ed.), sec. 151: "When it is conceded that riparian rights are property, the question as to the right to take them away without compensation would appear to be at an end."

The argument against the right of compensation in such a case seems to be based upon an assumption that because the Government has the power to make improvements in navigable waters, it follows that it can do so without making compensation to the owners of private property destroyed by the improvements. But this assumption is, as I think, entirely without foundation, and, if permitted by the courts to be made practically applicable, would amount to a disregard of the express mandate of the Constitution that private property shall not be taken for public uses without just compensation.

"The power to establish post offices and to create courts within the States was conferred upon the Federal Government, and included in it was authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain land for public uses. Its exist-

ence, therefore, in the grantee of that power ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?" *Kohl* v. *United States*, 91 U. S. 367, 374.

Accordingly in that case, a proceeding instituted by the United States to appropriate a parcel of land in the city of Cincinnati as a site for a post office and other public uses, was upheld, but those proceedings contemplated compensation, and Congress, in the act authorizing the proceedings, appropriated money for the purpose.

Now if, in order to render valid an appropriation of private property for the use of the Government in the erection of post offices and court houses compensation must be made, what is the difference in principle if the Government is appropriating private property for the purpose of improving the navigation of a navigable stream? This question has been already put and answered by this court in *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, where it was said:

"It cannot be doubted that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela River as in its judgment the public interests demand. Its dominion is supreme.

"But like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limi-

tations imposed by this Fifth Amendment, and can take only on payment of just compensation."

"The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. . . . And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway."

As already remarked, the power of the Government to control and regulate navigable streams and to carry into effect schemes for their improvement, is not directly given by the Constitution, but is only recognized by the courts as an incident to the power expressly given to regulate commerce between the States and with foreign nations.

Now, if it be held that Congress has power to take or destroy private property, lying under or adjacent to navigable streams, without compensating their owners, because it is done in the exercise of the power to regulate commerce, then it must follow that the same unlimited power can be exercised with respect to private property not in nor bounded by water. The power of Congress to regulate commerce is not restricted to commerce carried on in lakes and rivers, but equally extends to commerce carried on by land. If Congress, yielding to a loud and increasing popular demand that it should take possession and control of the railroads of the country, or should undertake the construction of new railroads as arteries of commerce, this novel notion, that the existence of the right to regulate commerce creates of itself and independently of the law of the State a Federal servitude on all property to be affected by the exercise of that right, would apply to all kinds of private property wherever situated.

But it may be asked why, if the question as to riparian rights is one of state law, the decision of the Supreme Court of Michigan in the present case, denying the claim of the abutting owner for compensation for the loss of his access to the river, is not conclusive?

The answer to this question will be found in the opinion of that court. Instead of ascertaining and applying, or professing to apply, the law of the State in respect to riparian rights, the Supreme Court of Michigan treated the question as one under Federal law, and, following what it understood to be the doctrine laid down by several Federal Circuit Court decisions as obligatory, held that it was competent for the Government of the United States, in the exercise of its power to regulate commerce between the States, to deprive abutting owners of their right of access to navigable streams, without compensating them for their loss. The cases so relied on were *Stockton* v. *Baltimore & N. Y. R. R. Co.*, 32 Fed. Rep. 9; *Hawkins Point Lighthouse Case*, 39 Fed. Rep. 77; and *Scranton* v. *Wheeler*, 57 Fed. Rep. 803.

The first of these cases arose on a bill filed in the Circuit Court of the United States for the District of New Jersey by the attorney general of New Jersey, seeking to restrain the Baltimore and New York Railroad Company, acting under congressional authority, from occupying without compensation land belonging to the State of New Jersey, lying under tidewaters, by the pier of a bridge. Mr. Justice Bradley, refusing the injunction, said:

"The character of the state's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation within the meaning of the Constitution. The Fifth Amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway, is at all a diversion of the property from its original use."

Mr. Justice Bradley was himself a New Jersey lawyer, and

availed himself, in that case, of the law of that State, which has always been to the effect that the land underlying the tide waters belonged to the State, and was held for a public use. His view was that as, under the law of New Jersey, the land beneath tide waters was held by the State for public uses, such land was not *private property* within the meaning of the Constitution, or that, at all events, its occupation, to a limited extent, by the pier of a bridge intended to promote commerce, was not a diversion of the property from its original use.

It needs no argument to show that such a decision is not applicable to the present case. Indeed, it is plain that if the case had been one involving the right of an abutter to access to the tide water, the same being, under the laws of the State, private property, the decision of that learned justice would have been very different. He was the organ of this court in pronouncing the opinion in *Barney* v. *Keokuk*, 94 U. S. 324, where the question was whether the title of riparian proprietors on the banks of the Mississippi extended to ordinary high-water mark or to the shore between high and low-water mark, and said:

"In our view of the subject the correct principles were laid down in *Martin* v. *Waddell*, 16 Pet. 367; *Pollard's Lessee* v. *Hagan*, 3 How. 212; and *Goodtitle* v. *Kibbe*, 9 How. 471. These cases related to tidewater, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genessee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands are situated. In Iowa, as

before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

Whether the distinction suggested by Mr. Justice Bradley, between property held by the State for public purposes and private property, be or be not sound, the doctrine has no application to the present case, and, as the Circuit Court case was not brought for review to this court, the suggestion remains unadjudged.

The so-called *Hawkins Point Lighthouse* case was an ejectment brought in the Circuit Court of the United States for the District of Maryland to recover possession of the land covered by a lighthouse erected on land lying under the waters of a tidewater navigable river, by the Lighthouse Board in pursuance of acts of Congress. The plaintiff claimed to be the owner of the submerged land, and the action did not involve the question of access to the river. Judge Morris held that the plaintiff was not entitled to recover; and, although stating that "the Court of Appeals of Maryland, whenever called upon to declare the nature of the title of the State and its grantees in the land at the bottom of navigable streams, has uniformly held that the soil below high-water mark was as much part of the *jus publicum* as the stream itself," extended Mr. Justice Bradley's suggestion in the New Jersey case, and declared that the plaintiff, as grantee of the State, had no private property in the submerged land entitled to constitutional protection. As the structure was a lighthouse, the case might have been governed by peculiar considerations, but the learned judge of the Circuit Court seems to have gone further, and to have held that, as a matter of Federal law, "In the hands of the State or of the State's grantees the bed of a navigable river remains subject to an easement of navigation, which the General Government can lawfully enforce, improve and protect, and that it is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim to compensation." If, by this is meant that riparian owners may be deprived, without compensation, of access to navigable streams abutting on their land by reason of a supposed servitude or easement imposed by the power granted

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to Congress by the Constitution to regulate commerce, then, for the reasons heretofore given and under the authorities cited, such a view cannot be sustained. The case under the name of *Hill* v. *United States*, was brought to this court, but the writ of error was dismissed on an independent ground, which rendered it unnecessary for this court to pass upon the questions ruled in the court below. And the question of the right of the plaintiff to be compensated for deprivation of his riparian rights was not considered, and, indeed, could not be, as it was held that neither the Circuit Court nor this court had jurisdiction. *Hill* v. *United States*, 149 U. S. 593.

Yet this was the case which the Supreme Court of Michigan said in their opinion "appeared to be exactly in point and to rule the present case."

The only other case relied on by the Supreme Court of Michigan was *Scranton* v. *Wheeler*, 57 Fed. Rep. 803; 16 U. S. App. 152, being this identical case, which had been removed from the state to the Federal court. It was subsequently brought to this court, but was dismissed because the record did not show that a Federal question had been raised or presented in the plaintiff's statement of his case in the state court. Accordingly the cause was remanded to the state court, and subsequently reached this court by a writ of error to the Supreme Court of Michigan. While the case was in the Circuit Court of Appeals an opinion was filed by Circuit Judge Lurton, in which, without adverting to the law of the State of Michigan, or citing any decisions of the Supreme Court of that State, in respect to riparian rights, he held that the right of the plaintiff of access to the navigable water was subordinate to the power of the Federal Government to control the stream for the purposes of commerce, and that the plaintiff was therefore not entitled to compensation for the extinction of his right.

The proposition, frequently made, that the power of Congress to regulate interstate commerce, and therefore navigation, is *paramount*, can properly be understood to mean only that, as between the authority of the States in such matters and that of the General Government, the latter is superior. It has no just reference to questions concerning private property lying

within the States. Much less can it be rightly used to signify that such power can be exercised by Congress without regard to the right of just compensation when private property is taken for public use.

The suggestion that "the riparian owner acquired the right of access to navigability subject to the possibility that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property, for the purpose of improving navigation," would seem to be irrelevant, because the liability that his private property may at all times be taken for public uses is known to every one. But hitherto it has not been supposed that the knowledge of such liability deprives the owner of the right of compensation when his property is actually so taken.

Nor can the statement that, in the opinion of this court, "it was not intended by the framers of the Constitution that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement," be admitted. The *intention* of the framers is seen in the provisions of the Constitution, and in them the right to take private property for public uses is indissolubly connected with the duty to make just compensation. It cannot be supposed that a recognition of such a duty would cripple the Government in the just exercise of the power it incidentally possesses to regulate interstate navigation.

As, then, the Supreme Court of Michigan considered the question solely as a Federal one, in which it supposed it was controlled by the Federal cases cited, this court has jurisdiction to review its judgment; and as by that judgment the plaintiff in error has been refused the protection of the Constitution of the United States claimed by him, I think the judgment should be reversed and the cause remanded to be proceeded in according to law.

# FRITZ CONTZEN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 84. Submitted November 7, 1900.—Decided December 3, 1900.

Texas was an independent State when admitted into the Union, and the effect of the admission was to make its citizens, citizens of the United States. But those who, at that time, could only become citizens by naturalization, were thereupon relegated to the laws of the United States in that behalf.

Minor aliens in Texas, separated from their parents, were not made citizens of the United States by the admission, and in order to become such were obliged to comply with the requirements of the laws of the United States.

As appellant was a German subject and not a citizen of Texas when Texas became one of the United States, and had not been naturalized when the injury complained of was inflicted, the Court of Claims was right in dismissing his petition for want of jurisdiction.

APPELLANT filed his petition in the Court of Claims, alleging that on October 20, 1861, a band of Apache Indians raided the settlement at San Xavier, near Tucson, Arizona Territory, and stole from his ranch certain cows, horses and mules of the value of $10,330; that these Indians were in amity and under treaty relations with the United States at that date; and "that petitioner is a naturalized citizen of the United States, and has at all times borne true allegiance to the Government of the United States," etc.

The United States pleaded that the claimant was not a citizen of the United States at the date of the alleged depredation, and that the court was therefore without jurisdiction to hear and determine the cause.

The court adopted as its findings of fact the following agreed statement of facts:

"The claimant, Fritz Contzen, was born in Germany on the 27th day of February, 1831, and emigrated to Texas in July, 1845. He remained in Texas until the admission of the State into the Union, December 29, 1845.

"Since the admission of Texas, the claimant has resided con-

tinuously in the United States, mostly in Arizona and some time in California. He visited Germany with his wife and child from 1873 to 1880, his home and furniture remaining all the time in this country. He was married in the United States. His residence was in Texas until he came to Arizona, in 1855, with Major Emory on the boundary commission.

"In the year 1854 he went into court at San Antonio, Texas, and he was told that he being a resident of Texas when it became part of the United States, that made him a citizen of the United States, and he voted there. He never took any further steps about naturalization. There is no record of naturalization from 1847 on of any one of the claimant's name, when such record should appear in the courts of San Antonio.

"That in October, 1861, the defendant Indians were in amity with the United States."

Judgment was thereupon given sustaining defendants' plea to the jurisdiction, and dismissing the petition. 33 C. Cl. 475.

*Mr. A. B. Browne*, *Mr. J. W. Douglas*, *Mr. Alexander Britton* and *Mr. Alexander Porter Morse* for appellant.

*Mr. Assistant Attorney General Thompson* and *Mr. Lincoln B. Smith* for appellees.

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

The petition alleged that appellant was a naturalized citizen of the United States at the time it was filed, but it contained no averment that he was such citizen at the date of the alleged depredation. If he was not, the Court of Claims did not have jurisdiction to adjudicate upon his claim, and its judgment must be affirmed. *Johnson* v. *United States*, 160 U. S. 546.

It appeared that Contzen was born in Germany, February 27, 1831, and came to Texas in July, 1845, and that he was not naturalized under the statutes of the United States in that behalf prior to October 20, 1861. His title to citizenship at that time is asserted on the ground that he was embraced by a collective naturalization effected by the admission of Texas into the Union.

It is not disputed that citizenship may spring from collective naturalization by treaty or statute, nor that by the annexation of Texas and its admission into the Union all the citizens of the former Republic became, without any express declaration, citizens of the United States.

And the first question is whether Contzen was a citizen of the republic when it became a State.

The declaration of independence of Texas was adopted March 1, and proclaimed March 2, 1836, and the constitution of that Republic was ordained March 17 of that year.

Section six of the "General Provisions" of that instrument read: "All free white persons who shall emigrate to this Republic, and who shall, after a residence of six months, make oath before some competent authority that he intends to reside permanently in the same, and shall swear to support this constitution, and that he will bear true allegiance to the Republic of Texas, shall be entitled to all the privileges of citizenship."

By section ten it was provided that: "All persons (Africans, or descendants of Africans, and Indians excepted) who were residing in Texas on the day of the declaration of independence, shall be considered citizens of the Republic and entitled to all the privileges of such." 2 Charters and Constitutions, 1760.

The fundamental law of the Republic thus identified as citizens only such persons as were residing in Texas on the day of the declaration of independence or should be naturalized according to its provisions.

Section 10 also provided that: "No alien shall hold land in Texas except by titles emanating directly from the government of this Republic;" and by an act of 1837, appointments of aliens to military office were forbidden. Laws Rep. Texas, vol. 2, p. 61.

Aliens as well as Africans and Indians were recognized constituents of the population.

March 1, 1845, a joint resolution for the annexation of Texas was approved, which provided that the territory of that Republic might be erected into a new State, "with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted

as one of the States of this Union." The government of Texas thereupon consented to annexation, and a convention was called to sit at Austin on July 4, 1845, for the adoption of a constitution for the proposed State. That convention assented to and accepted the resolution of Congress, and framed a constitution, which was submitted to and ratified by the people, October 13, 1845.

The joint resolution for the admission of Texas into the Union was approved December 29, 1845. This recited the previous proceedings, and that the constitution, "with the proper evidence of its adoption by the people of the Republic of Texas," had been transmitted to the President of the United States and laid before Congress. An act of Congress was passed on the same day, December 29, 1845, by which the laws of the United States were "declared to extend to and over, and to have full force and effect within, the State of Texas, admitted at the present session of Congress into the Confederacy and Union of the United States." 2 Charters and Constitutions, 1764, 1765, 1768, 1783; 5 Stat. 797; 9 Stat. 1, 108.

Contzen was a minor in 1845, and his nationality of origin attached. He did not reside in Texas on the day of the declaration of independence; he had not resided there six months at the date of the admission of Texas into the Union; he had not taken the oath of allegiance to the Republic; he was simply, as Davis, J., delivering the opinion of the Court of Claims, said, "a German subject lately arrived in Texas." Clearly he was not a citizen of Texas when the State was admitted.

But it is contended that by his stay in Texas of less than six months Contzen became one of the people of Texas; that the people were admitted into the Union; and that all who were competent thereupon became citizens of the United States. In other words, that the effect of the proceedings through which annexation and admission were accomplished was not simply to collectively make citizens of the United States of all the then citizens of Texas, but to collectively naturalize all who might have been naturalized in Texas, but had not been, and had in no way signified their election to become citizens of the United States. And that this included alien minors independently of their parents.

We cannot concur in this view, and do not think such was the intention of Congress or of the people applying for admission.

Texas occupied towards the United States the position of an independent sovereignty. Its citizens were determined by its laws, and they prescribed the manner in which aliens might become citizens.

The United States admitted Texas as one of the States of the Union with its population as it stood. Those who were citizens of the State became citizens of the United States, while aliens were relegated for naturalization to the laws of the United States on that subject.

It is true that section two of article three of the state constitution, transmitted to Congress in the process of admission, provided that: "All free male persons over the age of twenty-one years, (Indians not taxed, Africans and descendants of Africans excepted,) who shall have resided six months in Texas, immediately preceding the acceptance of this constitution by the Congress of the United States, shall be deemed qualified electors."

But we need not consider the effect of that clause, as Contzen did not come within it.

The subject of collective naturalization is discussed at length in *Boyd* v. *Thayer*, 143 U. S. 135, and many cases cited and illustrations given. The case before us, however, is not one of a treaty of cession, or relating to a territory of the United States and involving the construction of acts of Congress for its government, or of enabling acts for its admission.

Contzen, as we have said, was a minor at the time Texas was admitted. If he elected, when he attained his majority, to become a citizen of the United States, the way was open to him.

By the act of May 26, 1824, carried forward into section 2167 of the Revised Statutes, special provision was made for the naturalization of alien minor residents on attaining majority, by dispensing with the previous declaration of intention, and allowing three years of minority on the five years' residence required; but he was obliged, at the time of his admission, to take the oath to support the Constitution, and of renunciation of all allegiance and fidelity to any foreign sovereign, in court,

and also to declare on oath and prove to the satisfaction of the court that for two years next preceding it had been his *bona fide* intention to become a citizen of the United States; and in all other respects to comply with the laws in regard to naturalization.

The usual proof of naturalization is a copy of the record of the court admitting the applicant, though, in some instances, there may be facts from which, in the absence of the record, a jury may be allowed to infer that a person, having the requisite qualifications to become a citizen, had been duly naturalized. But the finding of facts in this case excludes any presumption that Contzen had complied with the statute prior to October, 1861.

*Judgment affirmed.*

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## LOWRY *v.* SILVER CITY GOLD AND SILVER MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 104. Argued and submitted November 14, 1900.—Decided December 3, 1900.

On the facts stated in the statement of the case, *held* that the court below was right in deciding that the plaintiffs in error were estopped by virtue of the lease from the defendant in error under which two of the plaintiffs in error acquired possession of the premises in dispute from maintaining this action.

On January 1, 1889, the Wheeler Lode mining claim, a claim 1500 feet in length by 600 feet in width, was duly located on mineral lands situated in the Tintic mining district, Juab County, Utah. The title to the claim passed to the defendant in error, and its right thereto was kept alive by regular performance of the prescribed annual work. On February 8, 1897, it leased this claim to two of the plaintiffs in error, Lowry and De Witt, for eighteen months, and those lessees went into possession and continued work on the mine. On June 4, 1897, the owners of a mining claim called the Evening Star, applied for

a patent, and included in their application a portion of the Wheeler claim. They published due notice of their application, and the sixty days given by statute for commencing an adverse suit passed without any such suit by the defendant in error, the owner of the Wheeler mining claim. Thereupon the two lessees, together with the other plaintiff in error, Smith, attempted to locate a new claim, called the Little Clarissa, upon the ground covered by the Wheeler claim. This attempted location was made two or three days after the expiration of the sixty days' publication by the owners of the Evening Star, and while the lessees were in possession under the lease from the owner of the Wheeler claim. It appears by the surveys that the premises claimed by the Evening Star included the original discovery shaft of the Wheeler location, the same being within two and one fourth feet of the boundary line. It also appears that the original discovery shaft of the Wheeler claim was sunk only about nine and one half feet in depth, and was then practically abandoned; that the vein was traceable and was traced on the surface for something like 500 feet within the boundaries of the Wheeler location, and that thereafter and many years before the lease referred to a new shaft had been sunk on that vein some two or three hundred feet in depth at a point far outside of the Evening Star location and entirely within the limits of the Wheeler location, and that this was the condition at the time the lease was executed. The contract of the lessees was that they should sink this shaft a depth of at least six feet each month during the life of the lease and should not allow or permit any miner's or other liens to be filed against the claim, or suffer any act or thing whatever to be done whereby the title of the defendant in error to the claim should be incumbered. After the location by the plaintiffs in error of the Little Clarissa claim and a repudiation by them of the obligations of the lease, the defendant in error filed its bill in the District Court of Utah, in and for the county of Juab, to quiet its title, restrain the defendants from occupying the premises and for restitution thereof. This suit was commenced after the publication by the locators, the lessees, and Smith, of an application for a patent for the Little Clarissa mine, and within the 60

days required for commencing an adverse suit. The District Court entered a decree quieting the title of the plaintiff, ordering restitution, and enjoining the defendants from entering upon the premises, or in any way interfering with plaintiff's possession and enjoyment of the premises. This decree was affirmed by the Supreme Court of the State (19 Utah, 334), and thereupon this writ of error was brought.

*Mr. O. W. Powers* for plaintiffs in error. *Mr. Arthur Brown* and *Mr. H. P. Henderson* were on his brief.

*Mr. Charles S. Varian* and *Mr. F. S. Richards* for defendant in error, submitted on their brief.

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

This was plainly an attempt on the part of the plaintiffs in error—two of whom were lessees of the defendant in error—under the forms of law to appropriate to themselves property which for years had been in the unchallenged possession of the defendant in error, and upon which it had expended many hundreds of dollars. That such attempt was unsuccessful in the courts is no more than was to be expected.

The Supreme Court of the State placed its decisions upon two grounds: First, that although the Evening Star claim included the original discovery shaft of the Wheeler claim, it did not thereby destroy that claim in view of the fact that long prior to the location of the Evening Star the owners of the Wheeler had located a new shaft and developed the mine in that shaft. *Gwillim* v. *Donnellan*, 115 U. S. 45, was held not applicable. The other ground was estoppel by virtue of the lease under which two of the plaintiffs in error acquired possession. While the former ground is the one principally discussed in the opinion, the latter was adverted to in a few words at its close. The latter is sufficient to dispose of the case in this court. *Eustis* v. *Bolles*, 150 U. S. 361. See also *De Lamar's Nevada Gold Mining Company* v. *Nesbitt*, 177 U. S. 523, and cases cited in the opinion. The writ of error is

*Dismissed.*

# KIZER *v.* TEXARKANA & FORT SMITH RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 100. Argued and submitted November 13, 1900.—Decided December 3, 1900.

That a Federal statute was construed unfavorably to one of the parties to a suit is no ground for jurisdiction by this court, unless such construction was not only unfavorable, but was against the right, etc., specially set up and claimed under the statute; in which case the party so setting up and claiming the right under the statute can obtain a review here.

THE case is stated in the opinion of the court.

*Mr. Oscar D. Scott* for plaintiff in error submitted on his brief.

*Mr. James F. Read* for defendant in error. *Mr. Gardiner Lathrop*, *Mr. Thomas R. Morrow*, *Mr. John M. Fox*, *Mr. Samuel W. Moore*, and *Mr. James B. McDonough* were on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error commenced an action against the defendant in error in a circuit court of the State of Arkansas to recover damages for the breach of an alleged contract between the parties, by which the railroad company agreed to furnish cars and to transport over its road and into points in the State of Texas certain lumber for the plaintiff in error from his sawmill in Rankin, in Little River County, in the State of Arkansas, at a certain rate of compensation, and it was alleged in the plaintiff's complaint that the defendant had violated that contract by charging a greater sum for the transportation of such lumber than had been agreed upon, and the plaintiff sought to recover from the defendant in error the excess paid by the plaintiff over the contract price.

Several defences were put in by the defendant, and among others it set up that the contract was illegal, because the trans-

portation of the lumber from Rankin, in the State of Arkansas, to places in the State of Texas over defendant's road was interstate commerce, and the contract therefore violated sections 1, 2 and 3 of the interstate commerce act, act of February 4, 1887, c. 104, 24 Stat. 379, in that it made a discrimination in favor of the plaintiff.

The trial court held that the contract did violate that act, and was, therefore, void, and could not be enforced or damages recovered for its breach.

Plaintiff in error then appealed to the Supreme Court of Arkansas, where the judgment was affirmed, the court saying, in its opinion, that "the facts in this case, as found by the court, as set out in the statement of facts, show that the contract upon which the appellant relies is within the prohibitions of sections 1, 2 and 3 of the interstate commerce law, enacted by Congress. . . . We think the contract relied on in this case is prohibited by the act of Congress to regulate commerce, and is void."

Upon the affirmance of the judgment by the Supreme Court of Arkansas, the plaintiff brought the case here by writ of error.

He now says that, although he set up no claim of any title, right, privilege or immunity under the act of Congress, yet the claim which defendant specially set up under it was acknowledged and enforced by the state court, and the statute was thus construed unfavorably as to him, and that he has, therefore, a right to have the judgment of the state court, which was based on such construction, reviewed here under section 709 of the Revised Statutes of the United States. But that section provides, so far as here applicable, that when any title, right, privilege or immunity is claimed under a statute of the United States, and the decision of the state court is against the title, right, etc., specially set up or claimed under such statute, then and in such case the judgment of the state court may be reviewed by this court.

Here, the claim under the Federal statute has been allowed by the state court, and the contract sued on by the plaintiff in error has been denied validity because of its violation of that statute. It is not every case where a Federal statute has been

Syllabus.

construed by a state court that gives a right of review to this court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the state tribunal in order to give us jurisdiction to review its judgment. That a Federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this court, unless such construction was not only unfavorable, but was against the right, etc., specially set up and claimed under the statute. In that case the party setting up and claiming the right under the statute, which has been denied, can obtain a review here. Thus it might happen, as it has happened in this case, that, while the decision upon the construction of the statute was unfavorable to the maintenance of the cause of action set forth by the plaintiff in error, it was not against, but in favor of, the claim made under the Federal statute. The question whether that statute, properly construed, prohibited the making of such an agreement as that set up in the complaint in the state court, having been decided in favor of the claim set up by defendant under the statute, this court has no jurisdiction to review the judgment. *De Lamar's Gold Mining Company* v. *Nesbitt*, 177 U. S. 523, 528, and cases there cited; *Missouri* v. *Andriano*, 138 U. S. 496.

The writ of error is therefore

*Dismissed.*

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## LAS ANIMAS LAND GRANT COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 65. Argued November 13, 1900.—Decided December 3, 1900.

The fourth subdivision of section 13 of the act establishing the Court of Private Land Claims, which provides that "no claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority" applies to this case, and the claimant has no right to ask that court to pass upon its claim.

Opinion of the Court.

THE case is stated in the opinion of the court.

*Mr. William B. Vates* for appellant.

*Mr. Matthew G. Reynolds* for appellees. *Mr. Solicitor General* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The company has appealed from the judgment of the Court of Private Land Claims dismissing for lack of jurisdiction of the subject-matter its claim, and also the several claims in that court which had been consolidated with it in the case now before us.

On March 2, 1893, the appellant filed its petition in the court below in regard to the land grant in question. It therein claimed to be the owner, through mesne conveyances, of a land grant made by the governor of New Mexico, in 1843, to two residents of the then department of New Mexico, (which was a department of the Republic of Mexico,) named respectively Cornelio Vigil and Ceran St. Vrain. It was alleged that the grant had been, subsequently to the cession of the territory to the United States by the government of Mexico, surveyed by the United States surveyor general for the State of Colorado, and that it contained 3,640,465.21 acres. It was also alleged that pursuant to the eighth section of the act of Congress, approved July 22, 1854, c. 103, 10 Stat. 308, the then owners of the grant presented the same to the surveyor general of the Territory of New Mexico, who, pursuant to the provisions of the said act, took testimony as to the nature, character and extent and *bona fides* of the grant, and on September 17, 1857, rendered his decision in favor of the validity of the grant in its entirety, and transmitted his report to the Congress of the United States for its action in the premises. Subsequently Congress passed the act approved June 21, 1860, c. 167, 12 Stat. 71, the first section of which, in relation to claim No. 17, (the claim in question,) enacted that it should not be confirmed for more than eleven square leagues to each of the claimants, Cornelio Vigil and Ce-

ran St. Vrain. (This would amount to something in the neighborhood of one hundred thousand acres of land.)

The second section of the act provided for a survey of the claims of Vigil and St. Vrain, and directed that it should be made with reference to actual settlers holding possession under titles or promises to settle, which had heretofore been given by said Vigil and St. Vrain in the tracts claimed by them, and these settlers' tracts were to be deducted from the area embraced in the twenty-two square leagues, and the remainder was to be located in two equal tracts, each in square form, in any part of the tract claimed by said Vigil and St. Vrain, selected by them, and it was made the duty of the surveyor general of New Mexico to immediately proceed to make the surveys and locations in accordance with the terms of the section.

It also appeared by the petition that Congress passed a further act in relation to this claim, approved February 25, 1869, c. 47, 15 Stat. 275. That act gave directions for the survey of the claims of Vigil and St. Vrain, and then directed that before the act of June 21, 1860, *supra*, confirming the grant *pro tanto*, should become legally effective, the claimants or their legal representatives were to pay the cost of so much of the surveys as enured to their benefit respectively. The act further provided that upon the adjustment of the claims, according to its provisions, it was the duty of the surveyor general to furnish approved plats to said claimants or their legal representatives, and after the lines were run the surveyor general was to notify Vigil and St. Vrain, or their agents, of the fact of such survey being made, and those claimants were directed, within three months after notice of such survey, to select and locate their claims in accordance with the act, and also with the act of 1860, which was amended by the act of 1869, and in case they failed to make such selection and location they were to be deemed and held to have abandoned their claim.

Various other allegations were made in the petition, not now material.

The prayer was that the validity of the title to the grant to Vigil and St. Vrain and the right of the petitioner, as their grantee, by mesne conveyances, should be inquired into by the

court, and that the grant, with the exception of tracts heretofore confirmed and awarded under the provisions of the acts of Congress of June 21, 1860, and February 25, 1869, might be confirmed to the petitioner, or to the heirs and legal representatives of the said Vigil and St. Vrain, and if any of the lands had been sold that their value might be inquired into, and the petitioner recover the same in place of such lands as may have been disposed of by the Government.

An answer was filed on the part of the Government, which put in issue all the allegations of the petition as to the validity of the grant, and the answer alleged that the grant was wholly unauthorized and void.

Among other things the answer of the Government also referred to and set out the report of the Senate committee to the Senate in 1860, which explained the reason for the act of 1860. Reference was made in the report to the original petition for the grant and to the language contained therein, which asked only for a grant of a tract of land within the boundaries of the land described in the petition, and not for a grant of the whole land so described, and it was stated in the report that such language formed no justification for the grant of the whole land described in the petition; that such grant was the act alone of the justice of the peace, who was without jurisdiction, and the committee found no proof of the approval of his action by an officer superior to him, and as his power could not go beyond the execution of the governor's orders, the committee could not and did not concur in the recommendation of the surveyor general that the grant should be confirmed for the full extent claimed. The committee thought, however, that the parties were entitled to have their title confirmed to some extent, and to what extent involved the inquiry as to the true meaning of the words "a tract of land" as contained in the original petition, and the committee reported that as "under the Mexican colonization law of 1824 and the regulations of 1828, the extreme quantity allowed to be granted by the governor to any colonist was eleven square leagues; that in the absence of any other guide a restriction of the confirmation to the extent of eleven square leagues for each claimant would be the utmost they could fairly expect, and

would be not only a fair but a liberal compliance with the obligation imposed on the good faith of the United States under the terms of the treaty of Guadalupe Hidalgo." After this report to the Senate, the act of 1860, giving to each of the claimants a confirmation for eleven square leagues, was passed. The act of 1869 was also set up in the answer.

The case was thus at issue, when, after notice to the claimants, it was called for trial in the court below, the record shows that "no appearance was made by the plaintiffs and the court took the matter under advisement." On October 5, 1898, the record shows that "it appearing from the allegations of the several petitions herein that this court does not have jurisdiction of the subject-matter of the several actions, for the reason that the right to the land claimed in said suits has hitherto been lawfully acted upon and decided by Congress, it is ordered and decreed by the court that said causes be, and the same are hereby, dismissed." The land company has appealed from this judgment of dismissal to this court. The court decided the case upon a perusal of the petition, which showed the source of the grant and the action of Congress in relation to it, and held that it appeared therefrom the court had no jurisdiction.

The Court of Private Land Claims was specially organized by the act of Congress approved March 3, 1891, c. 539, 26 Stat. 854, for the purpose of hearing and determining claims of a particular character specially pointed out and described in the body of that act. It has no other jurisdiction than that granted by Congress, being confined entirely to claims of the character mentioned in the act.

The sixth section of the act describes generally the character of the claims submitted to the court for adjudication.

Section 13 of the act provides "that all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act, namely: . . . Fourth. No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority."

The history of the action of Congress in relation to this claim, as contained in the petition and in the answer, shows that, so

far as the rights of the claimant under the land grants are concerned, those rights had been lawfully acted upon and decided by Congress prior to the passage of the act of 1891. The action of Congress in the act of 1860, and as thereafter amended in 1869, was a final adjudication which granted eleven square leagues to each of the two claimants and rejected and refused to confirm the grant for any larger amount.

The claim in this case is thus brought directly within the fourth subdivision of section 13, above set forth, and it is perfectly clear that Congress did not give the Court of Private Land Claims jurisdiction to determine the rights of the parties in cases of this description.

Whatever the rights of the claimant may be, if any, to have its claim decided by a judicial tribunal, it certainly has no right to ask that the Court of Private Land Claims shall pass upon its claim when, by the very act which creates that court, it is prohibited from exercising jurisdiction in a case like the one before us.

The judgment of the court below was, therefore, right, and must be

*Affirmed.*

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## BAGGS *v.* MARTIN.

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

No. 205. Submitted October 29, 1900.—Decided December 3, 1900.

The receiver in this case, having voluntarily brought this case into the Circuit Court, by whose appointment he held his office, cannot, after that court has passed upon the matter in controversy, be heard to object to the power of that court to render judgment therein.

THIS was a cause brought to this court on a certificate from the judges of the Circuit Court of Appeals of the Eighth Circuit. A statement of the facts and the questions put will be found in the opinion of the court.

Opinion of the Court.

*Mr. A. M. Stevenson* for plaintiff in error.

*Mr. E. H. Wilson*, *Mr. E. Keeler* and *Mr. H. N. Sales* for defendants in error.

Mr. Justice Shiras delivered the opinion of the court.

Edward C. Baggs was, on July 1, 1898, duly appointed receiver of the Denver City Railroad Company, a corporation of the State of Colorado, by the Circuit Court of the United States for the District of Colorado, in an action brought in said court by the Central Trust Company, a corporation of the State of New York. While Baggs, as such receiver, was managing and operating said road one Mary E. Martin, while a passenger on the railroad, received injuries, on account of which she died on August 7, 1898. Albert G. Martin, Harry D. Martin and Herman H. Martin brought an action in the district court for the county of Arapahoe, State of Colorado, against Edward C. Baggs, as receiver of the Denver City Railroad Company, alleging that their mother, Mary E. Martin, had received fatal injuries by the fault and negligence of certain persons in the employ of said receiver engaged in operating said road, and claiming damages, in accordance with the laws of the State of Colorado, against Edward C. Baggs in his capacity as receiver. Thereafter, on September 19, 1898, and within due time, the receiver presented his petition and bond to the district court for the county of Arapahoe, praying for the removal of said cause from said court to the Circuit Court of the United States for the District of Colorado, on the alleged ground that the said action was one arising under the laws of the United States, and was ancillary to said action and proceeding in said Circuit Court of the United States for the District of Colorado, wherein said Central Trust Company of New York was complainant and said Denver City Railroad Company was defendant. This application to remove was granted, and thereafter a trial of said cause was had in the Circuit Court of the United States, and a verdict and judgment were recovered against the said Edward C. Baggs, as receiver of the Denver City Railroad Company, in the sum

of three thousand dollars. Thereafter, and in due season, the record in said cause was duly removed, by writ of error, to the United States Circuit Court of Appeals for the Eighth Circuit, where it still remains, the cause being as yet undecided. Whereupon the following questions have been certified to us by the judges of the said Circuit Court of Appeals:

"First. In view of the provisions contained in section 3 of the judiciary act approved March 3, 1887, 25 Stat. 436, permitting receivers appointed by any court of the United States to be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver is appointed, was it competent for said Edward C. Baggs, as receiver of the Denver City Railroad Company, to remove said cause from the district court of Arapahoe County, wherein he was sued, to the Circuit Court of the United States for the District of Colorado?

"Second. Did said Circuit Court for the District of Colorado, by virtue of the aforesaid removal, acquire lawful jurisdiction of said cause, and power to render the aforesaid judgment therein?"

It may be, as contended on behalf of the plaintiff in error, that the mere order of the Circuit Court of the United States appointing a receiver for a corporation created by the law of a State, at the suit of a citizen of another State, and where the jurisdiction of the Circuit Court depended on the diverse citizenship of the parties, did not create a Federal question under section 709 of the Revised Statutes, and that, accordingly, the removal of this cause from the state to the Federal court, for the sole reason that the defendant, seeking the removal, had been so appointed, was not well founded. *Bausman* v. *Dixon*, 173 U. S. 113.

But, without entering into that subject, or the question of the scope and effect, as respects jurisdiction, of the act of March 3, 1887, permitting receivers appointed by any court of the United States to be sued without the previous leave of the court in which he had been appointed, we think that, in the present case, the receiver, having voluntarily brought the cause into the

Circuit Court by whose appointment he held his office, cannot, after that court has passed upon the matter in controversy, be heard to object to the power of that court to render judgment therein.

We do not mean to be understood to say that mere consent, or even voluntary action by the parties, can confer jurisdiction upon a court which would not have possessed it without such consent or action. But here the Circuit Court had, independently of the citizenship of the parties in the damage suit, jurisdiction over the railroad and its property in the hands of its receiver. It may be that its jurisdiction was not, by reason of the act of March 3, 1887, exclusive of that of other courts in controversies like the present one. But when the receiver, waiving any right he might have had to have the cause tried in a state court, brought it before the court whose officer he was, he cannot successfully dispute its jurisdiction. The claim was against him as receiver, and if successfully asserted, would affect the property of the Denver City Railroad Company, which was in course of administration by the Circuit Court of the United States for the benefit of its creditors, among whom were the defendants in error. As, then, the cause of action arose out of the alleged misconduct of the receiver, or of his agents, for whom he was responsible, and as the property to be affected was in the exclusive control of the Circuit Court, that court plainly had jurisdiction to entertain and determine the controversy, whether that jurisdiction was invoked by the parties seeking redress, or, as in this case, by the receiver. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609.

*We, therefore, answer the second question put to us by the Judges of the Circuit Court of Appeals in the affirmative; and it is, therefore, unnecessary to answer the first question, as the defendants in error are not raising it; and it is so ordered.*

# ABRAHAM *v.* CASEY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 62. Submitted November 2, 1900.—Decided December 3, 1900

The conclusions in this case of the Supreme Court of Louisiana depended alone upon an interpretation of the local law of the State governing the sale, the record of title to real estate, and the nature, under the local law, of the rights of a mortgagee creditor; and, accepting the rule of property under the law of that State to be as so announced, the proceedings in the equity cause were not *res judicata*, and the *lis pendens* created by that suit did not prevent the exercise by Maxwell of his right to foreclose his mortgage, and the title which he acquired in the foreclosure proceedings was not impaired by the pendency of that suit.

A STATEMENT somewhat in detail of the admitted facts concerning this protracted and involved litigation is essential in order to simplify and make clear the issues which arise for decision on this record.

Jean Baptiste Cavailhez, a native of France, took up his residence about 1849 in what is now known as the parish of Vermilion, Louisiana. He married Earnestine Diaz, and they there lived together as man and wife, where a daughter, Marcelline, was born. In 1862 Cavailhez purchased a plantation and his title was recorded, and on the 19th of August, 1869, Cavailhez sold to Clarke H. Remick the plantation which Cavailhez had acquired, as aforestated. The consideration was $15,000, $7000 of which was evidenced by a note of the purchaser, Remick, for that amount, payable on demand to bearer, and bearing 8 per cent interest from a stated date. The remainder of the price, $8000, was evidenced by four notes for $2000 each, maturing at one, two, three and four years from date, bearing 8 per cent interest from their date until paid. The payment of the five notes was secured by mortgage upon the property.

On the day the foregoing act of sale was passed, (the 19th of August, 1869,) in view of a marriage contemplated to take place between Clarke H. Remick and Marcelline Cavailhez, a marriage

contract was entered into between them, determining, as allowed by the laws of Louisiana, the rules which should govern the property relations of the prospective spouses during the existence of the proposed marriage. Jean B. Cavailhez and his wife, Earnestine Diaz, became parties to the contract, and gave to their daughter Marcelline, as her separate property, the note for $7000, which had been furnished by Remick, who became responsible for the amount thereof to his intended wife as her paraphernal property. Both the act of sale to Remick from Cavailhez and the marriage contract were duly recorded. Earnestine Diaz, the reputed wife of Cavailhez, died some time before 1882. Cavailhez died in 1882, and Remick, the son-in-law, died shortly afterwards in the same year. Remick left surviving his widow, Marcelline, and four minor children. His succession was duly opened in the probate court having jurisdiction, in May, 1882. His widow, Marcelline, qualified as tutrix of the children, and after due proceedings the plantation which Remick had bought of Cavailhez was, at auction, sold by decree of the probate court, and was bought by the widow. The proceeds arising from the probate sale were accounted for in the probate court. The title by which Mrs. Remick thus acquired the plantation was also duly recorded.

On the 22d day of August, 1883, Mrs. Remick, having become indebted to A. G. Maxwell, mortgaged the plantation which had been acquired by her as above stated to secure the Maxwell debt, which was evidenced by two notes, amounting in the aggregate to $3483.50, which notes were described in the act of mortgage which was recorded.

On the 5th of March, 1884, Jeanne Caroline Cavé, alleging herself to be a citizen of France, filed her bill of complaint in the Circuit Court of the United States for the Western District of Louisiana, in which she in substance averred that she was the lawful wife of Jean B. Cavailhez, to whom she had been married in France in 1833; that Cavailhez had deserted her, had come to the State of Louisiana, and there unlawfully married and lived with Earnestine Diaz as his wife; that by the marriage relation which existed between complainant and Cavailhez it resulted that all the property acquired by him, during his resi-

dence in Louisiana was community property, of which she was the one-half owner. It was further alleged that at the time Cavailhez deserted her in France he had in his possession separate funds which he had received from her, and that she was entitled to be secured for the repayment of such funds by a legal mortgage upon the undivided portion of the community property belonging to the husband. The death of Cavailhez and of Earnestine Diaz, his reputed wife, was stated. The sale of the plantation to Remick, the marriage contract, the death of Remick and the purchase of the plantation by Mrs. Remick at probate sale, were all alleged, and the averment was made that both Remick and his surviving wife were fully cognizant that the complainant was the lawful wife of Cavailhez, and that all the parties, Cavailhez, Earnestine Diaz, Remick and the daughter Marcelline, had conspired for the purpose of concocting the sale to Remick and the marriage contract as an efficacious means of depriving complainant of her share in the community as the lawful wife of Cavailhez. The sole defendant to the bill was Marcelline Cavailhez, the widow of Remick, not only individually, but also as tutrix of her minor children, and as such administering the estate of her deceased husband. The prayer of the bill was "that said acts of sale and marriage contract . . . be decreed null and void; that your oratrix be recognized as the widow of said Baptiste Cavailhez and his lawful wife up to the date of his death; that the marriage between said Baptiste Cavailhez and Earnestine Diaz, both now deceased, be decreed absolutely null; that the aforesaid . . . plantation be decreed to be still the property of the estate of Baptiste Cavailhez; that your oratrix be recognized as the owner of one undivided half of said . . . plantation; that she be recognized as a mortgage creditor of said Baptiste Cavailhez in the sum of $5310, with interest from judicial demand, on the undivided half thereof belonging to said Baptiste Cavailhez."

Mrs. Marcelline Remick answered, both in her capacity as tutrix and individually. She averred the validity of the marriage of her father and mother; charged that even if the previous marriage between the complainant and Cavailhez had taken place as alleged in the bill, the good faith of her mother, Earn-

estine Diaz, rendered the marriage lawful as to her and her issue. The alleged fraud in the sale of the plantation and the marriage contract was denied. It was moreover averred that her husband Remick, during his lifetime, had expended a considerable amount of money in improving the plantation, and that if the complainant was entitled to the relief which she sought she was in equity bound to pay the value of such improvements.

Whilst this suit was pending in the Circuit Court of the United States the notes held by Maxwell, and which were secured by mortgage as already stated, became due. Maxwell thereupon commenced on May 25, 1885, in the state court having jurisdiction, foreclosure proceedings according to the forms provided by the laws of Louisiana, Mrs. Marcelline Remick, individually and as tutrix, being made the defendant. Under a decree of sale on the 8th of July, 1885, the plantation was sold, and was bought conjointly by Laurent Laccassagne and Maxwell. The formal deed of the sheriff to them was regularly executed and recorded. On the 22d day of October, 1885, Maxwell conveyed to Laccassagne his undivided half of the property thus purchased. Thereafter, on the 11th of January, 1886, the equity cause which was pending at the time of the sale just mentioned in the Circuit Court of the United States, was decided in favor of the complainant, the decree substantially awarding all the prayers of the bill. It declared complainant to be the lawful wife of Cavailhez, and that the sale made by him to Remick was void; that the marriage contract between Remick and Marcelline Cavailhez was likewise void, and therefore that one half of the property belonging to Cavailhez at the time of his death was owned by the complainant as his widow in community, and that the other half was liable to pay the amount which the complainant had asserted in her bill to be the sum of her separate property received by her husband. The decree, however, recognized in part the right of the defendant to recover for the value of the improvements which had been put by Remick upon the plantation. A writ of possession was issued to enforce this decree, it being immaterial for the purposes of the case to ascertain what was done in execution of the writ. The complainant in the equity suit, Jeanne C. Cavé, after the decree in her favor,

died in 1886, leaving a will, in which she instituted Francois Chapuis, a citizen of Switzerland, her universal residuary legatee, and appointed him her executor. Her estate was opened, and in the probate proceedings Chapuis was appointed as executor, and was recognized as universal legatee.

On April the 15th, 1886, Laurent Laccassagne,[1] averring himself to be a citizen of France, filed his bill in the Circuit Court of the United States for the Western District of Louisiana against Francois Chapuis individually, and as universal legatee of Jeanne C. Cavé, and as her executor. The bill alleged the ownership of the complainant of the plantation which had been bought in the Maxwell foreclosure. It averred the decree in the equity cause in favor of Mrs. Jeanne C. Cavé, the fact of her death, and that Chapuis was her executor, and had succeeded to her rights as her universal legatee; it alleged a disturbance of the possession of the complainant by a writ of possession issued to enforce the decree. He, moreover, averred that the court was without jurisdiction to render the decree, because Mrs. Jeanne C. Cavé, the complainant, had falsely represented herself to be a citizen of France, when in fact she was a citizen of the State of Louisiana; it charged that the decree was inoperative as to Laccassagne, because his rights were not involved in the controversy. The prayer was that the decree be vacated; that Chapuis be perpetually enjoined from enforcing it. Chapuis demurred to the bill, first, for want of jurisdiction, because both himself and the complainant were aliens, and, second, because of a want of equity. A restraining order issued which, after hearing, was set aside, and a final decree was ultimately entered, maintaining the demurrers and dismissing the bill. From this decree Laccassagne appealed to this court.

Pending the appeal just referred to, Chapuis, having become indebted to the commercial firm of H. Abraham & Son, mortgaged the undivided half of the plantation, which had been acquired by him as above stated. He also, in the same act of

[1] In *Lacassagne* v. *Chapuis*, 144 U. S. 119, as also in the records sent up with this case from the court below, *Lacassagne* is spelled with one "c"; but in the opinion in this case it is changed as shown.

mortgage, transferred to Abraham & Son, as security for the debt due that firm, the claim against the other undivided half of the plantation, which had been allowed Mrs. Jeanne C. Cavé, the complainant in the equity cause. He moreover thereafter caused probate proceedings to be had as to the estate of Jean Baptiste Cavailhez, provoked a sale under the order of the probate court to pay the debts of the estate, and at such sale bought the undivided half of the plantation, which it was assumed belonged to Cavailhez, in accordance with the decree in the equity cause.

In March, 1892, the appeal pending in this court in the case of *Lacassagne* v. *Chapuis*, was here decided. The decree of the lower court which dismissed the bill absolutely was "so modified as to declare that it is without prejudice to an action at law, and, as so modified, it is affirmed with costs."

The debt due to Abraham & Son, which Chapuis had secured by the mortgage and transfer, as above stated, matured, and that firm commenced in February, 1893, proceedings in the state court having jurisdiction, to foreclose the mortgage. Thereupon Laurent Laccassagne, in May, 1893, filed his petition in the Seventeenth Judicial District Court in and for Vermilion Parish, Louisiana, against Chapuis and Abraham & Son. He alleged his ownership of the property in virtue of the Maxwell foreclosure and his purchase from Maxwell; he charged that the decree in the original Cavé suit in the Circuit Court of the United States was *res inter alios acta* as to him; that it was void because of a want of jurisdiction growing out of the fact that both parties to the cause were citizens and residents in the State of Louisiana; that the mortgage of Abraham & Son was worth nothing because of the want of title in Chapuis, and prayed that Abraham & Son be perpetually enjoined from enforcing their mortgage against the plantation, and that they with Chapuis or his successors in right be forever restrained from disputing the ownership of the petitioner. Both Abraham & Son and Chapuis excepted on the ground of *res adjudicata* arising from the decree of the Circuit Court of the United States rendered in the suit of Mrs. Cavé, and by a further exception of estoppel alleged also to have arisen from the decrees in said

cause, based on the ground that the foreclosure proceedings of Maxwell had been commenced whilst the original equity cause suit was pending. The trial court sustained both exceptions, refused the injunction, and dismissed the petition of Laccassagne. An appeal was taken by Laccassagne to the Supreme Court of the State of Louisiana. In that court the judgment below was reversed, and the case was remanded to the trial court with directions to hear the cause on its merits.

Laccassagne thereupon amended his pleadings, the parties defendant answered, various substitutions of persons took place, caused by the death of necessary parties; interventions were filed, and other proceedings were had, which were confusing and conflicting, and need not be referred to, except to say that the decree of this court in *Lacassagne* v. *Chapuis* was pleaded as an additional ground for the claim of *res adjudicata* and estoppel. Suffice it to say that, when the issues were finally made up, the cause was decided by the trial court against Laccassagne. He again prosecuted an appeal to the Supreme Court of the State of Louisiana, and the judgment of the trial court was reversed. The court finally disposed of the cause by decreeing the validity of the Maxwell foreclosure sale and the purchase thereunder, and ordered an injunction restraining Chapuis or his successors and representatives, including Abrahams & Co., from interfering with Laccassagne as the owner of the property. To such decree this writ of error is prosecuted.

*Mr. William A. Maury*, *Mr. Albert Voorhies* and *Mr. W. O. Hart* for plaintiffs in error.

*Mr. W. S. Benedict* for defendant in error.

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

The Federal questions raised by the assignment of errors are that the court below refused to give due faith and credit to the decree of the Circuit Court of the United States for the West-

ern District of Louisiana and to the decree of this court in the case of *Lacassagne* v. *Chapuis*, 144 U. S. 119.

To determine whether these contentions are well founded, the exact ground upon which the court below predicated its conclusion must be ascertained. The court decided that the decree of the Circuit Court of the United States for the Western District of Louisiana was not *res adjudicata* against Laccassagne, because he was not a party to that cause, and as to him, therefore, it was *res inter alios acta.* It further held that the *lis pendens* arising from that cause did not estop Laccassagne, since the title which he held originated prior to the inception of the suit and was wholly independent of the issues which it involved.

These general propositions which the court announced were deduced from the following conclusions, viz: 1. Under the Louisiana law Jean B. Cavailhez, as head and master of the community existing between husband and wife, had the undoubted right to dispose of the community property without the consent of his wife, and therefore the deed made by him to Remick was binding upon the community irrespective of whether Mrs. Cavé, the plaintiff in the equity cause, was or was not his lawful wife. 2. That as to the charge of fraud made conjointly against Cavailhez, his reputed wife Earnestine Diaz, his daughter Marcelline, and the purchaser Remick, such alleged fraud was wholly inefficacious even if established as to them, to affect Maxwell, who had acquired his mortgage whilst the property stood on the public records in the name of Remick by a conveyance from Cavailhez, who had the power to make the title. 3. That the right acquired by Maxwell under his mortgage was, by the Louisiana law, a *quasi* alienation of the property in his favor, taking its origin, it is true, from the date of the mortgage given by Mrs. Remick, but relating back to the recorded title from Cavailhez, which was in every respect, as to Maxwell, unaffected by the issues in the equity suit. 4. That the right thus acquired by Maxwell was an independent one, springing from the undoubted power of Cavailhez to sell and from the state of the public records, on the faith of which Maxwell had the right to rely when he accepted his mortgage. 5. That the

laws of Louisiana forbidding a transfer of property *pendente lite* did not operate to prevent Maxwell from foreclosing his mortgage pending the equity suit, because, although the foreclosure proceedings were filed after such cause was commenced, the right in virtue of which they were initiated arose long anterior to the beginning of the equity suit, and was paramount to and independent of all the controversies which were therein presented for decision.

These conclusions of the state court depended alone upon an interpretation of the local law of the State, governing the sale, the record of title to real estate, and the nature under the local law of the rights of a mortgagee creditor. 48 La. Ann. 1160; 51 La. Ann. 840. It is the duty of this court to follow the rule announced on such subjects by the highest court of a State. *Clarke* v. *Clarke*, 178 U. S. 186–190, and authorities there cited.

Accepting the rule of property under the Louisiana law to be as announced by the Supreme Court of that State, it is manifest that the proceedings in the equity cause were not *res adjudicata*, and that the *lis pendens* created by that suit did not prevent the exercise by Maxwell of his right to foreclose his mortgage, and therefore the title which he acquired in the foreclosure proceedings was not impaired by the pendency of the suit. But it is argued although this be undoubted, it is not applicable because of the decree of this court in the case of *Lacassagne* v. *Chapuis*. In that cause, however, the decree below which dismissed the bill was so modified as to cause it to be "without prejudice to an action at law." And the court below has expressly decided that the proceeding taken by Laccassagne in the state court, and which is now under review, was the proper method by which he could, according to the Louisiana law, test his legal rights asserted to arise from the Maxwell foreclosure proceedings, and the purchase made thereunder. It is, however, argued that in the opinion in *Lacassagne* v. *Chapuis* this court upheld a construction of the Louisiana law which is in conflict with that law as construed by the Supreme Court of Louisiana in its opinions in this case, and therefore, it is asserted, this court should apply its previous conclusions as to the law of Louisiana instead of now conforming to the view of the Louisi-

ana law subsequently laid down by the Supreme Court of the State. This court, it is said, by virtue of the appeal in the *Lacassagne* case, was first vested with jurisdiction to consider the Louisiana statute as to *lis pendens*, and therefore, at least, as to the parties to this record, should hold the Louisiana law to be in accord with its previous decision, although by doing so the interpretation of the state law by the Supreme Court of the State be wholly disregarded. But we need not pause to point out the unsoundness of this argument as applied to the question now here, since the premise which the proposition assumes is without foundation. The case of *Lacassagne* v. *Chapuis* came to this court on two demurrers, the one predicated on a want of jurisdiction because both parties were aliens, and the other on an asserted want of equity in the bill. The jurisdictional question as to alienage was disposed of on the ground that the bill was ancillary to the original suit. Whether the other matters alleged were within the cognizance of a court of equity was fully considered, and it was held that the claim of title in Laccassagne furnished no ground for equity jurisdiction. The court observed: "As the plaintiff was evicted and the plantation was put into the possession of the widow Cavé, a court of equity cannot give the plaintiff any relief *until he has established his title by an action at law.*" True it is that subsequently, in considering whether the mortgage right of Laccassagne created a cause cognizable in equity, the opinion intimated views of the Louisiana law not in accord with the law of that State, as announced by the Supreme Court of Louisiana as hitherto stated. But the passages referred to were merely reasoning conducive to the demonstration that the rights asserted, in the bill, were cognizable at law only, and therefore not the subject of equitable jurisdiction. That the court did not intend to and did not decide what were the legal rights of Laccassagne is at once demonstrated by the fact that the decree below, which dismissed the bill, was amended so as to cause it to be without prejudice to an action at law, and as thus modified was affirmed. To treat the passages in the opinion, which are relied on as having the conclusive import now in argument attributed to them, would of necessity give rise to the following deduction: The opinion

on the one hand dismissed the question of legal title from consideration because it was not within the province of a court of equity to decide who held the legal title, nevertheless the question of such title was finally disposed of in the cause.

But the premise contended for pushes to a more flagrant contradiction, since it cannot be accepted without admitting that, although the decree was "without prejudice to an action at law," the right to such action was in substance foreclosed.

*Affirmed.*

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## BALDWIN *v.* MARYLAND.

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

No. 113. Argued November 16, 1900.—Decided December 3, 1900.

**The controversy between the State of Maryland and the estate of the ward having been finally settled in favor of the State, and the only Federal question presented in this case having been determined in favor of the State, this court declines to consider the purely local question whether a judgment binding the estate binds also the sureties on the guardian's bond.**

THE facts are these: Prior to 1880 certain residents of Maryland died, leaving property to Columbus C. Baldwin, a minor. After the settlement of the estates of the decedents a guardian of the estate of said minor was appointed by the Orphans' Court of Washington County, Maryland. In consequence of the death of the guardian succeeding guardians were appointed, and in August, 1891, William Woodward Baldwin was duly appointed a guardian of the estate of such minor, and gave bond to perform his duty according to law. The present plaintiffs in error were sureties on that bond. During the years of the guardianship the Register of Wills of Washington County made annual returns to the county commissioners of the property of estates unsettled, and among those that of the estate of this minor, and taxes were levied thereon in accordance with law, and were

duly paid up to the year 1893. The taxes for 1893 and 1894 being unpaid, the guardian filed a bill in the Circuit Court for Washington County to restrain their collection. The basis of his contention was that both he and the ward were non-residents of Maryland, and that the estate of the ward had been taken by him outside of the State. The Circuit Court decided against him, and denied the injunction. This judgment was affirmed by the Court of Appeals of the State. 85 Maryland, 145. An attempt was made to review that judgment in this court, but the writ of error was dismissed (168 U. S. 705) on the ground that no Federal question had been distinctly preserved, or, if preserved, that there was a non-Federal question which was decisive of the case. Thereafter, the taxes being still unpaid, and the estate still unsettled, and the same statement presented by the Register of Wills to the county commissioners in respect to the taxes of 1895, this action was commenced to recover from the bondsmen the amount of the taxes for the years 1893, 1894 and 1895. Judgment was rendered against them in the trial court, and affirmed by the Court of Appeals of the State, (89 Maryland, 587,) to reverse which judgment this writ of error has been sued out.

*Mr. Charles A. Boston* for plaintiffs in error.

*Mr. Henry Kyd Douglas* for defendant in error.

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

The controversy in the case reported in 85 Maryland, 145, was one between the estate of the ward and the State of Maryland. In that case the right of the State to compel a payment by the estate of the ward of taxes levied thereon for the years 1893 and 1894 was settled. The personality of the litigants, the form of the action, do not disturb the substantial fact that the controversy was between the estate of the ward and the State of Maryland, and that that controversy was determined in favor of the State. This court declining to disturb the final judg-

ment of the Court of Appeals of the State of Maryland, that controversy is settled and beyond further litigation. The matter has become *res judicata* between the estate and the State. There is no pretence that the taxes of 1895 stand in any other condition as to matter of fact than the taxes of 1893 and 1894, which were in terms included within the litigation settled by the decision referred to. The ruling therefore, as to the taxes for 1895 comes within the force of that decision, and is determined by the conclusion in respect to the taxes of 1893 and 1894. *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371.

The controversy, therefore, between the State of Maryland and the estate of the ward having been finally settled in favor of the State, and the only Federal question presented in this case being that already determined as to the right of the State to enforce a tax upon the property of the ward, it is unnecessary to consider the purely local question as to whether a judgment binding the estate binds also the sureties on the guardian's bond. *Murdock* v. *Memphis*, 20 Wall. 590; *Myrick* v. *Thompson*, 99 U. S. 291, 297; *Swope* v. *Leffingwell*, 105 U. S. 3.

The judgment of the Court of Appeals of Maryland is

*Affirmed.*

Mr. Justice White and Mr. Justice Peckham dissented.

# STEARNS *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 20. Argued October 16, 17, 1900. — Decided December 3, 1900.

The constitution of Minnesota of 1858, still in force, provided that all taxes should be as nearly equal as may be, and that the property taxed should be equalized and uniform throughout the State. It made provision for certain defined exemptions, and provided for uniform and equal taxation throughout the State. Before that time, namely, on September 28, 1850, Congress had granted to the several States, Minnesota included, the swamped and overflowed lands within each; and other grants were subsequently made, as stated in the opinion of the court, subject to be taxed only as the land should be sold. There were also statutes passed in regard to the taxation of land granted to the Lake Superior and Pacific Railroad Company, which are set forth in the opinion of the court. In 1896 an act was passed, repealing all former laws exempting from taxation, and providing for the taxation of the lands granted to railroads as other lands were assessed and taxed. *Held*, that, in this legislation a valid contract was created, providing for the taxation of all railroad property (lands included) on the basis of a per cent of the gross earnings, which contract was impaired by the legislation of 1896, withdrawing the lands from the arrangement, and directing their taxation according to their actual cash value; that as to the St. Paul & Duluth Railroad Company a contract was made, and only Congress can inquire into the manner in which the State executed the trust thereby created and disposed of the lands; and that, as to the Northern Pacific Company, the legislation changed materially the terms of the contract between the State and that company.

This case comes on error to the Supreme Court of the State of Minnesota, is brought here at the instance of certain railroad companies, and involves the question whether the real estate belonging to them, and not used in the operation of their roads, is subject to taxation according to its value, or is excepted from such ordinary rule of taxation by virtue of a contract alleged to have been made many years ago by legislation of the State, to the effect that railroad companies should pay a certain per cent on their gross earnings in lieu of taxes on all their property.

The facts are as follows, and first as to lands belonging to the St. Paul and Duluth Company:

The constitution of Minnesota, adopted in 1858, has always contained these provisions (Article IX, sections 1 and 3):

"SEC. 1. All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State."

"SEC. 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation."

On May 23, 1857, by the territorial legislature of Minnesota, the Nebraska and Lake Superior Railroad Company was organized. Laws, Minn. 1857, c. 93, p. 323. By an act of the state legislature, of date March 8, 1861, the name of this company was changed to the Lake Superior and Mississippi Railroad Company. Laws, Minn. 1861, p. 201. By this act certain of the swamp lands granted to the State by the act of Congress of September 28, 1850, 9 Stat. 519, were granted to that company to aid in the construction of its railroad. The St. Paul and Duluth Company is the successor in interest of that company, and has succeeded to all its rights, privileges, immunities and property. By act of Congress of date May 5, 1864, 13 Stat. 64, as amended July 13, 1866, 14 Stat. 93, lands were granted to the State of Minnesota to aid in building a railroad from the city of St. Paul to the head of Lake Superior. The first section declaring the grant reads: "That there be, and there is hereby, granted to the State of Minnesota for the purpose of aiding in the construction of a railroad in such State from the city of St. Paul to the head of Lake Superior, every alternate section of public land," etc. Section 5 reads:

"That the said lands hereby granted when patented to said

State, shall be subject to the disposal of said State for the purposes aforesaid, and for no other; and the said railroad shall be and remain a public highway for the use of the Government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States."

On February 23, 1865, the legislature of Minnesota passed an act accepting the grant, and transferring the lands to the predecessor of the St. Paul and Duluth Railroad Company. Special Laws, Minn. 1865, c. 2, p. 19. The first section, after accepting the lands granted, reads:

"And the same are hereby granted, vested in, and transferred to the Lake Superior and Mississippi Railroad Company, its successors and assigns, to be held, used or sold and disposed of by said railroad company, to aid in the construction of a railroad, as contemplated and provided by said act of Congress, and for the equipment and operation of the same, and for no other purpose whatever, the same to be held, used, and disposed of upon and subject to the conditions in said act of Congress provided, and upon the conditions in this act contained. That in consideration of lands granted by this act, and of the lands, rights, privileges and franchises which have heretofore been granted to said railroad company, the said company shall, on or before the first day of March of each and every year after said railroad is completed and in operation, pay into the treasury of the State three per cent on the gross earnings of said railroad, which sum shall be in lieu and in full of all taxation and assessments upon the said railroad, its appurtenances and appendages, and all other property of said company, real, personal and mixed, including the lands hereby and heretofore granted to said company, or so intended to be granted. Provided, however, that the lands hereby and heretofore granted to said company shall be subject to like lands of individuals, to be taxed as fast as the same are sold or conveyed, or contracted to be sold, or are leased by said company, or the stumpage upon any lands is sold or contracted to be sold by said company; but no mortgage or trust deed executed by said company upon said lands shall, for the purpose of taxation, be construed as such sale, conveyance, lease or contract of sale."

Eight days thereafter, and on March 3, 1865, an act amendatory of this act was passed. Special Laws, 1865, c. 8, p. 45. The first section of this act is as follows:

"1. That whenever any lands heretofore or hereafter granted to the Lake Superior and Mississippi Railroad Company to aid in the construction or completion of its road or branches shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officer for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made, but in enforcing a collection of the taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof shall be in nowise impaired or affected thereby, but the improvements thereon and all the interest of the purchaser or lessee therein may and shall in case of default in the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company, so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are repealed. Provided, that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year, pay into the treasury of the State one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after thirty miles of said railroad shall be completed and in operation, and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this State, on or before the first day of March of each and every year, two per cent of the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the first day of March of each and every year, pay into the treasury of this State three per cent of the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatever."

Statement of the Case.

The second section provided for acceptance of the provisions of the act by the railroad company; that when accepted "the same shall become obligatory upon the State and upon said company;" and they were accepted. Thereafter, as admitted, the railroad was constructed by the company "in reliance upon said act." Taxes were paid by the railroad company on its property in accordance with the terms of this alleged contract until 1895, and during those years the State made no attempt to levy any taxes upon these lands. In 1871 the following amendment to the state constitution was by vote of the people duly adopted (Laws, Minn. 1871, p. 41):

"Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this State or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property at and during the time and periods therein specified, pay into the treasury of this State a certain per centum therein mentioned of the gross earnings of such railroad companies now existing, or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote of the people of the State, and be adopted and ratified by a majority of the electors of the State voting at the election at which the same shall be submitted to them."

In November, 1896, this statute passed in 1895, Laws, 1895, p. 378, was adopted by the people:

"Sec. 1. All lands in this State heretofore or hereafter granted by the State of Minnesota or the United States or the Territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this State, except such parts of said lands as are held, used or occupied for right of way, gravel pits, side tracks, depots and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies. Provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as is now provided by law, and that nothing

in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands.

"SEC. 2. Such portion or portions of any act or acts, general or special, of the State or Territory of Minnesota heretofore enacted which provides or attempts to provide for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this State, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

"SEC. 3. If this act shall be held to be void, so far as it applies to the land of any particular railroad company in this State, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated."

Under these provisions the State proceeded to levy taxes upon the lands of the St. Paul and Duluth Company, and the validity of such taxation is the question involved.

Lands belonging to the Northern Pacific Railway Company are also involved in this litigation, and the facts in reference to those lands are these: On July 2, 1864, the Northern Pacific Railroad Company was chartered by an act of Congress to build a railroad from Lake Superior to the Pacific, and received a grant of public lands to aid in the construction thereof. The lands thus granted are those in respect to which the question of taxability arises. 13 Stat. 365. By section 17 of that act the company was authorized to accept "any grant, donation, loan, power, franchise, aid or assistance which may be granted to or conferred upon said company by the Congress of the United States, or by the legislature of any State, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or assistance, to its own use, for the purpose aforesaid."

By section 18 it was required to obtain the consent of the legislature of any State through which, in the operation of its road, it might pass previous to commencing work. Such consent was obtained from Minnesota by an act of the legislature of that State, approved March 2, 1865. Laws, 1865, p. 48. On March 4, 1870, the legislature of Minnesota passed an act,

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(Special Laws, Minn. 1870, p. 338,) the first and second sections of which are as follows:

"SEC. 1. That the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior and Mississippi Railroad Company, as is provided in and by an act entitled 'An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company,' approved March third, eighteen hundred and sixty-five. Provided, however, That the gross earnings of said railroad company on which a percentage is to be paid to the State shall include only the earnings of that portion of the Northern Pacific Railroad constructed and operated by said company within the limits of this State.

"SEC. 2. That said Northern Pacific Railroad Company shall have the right and authority to acquire and hold lands for right of way, depot grounds and for all necessary purposes of said company in all respects as provided by the general laws of this State, as set forth in sections numbered consecutively thirteen to twenty-seven, inclusive, of chapter thirty-four, title one, of General Statutes now in force. But where said company proceeds to condemn private property in more than one county in the same proceedings, the commissioners to be appointed shall be residents of the county where the property to be taken is situated, or of the county to which such county is attached for judicial purposes. And there is hereby granted to the Northern Pacific Railroad Company the right of way through and over any lands of this State to the same extent as is granted by act of Congress through and over the public lands to said company."

This act was duly accepted by the Northern Pacific Railroad Company. Thereafter its road was constructed, and up to the act of 1895, *supra*, taxes were levied and paid in the manner prescribed. The validity of taxes levied upon the lands of this company since the act of 1895, and under the authority of that

act, is challenged, and becomes in this litigation one of the questions involved.

Lands belonging to the Great Northern Railway Company were also involved in the litigation in the state courts, but that company is not here making any contention for a reversal of the judgment of the state Supreme Court.

After the act of 1895, approved by the vote of the people, proceedings were instituted to enforce the levy of taxes on the lands of these railroad companies, and the proceedings thus instituted are those which are now before us. The decision of the Supreme Court of the State was adverse to the railroad companies, (72 Minnesota, 200,) and the case is here on error to that judgment.

*Mr. C. W. Bunn* and *Mr. William B. Hornblower* for plaintiffs in error. *Mr. Julien T. Davies* and *Mr. Emerson Hadley* were on Mr. Hornblower's brief.

*Mr. H. W. Childs* and *Mr. W. B. Douglas* for defendant in error. *Mr. A. Y. Merrill* was on their brief.

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

The Supreme Court of Minnesota held that the contract alleged to have been made with the railroad companies for a per cent of the gross receipts in lieu of all taxation upon their property was, in view of the provisions of sections 1 and 3 of article 9 of the state constitution, one beyond the power of the legislature to make. We quote from its opinion:

"The language of the constitution is clear, exact and imperative. It requires that all property not exempt must be taxed, and that the basis of such taxation must be the cash value of the property.

* * * * * * * *

"It may be true, as claimed, that a gross earnings tax (if subject to amendment) is only another mode of arriving at equal taxation, and that such a system of commuted taxation of the

property of railway companies and similar corporations is of great practical and material advantage to the State; but the fact remains that the taxation of all property upon the basis of its cash value was the sole rule ordained by the constitution to secure equality and uniformity of taxation.

* * * * * * * *

"We hold that the statutes under which it is claimed that the lands in question are exempt from taxation in the ordinary way, upon the basis of their cash valuation, were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. *State* v. *Luther*, 56 Minnesota, 156.

"But this ratification or validation of the statutes was a qualified one, and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted and ratified by a majority of the electors.

"Our conclusion is that Laws, 1895, chapter 168, does not impair the obligation of any contract between the State and railway companies, and that the lands here in question are taxable in the ordinary way, as other lands are taxable."

The Federal question thus suggested is the single one for consideration. Was there a valid contract created by the legislation providing for the taxation of all railroad property (lands included) on the basis of a per cent of the gross earnings, which was impaired by the legislation of 1895, withdrawing the lands from this arrangement, and directing their taxation according to their actual cash value? And, first, as to the St. Paul and Duluth Company: That a contract was attempted to be made is obvious. The State, as trustee, held certain swamp and railroad lands. It proposed to give them to the company, subject to taxation in a certain way, if the company would construct the railroad. The company accepted the proposition and constructed the road. Thus, if the parties were competent to enter into such an arrangement, a contract was made. While some of the lands, the swamp lands, were granted to the State for a purpose other than railroad construction, they were granted in trust, and it has long since been settled that Congress alone

can inquire into the manner in which the State executed that trust and disposed of the lands. *Emigrant Co.* v. *County of Adams*, 100 U. S. 61, 69.

With respect to the Northern Pacific Railroad Company, the facts are slightly different, but the state legislation in respect to it was of a character to place its land grant in the same condition, so far as the question of contract is concerned. For the land grant to the company became operative within the limits of a State only when such State consented to the construction of the road. The power to consent carried with it the power to determine the conditions upon which such consent should be granted, and when the State of Minnesota said that the Northern Pacific Railroad Company might construct its road through the State, and might accept the provisions of the congressional grant, and prescribed the conditions upon which such road should be constructed and such grant should be taken, the effect of such legislation is the same as though the State received the grant and transferred it to the company on those conditions. It said in substance that, though the land was not given to the State to be transferred to a railroad company, (and in that case the State might have prescribed the conditions of the transfer,) it was given to the company subject to the assent of the State, and the State's assent to the gift was upon the conditions it named. The offer thus made by the State was accepted, and in reliance thereon the road was constructed.

Of course, withdrawing any portion of the property protected by the three per cent commutation, and subjecting that to ordinary taxation, leaving the three per cent still due from the railroad companies, changes materially the terms of the alleged contract, so that there can be no question that if there were a valid contract created by the earlier legislation, the act of 1895 impairs its obligation. The general rule of this court is to accept the construction of a state constitution placed by the state Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a State, through its legislation, to make an alleged contract, and the meaning and validity of such contract, were matters which

in discharging its duty under the Federal Constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract.

In *Douglas* v. *Kentucky*, 168 U. S. 488, this question was considered at length, and, by Mr. Justice Harlan, after a review of some prior cases, the conclusion was thus stated (p. 502):

"The doctrine that this court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 416, 452; *Wright* v. *Nagle*, 101 U. S. 791, 794; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg, Shreveport &c. Railroad* v. *Dennis*, 116 U. S. 665, 667; *N. O. Waterworks Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 36; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 493; *Bacon* v. *Texas*, 163 U. S. 207, 219."

See also *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Walsh* v. *Columbus, Hocking Valley & Athens Railroad Company*, 176 U. S. 469.

As a preliminary matter, it is worthy of note that the alleged invalidity of this contract, in respect to taxation, was not complained of for thirty years. Whether the revenues of the State were benefited or injured by this method of taxation we are not advised, but it does appear that neither party challenged it. Both the railroads and the State accepted and acted under it for nearly a third of a century. It may be well to notice the decisions of the Supreme Court of Minnesota prior to the one challenged in this proceeding. In *Railroad Company* v. *Parcher*, 14 Minnesota, 224, it appeared that a railroad charter had been granted by the territorial legislature, containing, among other things, a provision similar to the one in question, commuting all taxes on the basis of three per cent on the gross earn-

ings. The company having defaulted in its contract, foreclosure proceedings were had, and its property, franchises, etc., were bought in by the State. All this was done in pursuance of express statutory provisions. Thereafter an act was passed transferring to a new corporation all the property, franchises, etc., acquired by this foreclosure, and the question presented was whether this new company was entitled to the three per cent commutation. And it was held that it was. The opinion of the court was, that "by the foreclosure proceedings, the State acquired, without any merger, all the franchises and privileges held by the territorial corporation, and that it could transfer them to a new corporation of its own creation. We do not stop to question the argument of the Supreme Court to the effect that there was no merger. All that we deem necessary to notice is that the State by the foreclosure proceedings acquired title to property—railroad property, including lands granted to aid in construction—and, having that property," "could dispose of it free from any limitations imposed by the constitutional provisions which are now referred to as invalidating the present alleged contract. In other words, the State could take and dispose of lands upon precisely the same terms" upon which it took and disposed of the lands to the present plaintiffs in error.

This decision was recognized and reaffirmed in *St. Paul* v. *Railroad Company*, 23 Minnesota, 469, 475, in which it was said:

"Upon the renewal of the grant, in 1864, to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions, so as to require the annual payment of a different rate per cent of the gross earnings of the road, to commence upon the completion of thirty instead of fifty miles, and, in consideration of such annual payment, to exempt the railroad, its appurtenances, and other property, from all taxation, and from all assessments, both general and local. This modification of the original contract was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, by both the executive and legislative departments of the state government, but, by an express consti-

tutional amendment, adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the State."

See also *County of Stevens* v. *Railway Company*, 36 Minnesota, 467, 470, in which is this declaration:

"That the exemption from ordinary taxation, created in 1857 in favor of the Minnesota and Pacific Railroad Company, subsequently passed with the lands, and as a right appendant thereto, to the St. Paul and Pacific Railroad Company and to the First Division of the St. Paul and Pacific Railroad Company, may be now accepted without question. It was so decided eighteen years ago in the case of the last-named company v. *Parcher*, 14 Minn. 224, 297, which decision has been ever since followed. *State* v. *Winona & St. Peter R. R. Co.*, 21 Minn. 315; *Minnesota Central Ry. Co.* v. *Melvin*, id. 339; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Pfaender*, 23 Minn. 217; *City of St. Paul* v. *St. Paul & Sioux City R. R. Co.*, id. 475; *County of Nobles* v. *Sioux City & St. Paul R. R. Co.*, 26 Minn. 394; *State* v. *Northern Pacific R. R. Co.*, 32 Minn. 294."

And also *State* v. *Luther*, 56 Minnesota, 156, 162, 163, 164, decided 1894, in which the court said:

"The system of providing for the payment of a percentage of the gross earnings of the road in lieu of all other taxes on 'railroad property' and on the lands granted to aid in its construction, while owned by the company, was inaugurated by the territorial legislatures, and was universally in vogue at the date of the adoption of the constitution.

"And after that date the state legislatures invariably assumed that they continued to possess the power to adopt this system of commuted taxation when granting lands to aid in the construction of a railroad, whether such lands were the absolute property of the State, or were held by it in trust for that purpose under an act of Congress. This was the practice, not only as to old grants made before the adoption of the constitution, but also as to new grants, both state and congressional, made after that date."

And then, after referring to a number of grants by Congress and the State, added:

"In brief, the legislature assumed that when making a grant of lands to aid the building of a railway, or in executing the trust where lands had been granted to the State by Congress for the same purpose, (and which, while thus held by the State, either as proprietor or in trust, were, of course, not subject to taxation,) it had the power, in the furtherance of the object for which the grant was made, to exempt such lands from ordinary taxation, and to provide for commuted taxation of both the railroad and the granted lands.

"There is not in the history of the State a single grant of lands to aid in the building of a railway, where this system of commuted taxation has not been adopted, and we have not found an instance, prior to the adoption of the constitutional amendment of 1871, (Const. Art. 4, sec. 32*a*,) where a commuted system of taxation was provided that did not apply to a land grant as well as to the railroad property. This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

It would seem from these decisions to have been the settled law of the State that it could, after the adoption of the constitution of 1858, acquire title to lands and dispose of them subject to the same conditions under which the lands in controversy were granted to the plaintiffs in error.

In *McHenry* v. *Alford*, 168 U. S. 651, legislation of the Territory of Dakota, providing for the taxation of the lands of the Northern Pacific Railroad Company on the basis of a percentage of the gross earnings of the railroad company, was held not in conflict with the mandate in the organic act that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." While the language of this organic act is not the same as that of the Minnesota constitution, in that the Minnesota constitution by implication requires the taxation of all property except that by its terms specifically exempted, and this act makes no provision in respect to the matter of exemption; yet in respect to property subject to taxation it, like the Minnesota constitution, requires taxation

in proportion to the value of the property taxed. It is doubtless true that it has been held that forbidding an exemption from taxation and requiring taxation according to the "true value in money" forbids taxation otherwise than in accordance with established general rules in respect to valuation and prevents a commutation on a different basis; yet there have been rulings of the Supreme Court of Minnesota to the effect that commutation is not the same as exemption, or forbidden by a constitutional provision which forbids exemption, and that it may sometimes be the surest way of reaching taxation according to the "true value in money," and is, therefore, not necessarily an infringement of a constitutional provision requiring such taxation. Thus, in *County of Hennepin* v. *Railway Company*, 33 Minnesota, 534, 535, the court said:

"This is not an immunity from taxation, but a commutation of taxes—another and substituted way prescribed by law, in which the respondent, as the owner of this land among other property, is to contribute its share to the public revenue."

And in *County of Ramsey* v. *Railway Company*, 33 Minnesota, 537, 542:

"It was not in reality a plan for *exempting* property from taxation, but a substituted *method* of taxation. It must be supposed that it was contemplated that this system would, upon the whole, fairly effect the objects of taxation with respect to such corporations, and be equivalent in its results to taxation of the property owned by them."

So also in *County of Todd* v. *Railway Company*, 38 Minnesota, 163, 165:

"It has been considered that the purpose of such statutes has been, not to exempt property from taxation, but to provide a substituted method of securing to the State its proper revenue from the taxable property of these corporations. *City of St. Paul* v. *St. Paul & Sioux City R. R. Co.*, 23 Minn. 469; *County of Hennepin* v. *St. Paul, M. & M. Ry. Co.*, 33 Minn. 534, 535; *County of Ramsey* v. *Chicago, Mil. & St. Paul Ry. Co.*, *supra*."

And further, in *St. Paul* v. *Railway Company*, 39 Minnesota, 112, 113:

"As was said in *Ramsey County* v. *Chicago, Mil. & St. Paul Railway*, *supra*, these charters do not exempt the property from taxes, but provide a substituted method of taxation, based upon the assumption that the property of the companies will be used for railroad purposes, and thereby an income be derived, the percentage of which received by the State will be equivalent in its results to taxation of the property."

And again, in *State* v. *Luther*, 56 Minnesota, 156, 160:

"It is a common error, in construing statutes like the present, to assume that because the commuted tax is fixed with reference to, and is wholly derived from, the gross earnings of the road, therefore the lands are exempted from taxation altogether. The percentage of the gross earnings is paid as taxes on both the railroad and the granted lands, and, although derived wholly from the former, is a commutation tax alike on both."

The contract made in 1865 with the predecessor of the St. Paul and Duluth Railroad Company, void at that time but made valid by the constitutional amendment of 1871, (as by the Supreme Court of the State now affirmed,) commuted the taxes on all railroad properties, including its lands not used for railroad purposes, by the payment of three per cent on its gross earnings. Confessedly after that amendment there existed a binding contract between the State and the railroad companies, by which the taxes on all their property were to be commuted and discharged on the payment of three per cent of the gross earnings. If nothing had since occurred that contract, under the decision of the Supreme Court, would continue exempting lands not used, as well as lands used for railroad purposes, from any other taxation than that which was expressed by three per cent on the gross earnings of the companies. In other words, so far as the railroad companies are concerned, that constitutional amendment did away with the restrictive features of sections 1 and 3 of Article IX in the state constitution, and permitted and endorsed a peculiar method of taxation of railroad companies. The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies except upon a vote of the people. The converse of that proposition may be accepted, to wit, that by a vote of

the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment? The law of 1895 adopted by the people does not release railroad companies from the burden of paying three per cent upon their gross earnings into the state treasury, but simply operates to put certain properties belonging to them outside of the protection of that commutation. Was such an amendment within the contemplation of the constitutional provision of 1871? It may seem a not unreasonable modification to exempt from the contract such property as is not used for railroad purposes, but would not the legislation assume a different aspect if it had subjected to ordinary taxation all the railroad property, except locomotives, and upon them continued the burden of the payment of three per cent of the gross earnings? Of course, if there be no limitations in respect to the scope of amendment it would be within the power of the State to subject the bulk of the railroad property, whether used or not used for railroad purposes, to the burden of ordinary state taxation; and taking a single item like locomotives, without which the road could not be operated, continue upon the companies the duty of paying three per cent of the gross earnings. While it may be that no such inconsiderate action is to be expected, the possibility of such action suggests a query whether the power of repeal or amendment, preserved by the constitutional amendment of 1871, has not some limitations.

Giving to that power full scope, it may be said that if the prior legislation was unauthorized by the constitution, a repeal of the amendment would wipe out the whole provision in reference to railroad taxation, and subject all railroad property within the limits of the State to the ordinary rule in respect to taxation. So it may be that the reserved power of amendment carries with it the right to increase or diminish the rate per cent of taxation. But a different question is presented when it is insisted that the power of amendment carries with it the right of continuing the rate per cent as to part only, but not all of the property covered by the original contract. For, as stated, if the State can withdraw the lands not used for railroad purposes from the scope of this contract commutation, can it

not to-morrow likewise withdraw the lands which are used for railroad purposes, including therein the right of way, the tracks thereon, all the grounds occupied by station houses, etc., and then, on the day thereafter, withdraw from it all the personal property of the companies, except their locomotives, and still hold the corporations to the burden of the contract? May it not be fairly contended that the privilege of amendment reserved was as to the rate, and not as to the property to be included within the commutation? That the power of amendment has its limitations, or rather that an amendment may not be wholly as to the right of the State, and absolutely ignoring the right of the other party to the contract, has been adjudged by this court in *Louisville Water Company* v. *Clark*, 143 U. S. 1. In that case it was held that while under a statute the water company had been exempted from taxation on condition that it supplied water free to the city of Louisville, an act withdrawing that exemption from taxation, although silent as to the corresponding obligation of the water company, must be construed as releasing it from an obligation based upon such exemption. So it may well be said in the case before us that a contractual exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the State so as to continue the obligation in full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract.

But there is another matter of significance. The lands in controversy were granted by Congress to the State as trustee. The act of 1865, by which the State offered the lands to the predecessor of the St. Paul and Duluth Company, is entitled "An act to execute the trust created by the act of Congress." The right of a State to accept such a trust cannot now be doubted. It has become a part of the judicial history of the country. These lands were not donated by Congress to the State, to be used by it for its own benefit and in its own way, but were conveyed to the State in trust with the understanding that, as trustee, it should use them in the best possible manner for accomplishing the purposes of the trust. Of course, this implied that, except as restrained by its own powers, the

State should make the grant as valuable as possible for the accomplishment of the purpose of the trust. Under those circumstances the peculiar nature of the trust created enabled the State to determine the limits and mode of taxation to which that property thus placed in its hands should be subjected. It might have provided that the title be retained by the State, that no conveyance be made to the railroad company, and that the first and only conveyance should be when the railroad company had made a contract with some individual for its purchase, and that contract had been completed by full payment to the company. Is it to be doubted that the State, retaining the title, although authorizing the railroad company to sell, could, while that title was so retained, hold it free from any kind of taxation? Would it not be a legitimate and appropriate discharge of the trust conferred if the State adjudged that such property should be held in its own name free from all taxation until such time as its full value in cash could be obtained from some individual? If the State could retain the title free from taxation until such time as its disposition to a private purchaser enabled the railroad company to realize the full value of the land, was it not also within its power to say that a temporary transfer to the corporation charged with the duty of constructing the railroad should also be accompanied by a like exemption from taxation? And if it could exempt from all taxation, it might with equal propriety say that it should be subjected to taxation in only a limited way.

Of course, it may be said, and in a general way rightfully so, that the powers of the legislature of a State are limited by its constitutional provisions. It follows therefrom that in dealing with property generally the legislature must, in respect to taxation, as in all other matters, keep within the express constitutional limits as interpreted by the highest court of the State. We would not weaken, even if we had authority so to do, the full scope of this constitutional obligation. Whatever the people, framing their organic act, have declared to be the limits of legislative power, and the modes in which that power shall be exercised, must always be recognized by the courts, state and national, as obligatory. And if the property in controversy was

that which passed directly into the mass of the general property of the State it might properly be said that the construction placed on constitutional limitations by the Supreme Court of the State determined absolutely for all courts, state and national, the full scope of the legislative power.

And in this respect we may notice the suggestion of the Supreme Court of the State, that other lands than these might be withdrawn from the general rule of taxation provided by the state constitution, and the statement made by counsel in argument that many corporations had received in the early days of the State commutations based on a like principle. We quote the language of the Supreme Court:

"It is further claimed on behalf of the appellants that the mandates and inhibitions of the constitution as to the taxation of all private property have no application to public lands which passed into private ownership with the privilege of commuted taxation created with respect to them while they were yet public lands. If this proposition is true, then the legislature, if there are no other constitutional provisions prohibiting it, may provide for exempting from taxation the school lands of the State after their sale and after they have become absolutely private property, or provide that the owners thereof may forever pay a percentage on the gross or net income derived therefrom in lieu of all other taxes.

"The mandate of the constitution applies to all property which is the subject of private ownership, without reference to the source of its acquisition. It would be a palpable evasion of the constitution to permit the legislature to absolutely transfer public lands to private owners vested with the privileges and immunities as to taxation which are prohibited by the constitution."

We think the apprehension of the Supreme Court is one more of imagination than of fact. It is true that Congress might act so as in effect to keep withdrawn a large area of the State from taxation. Under the reservation in the act of admission and the acceptance thereof by the State of Minnesota the right of Congress to determine the disposition of public lands within that State was reserved, and, according to the decision in *Van*

*Brocklin* v. *State of Tennessee, infra*, lands belonging to the United States are exempt from taxation by the State. So that if Congress should determine that the great body of public lands within the State of Minnesota should be reserved from sale for an indefinite period it might do so, and thus the lands be exempted from taxation; and yet it cannot be imputed to Congress that it would discriminate against the State of Minnesota or pass any legislation detrimental to its interests. It had the power to withdraw all the public lands in Minnesota from private entry or public grant, and, exercising that power, it might prevent the State of Minnesota from taxing a large area of its lands, but no such possibility of wrong conduct on the part of Congress can enter into the consideration of this question. It is to be expected that it will deal with Minnesota as with other States, and in such a way as to subserve the best interests of the people of that State. That a power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power. So the fact that Congress might, if it saw fit, withdraw the public lands in Minnesota from sale, and thus prevent their taxation, furnishes no reason for denying the efficacy of the power to grant such lands, subject to conditions binding upon the State, or the right of the State, as its trustee, to prescribe limitations upon taxation. And this must be said bearing in mind that to the full extent there is no question of the duty of the legislature of Minnesota to subject any but trust property to the absolute scope of its constitutional provisions in respect to the matter of taxation. And in respect to the lands in controversy it must be remembered that they were granted to and accepted by the State in trust, and it cannot be doubted that the State has the power to compel its grantee to use the lands in furtherance of the trust and prevent it from creating a large and permanent ownership of lands.

When Minnesota was admitted into the Union, and admitted on the basis of full equality with all other States, there was within its limits a large amount of lands belonging to the national government. The enabling act, February 26, 1857, 11 Stat. 166, authorizing the inhabitants of Minnesota to form a constitution and a state government, tendered certain proposi-

tions to the people of the Territory, coupled in section 5 with this proviso (11 Stat. 167):

"The foregoing propositions herein offered are on the condition that the said convention which shall form the constitution of said State shall provide, by a clause in said constitution, or an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof; and that no tax shall be imposed on lands belonging to the United States, and that in no case shall non-resident proprietors be taxed higher than residents."

And article 2, section 3, of the constitution, passed by virtue of this enabling act, reads as follows (Gen. Stat. Minn. 1894, p. lxxiv):

"The propositions contained in the act of Congress entitled 'An act to authorize the people of the Territory of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original States,' are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to *bona fide* purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall non-resident proprietors be taxed higher than residents."

That these provisions of the enabling act and the constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between a State and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question

as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a State to deal with the nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the nation.

That a State and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new States, as well as subsequently thereto, is a matter of history. Section 10 of article 1 of the Constitution provides that "no State shall, without the consent of Congress, . . . enter into any agreement or compact with another State." It was early ruled that these negative words carried with them no denial of the power of two States to enter into a compact or agreement with one another, but only placed a condition upon the exercise of such power. Thus in *Green* v. *Biddle*, 8 Wheat. 1, a compact between Virginia and Kentucky was sustained, and it was held no valid objection to it that within certain restrictions it limited the legislative power of the State of Kentucky. In *Poole* v. *Fleeger*, 11 Pet. 185, an agreement between Kentucky and Tennessee as to boundary was upheld, Mr. Justice Story, speaking for the court, saying (p. 209):

"It cannot be doubted that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this

Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares that 'no State shall, without the consent of Congress, enter into any agreement or compact with another State,' thus plainly admitting that, with such consent, it might be done, and in the present instance that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."

The same doctrine was announced in *Virginia* v. *Tennessee*, 148 U. S. 503, and in the opinion in that case it was intimated that there were many matters in respect to which the different States might agree without the formal consent of Congress. In this case the difference between the agreements which States might enter into between one another and those from which they were debarred without the consent of Congress was noticed, and it was said (p. 518):

"There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way. If the bordering line of two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district and thus removing the cause of

disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply? . . .

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, sec. 1403, referring to a previous part of the same section of the Constitution, in which the clause in question appears, observes 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 land 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.'"

If as "a part of the general right of sovereignty" to which Mr. Justice Story refers in the quotation above made, the right of agreement between one another belongs to the several States, except as limited by the constitutional provisions requiring the consent of Congress, equally true is it that a State may make a compact with all the States, constituting as one body the nation, possessed of general rights of sovereignty and represented by Congress. That Congress has consented is shown by the fact that it proposed the terms of the agreement and declared the State admitted on its assent to those terms.

The Constitution, article 1, section 8, provides that—

"The Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

By an act of February 22, 1875, the legislature of Kansas ceded to the United States jurisdiction over the territory of the Fort Leavenworth Military Reservation, reserving not only the right to serve civil and criminal process, but also the right to tax railroad, bridge and other corporations, their franchises and property, within the limits of the reservation. And in *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S. 525, that cession was held valid, Mr. Justice Field, delivering the opinion of the court, saying in reference to this question (p. 541):

"In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution."

The act admitting Kansas into the Union contained in its first section this provision (12 Stat. 127):

"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 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 been passed."

Under the provisions of the treaty of 1854, between the Shawnee Indians residing within the territory of Kansas and the United States, certain of their lands were allotted to individual members and patented to them, with the express restriction that "the said lands shall never be sold by the grantee, or his heirs, without the consent of the Secretary of the Interior." In the case of *The Kansas Indians*, 5 Wall. 737, 757, this court, holding a law of the State of Kansas subjecting these lands to taxation invalid, said:

"There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired, and the general government at liberty to make any regulation respecting them, their lands, property or other rights, which it would have been competent to make if Kansas had not been admitted into the Union. . . . While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union." See also *Beecher* v. *Wetherby*, 95 U. S. 517, 523.

But we need not go outside of the present case. The State of Minnesota accepted the trust created by the act of Congress. Acceptance by a trustee of the obligations created by the donor of a trust completes a contract. Such contracts, as we have seen, have been frequent in the history of the nation, and their

validity has not only never been questioned but has been directly affirmed. *Tucker* v. *Ferguson*, 22 Wall. 527.

There is nothing in the case of *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, in conflict with these views. In that case it was held that property of the United States, situated within the limits of a State, was exempt by the Constitution of the United States from taxation by that State; and while, referring to the many exemption clauses in different acts of admission of States, it was said that they were but declaratory of the law and conferred no new right or power on the United States, it was not held that if in the absence of such exemption clauses the lands of the United States would have been subject to taxation, the compact thereby created would not have been operative to relieve them. And it must be remembered that the question here is not as to exemption, but as to full control over the matter of sale and disposal.

Returning, then, to the facts of the case before us, by the provisions quoted the State expressly agreed that no tax should be imposed on lands belonging to the United States, that it should never interfere with the primary disposal of the soil within the State by the United States, or with any regulations Congress might find necessary for securing the soil to *bona fide* purchasers thereof. These provisions are not to be construed narrowly or technically, but as expressing a consent on the part of the State to the terms proposed by Congress; and among these terms were that the full control of the disposition of the lands of the United States should be free from state action. Whether Congress should sell or donate; what terms it should impose upon the sale or donation; what arrangements it should make for securing title to the beneficiaries—were all matters withdrawn from state interference by the terms of the enabling act and the Constitution. With this full reservation of power in Congress it is not open to doubt that that body might have made such disposition of the public lands of the United States within the State as would withhold them from the burdens of state taxation, not only until such time as all interest of the United States in the lands had ceased, but also until they had been used to fully accomplish the purposes for which Congress was selling or donating them.

It is true, as has been held in the ordinary administration of the affairs of the land department, that whenever full payment has been made to the United States, and the full equitable title has passed to an individual purchaser or homesteader, the mere delay in furnishing to such purchaser or homesteader the legal evidence of his title does not relieve the land from ordinary state taxation. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496; *Northern Pacific R. R. Co.* v. *Patterson*, 154 U. S. 130.

But it has also been held that until the very last moment that liens or equitable rights of the United States are extinguished, no matter how trivial or small may be the right or the lien reserved, the land is not subject to state taxation. *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444; *Colorado Company* v. *Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496.

But whatever may be the rule applicable in the ordinary administration of affairs in the land department, the provisions of the enabling act and the state constitution, before referred to, secure to the United States full control of the disposition of the public lands within the limits of the State. Within the scope of this reserved power Congress might grant to a railroad corporation public lands to aid in the construction of its road, withholding not only the legal title, but also exemption from state taxation until such time as some one should pay into the treasury of the company the full value of the land in money to be used in the construction of its road. It would be a part of the power reserved in Congress to determine the terms and conditions upon which title should effectually pass from the government. If Congress has a right to make a private corporation its agent to thus utilize to the fullest extent the value of the land it is willing to give to aid a public enterprise, it may deal with a State upon the same basis. The State, accepting the trust given by Congress, has all the powers of a trustee, and must have also all the freedom of a trustee, and may determine in what way that

trust may be most successfully carried out. The mere fact that the legal title has passed by act of Congress from the nation to the State is not the vital fact. Under section 3, article IX, of the state constitution public property used exclusively for any public purpose is exempted from taxation. It is undoubtedly true as a general rule that a State does not tax its own property, but we do not rest on this express language of the state constitution. We place our conclusion upon higher grounds. Accepting this property as a trustee, as it had a right to do, it was not compelled to weaken the full accomplishment of that trust by subjection of the lands to taxation.

We do not mean to hold that it was bound to exempt the land, either permanently or for any specified time, from taxation if in its judgment as trustee it believed that the purpose of the trust could be otherwise fully and fairly accomplished; and to that extent, and no further, goes the opinion in *Tucker* v. *Ferguson*, *supra*. In that case the State saw fit to tax the land after the lapse of a certain time, in respect to which Congress had prescribed an exemption, and it was said by Mr. Justice Swayne, on page 572:

"She was in nowise fettered, except as she had agreed to fulfil all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be *ultra vires* and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further."

But, if in its judgment, as trustee, the trust could be most effectually accomplished by transferring the lands to some corporation, subject to only a limited taxation until such time as the full value of the lands could be secured for the purposes of the trust, it was not prevented from so doing by any obligation which it was under in respect to the general mass of property within the State. When the State accepted the position of

trustee it had all the freedom of judgment which belongs to a trustee in respect to the best means of carrying the trust into execution. The legislature was the body representing the State, whose judgment was invoked as to such means, and its action was taken not so much in discharge of its constitutional obligations to the people as of its contract obligations as trustee to the grantor of the trust. In other words, the State either could not accept the trust, or accepting it was entitled to all the freedom of judgment which attends the action of a trustee, and, as we have seen, it is too late in the history of railroad aid legislation in this country to hold that a State cannot accept the position of trustee of such a grant.

Congress, acting for the United States—the owner of the lands—could, by virtue of the compact with the State, have in creating the trust provided specifically for an exemption, or for taxation in a limited way. Having failed to so prescribe the manner in which the trust should be executed, the power became vested in the trustee, the State, and it exercised it in the way indicated by the legislation of 1865 and 1870. Having that power as trustee, it could make a valid contract in respect thereto with the corporations, and they, investing their money in the construction of the road on the faith of the contract tendered and accepted, are entitled to be protected against any subsequent legislative impairment in respect thereto.

For these reasons we are of opinion that there was a valid contract made with these companies in respect to the taxation of these lands—a contract which it was beyond the power of the State to impair; that this subsequent legislation does impair that contract, and cannot, therefore, be sustained.

*The judgment of the Supreme Court of Minnesota is reversed, except as to lands belonging to the Great Northern Railway Company, and the case is remanded for further proceedings not inconsistent with this opinion.*

MR. JUSTICE BROWN concurred upon the ground that the legality of commuting the payment of taxes upon railway property by a payment of a percentage upon the gross earnings, having been recognized by the legislature and the Supreme

Justices White, Harlan, Gray and McKenna, concurring.

Court of Minnesota for thirty years, and also having been recognized as valid in the constitutional amendment of 1871, it is too late to set up its repugnance to the state constitution as against railways which were built upon the faith of its validity.

Mr. Justice White, with whom concurred Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice McKenna, assenting to the judgment of reversal.

The act which was accepted by the corporation, and which is now decided to be an irrevocable contract protected from impairment by the Constitution of the United States, in substance provided that in lieu of all other taxes upon its property of every kind and nature, whether real or personal, the railroad company should annually pay a fixed gross receipt tax of three per cent. It, however, provided that the public lands which the State had received from the United States, and which it had given to the corporation to aid in the construction of its railroad, might be taxed by the State in addition to the three per cent gross receipt tax whenever the corporation had parted with its title to such property. When this gross receipt tax was enacted the constitution of the State commanded that taxation should be equal and uniform, and that property should be assessed according to valuation. In addition express authority was given to exempt from taxation certain enumerated classes of property, such as universities, schools, churches, burying grounds, etc. From this it resulted that the legislature was deprived of the right to exempt persons or property in any case unless embraced in the classes as to which the power to exempt was specifically granted as above stated. This is not disputed. It follows then that if the gross receipt tax was an exemption it was void, because repugnant to the constitution of the State. If so void, it did not create a contract, within the contract clause of the Constitution of the United States, for rights protected from impairment could not flow from an act which had no legal existence. The conclusion then that the act which imposed the gross receipt tax created a contract protected from impairment by the Constitution of the United States must rest

on the premise that such act was not an exemption. To this proposition I cannot give my assent.

True it is that in *McHenry* v. *Alford*, 168 U. S. 651, a territorial legislative act, which taxed a railroad corporation by a levy on its gross receipts, was decided not to be a violation of the organic act of the territory which commanded that taxation should be uniform, and that all property should be assessed by a method of valuation. But in that case no question of contract was involved, and the issue presented and the one decided was that the territorial legislature, in selecting a gross receipt tax as the method for reaching railroad property, did not necessarily violate the organic law of the territory as to uniformity and valuation. But this ruling is inapposite to the present case, where the question is not whether the legislature of Minnesota was empowered by the constitution of that State to provide that railroad property should be taxed by a gross receipt tax, but whether, conceding the legislature had the authority to enact such a tax as to railroads or any other class by it selected, it possessed the additional power to enter into an irrevocable contract, by which the method thus selected as to the persons and property designated should be forever thereafter continued.

It seems to me the moment it is admitted that the gross receipt tax is an irrevocable contract, thereby it necessarily results that an exemption from taxation was provided for. The object of forbidding exemptions from taxation is not alone to secure revenue, but is to preserve untrammeled by contract the fullness of all the lawful power of taxation in the successive repositories of such power. In other words, forbidding exemptions in terms directs that no one legislature shall by contract limit the lawful rights of its successors, by taking particular property out of the legislative authority to tax, on the assumption that such persons or property are thereafter to be governed by a contract which exempts from all future exercise of the legislative power of taxation. This seems so obvious that I cannot find words to express the thought that a particular person or property is irrevocably taken, by contract, beyond the reach of the legislative right to tax by any lawful mode deemed from time to time to be best for the public interest, without at the same time saying

that by such an irrevocable contract an exemption from taxation is created.

Nor does it seem to me that the decisions of the Minnesota courts, which are referred to as showing that under the constitution of that State it was competent for the legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered or decided in any form. Undoubtedly some of these decisions held that a gross receipt tax was valid, just as it was so held in *McHenry* v. *Alford*, *supra*. But, as I have said, to decide that the general assembly of Minnesota could select a gross receipt tax without violating the rule of uniformity or the requirement of valuation, did not involve the question whether one legislature in exercising its discretion as to such subjects could in addition impose by an irrepealable contract its action on the succeeding legislatures of the State.

The first case which arose in Minnesota, in which the question whether the levy of a gross receipt tax and the acceptance of the terms of the act by a corporation made an irrepealable contract, is the one now here, and there can be no question that the Supreme Court of Minnesota has declared unequivocally that the element of irrevocable contract, if upheld, would cause the act or acts to become exemptions, and therefore repugnant to the constitution of the State. Even if, however, the Minnesota decisions, prior to the one now before us, had the import which is deduced from them, in my opinion they would not be decisive of this controversy. The decisions in question were not rendered prior to the enactment of the gross receipt tax, which is here in controversy, and therefore it cannot be argued that they entered into and formed a part of such act. In adjudging whether a contract has been impaired by subsequent legislation, it is elementary that this court determines for itself whether there was a contract. Whilst it is true that in making such inquiry the persuasive power of state decisions will be taken into view, nevertheless the duty ever remains to determine independently whether the contract existed which it is asserted has been

impaired. Discharging such duty in this case, in view of the provisions of the constitution of the State of Minnesota, my mind cannot be persuaded to the conclusion that an agreement is not an exemption by which a particular person or property is forever, as regards taxation, by irrevocable contract, exempted from the general rules of taxation.

Nor can I agree because the State of Minnesota received public land from the United States to be used to aid in the construction of a railroad, the general assembly of that State was thereby endowed with the attribute of dealing with such land in violation of the constitution of the State. The constitution of the State was the measure of the powers of the legislature of Minnesota, and in our system of government I do not conceive that Congress can confer upon a state legislature the right to violate the constitution of the State. True it is that in taking the land a relation of trust was engendered, by which the obligation arose to devote the lands to the purpose for which they had been entrusted by Congress to the State. But this it seems to me can only signify that the State of Minnesota, through its legislature, was obliged to use the lands in furtherance of the trust, in accordance with the powers and under the restrictions imposed by the constitution of the State. Whilst this reasoning is alone to my mind sufficient to refute the theory that the gift by Congress could endow the general assembly with power to disregard the constitution of the State, even if Congress had so expressly directed, the conclusion is cogently reinforced when it is considered that no provision was made by Congress in giving the lands to the State, that in using such lands for the purposes specified in the grant the State should exempt them by irrevocable contract from taxation. Even if it be conceded *arguendo* only that such a power could have been lawfully imposed, its exercise ought not to be implied in order thereby to prevent the legislature of the State from using its taxing authority free from the restraints of an irrevocable contract. But again, if it be conceded that Congress could lawfully have authorized the legislature of the State of Minnesota to violate the constitution of that State, and even if it be granted that Congress did so, these concessions should not affect the de-

cision of this case. For if such power existed, it could only relate to lands given by the United States, and not to all the other real and personal property of the railroad, which came not from the grant by the United States to the State. But the irrevocable contract which is now decided to have been lawfully made by the general assembly of the State of Minnesota was not one dealing only with the lands given by the United States, but was one relating to all the property of the railroad. To enforce its obligations therefore, under the assumption of a trust as to lands given by the United States, is to restrain the power of the State by contract as to property within its borders, not received from Congress, not embraced by the trust, and over which the plenary taxing power of the State extends.

Because the provision as to the lands given by Congress to the State is indivisibly united with the other provisions contained in the gross receipt tax law, it does not follow that that which is confessedly repugnant to the constitution of the State should be held to be valid; but it should rather, I think, be decided that the vice which affects a part, and which cannot be separated, operates upon the contract as an entirety and causes the whole to be void.

Although I dissent, for the foregoing reasons, from some of the grounds stated in the opinion of the court, I yet concur in the judgment of reversal upon one ground expressed therein. Conscious that nothing is needed to strengthen the conclusive reasoning by which the proposition is sustained in the opinion of the court, nevertheless, as the question presents itself to my mind in a somewhat different aspect from that considered by the court, the additional grounds which cause me to concur will now be stated.

In 1871 an amendment to the constitution of Minnesota, which is set out in the opinion of the court, was adopted by a vote of the people. The opinion of the Supreme Court of Minnesota in the case at bar holds that the effect of that amendment was to ratify and confirm the gross receipt tax laws and to deprive the general assembly of all power to repeal or amend such laws, unless the legislative act so doing was submitted to and ratified by a vote of the people. Accepting this construc-

tion as conclusive, it follows that the gross receipt tax laws, even if they contained a grant of exemption, were no longer in violation of the constitution of the State, but did not evidence irrevocable contracts, since they were subject to repeal or amendment by a legislative act approved and ratified by a vote of the people. This suit rests upon an act of the general assembly of Minnesota, approved by the people in 1896, which it is claimed was the first act which repealed or amended the gross receipt tax law relating to the rights of the corporation now here, to the extent that it provided that the public lands given to the railroad should be taxed before the corporation had parted with its title. Before examining the scope of the act relied upon, it is important to bear in mind the relations which are engendered when a contract is entered into by a State subject to the reserved power to repeal, alter or amend. In such case no irrepealable contract, protected from impairment under the Constitution of the United States, takes effect, because it is impossible to conceive that contract rights which are conferred subject to the power of repeal, alteration or amendment are protected from an impairment which under the terms of the grant the State has reserved a right to make. *Louisville* v. *Bank of Louisville*, 174 U. S. 439, 444; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636, 644, *et seq.*

But whilst this is settled, it has also been equally determined that the reserved right to repeal, alter or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law. *St. Louis, Iron Mountain &c. Railway* v. *Paul*, 173 U. S. 404, 408, and cases cited. And an apt illustration of the application of this doctrine is found in *Louisville Water Co.* v. *Clark*, 143 U. S. 1.

Will, then, the enforcement of the amendatory act, which is here relied upon, providing for the taxation of the lands, before the corporation had parted with its title to them, in spite of the continued exaction of the gross receipt tax, deprive the corporation of its property without due process of law, or deny to it the equal protection of the laws? The repealing act says:

"SEC. 1. All lands in this State heretofore or hereafter granted by the State of Minnesota or the United States or the Territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this State, except such parts of said lands as are held, used or occupied for right of way, gravel pits, side tracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies."

But these provisions, which in and of themselves are clearly an amendment of the gross receipt tax laws, are accompanied by the following proviso:

"Provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings *in the same manner* and *in the same amount* as is now provided by law, and that nothing in this act contained *shall be construed to repeal said laws*, except in so far as the same relate to the tax upon said lands." [Italics are mine.]

Considering for a moment the ratified agreement which the gross receipt tax law embodied, it is patent that the duties which it imposed and the obligations to which it gave rise were in the strictest sense reciprocal or commutative; that is, that the agreement to pay the gross receipt tax, and necessarily the amount of those taxes, was predicated on the obligation on the part of the State to regard the payment of said tax as the discharge by the corporation of all taxes due upon all its real or personal property. The amendatory act, therefore, whilst increasing the sum of the obligation of the corporation to the State to the extent that the lands are no longer to be represented by the gross receipt tax, yet at the same time retains in favor of the State the right to take the whole amount of the stipulated payment of the gross receipt tax in the same manner as theretofore, that is, by the contract. That is to say, the amendatory act preserves the contract in favor of the State as an entirety, by retaining all the obligations due by the railroad to the State, and yet purports to repeal, alter or amend the contract by relieving the State from its obligation to the corporation to include all the property of the latter for the purpose of taxation by a gross receipt tax, which was the consideration upon which the obliga-

tion of the corporation to pay such tax rested. This consequence is made certain by the provision that the gross receipt tax, despite the amendment, shall remain payable *in the same amount*, and *in the same manner* as before the passage of the amendatory act, and is additionally made evident by the provision of the amendatory act declaring that it "*shall not be construed to repeal*" the gross receipt tax act. The situation created by the amendatory act may be thus illustrated: The State leases a building to it belonging for a term of years, conditioned on the payment of a stipulated amount of rent annually. The consideration of the obligation of the lessee to pay in such case would of course be the right of occupation granted by the State, and the continued right of the State to collect the rent would depend upon the enjoyment by the tenant of the right of occupation which the contract granted. Now, then, if in such a contract the power was reserved to repeal, alter or amend, and it was exercised by declaring that the right of occupation should cease, but that the duty to pay the rent should continue in the same amount and in the same manner stated in the contract, and that nothing in the amendatory act should be construed as relieving the lessee from the duty to pay the whole of the stipulated rent, a condition strictly analogous to that which arises from the amending act relied on in the case at bar would be presented.

My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the State are concerned, and at the same time to destroy the reciprocal duty owed by the State to the other contracting party, is not to repeal, alter or amend the contract at all, but, whilst preserving it, to endeavor by an act of arbitrary power to impose a burden incompatible with the very provisions and terms of the amendatory act itself. As has been previously said, the consideration of the contract obligation of the corporation to pay the gross receipt tax was the duty on the part of the State to consider such payment as a discharge of all taxes upon all the real and personal property of the corporation. The agreements being thus interdependent are of necessity indivisible, and to retain the entire duty or right of one party to

the contract must lead to the preservation of the corresponding and reciprocal right or duty of the other. In reason, the argument comes to this, that the act purporting to amend, on its face cannot be declared to have done so, without concluding at the same time both that it did alter, repeal and amend, and that it did not. Under these circumstances, to enforce the amendatory act would necessarily be to deny to the corporation the equal protection of the laws, since it would leave the corporation subject to taxation, not by the general laws of the State but by the provisions of a contract, and at the same time subject the corporation to a burden wholly incompatible with its liability under the contract. It would be a denial of due process of law to the corporation, since it would be but the recognition of the right of the State, without hearing and without process of any kind, to condemn the corporation to the performance of a duty alleged to be resting on it, and at the same time retain in favor of the State as against the corporation an obligation wholly at variance and in absolute conflict with the supposed duty arbitrarily declared by the amendatory act to rest upon the corporation.

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## MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* COHEN.

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

No. 157. Argued March 14, 15, 1900. — Decided December 3, 1900.

The provision in the statutes of New York that "no life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided," does not apply to or control such a policy issued by a corporation of New York in another State, in favor of a citizen of the latter State, but is applicable only to business transacted within the State of New York; and in such case the rights of the parties are measured by the terms of the contract.

Counsel.

On June 10, 1885, the petitioner delivered to Alexander Cohen, in the State of Montana, a life insurance policy for $3000, conditioned upon the annual payment of a premium of $89.61. Upon it the insured paid premiums up to and including June 10, 1892. No subsequent premiums were paid. On September 21, 1897, he died. His wife, Tine Cohen, was the beneficiary named in the policy.

The application commenced in these words: "Application for insurance in the Mutual Life Insurance Company of New York, 140 to 146 Broadway, corner of Liberty street, New York City, subject to the charter of such company and the laws of said State." It further contained this provision: "That if the insurance applied for be granted by the company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy." Among those conditions and stipulations was this: "Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

On November 9, 1898, this action was commenced in the Circuit Court of the United States for the District of Washington.

The single defence was the non-payment of premiums after June 11, 1892. There was no suggestion of rescission, abandonment, knowledge by the beneficiary of the non-payment of the premium, or any refusal or failure on her part in respect to the policy. A demurrer to the answer was sustained, judgment rendered for the amount of the policy, less the unpaid premiums, which judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, 38 C. C. A. 696, and thereupon the case was brought here on certiorari.

*Mr. Julien T. Davies* and *Mr. John B. Allen* for the Mutual Life Insurance Company. *Mr. Edward Lyman Short*, *Mr. Frederick D. McKenney* and *Mr. Robert C. Strudwick* were on their brief.

*Mr. S. Warburton* and *Mr. Harold Preston* for Cohen.

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

*Mutual Life Insurance Company* v. *Phinney*, 178 U. S. 327, was an action against the same insurance company, in the same district, on a policy like the one in controversy here, save that in that the insured was himself the beneficiary. It resulted in a judgment in the Circuit Court against the company. Thereupon the company sought to transfer it by writ of error to the Court of Appeals of that circuit, but that court dismissed the writ of error. Thereafter, on April 19, 1897, a certiorari was issued by this court. 166 U. S. 721. On examination we held that the Court of Appeals erred in dismissing the writ of error, that it had jurisdiction, and that it ought to have reversed the judgment of the Circuit Court. The decision was based on the ground of error in the ruling of the Circuit Court in respect to rescission and abandonment. In the opinion we referred to the fact that there was a primary question of the applicability of a statute of the State of New York, but deemed it unnecessary to decide it. That decision was followed by the cases of the same company against *Sears*, 178 U. S. 345; against *Hill*, 178 U. S. 347; against *Allen*, 178 U. S. 351. All of which cases were disposed of in like manner.

The primary question noticed but not decided in those cases is distinctly and solely presented in this.

The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana. Under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that State. *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226, 232. In that State, there being no statutory provisions to the contrary, the failure to pay the annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

New York, on the other hand, the State by which the insurance company was chartered and in which it had its principal office, by section 1 of chapter 321 of 1877 had enacted—

"SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided."

The provision referred to and which is stated at length in the succeeding part of the section is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S. 330.

This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover.

The question, therefore, is whether the law of New York controls.

The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the State. Proceeding on the accepted principle that a State may determine the conditions, the meaning and limitations of contracts executed within its borders the language of the statute reaches contracts made within the State. Undoubtedly a foreign insurance company making a contract within the State of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another State would be free from its limitations. There is no indication of an intent on the part of the legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the State and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the State shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the State and elsewhere shall as to all its business be so limited. If we cannot from the language impute to the legislature an intent to regulate the business of a foreign company outside of the State, how can we

find in such language an intent to prescribe limitations upon the contracts of a home company outside the State? In the absence of an expressed intent it ought not to be presumed that New York intended by this legislation to affect the right of other States to control insurance contracts made within their limits. Can it be that the State of New York, aware of the fact that other States and other countries might by their legislation properly prescribe terms and conditions of insurance contracts, meant by this legislation to restrict its local companies from going into those States and countries and transacting business in compliance with their statutes if in any respect they were found to conflict with the regulations prescribed for business transacted at home?

Again, it is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice. See Laws, 1876, chap. 341, sec. 1; the statute now under consideration, Laws, 1877; Laws, 1892, chap. 690, sec. 92; Laws, 1897, chap. 218, sec. 92. The varying provisions of these statutes, directed in terms, not to local companies but to companies doing business in the State of New York, strengthen the conclusion that the State was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the State.

Again, the terms of the act itself tend in the same direction. It provides for a 30-day notice. While such a notice might be reasonable as to all policies within the State, yet when it is remembered that some at least of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a 30-day notice in many cases would be of little value.

Further, by section 2 the statute provides that an affidavit by one authorized to mail the notice shall be "presumptive evidence" of the giving of the notice. Can it be supposed that the legislature of New York was contemplating a rule of evidence to be enforced in every state and nation of the world?

These considerations lead to the conclusion that the statute of

New York, directed as it is to companies doing business within the State, was intended to be, and is, in fact, applicable only to business transacted within that State.

It is not doubted that a contract by an insurance company of New York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. And it is urged that, although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is "subject to the charter of such company and the laws of said State;" and the contract refers to the application, and declares that it is issued "in consideration of the application for this policy and of the truth of the several statements made therein." While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the State is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words, if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all its respects controlled by the laws of New York.

Further, it may be noticed that even if the language justifies a broader construction, it may well mean that only such laws of the State of New York as are intended to and do change the charters of the companies or are intended to have extraterritorial application should be considered a part of the policy.

The stipulation in this policy is different from that presented to the Court of Appeals of New York in *Baxter* v. *Brooklyn*

*Life Ins. Company*, 119 N. Y. 450, 454, which was that it was "a contract made and to be executed in the State of New York, and construed only according to the laws of that State." There was a direct provision in respect to the contract itself, and thus incorporated those laws into its terms.

While authorities on this particular question are not numerous, we may properly refer to an opinion of the Supreme Court of Washington, the State in which this action was brought, *Griesemer* v. *Mutual Life Insurance Company*, 10 Washington, 202, in which, referring to this special question, and the contention that this very statute of the State of New York became a part of the contract of the company in the State of Washington, the court said, on pages 206, 207:

"It is claimed on the part of the plaintiff that upon its enactment it became attached to the defendant, it being a corporation organized under the laws of New York, and effected a change in its charter; so that every policy thereafter issued by it, whether in the State of New York or elsewhere, became subject to its provisions. On the other hand, it is claimed by the defendant that it only affected policies issued to, or held by, residents of the State of New York; that the evident object of its enactment was to protect such residents; that to give it a broader effect would be to convict the legislature of having discriminated against life insurance companies organized under the laws of the State.

"We are unable to construe the law in accordance with the contention of either party. The construction contended for by the defendant is too narrow. The language used is, that 'No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy. . . .' This language, construed in its ordinary sense, seems to preclude such a narrow construction. Beside, if it were warranted by the language, it would not be reasonable to suppose that the legislature intended to so limit the effect of the statute. If it had so intended, it would have made use of language which in some manner confined the rights to be affected by the statute to residents of the State, instead of to companies doing business therein. While the construction, contended for by the

plaintiff, seems to be equally untenable, for the reason that it would convict the legislature of having sought to accomplish something not in its power. So construed the act would apply to all policies of any company which should do business in the State of New York, wherever issued, regardless of the question as to whether or not it was organized under its laws. That the legislature of New York could not control companies not organized under its laws as to their business transacted in other States is too clear for argument. Hence the construction contended for by respondent would convict the legislature of having attempted that which it could not do, or of having deliberately discriminated against its own companies.

"In our opinion the reasonable and ordinary construction of the language used in the statute is such as to make it applicable to business done in the State of New York; and that the question as to whether or not the companies doing such business were organized under its laws, or those of some other State, has no influence upon the question as to whether or not the statute is applicable. This construction is justified by the language used, and will give force to every word, while the other will not do so. And since the well-settled rule as to construction of statutes requires every word to be given force if possible, it follows that the limitations of the act are impressed upon all policies issued in the State of New York by either domestic or foreign companies, and that it has no application to policies not issued therein, even although the companies issuing them were organized under its laws."

The New York cases cited by counsel throw no light on the question. *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y. 450, contained in the contract, as heretofore stated, an express stipulation of the controlling law. In *Carter* v. *Brooklyn Life Ins. Co.*, 110 N. Y. 15, the question was as to the significance of the word "renewed" in the section referred to, and it does not appear where the policy was issued. In *Phelan* v. *Northwestern Mutual Life Ins. Co.*, 113 N. Y. 147, the statute was held applicable to a foreign insurance company doing business in the State of New York, the notice given was held insufficient, and no question was considered as to the scope of the statute other-

wise. *De Frece* v. *National Life Ins. Co.*, 136 N. Y. 144, was likewise an action against a foreign insurance company, and involved no question like that before us. *Rae's Executors* v. *National Life Ins. Co.*, 20 U. S. App. 410, was also an action against a foreign insurance company, and the question was simply as to the sufficiency of the notice.

We conclude, therefore, that the statute of the State of New York does not under the circumstances presented control, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited.

*The judgment of the Circuit Court of Appeals will be reversed and the case remanded to the Circuit Court of the United States for the District of Washington, with instructions to set aside the judgment and overrule the demurrer.*

Mr. Justice McKenna dissented.

Mr. Justice Peckham took no part in the decision of this case.

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## WILLIAMS *v.* FEARS.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 287. Argued October 29, 1900.—Decided December 10, 1900.

By a general revenue act of the State of Georgia, a specific tax was levied upon many occupations, including that of "emigrant agent," meaning a person engaged in hiring laborers to be employed beyond the limits of the State. *Held* that the levy of the tax did not amount to such an interference with the freedom of transit, or of contract, as to violate the Federal Constitution.

Nor was the objection tenable that the equal protection of the laws was denied because the business of hiring persons to labor within the State was not subjected to a like tax.

The imposition of the tax fell within the distinction between interstate commerce, or an instrumentality thereof, and the mere incidents which

Statement of the Case.

may attend the carrying on of such commerce. These labor contracts were not in themselves subjects of traffic between the States, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could correctly be said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce.

R. A. WILLIAMS was arrested on a warrant issued by the county court of Morgan County, Georgia, and placed in the county jail on his failure to give bond pending his trial. Thereupon he made application to the judge of the superior court within and for that county for a writ of *habeas corpus* by petition alleging that the warrant under which he was arrested charged him with a violation of the tenth paragraph of section two of the General Tax Act of Georgia, of 1898, and that his restraint was illegal because that part of the act was in conflict with clause three of section eight, and with clause five of section nine, of article one, and with section two of article four, of the Constitution of the United States; and also with the Fourteenth Amendment. The writ of *habeas corpus* was duly issued and the application heard on the return thereto, which resulted in the denial of the petition by the superior court, and the remanding of Williams to custody. The case was then carried to the Supreme Court of Georgia, where, on April 11, 1900, judgment was rendered affirming the judgment of the superior court. 35 S. E. Rep. 699.

The title of the General Tax Act of 1898, (Georgia Laws, 1898, p. 21,) read thus:

"An act to levy and collect a tax for the support of the state government and the public institutions; for educational purposes in instructing children in the elementary branches of an English education only; to pay the interest on the public debt, and to pay maimed Confederate soldiers and widows of Confederate soldiers such amounts as are allowed them by law for each of the fiscal years eighteen hundred and ninety-nine and nineteen hundred; to prescribe what persons, professions and property are liable to taxation; to prescribe the methods of collecting and receiving said taxes; to prescribe the method of ascertaining the property of the State subject to taxation; to

prescribe additional questions to be propounded to taxpayers, and to provide penalties and forfeitures for non-payment of taxes; to prescribe how the oath of taxpayers shall be administered, and provide penalties for violation thereof, and for other purposes."

Section 2 provided "that in addition to the ad valorem tax on real estate and personal property as required by the constitution and provided for in the preceding section, the following specific taxes shall be levied and collected for each of said fiscal years eighteen hundred and ninety-nine and nineteen hundred."

Then followed paragraphs imposing poll taxes, and taxes on lawyers, doctors, photographers, auctioneers, keepers of pool and billiard tables, traveling vendors of patent or proprietary medicines, special nostrums, jewelry, paper, soap or other merchandise, local insurance agents, etc.

Paragraph 10 was as follows:

"Upon each emigrant agent, or employer or employé of such agents, doing business in this State, the sum of five hundred dollars for each county in which such business is conducted."

Section 4 was as follows:

"Be it further enacted by the authority aforesaid, That the taxes provided for in paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 of section 2 of this act shall be paid in full for the fiscal years for which they are levied to the tax collectors of the counties where such vocations are carried on at the time of commencing to do business specified in said paragraphs. Before any person taxed by paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 of section 2 of this act shall be authorized to carry on said business they shall go before the ordinary of the county in which they propose to do business and register their names, places of business, and at the same time pay their taxes to the tax collector; and it shall be the duty of said ordinary to immediately notify the comptroller general and the tax collector. Any person failing to register with the ordinary, or, having registered, failing to pay the tax as herein required, shall be liable to indictment for misdemeanor, and, on conviction, shall be

fined not less than double the tax, or be imprisoned as prescribed by section 1039 of volume III of the Code of 1895, or both, in the discretion of the court. One-half of said fine shall be applied to the payment of the tax, and the other to the fund of fines and forfeitures for use of officers of court."

*Mr. James Davison* for plaintiff in error.

*Mr. James M. Terrell* for defendants in error.

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

Persons following the occupations named in some twenty-nine paragraphs of section 2 of the Tax Act of 1898, if they failed to register their names before the ordinary, or, having registered, failed to pay their taxes, as required by section 4, were liable to indictment for misdemeanor.

The Supreme Court of Georgia pointed out that it did not distinctly appear whether Williams was charged with having done business without registering, or without paying the tax, but considered that to be immaterial since he could not be punished for a failure to do either, if the provision imposing the tax were unconstitutional.

As preliminary to considering the validity of the provision the court, as matter of orginal definition, and in view of prior legislation, (Acts, 1876, p. 17; Acts, 1877, p. 120; Code, 1882, §4598, *a*, *b*, *c*,) held that the term "emigrant agent," as used in the General Tax Act of 1898, meant a person engaged in hiring laborers in Georgia to be employed beyond the limits of that State.

The court called attention to the fact that while previous acts had required a license, this act provided for a specific tax on the occupation of emigrant agents in common with very many other occupations, the declared purpose of the levy being for the support of the government, and ruled that the question of whether the tax was so excessive as to amount to a prohibition on the transaction of that business, did not arise, and, indeed, was not raised.

The inquiry is, then, whether a state law taxing occupations is invalid so far as applicable to the pursuit of the business of hiring persons to labor outside the state limits because in conflict with the Federal Constitution.

On behalf of plaintiff in error it is insisted that paragraph ten is in conflict with the Fourteenth Amendment because it restricts the right of the citizen to move from one State to another, and so abridges his privileges and immunities; impairs the natural right to labor; and is class legislation, discriminating arbitrarily and without reasonable basis.

Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

And so as to the right to contract. The liberty, of which the deprivation without due process of law is forbidden, "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned; . . . although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes." *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 591; *Holden* v. *Hardy*, 169 U. S. 366.

But this act is a taxing act, by the second section of which taxes are levied on occupations, including, by paragraph ten, the occupation of hiring persons to labor elsewhere. If it can be said to affect the freedom of egress from the State, or the freedom of contract, it is only incidentally and remotely. The

individual laborer is left free to come and go at pleasure, and to make such contracts as he chooses, while those whose business it is to induce persons to enter into labor contracts and to change their location, though left free to contract, are subjected to taxation in respect of their business as other citizens are.

The amount of the tax imposed on occupations varies with the character of the occupation. Dealers in futures are compelled to pay one thousand dollars annually for each county in which the business is carried on; circus companies exhibiting in cities or towns of twenty thousand inhabitants or more, one thousand dollars each day of exhibition; peddlers of cooking stoves or ranges, two hundred dollars in every county in which such peddler may do business; peddlers of clocks, one hundred dollars; and so on.

The general legislative purpose is plain, and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject.

It would seem, moreover, that the business itself is of such nature and importance as to justify the exercise of the police power in its regulation. We are not dealing with single instances, but with a general business, and it is easy to see that if that business is not subject to regulation, the citizen may be exposed to misfortunes from which he might otherwise be legitimately protected.

Nor does it appear to us that the objection of unlawful discrimination is tenable.

The point is chiefly rested on the ground that inasmuch as the business of hiring persons to labor within the State is not subjected to a like tax, the equal protection of the laws secured by the Fourteenth Amendment is thereby denied.

In *Shepperd* v. *Commissioners*, 59 Georgia, 535, approved and followed in this case, the Supreme Court of Georgia decided that the act of 1876, which required a license as preliminary to carrying on this business, was not unconstitutional on this ground, for the reason that it did not appear that hiring for internal employment had become a business in Georgia, or was

pursued as such by any person or persons. And for the further reason that the State could properly discriminate in its police and fiscal legislation between occupations of similar nature but of dissimilar tendency; between those which tended to induce the laboring population to leave, and those which tended to induce that population to remain.

We are unable to say that such a discrimination, if it existed, did not rest on reasonable grounds, and was not within the discretion of the state legislature. *American Sugar Refining Company* v. *Louisiana*, *ante*, 89, and cases cited.

In fine, we hold that the act does not conflict with the Fourteenth Amendment in the particulars named.

Counsel for plaintiff in error further contends that the imposition of the tax cannot be sustained because in contravention of clause three of section eight, and clause five of section nine of article one of the Constitution.

Clause five of section nine provides that "no tax or duty shall be laid on articles exported from any State." The facts of this case do not bring it within the purview of this prohibition upon the power of Congress, and it need not be considered as a substantive ground of objection.

The real question is, does this law amount to a regulation of commerce among the States? To answer that question in the affirmative is to hold that the emigrant agent is engaged in such commerce, and that this tax is a restriction thereon.

In *Mobile County* v. *Kimball*, 102 U. S. 691, 702, Mr. Justice Field, delivering the opinion of the court, said: "Commerce with foreign nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." Broad as is the import of the word "commerce" as used in the Constitution, this definition is quite comprehensive enough for our purposes here.

These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the State. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was en-

gaged in transportation or that the tax on his occupation was levied on transportation.

In *McCall* v. *California*, 136 U. S. 104, we held that the agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, was an agency engaged in interstate commerce. But there the business was directly connected with interstate commerce, and consisted wholly in carrying it on. The agent was the agent of the transportation company, and he was acting solely in its interests.

So in *Norfork & Western Railroad Company* v. *Pennsylvania*, 136 U. S. 114, it was ruled that a tax imposed by a State on a corporation engaged in the business of interstate commerce, as described, for the privilege of keeping an office in the State, was a tax on commerce among the States.

On the other hand, it was held in *Nathan* v. *Louisiana*, 8 How. 73, that a broker dealing in foreign bills of exchange was not engaged in commerce, but in supplying an instrument of commerce, and that a state tax on all money or exchange brokers was not void as to him as a regulation of commerce.

In *Paul* v. *Virginia*, 8 Wall. 168, 183, it was decided that issuing a policy of insurance was not a transaction of commerce, and it was said: "The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence in value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale."

Again, in *Hooper* v. *California*, 155 U. S. 648, 655, it was held that a section of the penal code of California making it a misdemeanor for a person in that State to procure insurance for a resident in the State from an insurance company not in-

corporated under its laws, and which had not complied with its laws relative to insurance, was not a regulation of commerce. Mr. Justice White there adverts to the real distinction on which the general rule and its exceptions are based, "and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in their nature."

The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the States, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce.

Nor was the imposition in violation of section 2 of Article IV, as there was no discrimination between the citizens of other States and the citizens of Georgia.

*Judgment affirmed.*

Mr. Justice Harlan dissented.

# NEW YORK STATE *v.* BARKER.

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

No. 51. Argued October 30, 1900.—Decided December 10, 1900.

In this record there is no averment and no proof of any violation of law by the assessors of New York. The mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of the real estate of corporations when they have but one in the case of individuals, cannot be held to be a denial to the corporation of the equal protection of the laws, so long as the real estate of the corporation is, in fact, generally assessed at its full value.

This court cannot, with reference to the action of the public and sworn officials of New York city, assume, without evidence, that they have violated the laws of their State, when the highest court of the State refuses, in the absence of evidence, to assume such violation.

THE case is stated in the opinion of the court.

*Mr. David Willcox* for plaintiff in error. *Mr. William S. Opdyke* was on his brief.

*Mr. James M. Ward* for defendants in error. *Mr. Theodore Connoly* and *Mr. John Whalen* were on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error comes here for the purpose of obtaining a review of the judgment of the New York Court of Appeals, which affirmed the judgments of the courts below dismissing a writ of certiorari.

The relator is a corporation created under the laws of the State of New York and a resident of and doing business in the city of New York, and it procured the writ, as provided for in the statute, to review an assessment of $165,999 made upon its capital in the regular course of proceedings to levy and collect the annual tax budget of the city for the year 1896. Plaintiff sought to review the assessment on the ground,

among others, that it was illegal, and that to levy it, under the facts stated, would be to deny to the company the equal protection of the laws.

The facts upon which the question arises are these: The capital of the company was $900,000. The tax commissioners of the city of New York, in the course of their proceeding to tax the actual value of that capital, ascertained the actual value of what they termed the total "gross assets" of the company, which they found to have been..... $1,095,049

This value was arrived at from a statement of its property made by the company to the commissioners. By the term "gross assets," used by the commissioners, is meant the actual value of the capital and surplus of the company, but not its franchise. *People ex rel. Union Trust Company* v. *Coleman*, 126 N. Y. 433.

From this total they deducted —

(*a*) The debts of the company.....$329,050

(*b*) The assessed value of the real estate of the company, otherwise taxed. 600,000

929,050

Leaving a balance of..... $165,999

which was the amount upon which the company was assessed upon its capital aside from the assessment of $600,000, separately made upon its real estate.

The company claims that these "gross assets" should have been stated at $730,049, and the same deduction should be made as in the above statement, which would result in no assessment on the capital.

This difference of gross assets arises in this way: As made up by the commissioners they consist of the actual value of the building and lot owned by the company in New York city, in which it does business, taking it at its cost as admitted by the company in its statement made to the commissioners and which the commissioners found to be its actual value, viz.. $ 965,000

And to that is added other property..... 130,050

Making a total of..... $1,095,049,

while the item as claimed by the company is made up of the

value of the same building and lot as it was assessed by one of the deputy tax commissioners for the purpose of separate taxation under the law, such assessed value being..... $600,000
Added to that was the same item of..... 130,050
for other property as stated by the commissioners, the gross assets of the company by this valuation amounting to..... $730,050
and the difference between the two items is seen to be $365,000. The plaintiff in error insists that in arriving at the actual value of the capital for taxation under the statute of 1857 (the third section of which is set out below) the real estate which goes to make up a part of such value should be put in at its value as assessed for taxation in a separate manner, while the commissioners claim that as the law provides that the assessment upon the capital shall be at its actual value, it is necessary to arrive at the actual value of the real estate before a particular assessment can be reached in regard to the capital, which includes it, and that in arriving at the actual value of the real estate they are not estopped from determining what that actual value is by the fact that for the purpose of a separate assessment the real estate had been mistakenly and improperly assessed at another and a lower figure.

These conflicting claims arise out of the statute which provides for the taxation of corporations, their capital stock and surplus, and the general statute which provides for the taxation of real estate belonging either to individuals or corporations. That portion of the statute relating to the taxation of the capital of corporations which provides the method to be pursued reads as follows:

"The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations, actually owned by such company, which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value and

taxed in the same manner as the other personal and real estate of the county." Laws of 1857, c. 456, § 3.

As the New York Court of Appeals, in *People* v. *Commissioners of Taxes*, 95 N. Y. 554, has said, there is a most extraordinary confusion of ideas in the above section. Its meaning has, however, in some respects been made tolerably clear by the above cited case, together with those of *The People ex rel. Union Trust Company* v. *Coleman*, 126 N. Y. 435, and *People ex rel. Equitable Gas Light Company* v. *Barker*, 144 N. Y. 94.

In the first case it was stated that the general purpose of the statutes relating to assessments and taxation is to secure an assessment of all property, real and personal, at its actual value, and they are to be construed and enforced with this purpose in view. A construction of the statute in relation to other questions not material here was given in that case. In the case reported in 126 N. Y. it was held that the phrase "capital stock" contained in the section above quoted meant not the share of stock owned by the individual members but the capital owned by the corporation, and that this capital was to be taxed, together with the surplus, after making the reductions provided for in the section, and that the law did not include, for purposes of assessment and taxation, the franchises of the company.

In the *Equitable Gas Light Company Case*, 144 N. Y. 94, it was held that in arriving at the actual value of the capital for purposes of assessment, the assessors were not concluded by the assessed value of the real estate made for purposes of separate taxation if that assessment were a mistaken one, but might legally disregard such assessed valuation and estimate the real estate at its actual value, although it exceeded its assessed value.

Looking at the manner of assessing the real property of both individuals and corporations we find the general statute is as follows:

1 Revised Statutes, 393, § 17; 9th ed. p. 1685:

"All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor."

And also 1 Revised Statutes, 389, § 6:

"The real estate of all incorporated companies shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. . . ."

The special statute applying to New York city is substantially the same so far as assessment at full or actual value is concerned. Consolidation Act, c. 410, Laws of 1882, § 814.

Under these statutes the tax upon real estate must be imposed in all cases, both of individuals and of corporations, upon its full and true value as found by the assessors. In the case of the individual, however, no resort can be had to any other proceeding by which that tax can be increased by any subsequent assessment upon the difference between the assessed and the actual value of the real estate, if any there should be. In the case of corporations, on the contrary, under the construction given the statute of 1857 by the Court of Appeals, in the last above-cited case, if the real estate should be mistakenly assessed under the general statute at an undervaluation for purposes of separate taxation, the difference between the assessed and the actual value of the real estate may be reached in making an assessment upon the actual value of the capital under the act above mentioned. By such a result it is claimed the company is denied the equal protection of the laws. It must be remembered there is no claim made that in any event the corporation is taxed upon any property not legally taxable or that it is taxed beyond the actual value of its property as provided by law. The only claim is that in this opportunity to correct a mistaken assessment upon its real estate in the case of a corporation when assessed upon its capital, which does not exist in the case of an individual, the corporation is denied the equal protection of the laws. This is the sole Federal question in the case.

It is seen that the laws of the State provide for no undervaluation of real estate owned by either individuals or corporations. Those laws provide in terms for the assessment of all real estate at its actual value, while the whole force of the contention of the plaintiff in error is based upon the fact of undervaluation, although it is in the very teeth of the statute, and is a plain violation of its provisions. If there were no undervaluation of

real estate, or, in other words, if the laws of the State were complied with, the questions sought to be raised by the plaintiff could not arise. The failure of the assessors in this one instance to assess the real estate of the company for separate taxation at its actual value, and its assessment at that value in assessing for taxation the actual value of the capital of the company, could obviously work no denial of the equal protection of the laws to the company, if individuals were in fact assessed for their ownership of real estate at its full and true value as required by law. If the law were faithfully carried out, no harm could in any event come to the plaintiff in error by this subsequent assessment of its real estate at its full value, for it would only pay the same as individuals, they being assessed upon their real estate at its full value. To raise the question which the plaintiff in error seeks it was therefore obviously necessary to allege and prove as a fact that there was habitual violation of law by undervaluation; that, in the language of Mr. Justice Miller, in *Supervisors* v. *Stanley*, 105 U. S. 305, 318, the assessors "habitually and intentionally, or by some rule prescribed by themselves or by some one whom they were bound to obey," undervalued real estate for assessment in New York city; or, as stated in *Cummings* v. *National Bank*, 101 U. S. 153, 155, that a rule or system of valuation had been adopted by those whose duty it was to make the assessment, which was designed to operate unequally and to violate a fundamental principle of the Constitution, and that such rule had been applied not solely to one individual, but to a large class of individuals or corporations. It was said in that case that this was precisely the case made by the bill, and if supported by the testimony, the court thought relief should be given. There was both allegation and proof.

Both these cases related to the taxation of national bank shares, and the question was whether the tax levied violated the provisions of the national banking act on that subject.

In this record there is no averment and no proof of any violation of law by the assessors of New York. There is no allegation in the petition for the writ of certiorari that there has been any undervaluation of real estate, either with regard to

individuals or corporations, but on the contrary it is therein asserted that the assessed valuation of the real estate of the company was its actual value, and that it had been overvalued in the valuation of the capital of the company. The mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of their real estate, when they have but one in the case of individuals, cannot be held to be a denial to the corporations of the equal protection of the laws, so long as the real estate of the individual is, in fact, generally assessed at its full value. But we are nevertheless asked by the argument at bar, in the absence of allegations or proof of habitual, or indeed of any undervaluation, to assume or take judicial notice of its existence, notwithstanding such undervaluation would constitute a clear violation of the law of the State. And this we are asked to do in order to reverse a judgment of a state court. Such a presumption of the violation of law and of their duty by the assessors, the Court of Appeals of New York expressly refused to adopt. *People ex rel. Manhattan Railway Company* v. *Barker*, 146 N. Y. 304. In delivering the opinion of the court, Judge Haight said, at page 312:

"The value of property is determined by what it can be bought and sold for, and there can be no doubt but that these various expressions used in the statutes are all intended to mean the *actual value* of the property. The commissioners are sworn officers, and as such, in the absence of evidence to the contrary, are presumed to have done their duty. They have assessed the real estate at $7,323,200, and yet, under the method presented by their counsel for ascertaining the value of the relator's personal property, they now estimate the actual value of the real estate to be $45,591,352. We are aware that it is generally understood that in many localities throughout the State assessors, in violation of their duties, assess the real estate in their localities at a sum less than its actual value, but in the absence of evidence that this has been done by the commissioners of taxes and assessments in the city of New York, we cannot assume that they have so transgressed, for the purpose of approving of their work in this case."

Should this court, with reference to the action of the public and sworn officials of New York city, assume without evidence that they have violated the laws of their State, when the highest court of the State itself refuses, in the absence of evidence, to assume any such violation? We think not.

Nor did the Court of Appeals act upon any judicial notice of the fact of undervaluation in the case of *The Equitable Gas Light Company*, 144 N. Y. 94, already cited. While the assessed value was stated, the commissioners in their return to the writ of certiorari distinctly showed that the actual was more than the assessed value, and the only question in the case was whether in arriving at the actual value of the capital they were bound by the assessed and could not be permitted to show the true value of the real estate. The court held they were not so bound.

What the court remarked about the practice of undervaluation was not the basis of its judicial action, for the facts were distinctly proved. The subsequent case in 146 N. Y. (*supra*) is a direct authority for the refusal to make any presumption of a violation of official duty.

This court did not presume a violation of duty in *Cummings* v. *National Bank*, *supra*. On the contrary, the bill alleged the facts, and the testimony supported the allegations. In extenuation of the practice alleged and proved, the court remarked in passing (page 162) that it was not limited to the State of Ohio, and that it was matter of common observation that in the valuation of real estate the rule was habitually disregarded. Although the justice who wrote the opinion did speak of the fact as matter of common observation, neither he nor the court took judicial notice thereof, but only those facts which had been pleaded and testimony to sustain which had been duly given formed the basis of judicial action. We will not and ought not to presume a violation in the absence of allegations and proofs to that effect.

Whether, if the case were proved, as assumed by counsel, it would in fact amount to any such discrimination against corporations as to work a denial to the plaintiff of the equal protection of the laws, is a question not raised by this record, and, therefore, not necessary to be decided.

Syllabus.

We think the plaintiff in error has failed to show any error in the record, and the judgment of the Court of Appeals of New York is, therefore,

*Affirmed.*

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## NEW YORK STATE *v.* BARKER (NO. 2).

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

No. 52. Argued with No. 51, October 30, 1900.—Decided December 10, 1900.

Same counsel as in No. 51.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This case involves the taxes of 1897, and the same question in substance arises herein that has just been decided in the preceding case, and the judgment is, therefore,

*Affirmed.*

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## WISCONSIN, MINNESOTA AND PACIFIC RAILROAD *v.* JACOBSON.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 28. Argued October 18, 19, 1900.—Decided December 10, 1900.

The briefs filed in this case are in plain violation of the amendment to Rule 31, adopted at the last term, and printed in a note to this case.

The providing, at the place of intersection of the two railroads affected by this case, ample facilities for transferring cars used in the regular business of the respective lines, and to provide facilities for conducting the business, while it would afford facilities to interstate commerce, would not regulate such commerce, within the meaning of the Constitution.

The tracks of the two railroads being connected, the making of joint rates

is a matter primarily for the companies interested, and the objection that there is any violation of the interstate commerce clause of the Constitution is untenable.

Whether a judgment enforcing trade connections between two railroad corporations is a violation of the constitutional rights of either or both depends upon the facts surrounding the cases in regard to which the judgment was given.

In this case the judgment given does not violate the constitutional rights of the plaintiff in error.

THIS case comes here by writ of error to the Supreme Court of Minnesota to review the judgment of that court, affirming the judgment of the District Court, directing the plaintiff in error and the Willmar and Sioux Falls Railway Company to make track connections with each other at Hanley Falls, in the State of Minnesota, where their respective tracks intersect.

The proceeding was duly commenced by the defendant in error, pursuant to the provisions of chapter 91 of the General Laws of Minnesota of 1895. The third section, a part of which is material to the question reviewed, is set forth in the margin.[1]

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[1] SEC. 3. (*a*) That all common carriers subject to the provisions of this act shall provide at all points of connection, crossing or intersection at grade, where it is practicable and necessary for the interests of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or tracks may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivery of passengers, property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates or charges between such connecting lines or on freight coming over such lines; but this shall not be construed as requiring any common carrier to furnish for another common carrier its tracks, equipment or terminal facilities without reasonable compensation; that each of said connecting lines shall pay its proportionate share for the building and maintenance of such tracks and switches as may be necessary to furnish the transfer facilities required by this act, and in case they cannot agree on the amount which each line shall pay, then said amount shall, upon application by either party, be determined and adjusted by the Railroad and Warehouse Commission, and either party shall have the right to appeal from the order of said commission fixing the amount so to be paid, to the district court of the county where said transfer facilities are furnished, by serving a notice in writing on the adverse party within

In accordance with the statute, the defendant in error filed his petition before the railroad commission of the State, setting

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ten (10) days after the making and filing of such order by said commission, and upon the service of such notice there shall be pending in said district court a civil action for the adjustment and determination of the amount to be paid by each carrier for the expense of the building and maintenance of said transfer facilities. Pleadings shall be made and filed in said action in conformity to those required by law and rules of practice in said court, and said cause shall be tried in the manner provided for the trial of civil actions in the district courts of this State.

(*b*) All railway companies doing business in this State shall, upon the demand of any person or persons interested, or upon demand of the Railroad and Warehouse Commission, establish reasonable joint through rates for the transportation of freight between points on their respective lines within this State.

Carload lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading into other cars shall be done without charge therefor to the shipper or receiver of such carload lots, and such transfer shall be made without unreasonable delay, under such contract arrangements as such connecting companies may make, or under such rules as the Railroad and Warehouse Commission may prescribe, as hereafter provided in this act.

Less than carload lots shall be transferred into the connecting railway cars at cost, which shall be included in and made a part of the joint rates adopted by such railway companies, or established as provided by this act. When shipments of freight to be transported between different points within this State are required to be carried by two (2) or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or state traffic as they give to interstate traffic over their line of road.

(*c*) In the event of that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, or fail to establish between themselves the rates and terms upon which cars of one company shall be transferred in such through shipments from the line of one company to the other and returned, or fail to provide for the convenience and prompt transfer of such through freight from the cars of the receiving company to those of the connecting line, it shall be the duty of the Railroad and Warehouse Commission of this State, and said commission is hereby directed, upon the application of any person or persons interested, to establish reasonable joint rates for the shipment of freight and cars over any two or more connecting lines of railroad in this State, and to prescribe the reasonable rules under which any such cars so transferred shall be returned; and in establishing, changing or revising any such rates they shall take into consideration the average of rates charged by

forth the grounds upon which he based the request for an order directing the two companies to make the track connection therein referred to.

Both companies defended. The grounds of defence were sub-

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said railway companies operating such connecting lines for joint shipments for like distances.

The rates established by said commission shall go into effect within ten (10) days after the same are promulgated by said commission, and from and after that time the schedule of rates so established shall be *prima facie* evidence in all courts of this State that such rates are reasonable through rates for the transportation of freight and cars upon the railroads for which such schedule has been fixed.

(*d*) Before the promulgation of such rates or rules, as above provided, the Railroad and Warehouse Commission shall notify the companies interested in the schedule of joint rates fixed by them, and they shall give said railroad companies a reasonable time thereafter to agree upon a division of charges provided for in such schedule, and in the event of the failure of the railway companies to agree upon such division and to notify the board of such agreement, said commission shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by the commission shall, in all controversies or suits between the railroad companies interested, be *prima facie* evidence of the just and reasonable division of such charges.

(*e*) Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this State is hereby prohibited and declared to be unlawful, and every company or person violating the provisions of this section shall be subject to the penalties prescribed in section twelve (12) of the original act to which this act is amendatory.

(*f*) Nothing herein contained shall be construed as requiring any railroad company to send its cars over the line of railroad of another company when its own line of railroad runs to and reaches the point of destination or the point of connection with another railroad on which such point of destination is located, or to use its track or terminal facilities at terminal points for the handling of cars or traffic of another or competing company: *Provided*, That in no case shall the charges for transportation exceed the established through joint rates between any two points.

(*g*) Whenever any property is received by any common carrier, subject to the provisions of this act, to be transported from one place to another within this State, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule, hereinafter provided for, the common-law liability with reference to such property, while in its custody as a common carrier; such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property.

stantially alike. The plaintiff in error alleged in its answer, among other matters, that to construct a connecting track, as asked for in the petition and as provided for in the statute mentioned, would require the company to go outside of its right of way and to condemn land for that purpose.

In addition, it was urged that to compel the companies to made such connection would violate the commerce clause and also the Fourteenth Amendment of the Federal Constitution in particulars specially set forth, and it was claimed that the statute was therefore void.

Evidence was taken before the commission, which finally ordered the connection to be made. The two companies appealed to the district court, which heard the case anew, and then made substantially the same order as that made by the commission.

The judgment of the district court declared as follows:

"That it is the duty of the defendants, the Wisconsin, Minnesota and Pacific Railroad Company and the Willmar and Sioux Falls Railway Company, and they should be and are required to forthwith provide at the place of intersection of their said roads at said Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of their respective lines of road from the line or tracks of one of said companies to those of the other, and to forthwith provide, at said place of intersection, equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering property and cars to and from their respective lines."

Payment of the cost of furnishing this track connection is provided for in section 3 (*a*) of the statute.

No evidence was offered on the part of the companies either before the commission or the district court. Reliance was placed on the evidence offered upon the part of the defendant in error and upon the admissions made in the district court.

The following are some of the facts appearing in the record herein:

The road of the plaintiff in error runs from Watertown, in the State of South Dakota, near the western boundary of the

State of Minnesota, easterly to Morton, in the latter State, where it connects with the Minneapolis and St. Louis Railroad Company, running from Morton to Minneapolis, and thereby constitutes physically one straight line of road from Watertown to Minneapolis. There is a small station called Hanley Falls, in the State of Minnesota, on the line of the plaintiff in error's road, a short distance east of Watertown. The plaintiff in error has a trackage contract, by virtue of which it connects at Merriam Junction, Minnesota, (a station within a few miles of Minneapolis,) with the Northwestern system, and in that way reaches Sioux Falls.

The Willmar and Sioux Falls Railway runs from Willmar, Minnesota, some distance south to Hanley Falls, and thence south to Sioux Falls in South Dakota. This road is operated by the Great Northern Railway Company.

It is 181 miles from Hanley Falls to Sioux City *via* the Willmar and Sioux Falls Railway and its connections, while it is 380 miles between the two places by way of the Wisconsin, Minnesota and Pacific Railroad and its connections, and it requires forty-six to forty-eight hours to transport freight over the latter road from Hanley Falls to Sioux City, while but fourteen hours are required to transport it between those places by the Willmar and Sioux Falls Railway. The tariff rates on stock from Hanley Falls to Sioux City are the same on both roads.

Traffic originating on the railroad of the plaintiff in error west of Hanley Falls and destined to Sioux City could, if transferred at Hanley Falls to the Willmar and Sioux Falls Railway, be transported to its destination by that road, which is 200 miles shorter than by the road of plaintiff in error, in from thirty to thirty-five hours' less time, provided the transfer from the road of the plaintiff in error to that of the Willmar and Sioux Falls road could be made at Hanley Falls in carloads without unloading from the cars in which the shipments were first made. No facilities have been provided by either of the companies for the transfer or interchange of business at Hanley Falls and there is no track connection between them, although they have track connections and transfer facilities at Minneapolis.

Statement of the Case.

There is an immense supply of wood along the line of the Great Northern system of which the Willmar and Sioux Falls Railway forms a part, much larger than upon the line of the railroad of plaintiff in error, the wood on the line of the latter company being scarce and becoming more so every day. Citizens of towns west of Hanley Falls upon the line of the railroad of the plaintiff in error are purchasers and consumers of wood and posts, and a connection and transfer facilities at Hanley Falls would cheapen these commodities at such towns. Taking the wood from the Willmar road by transferring the cars might result in somewhat lessening the benefit to the plaintiff in error of a much longer haul of dearer wood along its own line.

The farmers along the line of the road of the plaintiff in error, west of Hanley Falls, have heretofore raised many stock cattle which are ready to be fed and fattened for market, the best market for such cattle being Sioux City, in the State of Iowa, "on account of the supply of feed being more plentiful and cheaper at or near Sioux City, and such stock can be sold to the best advantage in the market having the cheapest and best supply of feed." Making the connection at Hanley Falls would result in the use of the Willmar road from that point to Sioux Falls for certain kinds of cattle which otherwise would probably not be carried there and might be sent to the poorer market of St Paul or Minneapolis, and thus give the plaintiff in error the benefit of its long haul. The result of the continued lack of these facilities might also be that the trade in that kind of cattle would decline and be extinguished among the people west of Hanley Falls, in which event, while no one would be benefited by such want of facilities, many would be injured. At the station at Hanley Falls the tracks of these respective roads intersect at grade "at a point from 40 to 60 rods distant from the respective depots of the two companies, and in such manner that it is practicable for them to provide ample, equal and reasonable facilities by track connections for the transfer from one of said roads to that of the other of any and all cars of whatsoever name or nature used in the business or on the lines of the roads of the two companies mentioned, or either of them."

There was evidence showing that on account of the great loss in weight of the cattle known as "stockers and feeders" when arriving at Sioux City over the long haul of 380 miles on the road of the plaintiff in error and its connections, that market had become practically shut out from the owners of such cattle living on the road of the plaintiff in error west of Hanley Falls, while the St. Paul and Minneapolis markets, being poor markets for "stockers and feeders," the trade in that kind of cattle west of Hanley Falls had greatly diminished, and was still diminishing.

*Mr. Albert E. Clarke* for plaintiff in error.

*Mr. W. B. Douglas* for defendant in error.

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

Before entering upon the discussion of the questions in this case, we desire to say that the briefs filed herein during this term are in plain violation of the amendment to Rule 31, adopted at the last term. See 178 U. S. 617. The rule as amended is reproduced in the margin.[1] The type used in quoting the statute is so small as to be exceedingly difficult to read. Many briefs are still printed on glazed paper. We shall hereafter insist upon a strict compliance with the terms of the rule as amended.

This writ of error has been sued out by the plaintiff in error alone, and various grounds are stated for the claim that the statute upon which the judgment below is founded is a violation of the Constitution of the United States. It is alleged that this judgment, and also the statute, interfere with and regulate interstate commerce, and therefore they violate the commerce clause of the Constitution.

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[1] 31. All records, arguments and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

Opinion of the Court.

Plaintiff in error urges that transporting cattle from Minnesota to Iowa constitutes interstate commerce, and that neither the State of Minnesota nor its railroad commission has the right to in any manner interfere with or regulate such commerce. The judgment in this case, however, neither regulates nor interferes with that commerce, nor does that part of the statute upon which the judgment is founded. Whether any other portion of the statute does regulate such commerce is beside the question, and it is not necessary to here decide. To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly afford facilities to interstate commerce, if there were any, and would in nowise regulate such commerce within the meaning of the Constitution. That is all that has been done by the judgment under review. A State may furnish such facilities or direct them to be furnished by persons or corporations within its limits without violating the Federal Constitution. But the Supreme Court of the State, in the opinion delivered therein, said that there was ample evidence in the case of a necessity for such track connection resulting from the benefit which would accrue to exclusively state commerce when considered alone, to justify the ordering of the connection in question.

What is said in the statute in relation to the establishment of joint through rates for the transportation of freight between points on the respective lines of these roads within the State, and the manner of enforcing the establishment of such rates in case of the omission so to do by the companies, and as to any unjust or unreasonable charge for the transportation of freight or cars, are all matters which do not arise under this judgment, and which may never arise as a result of its enforcement. The

tracks being connected, the making of joint rates is a matter primarily for the companies interested, and it may be that they will agree upon them, and thus do away with the necessity of any resort to the courts. The objection that there is any violation of the interstate commerce clause of the Constitution is, we think, clearly untenable.

Adhering strictly to the question involved in this case, namely, the validity or the invalidity of the judgment actually rendered, we are met by the objection of the plaintiff in error that the judgment itself is necessarily and inherently illegal, because upon the conceded facts, if the judgment be enforced, it can only result in taking the property of the plaintiff in error without due process of law, and in refusing it the equal protection of the laws and in depriving it of its liberty to contract with such persons or corporations as it may choose. We think not one of these objections is tenable.

At common law the courts would be without power to make such an order as was made in this case by the state court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind. If power were granted by the legislature, and it amounted in the particular case simply to a fair, reasonable and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and of the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it. *Atchison &c. Railroad Company* v. *Denver &c. Railroad Company*, 110 U. S. 667, 681; *People ex rel. &c.* v. *Boston & Albany Railroad Company*, 70 N. Y. 569; *People* v. *Railroad Company*, 104 N. Y. 58.

Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. *Olcott* v. *Supervisors*,

16 Wall. 678, 694; *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S. 641; *United States* v. *Joint Traffic Association*, 171 id. 505–569, 570; *Lake Shore Railway Company* v. *Ohio*, 173 id. 285, 301.

It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given them is held to be a constitutional exercise of legislative authority. The right of the legislature to tax in furtherance of such use is founded upon the same considerations that the use is a public one, and therefore taxation in support of such use is valid. *Olcott* v. *Supervisors*, *supra*. The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience.

While this power of regulation exists, it is also to be remembered that the legislature cannot under the guise of regulation interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation. *Lake Shore &c. Railway Company* v. *Smith*, 173 U. S. 684.

The only question arising as each case comes up for decision is whether in the particular case the power has been duly exercised. Instances where the exercise of this power has been discussed exist in the cases of *Louisville Railroad Company* v. *Kentucky*, 161 U. S. 677, 696; *Lake Shore Railway* v. *Ohio*, 173 U. S. 285, 292; *Holden* v. *Hardy*, 169 U. S. 376, 392. The books contain almost countless cases where the question of the police power of the States and its proper limitations and conditions have arisen, but those above cited are sufficient for the purposes of this case.

The argument favoring the invalidity set up by the plaintiff in error, so far as it is founded upon the provisions of the judgment in question, is directed to two alleged facts, the first of which is that by making track connections the plaintiff in error may be deprived of a long haul of a certain kind of cattle, and may be compelled to deliver them in a car to be drawn by the

Willmar road from Hanley Falls to Sioux City. This long haul exists, as stated, in transporting the cattle from Hanley Falls directly east for about one hundred miles to Merriam, near Minneapolis, then south for another hundred miles, and then westerly to Sioux Falls, 180 miles further, consuming in the transit forty-six to forty-eight hours, when, if the car were placed on the Willmar and Sioux Falls road at Hanley Falls, the transportation would cover but 180 miles, and the time consumed in transit would be but fourteen hours.

The other fact referred to relates to the wood transportation. There is now very little wood left along the line of the road of the plaintiff in error east of Hanley Falls, from which to supply consumers west of that station, and the price is dearer than the wood from northern Minnesota along the stations of the Willmar road. But the complaint is that the enforcement of this judgment would compel the plaintiff in error to receive wood from the Willmar road at Hanley Falls, which would thus permit the latter road to enter into competition at stations west of that place with the wood taken from along the line of the road of the plaintiff in error east of that station.

In truth, however, competition in the case of either cattle or wood lies more in assertion than in substantial fact.

First, as to the cattle. This long haul of 380 miles necessarily causes a great loss in weight in the cattle, and much greater liability arises of the lighter cattle being trampled upon and killed by the heavier ones in the same car. Such liability increases the longer the transportation exists. These facts act almost as a complete bar to the traffic in that kind of cattle called "stockers and feeders," from stations west of Hanley Falls over the road of the plaintiff in error to Sioux City. It may be said, therefore, that competition between the roads for the transportation of such cattle to Sioux Falls does not exist. Those who own these cattle and are near enough to Hanley Falls to drive them to that station and there load them upon the Willmar and Sioux Falls Railway do so, but those who are so far off as to make that impracticable have largely given up the attempt to reach Sioux Falls with their cattle on account of the difficulties and losses above mentioned. Nor does the failure

of the owners to reach the Sioux City market result in sending all the cattle of the "stockers and feeders" class, which would otherwise go to that market, to Minneapolis or St. Paul, which would give the long haul for those cattle to the road of the plaintiff in error. The evidence is that St. Paul and Minneapolis are much poorer markets for the above named cattle than Sioux City because of the absence of feed in those markets, which is present in large quantities and at cheaper prices at Sioux City. The result has therefore been that this lack of facilities at Hanley Falls has materially injured trade in this particular class of cattle by parties west of Hanley Falls, while the plaintiff in error does not secure any substantially greater amount of such transportation for the Minneapolis or St. Paul market, for the reason just stated.

Second, as to the wood. It seems that there is very little wood along and near the line of the road of the plaintiff in error east of Hanley Falls, and the supply is being rapidly exhausted, but that which yet remains is being brought in decreasing quantities and comes so dear to the inhabitants of towns west of Hanley Falls, that rather than purchase it they will and do drive from ten to fifteen miles to get to a station on the Willmar road, and there buy wood which they bring back for less than it costs to buy wood on the line of the road of the plaintiff in error coming from stations east of Hanley Falls. The country west of Hanley Falls is rolling prairie and produces no wood. The inhabitants of those towns are buying more wood, and yet are taking less from the road of the plaintiff in error. They obtain wood as stated by drawing it from stations on the Willmar road anywhere from ten to fifteen miles away. To furnish facilities therefore at Hanley Falls so that the wood from the forests of northern Minnesota may be brought there on the Willmar road and transferred in cars to the road of the plaintiff in error, and transported to stations west of Hanley Falls, is not in fact to compete or provide for competition with the plaintiff in error in the article of wood. It is simply affording facilities to people along the line of its road west of Hanley Falls to obtain wood by a short haul on the road of the plaintiff in error, which without such facilities would be obtained by many

people by drawing it in their own conveyances from stations on the Willmar road.

These are the facts upon which the plaintiff in error must rest its argument, that to enforce the judgment would compel it to pay its share in the cost of the construction of a track to be used for the purpose of depriving the company of its traffic, and transferring it to its competitor. The facts do not afford a fair foundation for the argument.

As has been seen, it is not a case, so far as the cattle are concerned, where the plaintiff in error is deprived of its traffic and compelled to transfer it to another and competing company. The question is whether this company in its effort to compel owners of this class of cattle to transport them over its road to Minneapolis, which is a less favorable market, can rightfully refuse to make track connections with another company, by which the owners of the cattle can reach the more favorable market of Sioux City at such a cost as will render the transportation profitable. In the consideration of this question the further fact must be borne in mind that the failure to get to Sioux City with such cattle does not necessarily result in sending them over the road of the plaintiff in error to either Minneapolis or St. Paul, but the lack of facilities at Hanley Falls simply tends to diminish, if not to extinguish, the trade in such cattle west of that station. Other kinds of cattle would still be sent to St. Paul or Minneapolis the same as ever. Can it be possible that a railroad chartered and built primarily for the accommodation and in the interests of the public can under such facts legally refuse the track connections directed in this case? Can it refuse to obey the commands of the legislature in such case upon the sole ground that it may thereby somewhat lessen the earnings of its road? Or can it refuse to make such connections because, if they were made, wood could be brought from the forests of northern Minnesota to all towns along its line west of Hanley Falls, and there sold for a less price than can now be done, when without such connection being made the demand for the wood along the line of the road of the plaintiff in error is nevertheless constantly decreasing owing to its quality and price? We think these questions should receive a

negative answer. The interests of the public should not be thus wholly, and it seems to us, unjustifiably ignored.

Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse according, as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action.

We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly or improperly affect the pecuniary rights or interests of the plaintiff in error.

As we have said, it is unnecessary in this case to determine the question of the validity of the whole act with regard to all its provisions and details. We need express no opinion upon that subject. We simply here determine that the judgment actually rendered, directing this track connection to be made and thus affording track facilities at Hanley Falls, does not violate the constitutional rights of the plaintiff in error.

The distinction between this case and that of *Lake Shore &c. Railway Co.* v. *Smith*, 173 U. S. (*supra*) is plain. There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald and unmixed power of discrimination in favor of a

few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation could be rested, unless the simple decision of the legislature should be held to constitute such reason.

In this case the provision is a manifestly reasonable one, tending directly to the accommodation of the public, and in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself.

Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error. *Mayor &c.* v. *Northwestern Railway*, 109 Mass. 112; *People* v. *Railroad*, 58 N. Y. 152, 163; *People* v. *Boston &c. Railroad Company*, 70 N. Y. 569; *People* v. *Railroad Company*, 104 N. Y. 58, 67.

The judgment of the Supreme Court of Minnesota is, therefore.

*Affirmed.*

Mr. Justice White and Mr. Justice McKenna, dissented.

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## DULUTH AND IRON RANGE RAILROAD COMPANY *v.* ST. LOUIS COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 173. Argued October 17, 1900. — Decided December 10, 1900.

Following the decision and the concurring opinion in *Stearns* v. *Minnesota*, *ante*, 223, the court holds that the act of the legislature of Minnesota relied upon in this case was void.

Opinion of the Court.

THE case is stated in the opinion of the court.

*Mr. Frank B. Kellogg* for plaintiff in error. *Mr. J. H. Chandler*, *Mr. H. J. Grannis*, and *Mr. C. A. Severance* were on his brief.

*Mr. W. B. Douglas* for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The lands granted to the plaintiff in error to aid in the construction of its line of railroad were swamp lands which had accrued to the State under the act of Congress of March 12, 1860. The granting act did not impose a gross receipt tax or purport to make any contract with reference to a tax of that character, but provided, in section 2, in express terms, that the lands granted should be exempt. The proviso in question reads as follows: "None of the lands hereby granted shall be subject to taxation until the expiration of five years from the issuance of the patent by the State, unless previously sold or disposed of by said railroad company."

Subsequently to the passage of this act, the legislature of Minnesota, in 1873, enacted a law allowing railroad corporations, which accepted the provisions thereof, to discharge the tax on all their property, real and personal, by the payment of a gross receipt tax, with the condition, however, that the land which had been given by the State to aid in the building of the railroad should "be subject to taxation as soon as sold, leased, or contracted to be sold or leased." By this law the railroad property and granted lands of the company were, as the result of the payment of the gross receipt tax, to be "forever exempt from all taxation and from all assessment." This law became operative after the adoption of the constitutional amendment relating to gross receipt taxes. The amendment in question has been fully stated in *Stearns* v. *Minnesota*, decided at this term. There is no contention that this general law, which was passed after the constitutional amendment in question, was repugnant to the constitution of Minnesota, since in the *Stearns*

case, 72 Minnesota, 200, and in the case at bar, 80 Northwestern Rep. 626, the Supreme Court of Minnesota held that the effect of the amendment of 1871 was not only to ratify prior gross receipt tax laws, but moreover to authorize the legislature to enact similar laws in the future, all, however, being subject to the reserved power to repeal, alter or amend, conditioned upon approval by a vote of the people.

If the case rested wholly upon the provisions in the act granting an exemption for a stated period, the issue for decision would be whether an express contract of exemption could lawfully have been made in view of the clauses of the constitution of the State of Minnesota requiring equality and uniformity, and empowering the legislature to exempt only in certain specified cases. On this question there would be no room for the assertion that prior decisions of the Supreme Court of the State of Minnesota relating to the validity of acts imposing gross receipt taxes had recognized the power to make such contract, since such decisions of that court, whatever be the doctrine which they announced as to gross receipt taxes, have uniformly and consistently denied the authority to grant an exemption. But the controversy which this case presents does not rest on the rights asserted to have been conferred by the exemption contained in the granting act, since the plaintiff in error accepted the provisions of the law of 1873, and has from the time of such acceptance paid the gross receipt tax therein provided. Although it be that the law imposing the gross receipt tax, and which was accepted by the corporation, did not give rise to an irrevocable contract protected from impairment by the contract clause of the Constitution of the United States, since the right to repeal, alter or amend was reserved, the question yet remains whether the act of the legislature of Minnesota which was submitted to a vote of the people and which is here relied upon as manifesting the exercise of the reserved power to repeal, alter or amend, has such effect. The repealing or amending act relied upon in this case is the same one which was involved in the case of *Stearns* v. *Minnesota*, *ante*, 223, and its text was fully stated in that case. Here, as there, to treat the act in question as a repeal, alteration or

amendment of the contract would be to preserve all the obligations of the corporation in favor of the State, and to take away from the corporation the consideration on the part of the State upon which the duty of the corporation to pay the gross receipt tax rested. For this reason, we conclude that the act which it is asserted repealed or amended the contract was void, because a mere arbitrary exercise of power giving rise, if enforced, not only to a denial of the equal protection of the laws, but to a deprivation of property without due process of law. The reasons by which we are led to this conclusion were fully expressed in the concurring opinion of four members of the court in *Stearns* v. *Minnesota*, and need not be here repeated.

*Judgment reversed, and case remanded for further proceedings not inconsistent with this opinion.*

MR. CHIEF JUSTICE FULLER, MR. JUSTICE BREWER, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM concurred in the result.

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## AVERY *v.* POPPER.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 72. Submitted November 7, 1900.—Decided December 3, 1900.

In an action by a chattel mortgagee of certain cattle against the purchaser of the same at a marshal's sale upon execution, the question was whether a chattel mortgage upon a portion of such cattle, which did not identify the particular animals covered by it, was good as against the purchaser of the entire lot at marshal's sale. *Held*: That this presented no Federal question.

With respect to writs of error from this court to judgments of state courts, in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid and these proceedings were regular, that the purchaser took the

Statement of the Case.

title of the defendant in the execution, and the issue relates to the title to the property as between the defendant in the execution, or the purchaser under it, and the party making the adverse claim, no Federal question is presented.

This was an action originally instituted in the District Court of Hunt County, Texas, by Ignatz Popper and Edward Popper, (doing business under name of I. Popper & Brother,) to recover upon a certain promissory note executed May 26, 1891, by John H. Cooke and Mary E. Cooke, his wife, to Thomas H. King, for $1940, and for the foreclosure of a chattel mortgage upon certain personal property hereinafter described, and (in their amended petition) also for a personal judgment against John M. Avery and his sureties upon certain replevin bonds.

An interest in the note to the amount of $775 was transferred by King, the payee, on April 10, 1892, to the firm of I. Popper & Brother, and the residue of such note and interest to Robert R. Neyland, under the name and style of R. R. Neyland & Company;

To secure the payment of such note John H. Cooke and wife, on May 26, 1891, executed and delivered to King a chattel mortgage upon fifty cows, with their calves of that spring, which cows were branded "Cooke" on the left side and "O K" on the left hip, the calves not being branded; also one bay mare colt, one gray horse colt and one black mule colt. This instrument was legally filed and registered as a chattel mortgage on May 30, 1891;

On June 14, 1893, the marshal of the United States levied upon, among others, the above mentioned property, by virtue of an execution issued out of the Circuit Court of the United States at Dallas on June 8, 1893, upon a judgment rendered in favor of W. W. Avery against John H. Cooke and certain sureties upon a supersedeas bond, but not against his wife, Mary E. Cooke. This judgment was rendered in pursuance of the mandate of this court in *Cooke* v. *Avery*, 147 U. S. 375. At the marshal's sale, which took place on June 28, 1893, the property was bid in by John M. Avery as attorney for and in the name of W. W. Avery, and all of such property was then and there delivered to John M. Avery;

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On the following day, June 29, 1893, I. Popper & Brother brought this action in the District Court of Hunt County against John H. and Mary E. Cooke, W. W. Avery and John M. Avery, to recover of the Cookes the amount of plaintiffs' interest in the note, ($775,) and to foreclose against all the defendants their mortgage upon the property described. On the same day R. R. Neyland & Company brought a separate suit against the same parties to recover the balance due on such note after deducting the amount due Popper & Brother, and likewise to foreclose the mortgage. These suits were consolidated January 16, 1894. The property was seized while in the possession of John M. Avery by virtue of writs of sequestration issued in these actions. After such seizure, John M. Avery replevied and resumed possession of the property, drove it out of Hunt County, and within a short time thereafter sold and disposed of it.

At the time the mortgage was executed to secure the note, there were many more animals of the same description mingled with those upon which the mortgage was given; but the state court found the evidence sufficient to show that, just prior to the execution of the mortgage, the animals embraced in it were pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage. But the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there any such separation when the execution in favor of Neyland was levied upon the property in controversy. The court further found that the fifty head of cows described in the mortgage, as well as all others of like description mingled with them, were the separate property of Mary E. Cooke at the time the mortgage was executed, and continued to be her separate property until disposed of by Avery; that the fifty calves were born during the marriage of Cooke and wife, after the cows became the separate property of Mrs. Cooke, and were, therefore, at the time the mortgage was given and the execution in favor of Avery levied, the community property of John H. and Mary E. Cooke. Also, that the horses and mule involved in this suit were the offspring of the separate property of Mary

E. Cooke during her marriage with John H. Cooke, and were likewise the community property of Cooke and his wife at the time the mortgage was given and the execution levied.

The case appears to have been first tried in 1894, and judgment rendered against the plaintiffs in error; but on appeal by them the mortgage was held to be invalid, the judgment reversed, and the case remanded by the Court of Civil Appeals for a new trial. *Avery* v. *Popper*, 34 S. W. Rep. 325. The case was again tried in October, 1897, and resulted in a judgment in favor of Popper & Brother against John H. Cooke in the sum of $1637 and in favor of Neyland, whose suit was consolidated with the other, in the sum of $1974. The mortgage was foreclosed on the fifty cows, one mare, one horse and one mule, and a further judgment rendered against John M. Avery and the sureties upon his replevin bond in the sum of $850, the value of the property disposed of by him. The court further found that as to the fifty calves the mortgage was invalid, and a foreclosure of the mortgage to that extent was denied.

The case was again carried to the Court of Civil Appeals by John M. Avery and his sureties, which affirmed the judgment against Cooke and wife, but increased the judgment against John M. Avery and his sureties in the sum of $534, the value of seventeen two-year old steers and thirty-two two-year old heifers. 45 S. W. Rep. 951. The court found the District Court to have been in error in holding that the mortgage executed by the husband and wife was not a lien upon all the property embraced in it, whether separate or community. On appeal to the Supreme Court the judgments of the Court of Civil Appeals and of the District Court were reversed, and a judgment ordered in favor of Popper & Brother and Neyland against the plaintiff in error, John M. Avery, and his sureties in the sum of $850, interest and costs. 92 Texas, 337. The court found that "no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd. The power was given to sell certain cows and their calves, which could only be done by selecting them from the herd, and it being necessary to the execution of the express authority to sell, the law will imply the authority to take the

fifty cows and calves from the larger number. *Oxsheer* v. *Watt*, 91 Texas, 124. The chattel mortgage was valid between the parties to it." "Upon default in payment, King or the holders of the note, had the right to select from John H. and Mary E. Cooke's stock of cattle and sell fifty cows and calves corresponding to the description in the mortgage. If the right had been exercised while the calves of the spring of 1891 were following their mothers, the selection of the cow would have identified the calf. But having failed to exercise the right until in the course of nature the dam and the young would separate, it has become impossible to identify the calves, and all claim upon them has failed before Avery converted the stock."

Whereupon Avery and his sureties sued out a writ of error from this court.

*Mr. John M. Avery* for plaintiffs in error.

*Mr. Benjamin F. Looney* for defendants in error.

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

The plaintiffs in error invoke the jurisdiction of this court upon the ground stated in the third clause of Rev. Stat. section 709 of a "title, right, privilege or immunity claimed under . . . an authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed." The special right claimed was a right as purchaser under the marshal's sale upon execution to a priority of payment from the goods sold as against the chattel mortgage. The claim set up in the second assignment of error was that the mortgage was invalid as against such execution for the reason that there were many more animals of the same description mingled with those upon which the mortgage was given, and that the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation up to the time said execution from the United States court was levied

upon the property in controversy; that no lien attached to any particular animals in the herd, nor did the mortgage give a lien upon an undivided interest in the herd, and as a matter of law was invalid as against the execution; and that in giving priority to the mortgage the Supreme Court of Texas failed to give full force and effect to the judgment of the Circuit Court of the United States.

It should be borne in mind that this action was not begun until the day after the termination of the action in the Federal court by a sale of the property to Avery, the payment of the money, and apparently the return of the execution satisfied; and that the question litigated was not the legality of this particular judgment, which was admitted to be valid, but the general question whether, under the laws of Texas, an execution is valid as against a mortgage upon animals which are not identified, and not separated from others of the same description with which they were mingled. Briefly stated, the question is whether the mere fact that the plaintiff in error was a purchaser at a marshal's sale of the property, entitles him to bring into this court questions under the state law with respect to the validity and priority of a chattel mortgage covering the same property or a part thereof.

There are many authorities upon the general question of the rights of purchasers at marshals' sales as against lienholders under laws of the several States, from which the true rule may be deduced. The question is analogous to the one decided at the last term of this court in *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571, and *De Lamar's Nevada Gold Mining Co.* v. *Nesbitt*, 177 U. S. 523, to the effect that the mere fact that parties claim adversely to each other under the mining laws or under patents of the United States does not entitle them to a writ of error from this court, unless there be a question made as to the meaning and construction of a Federal statute, or of an authority exercised under the United States.

Of the cases bearing more directly upon the question here involved of the relations of a purchaser under a marshal's sale to others claiming the same property, the earliest is that of *Collier* v. *Stanbrough*, 6 How. 14. Collier was the purchaser

under a marshal's sale upon execution against one David Stanbrough of certain personal property which was claimed by Josiah Stanbrough, the defendant, who insisted that the property was not legally seized or levied upon, and that it was not legally appraised or advertised as required by law. Jurisdiction under the writ of error to the Supreme Court of Louisiana was sustained upon the obvious ground that the sale by the marshal was directly attacked, and the invalidity of plaintiff's title set up as a defence.

In *Erwin* v. *Lowry*, 7 How. 172, Erwin was the purchaser at a marshal's sale of certain land and negroes, and was sued by Lowry, who claimed as curator of the estate to which the property belonged. The question was the same as that in *Collier* v. *Stanbrough*, namely, whether the marshal's deed to Erwin was void for the reason that it was not supported by a lawful judgment, or for want of compliance with any legal requirement in conducting the seizure and sale. The jurisdiction was also sustained in this case.

In *Clements* v. *Berry*, 11 How. 398, the suit was by Daniel Berry against the marshal directly, in replevin, to recover property levied upon as the property of Charles F. Berry, and the sale was stopped by a writ of replevin issued from the state court. As the marshal was a party defendant to the suit, and his right to sell the property was directly attacked, the jurisdiction was sustained. For the same reason that the marshal was made a defendant to the suit in the state court, and justified under process from the Federal court, jurisdiction was sustained in *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Etheridge* v. *Sperry*, 139 U. S. 266, and *Bock* v. *Perkins*, 139 U. S. 628.

In *Day* v. *Gallup*, 2 Wall. 97, the suit was by Gallup against Derby and Day, execution creditors, Allis, their attorney, and Gear, marshal of the United States, who justified under a judgment of the Federal court against one Griggs. The suit was discontinued as to the marshal before trial. The case turned on the ownership of the goods seized, and judgment went against Derby and Day, which was affirmed by the Supreme Court of Minnesota. The suit was not begun until after the execution

from the Federal court had been returned and the action completely terminated. Upon writ of error from this court it was held that at the time Gallup brought his action there was no case pending in the Federal court respecting the goods which had been attached under process from that court; that it did not appear that the authority of Gear as marshal to take the goods was drawn in question, and that from the return of the execution satisfied the Federal court had no control over the parties. The case between the plaintiffs in error against Griggs, the original defendant in the Federal court, had been decided, the money made on the execution and the debt paid. In commenting on that case in *Buck* v. *Colbath*, p. 342, it was said: "It is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

We do not undertake to say that the mere fact the action in the Federal court is no longer pending would oust the jurisdiction of this court to reëxamine the action of the state court, if the validity of the judgment of the Federal court, or the proceedings by the marshal under that judgment were directly attacked; but in *Day* v. *Gallup*, it appeared that not only had the proceedings in the Federal court terminated, but that the real question was the ownership of the goods as between the attaching creditors and Gallup. Gallup claimed under a sale of the goods which the attaching creditors insisted was a fraud.

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, Rochereau, a judgment creditor of one Sauvé, brought an action in the state court against Dupasseur, alleging that he had taken possession of a plantation belonging to Sauvé upon which he, Rochereau, held a mortgage, and charging that the plantation was bound for the debt, and that Dupasseur was bound either to pay the debt or give up the plantation. Dupasseur defended upon the ground that he had bought the property at a marshal's sale, upon an execution in his own favor against Sauvé, "free of all mort-

gages and incumbrances, and especially from the alleged mortgage of the plaintiff," Rochereau. Upon writ of error from this court it was held that, as the question at issue was the effect to be given to the judgment of the Federal court and to the proceedings under the execution in that court, and to the sale by the marshal free of all mortgages and incumbrances, jurisdiction should be sustained. Here the validity of the sale by the marshal was directly attacked. Notwithstanding the fact that Dupasseur purchased the property under the execution sale on May 5, 1876, and Rochereau did not begin his action until June 7, 1866, the jurisdiction was sustained, because Dupasseur's title under that purchase was attacked by the other party.

In *McKenna* v. *Simpson*, 129 U. S. 506, an assignee in bankruptcy resorted to a state court to set aside a conveyance by the bankrupt as in fraud of creditors; but as no question was raised there as to the power of the assignee under the acts of Congress, or as to the rights vested in him as assignee, but only as to what should be deemed a fraudulent conveyance and as to the application of the evidence in reaching that decision, we held that the case presented no Federal question, and the writ of error was dismissed.

*Per contra*, in *O'Brien* v. *Weld*, 92 U. S. 81, the question arose whether, under the bankrupt law, the District Court had authority to make a certain order, and as the decision of the state court was against such authority, jurisdiction was sustained. Such was also the case in *Factors' & Traders' Insurance Co.* v. *Murphy*, 111 U. S. 738, where the effect to be given to a sale of property under an order of a District Court was in question, the authority of the court to direct a sale free from incumbrances being denied.

In *Stanley* v. *Schwalby*, 162 U. S. 255, the action in the state court was directly against officers of the United States, and ultimately against the Government itself. Jurisdiction was sustained upon that ground.

Finally, in *Pittsburg, Cincinnati &c. Railroad* v. *Long Island Loan & Trust Co.*, 172 U. S. 493, the question arose whether

due effect was accorded to certain foreclosure proceedings in Circuit Courts of the United States, under which plaintiff in error claimed title to the land and property in question. Under these proceedings a sale of railroad property had been made, subject to certain outstanding bonds prior in lien to the mortgage and to all other, if any, paramount liens thereon, and that the decree should not in any manner prejudice or preclude the holders of such paramount liens. Plaintiff in error contended that the state court did not give due effect to these decrees of the Circuit Courts of the United States, in that it did not recognize as paramount the rights acquired under those decrees by the purchasers of the property in question; but postponed or subordinated these rights to a lien upon such property, which, it was alleged, was created or attempted to be created while those suits were pending, and while the property was in the actual custody of those courts, by receivers, for the purposes of being administered. As the question concerned the effect to be given to a sale under process from the Federal courts, and to the construction of the decree of those courts, jurisdiction was sustained.

With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and these proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property, as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented—in other words, it must appear that the decision was made against a right claimed under Federal *authority*, in the language of Rev. Stat. § 709.

Applying this test to the case under consideration, it is evident from the record that no question was made as to the valid-

ity of the judgment, or the regularity of the proceedings in the Federal court; and that the case turned upon the question whether, under the laws of Texas, a chattel mortgage upon property sold under execution is good which does not identify the particular property covered by it, but leaves such property to be subsequently identified by selection of the mortgagor. In regard to this, the Supreme Court of that State held (92 Texas, 337) that the chattel mortgage upon the fifty cows with their calves, out of a designated herd of one hundred, with power to the mortgagee to sell on default, gave him the right to select such cows from the larger number; and that such mortgage, implying, as it did, a power of selection on the part of the mortgagee, was, when duly registered, notice of his rights to the purchaser of the mortgagor's interest—following in these particulars *Oxsheer* v. *Watt*, 91 Texas, 124. That this was no new doctrine in the State of Texas is also evident from the case of *Elliott* v. *Long*, 77 Texas, 467, decided in 1890, three years before the property was sold upon execution in this case. See also *Wofford* v. *McKenna*, 23 Texas, 36, 46. We are referred to two cases which apparently conflict with these, *Cleveland* v. *Williams*, 29 Texas, 204, 212, and *Moss* v. *Sanger*, 12 S. W. Rep. 616, but if any such conflict existed, it was for the Supreme Court to settle it, as it seems to have done in *Elliott* v. *Long*, by overruling the former cases. Whether the right of selection recognized as between mortgagor and mortgagee is also applicable as between a purchaser upon execution and the mortgagee, is not a Federal question, if no discrimination be made against executions from Federal courts.

This was a question either of local law or of general law. If of local law, of course the decision of the Supreme Court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to state courts. Conceding that, if the question had arisen on appeal from a Circuit Court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a state court, whose opinion upon a question of general law is not reviewable here.

Other questions are raised in the assignments of error, but they bear even more remotely upon a Federal right. The decision already made covers them.

The writ of error must therefore be

*Dismissed.*

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## *In re* DE BARA, PETITIONER.

ORIGINAL.

No. 15, Original. Submitted November 5, 1900.—Decided December 3, 1900.

Under section 5480 of the Revised Statutes of the United States the court below had the power to give a single sentence for several offences, in excess of that which is prescribed for one offence.

*In re Henry*, 123 U. S. 372, affirmed and followed to this point.

THE case is stated in the opinion of the court.

*Mr. D. W. Baker* for petitioner.

*Mr. Solicitor General* opposing.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Upon filing the petition in this case a rule to show cause was issued to John L. M. Donell, Superintendent of the House of Correction, at Detroit, Michigan, by whom it is alleged the petitioner is illegally restrained of his liberty.

The petition shows that the petitioner was convicted in the United States District Court for the Northern District of Illinois, upon the charge of violating section 5480 of the Revised Statutes of the United States, which prohibits the use of the mails for fraudulent purposes, and that on June 17, 1899, he was sentenced as follows:

"Came the parties by their attorneys and the defendant in his own proper person in the custody of the marshal to have the sentence and the judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, 1899,

one of the days of this term of court, been found guilty by a jury in due form as charged in the indictment filed herein against him; and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reason why sentence and judgment should not be pronounced, it is therefore considered by the court and as the sentence and the judgment of the court upon the verdict of guilty so rendered by the jury as aforesaid, that the defendant Edgar De Bara be confined and imprisoned in the House of Correction at Detroit, Michigan, for and during the term of three years."

That the sentence was made to run from June 20, 1899, and since said day the petitioner has been confined in the House of Correction at Detroit, Michigan. That although there was but one offence committed by him, there were filed against him numerous indictments, all of which charged in a different way the same offence, and all were for violating section 5480.

That the record shows that the petitioner was convicted of the offence set out in said section, and that he was sentenced to a greater punishment than prescribed therein; that there was pronounced against him but one sentence, "as upon his having been found guilty by a jury in due form, as charged in the indictment filed against him, and that the said several other indictments were mere surplusage, and a restatement of the matter contained in indictment No. 3012, and that no evidence was given against your petitioner except evidence of the offence stated in indictment No. 3012," and that the "sentence was null and void, and of no effect."

That petitioner could not be imprisoned for a longer period than eighteen months; and that under the commutation for good behavior he would be entitled to a deduction of three months from said sentence; and that he has been confined for a full period of eighteen months, less the deduction of which he is entitled, and has fully satisfied any sentence which could be imposed on him, and he is therefore unlawfully restrained of his liberty.

A copy of the record is attached to the petition.

In his return to the rule the Superintendent of the Detroit

House of Correction justified the detention of the petitioner by the judgment and sentence of the District Court as follows:

"SATURDAY, June 17, A. D. 1899.

"The District Court of the United States for the Northern Division of the Northern District of Illinois met at nine o'clock A. M. pursuant to adjournment.

"Present: The Hon. Christian C. Kohlsaat, judge of said court, presiding; the clerk and marshal.

"The United States
*vs.*
Edgar De Bara. } 3012, § 5480 vio. postal laws.

"Come the parties by their attorneys, and the defendant in his own proper person, in custody of the marshal, to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, A. D. 1899, one of the days of this term of this court, been found guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reason why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Edgar De Bara, be confined and imprisoned in the House of Correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years."

The record contains only the indictment in cause No. 3012, and the return to the rule shows that the judgment and sentence under which the petition is held is designated by that number.

The indictments in the other case do not appear in the record nor does the record contain the evidence, but the following does appear:

"The United States
*vs.*
Edgar De Bara, Fannie De Bara. } 3012.

"Come the parties by their attorneys, and in open court and

in the presence of his defendants, and with their consent, agree that causes numbered 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, and 3017 shall be consolidated and tried with this cause, and that all of said causes be tried together by the same jury.

"Thereupon it is ordered by the court that said causes be consolidated."

It further appears that on the 1st of June, 1899, under the same title and number, an order was entered reciting that on the 15th of May, 1899, pleas of not guilty to the several indictments were interposed, and that a jury (naming them) were duly impanelled and sworn "in causes numbered 3007, 3008, 3010, 3011, 3013, 3014, 3015, 3016 and 3017 consolidated, in all of which said causes the United States is the plaintiff and Edgar De Bara and Fannie De Bara are the defendants, a true verdict to render according to the evidence."

It also appears from the record that in cause No. 3012, the jury returned into the court with a verdict, and upon their oaths did say:

"We, the jury, find the defendants Edgar De Bara and Fannie De Bara guilty as charged in the indictments 3009, 3012, 3015, and all the counts therein; we also find the defendants Edgar De Bara and Fannie De Bara guilty in counts two and three as charged in indictments Nos. 3007, 3008, 3010, 3011, 3013, 3014, 3016, 3017.

"Thereupon the defendants, by their attorneys, move the court for a new trial herein."

On the 17th day of June, 1899, the following order was entered:

"The United States
*vs.*
Edgar De Bara, Fannie De Bara. } 3012.

"Comes the United States by S. H. Bethea, Esq., district attorney, and declines to prosecute the first count in each indictment in cases numbered 3007, 3008, 3010, 3013, 3014, 3016 and 3017, whereupon it is ordered by the court that a *nolle prosequi* be and the same is hereby entered herein, as to said first count in each of said indictments."

It is not correct therefore, as contended by counsel for petitioner, that the judgment and sentence of the District Court were confined to indictment in case No. 3012. The proceedings were entitled as of that case because of the consolidation, but the other cases did not lose thereby their identity and consequences. The judgment and sentence must be construed by the cases which were tried, and upon which the jury rendered its verdict. The petitioner was found guilty as charged in the indictment in 3012 on all counts; also on all counts in 3009 and 3015, and on all counts 2 and 3 of the indictments in Nos. 3007, 3008, 3010, 3011, 3013, 3014, 3016 and 3017.

Therefore the only question for our determination is whether the court had the power under section 5480 to give a single sentence for several offences in excess of that which is prescribed for one offence. The section provides as follows:

"If any person having devised, or intending to devise, any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post office establishment of the United States or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post office of the United States, or take or receive any therefrom, such person, so misusing the post office establishment shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device."

The question raised upon the statute is not an open one in this court. It is substantially ruled by *In re Henry*, 123 U. S. 372. In that case there were two indictments, each charging three

offences. The petitioner was convicted on both indictments and sentenced on both. Upon serving out his first sentence he applied to be discharged on *habeas corpus* because, as he alleged, "the court had no jurisdiction to inflict a punishment for more than one conviction of offences under this statute committed within the same six calendar months."

In passing on the contention the court, by the Chief Justice, said:

"We have carefully considered the argument submitted by counsel in behalf of the petitioner, but are unable to agree with him in opinion that there can be but one punishment for all the offences committed by a person under this statute within any one period of six calendar months. As was well said by the District Judge on the trial of the indictment, 'the act forbids, not the general use of the post office of a letter or packet, or the taking out of a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act.' It is not, as in the case of *In re Snow*, 130 U. S. 274, a continuous offence, but it consists of a single isolated act, and is repeated as often as the act is repeated.

"It is indeed provided that three distinct offences, committed within the same six months, may be joined in the same indictment; but this is no more than allowing the joinder of three offences for the purposes of a trial. In its general effect this provision is not materially different from that of section 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person 'for two or more acts or transactions of the same class of crimes or offences,' and the consolidation of two or more indictments found in such cases. Under the present statute three separate offences, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all. That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offence, and punishable only as such, out of what, without it, would have been several distinct offences, each complete in itself."

We need not add much to this language. The contention of the petitioner would make the punishment depend upon the manner of pleading, and, may be, upon the discretion of prosecuting officers rather than upon the violation of the law. And to what end? In mitigation of ultimate punishment? But that function is confided to the court. To it is confided the power to adapt the punishment to the degree of crime. It may sentence the full penalty upon one offence. It may, though it is not required, to do more upon three offences, and in a single sentence of one day, or of eighteen months, or three times eighteen months, it may express its views of the criminality of a defendant, and, to use the language of the statute, "proportion the punishment especially to the degree in which the abuse of the post office establishment" enters as an instrument "in the defendant's fraudulent scheme and device."

*The rule is discharged.*

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## WABASH RAILROAD COMPANY *v.* TOURVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No 36. Submitted October 9, 1900.—Decided December 3, 1900.

The Wabash Railroad Company was a consolidated railroad corporation, separately organized under the laws of Illinois and the laws of Missouri. It became indebted to Tourville, who was in its employ, for a small sum for which he sued it before a justice of the peace of St. Louis. The complicated proceedings which followed are fully set forth in the opinion of this court. The judgment of the trial court being set aside by the Circuit Court, this court holds that the judgment of the Circuit Court was undoubtedly final; that it completed the litigation; and that it left nothing to the lower court but to enter the judgment which it directed.

The holding by the Supreme Court of Illinois that the judgment was foreign to that State, and therefore not subject to garnishment there, is sustained by the weight of authority.

THE case is stated in the opinion of the court.

Opinion of the Court.

*Mr. Wells H. Blodgett* and *Mr. George S. Grover* for plaintiff in error.

*Mr. Virgil Rule* and *Mr. John D. Johnson* for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

The plaintiff in error is a consolidated railway corporation, separately organized under the laws of Illinois and Missouri. It was indebted to the defendant in error, whom we shall designate by his name, Tourville, for work and labor performed in St. Louis, Missouri, in the sum of $81.98. Tourville was indebted on a promissory note for $132 to one Flannigan, who lived in East St. Louis, State of Illinois.

On the 10th of June, 1891, Tourville commenced an action before a justice of the peace of the city of St. Louis, against the plaintiff in error for his wages, and obtained a judgment by default for the sum of $75 on the 22d of June, 1891. From this judgment the plaintiff in error appealed to the Circuit Court of the city of St. Louis.

Prior to the suit by Tourville against plaintiff in error, to wit, on the 3d of June, 1891, Flannigan commenced suit against him before a justice of the peace of East St. Louis, Illinois, and caused the plaintiff in error to be summoned as garnishee. Tourville was not personally served, but plaintiff in error orally notified him and his attorney in time for him to make defence to the suit. He did not appear, and judgment was entered against him by default on July 13, 1891, for $132.

The plaintiff in error appeared in the action brought by Flannigan, and admitted indebtedness to Tourville in the sum of $71.83, and pleaded and claimed for him the exemption allowed by the laws of Illinois and Missouri; and also pleaded and proved that Tourville had recovered a judgment against plaintiff in error for his wages in the courts of Missouri, and that such wages were earned in Missouri under a contract made there, and were payable in the city of St. Louis, "and nowhere else," and were exempt from attachment by laws of that State,

because Tourville was the head of a family, residing with the same in the State, and had no property except his wearing apparel.

The Illinois exemption was allowed, which amounted to $50, but the Missouri exemption was disallowed, and judgment was rendered against plaintiff in error on the 25th of July, 1891, for the sum of $21.83. The company appealed to the City Court of East St. Louis.

On the 21st of December, 1891, the case came on for trial in the City Court of East St. Louis. Tourville did not appear. The plaintiff in error appeared and demanded a jury. The attachment was sustained, and a verdict found against Tourville for the sum of $132, and against the company as garnishee in favor of Tourville for the use of Flannigan for $21.83 and costs—amounting in all to $43.38. Execution was issued, and the company paid the judgment against it as garnishee.

On the trial of the action of Tourville against the company in the Circuit Court of St. Louis the facts stated above were stipulated, and the case submitted to the circuit judge, sitting as a jury, and judgment was rendered in favor of Tourville as follows:

| | |
|---|---|
| Whole amount of wages | $81 98 |
| Less judgment and costs paid by defendant in East St. Louis | 43 38 |
| Judgment against defendant | $38 60 |

The plaintiff Tourville took an appeal to the St. Louis Court of Appeals which reversed the judgment, holding that the proceedings in garnishment, were void, on the ground that the justice's court of East St. Louis had no jurisdiction, because there was no personal service on Tourville, and the directions of the statute for substituted service had not been observed, and because plaintiff in error had failed to make this defence, although it appeared by the papers on file in the justice's office.

The opinion concluded as follows: "It results from the foregoing that the court erred in holding that the defendant company was entitled to credit for the amount paid by it in the garnishment proceedings. The judgment is reversed and the

cause remanded, with directions to the trial court to enter judgment for plaintiff for eighty-one dollars, the amount sued for and admittedly due if we disregard the garnishment proceedings." 61 Mo. App. 527.

The mandate was issued, and the court ordered "to enter judgment for plaintiff for eighty-one dollars, the amount sued for."

On the 21st of April, 1895, and before the mandate reached the Circuit Court, Flannigan instituted another suit by attachment against Tourville before a justice of the peace in East St. Louis, and the defendant in error was again summoned in garnishment.

On the return of the mandate to the Missouri Court of Appeals of the Circuit Court of St. Louis the proceedings in said suit and garnishment were offered in evidence, but ruled out, and the company excepted.

Judgment was then entered in favor of Tourville for $81 in pursuance of the mandate. The company again excepted, and moved to set the judgment aside, and for a new trial, on the ground that by entering said judgment and rejecting said evidence the court refused to give full faith and credit to proceedings against the defendant in a sister State, in violation of section 1, article 4 of the Constitution of the United States. The motion was overruled, and the defendant excepted. Subsequently a motion was made to modify the judgment, and in support thereof the proceedings in garnishment were again offered, and again ruled out. Execution was issued on the judgment.

On the 12th of October, 1895, a motion was made to quash the execution, based on the same grounds as former motions, which was also denied. The company then appealed to the Supreme Court of the State. That court sustained the rulings of the lower court and affirmed its judgment. 148 Mo. 614.

The Supreme Court said:

"The Circuit Court committed no error in rejecting the evidence of the proceedings in the second attachment suit in Illinois in rendering judgment for the plaintiff or in refusing to modify that judgment. It is true if the judgment of the Circuit Court had been simply reversed and the cause remanded the

case would have stood as though no judgment had ever been rendered, and the parties would have been entitled 'to proceed in the court below to obtain a final determination of their rights in the same manner and to the same extent as if the cause had never been decided by any court.' *Crispen* v. *Hannoran*, 86 Mo. *loc. cit.* But such was not the case. The cause was remanded to the Circuit Court with directions 'to enter judgment for the plaintiff for $81,' and the Circuit Court had no judicial discretion in the matter. It had no power to enter any other judgment or to consider or determine other matters not included in the duty of entering the judgment as directed. *State ex rel.* v. *Edwards*, 144 Mo. 467; *Rees* v. *McDaniel*, 131 Mo. 681; *Young* v. *Thrasher*, 123 Mo. 308; *Stump* v. *Hornback*, 109 Mo. 272; *Chouteau* v. *Allen*, 74 Mo. 56.

"3. The court committed no error in issuing execution on the judgment, nor in overruling defendant's motion to quash the same. The judgment of the St. Louis Court of Appeals rendered on the 26th of March, 1895, was a final judgment in the cause. *Young* v. *Thrasher*, 123 Mo. 308; 1 Black on Judgments, sec. 34, p. 36, and cases, note 64; *Mower* v. *Fletcher*, 114 U. S. 127; *Smith* v. *Adams*, 130 U. S. 167.

"The entry of that judgment in the Circuit Court was a purely ministerial act, carrying into execution the judgment of the appellate court of the date and effect as rendered by that court. One of the effects of that judgment was to merge the cause of action, the debt sued for, in the judgment. 'It was drowned in the judgment.' It thereby 'lost its vitality,' and 'all its power to sustain rights and enforce liabilities terminated in the judgment.' *Cooksey* v. *Kansas City &c. Railroad*, 74 Mo. 477; 1 Freeman on Judgments, § 215; 2 Black on Judgments, § 674. On the 26th of March, 1895, the old debt of the company to the plaintiff ceased to exist, and thereafter could not sustain any liability imposed thereon by the subsequent garnishment proceedings under the second attachment suit in Illinois. 15 Am. & Eng. Encycl. p. 341."

To the judgment of the Supreme Court this writ of error was sued out.

It is contended that full faith and credit were not given to

the proceedings in garnishment, and in support of it counsel has ably and fully discussed the law and effect of garnishment. We do not think it necessary to enter into that discussion as fully as counsel have. The judgment of the Court of Appeals was undoubtedly final. It completed the litigation, and left nothing to the lower court but to enter judgment for Tourville for $81. The lower court had no option or jurisdiction to do anything else. The rule precludes in that State the adjudication of rights occurring subsequently to the rendition of the original judgment. *Young* v. *Thrasher*, 123 Mo. 308.

This disposes of the various motions of defendant in error preceding the entry of the judgment on the mandate, and the motions to set aside the same and to grant a new trial. Is the motion to quash the execution entitled to different consideration? It is not clear from the opinion of the Supreme Court whether the lower court under the local procedure had as little power over the execution on the judgment as it had over the judgment entered on the mandate of the Court of Appeals. The Supreme Court, however, did hold that the judgment was foreign to Illinois, and therefore not subject to garnishment there. In this the court is sustained by the weight of authority. Drake on Attachments, sec. 625, and cases compiled in 14 Am. & Eng. Enc. of Law, (2d ed.), 775, 776.

This court has held that to the validity of a plea of attachment the attachment must have preceded the commencement of the suit in which the plea is made. *Wallace* v. *McConnel*, 13 Pet. 136.

*Judgment affirmed.*

Mr. Justice Brewer dissented.

# MASON *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 258. Argued October 25, 26, 1900.—Decided December 10, 1900.

The Supreme Court of the State of Missouri having decided that the provision of the state constitution respecting the enactment of registration laws does not limit the power of the general assembly to create more than one class composed of cities having a population in excess of one hundred thousand inhabitants, this conclusion must be accepted by this court.

The general right to vote in the State of Missouri is primarily derived from the State; and the elective franchise, if one of the fundamental privileges and immunities of the citizens of St. Louis, as citizens of Missouri and of the United States, is clearly such franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised.

The power to classify cities with reference to their population having been exercised, in this case, in conformity with the constitution of the State, the circumstance that the registration law in force in the city of St. Louis was made to differ in essential particulars from that which regulated the conduct of elections in other cities in the State of Missouri, does not, in itself, deny to the citizens of St. Louis the equal protection of the laws; nor did the exercise by the general assembly of Missouri of the discretion vested in it by law, give rise to a violation of the Fourteenth Amendment to the Constitution of the United States.

By an act of the general assembly of the State of Missouri, approved on May 31, 1895, provision was made for the registration of voters in cities which then had or thereafter might have a population of over one hundred thousand inhabitants. This law became operative in the cities of St. Louis, Kansas City and St. Joseph. On June 19, 1899, the governor of Missouri approved an act of the general assembly, known as the Nesbit law, which made provision for the registration of voters in cities in Missouri which then had or might thereafter have a population of over three hundred thousand inhabitants. At the time the Nesbit law went into operation it affected only the city of St. Louis, which was the only city in Missouri having a population of over three hundred thousand inhabitants.

Statement of the Case.

The defendant relators were appointed a board of election commissioners under the Nesbit law, and certain expenditures having been incurred in carrying the law into effect, the board applied to the plaintiff in error, in his official capacity as auditor of the city of St. Louis, to examine, audit and pass upon the accounts of the board, as required by law. Compliance with such request having been refused, the present litigation was commenced by the filing on January 5, 1900, in the Supreme Court of Missouri of a petition for a writ of mandamus, to compel the performance by the plaintiff in error of the duty in question. An alternative writ having issued, a return was filed, in which it was averred that the law under which the relators claimed to act was void, because repugnant both to the constitution of Missouri and the Constitution of the United States. The incompatibility between the law in question and the Constitution of the United States was rested upon the contention that the provision of the law "deprives the citizens of the United States residing in the city of St. Louis of their right to the equal protection of the laws, and imposes on citizens of said city unconstitutional requirements as preliminary to their right to vote and hold office."

Issue having been joined by the filing of a reply, the matter was heard by the Supreme Court of Missouri, and that court awarded a peremptory writ. 55 S. W. Rep. 636. It also overruled a petition for a rehearing. A writ of error was thereupon allowed by the Chief Justice of the state Supreme Court.

As the most convenient form of stating the contentions of the plaintiff in error, we excerpt from the brief of counsel a statement of the proposition relied on:

"We maintain that this Nesbit law does deny to the citizens of St. Louis the equal protection of the laws in these respects:

"(*a*) It denies them the right of appeal to any court from the action of the precinct boards of registration and from the action of the board of election commissioners, in striking their names from the registration lists, as qualified voters, while in cities of 100,000 inhabitants and up to 300,000 inhabitants, under the provisions of the law of 1895, this right is secured.

It is secured so completely by the last named law that an appeal lies even to the highest court of the State.

"(*b*) It denies them the right of appeal to any court or judicial tribunal from the action of the precinct boards of registration or from the action of the election commissioners in admitting to registration or in refusing to strike from the registration lists of qualified voters persons who are not entitled to register or to vote—a right secured to all citizens by the law of 1895 in cities and counties of 100,000 and not exceeding 300,000 inhabitants.

"(*c*) It allows a partisan board to add hundreds and even thousands of names to the registration lists, which names are unknown to the voters till the day of election, and have been subjected to no canvass as to their right to remain on the lists as registered qualified voters. If a citizen of St. Louis registers in his own precinct, under the Nesbit law, or names are placed on the registration lists in the precinct by the precinct boards of registration during the three days allowed by the law for registration in the precinct, the Nesbit law requires, as does the law of 1895, that the clerks, representing parties of opposite politics, shall go together to each house or room from which the party registers, and ascertain, by personal inquiry, whether or no the party registered actually resides at that place.

"But if the party has registered at the office of the board of election commissioners, which he may do on all such days on which registration is not conducted in the precincts, which days of precinct registration are the Tuesday four weeks before the election, the Saturday following, and the third Tuesday before the election, and which he may do even on the Thursday, Friday and Saturday immediately preceding the election—there is no canvass or examination whatever provided by the Nesbit law of his right to do so; his name is placed on the registration and poll books by the commissioners, their deputy or clerks—all appointed by vote of a majority of the board—and it appears on the day of election as the name of a qualified voter of the precinct. Thus a marked distinction is made by the Nesbit law between those who register or have their names placed on the registration lists at the office of the election commissioners and

those who register in their own precinct. The latter are subjected to close and bi-partisan scrutiny; the former go unchallenged and uncontested. Under the law of 1895 this cannot occur, for no registration under that law can be made in the office of the board of election commissioners, but all must be made in the several precincts, and all is subject to rigid bi-partisan scrutiny and canvass. This latter is the law in all cities of 100,000 and up to 300,000 inhabitants, and the former is the Nesbit law for all cities—meaning St. Louis alone—of over 300,000 inhabitants.

"(*d*) Under the Nesbit law the judges and clerks of election for each precinct, who are also the registration and canvassing officers for those precincts, are all appointed by vote of a majority of the board of election commissioners—a majority necessarily partisan. This majority selects them arbitrarily — true, the law says they shall be of 'opposite politics'— but whether of opposite politics or not, whether fit persons or not, whether intelligent or not, is left to the uncontrolled, arbitrary and exclusive determination of the majority of the board. This in St. Louis alone. In all other cities of 100,000 and up to 300,000 inhabitants 'the commissioner or commissioners shall select the judges and clerks to represent the party to which said commissioner or commissioners belong,' and the person selected shall be intelligent, educated, etc., and 'shall be recognized members of the party from which selected.' The names of those selected shall be filed in the Circuit Court and published, and any elector may file objections to the persons so selected and have his objections heard and determined by the court. If sustained, new names are submitted by the commissioners until fit persons are secured; and that being done, the appointments made by the commissioners are confirmed by the court. The court names no one; it only hears and passes on names objected to, and then confirms the approved appointees of the commissioners.

"(*e*) The Nesbit law is so partisan as to deny to all citizens in St. Louis, not members of the political party to which the two majority members of the board belong, the equal protection of the law. This is apparent on the face of the law. In this

respect it is in strong contrast with the law of 1895. In our statement we have set forth the leading features of the two laws and we will not repeat them here, but refer to that statement in support of this proposition. Where a State recognizes political parties by its laws as does the State of Missouri by numerous provisions, then it must do so equally for all—it must grant to all its citizens equality of right and protection—and this it has done in the enactment of this Nesbit law; and in that has violated the Fourteenth Amendment to the Constitution of the United States. It has done this, not only as between St. Louis and all other cities of over 100,000 inhabitants, but in St. Louis itself it has made such distinction between parties in that city as to deprive all citizens of that city who are not members of the political party to which the majority of the board belongs of the equal protection of the law.

"(*f*) The Nesbit law involves a denial of the equal protection of the laws, in that it provides penalties which are different in degree and character for offences than are prescribed for the same offences by the law of 1895 and by the general statutes of the State; that is, the same offence committed in the city of St. Louis is punished one way under the Nesbit law; if committed in Kansas City or St. Joseph, or in any other city of 100,000 and not having 300,000 inhabitants, it is punished in another way under the law of 1895; and if committed in the State at large it is punished in yet another way under the general laws. Furthermore certain acts are crimes if committed in one locality in the State, but not so when committed in another.

* * * * * * * *

"(*g*) The law also imposes unconstitutional requirements on the citizens of St. Louis as requisite to the right to vote, in that it provides that a voter shall have resided in his election precinct at least 20 days prior to the election, and is not 'directly interested in any bet or wager depending upon the result of the election.' No such requirements are in article 8 of the state constitution; to enforce them on the citizens of St. Louis is for the legislature to attempt to add tests to them not authorized by the state constitution and not applied to the other citizens of this State."

*Mr. George D. Reynolds* and *Mr. George H. Shields* for plaintiff in error. *Mr. J. W. Noble* was on their brief.

*Mr. Samuel B. Jeffries* for defendants in error. *Mr. Edward C. Crow* was on his brief.

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

The constitution of Missouri in force at the time of the enactment of the law of June 19, 1899, usually referred to as the Nesbit law, in addition to prescribing certain qualifications as necessary to the right to vote, empowered the general assembly of the State to "provide by law for the registration of voters in cities and counties having a population of more than one hundred thousand inhabitants;" and further directed that the general assembly "may provide for such a registration in cities having a population exceeding twenty-five thousand inhabitants and not exceeding one hundred thousand, but not otherwise." A law approved May 31, 1895, applied to all cities having a population in excess of one hundred thousand inhabitants, and before the adoption of the Nesbit law, the act of 1895 was operative in the city of St. Louis. The Nesbit law, which applied to cities having a population of over three hundred thousand inhabitants, necessarily withdrew the city of St. Louis from the operation of the earlier statute.

The contention that the Nesbit law denied to citizens of St. Louis the equal protection of the laws, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, is based upon certain propositions, elaborated in the argument of counsel, which we have reproduced in the statement of the case.

The assertions referred to, it must be borne in mind, are made by a public official, who is seeking to avoid the performance of duties enjoined upon him by the law in question, and who does not allege that any particular rights possessed by him as an individual have been expressly invaded. Whether under the ruling in *Wiley* v. *Sinkler*, *ante*, 58, the plaintiff in error could properly raise the objection in question, we shall not deter-

mine, in view of the fact that the Supreme Court of Missouri entertained and considered the question whether the law in question violated the Constitution of the United States.

In its final analysis it is apparent that the reasoning urged to sustain the propositions relied on must rest upon the assumption that under the constitution of Missouri but one registration law can be enacted applicable to cities having a population in excess of one hundred thousand inhabitants, whatever the maximum number of inhabitants may be; that, as a natural consequence, the citizens of St. Louis cannot be classified separately from cities having a population in excess of one hundred thousand but less than three hundred thousand inhabitants, and that as the law of 1895 more effectually protected the exercise of the right and privilege of voting, and threw about the enjoyment of the right of suffrage greater safeguards than does the later law, therefore the last enactment denies to the citizens of the city of St. Louis the equal protection of the laws.

But the state Supreme Court has, in this case, decided that the provision of the state constitution respecting the enactment of registration laws does not limit the power of the general assembly to create more than one class composed of cities having a population in excess of one hundred thousand inhabitants, and hence that the Nesbit law was not repugnant to the state constitution. This conclusion must be accepted by this court. *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 566; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 462, and cases cited.

In one aspect the argument urged against the validity of the provisions of the Nesbit law depends merely on comparison of the requirements of that law with the act of 1895. All the other contentions are reducible to the proposition that a violation of the Fourteenth Amendment to the Constitution of the United States has resulted from the putting in force by the general assembly of Missouri, in cities having a population of over three hundred thousand inhabitants, of a registration law which, in the mind of a judicial tribunal, may not as effectually safeguard the right and privilege of voting as might be devised, considered alone or with reference to a prior enactment.

Syllabus.

But the obvious answer is that the law in question has been declared to be valid under the constitution of the State. The general right to vote in the State of Missouri is primarily derived from the State, *United States* v. *Reese*, 92 U. S. 214; and the elective franchise, if one of the fundamental privileges and immunities of the citizens of St. Louis, as citizens of Missouri and of the United States, is clearly such franchise "as regulated and established by the laws or constitution of the State in which it is to be exercised." *Blake* v. *McClung*, 172 U. S. 239, quoting from the opinion of Mr. Justice Washington at circuit in *Corfield* v. *Coryell*, 4 Wash. C. C. 380. The power to classify cities with reference to their population having been exercised in conformity with the constitution of the State, the circumstance that the registration law in force in the city of St. Louis was made to differ in essential particulars from that which regulates the conduct of elections in other cities in the State of Missouri, does not in itself deny to the citizens of St. Louis the equal protection of the laws. Nor did the exercise by the general assembly of Missouri of the discretion vested in it by law give rise to a violation of the Fourteenth Amendment to the Constitution of the United States. *Chappell Chemical Co.* v. *Sulphur Mines Co.*, 172 U. S. 474, 475, and cases cited; *Maxwell* v. *Dow*, 176 U. S. 581, 598.

*Judgment affirmed.*

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## GABLEMAN *v.* PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY.

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

No. 438. Submitted November 16, 1900. — Decided December 10, 1900.

An action against a receiver of a state corporation is not a case arising under the Constitution and laws of the United States simply by reason of the fact that such receiver was appointed by a court of the United States.

Statement of the Case.

A receiver appointed by a Federal court may be sued in that court as well as in the state court, but if in the state court, he is not entitled to remove the cause on the sole ground of his appointment by the Federal court.

THE certificate in this case was as follows:

"This action was brought originally in the superior court for Vanderburg County, in the State of Indiana, on the 28th of August, 1897, by the plaintiff in error, a citizen of Indiana, against the defendants in error, to recover damages for personal injuries said to have been sustained by the plaintiff in error, in March, 1897, through the negligence of the defendants in error in the operation of a railway train, and the failure to properly operate the gates at a railway crossing. The defendant railway company is a corporation organized under the laws of the State of Indiana, and the defendant, George Colvin, is a citizen of Indiana. The defendant, Edward O. Hopkins, was, at the time the injuries were received and the suit was commenced, receiver of the defendant railway company, by appointment of the United States Circuit Court for the Southern District of Illinois, and was, at the time of the injuries, in sole control and management of the railway company, having an office in Vanderburg County, in the State of Indiana, the defendant Colvin being in his employment as a locomotive engineer, and as his servant operating the engine at the time of the injury. The record does not show that the duties of the defendant, Colvin, extended to the operation or maintenance of the gates at the railway crossing. The record does not disclose the place of residence, or the citizenship of Hopkins, as an individual.

"In due time after the commencement of the suit the defendant, Edward O. Hopkins, receiver, on his sole petition, removed the cause into the Circuit Court for the District of Indiana, upon the ground that it was a case arising under the Constitution and laws of the United States. A motion to remand was entered by the plaintiff in error, and overruled by the Circuit Court for the District of Indiana; and, at the trial subsequently, a verdict was, by direction of the court, returned for the defendants in error.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"(1.) Did the Circuit Court of the United States for the District of Indiana have, upon these facts, jurisdiction to try the cause?

"(2.) Was the cause one properly removable into the Circuit Court of the United States?"

*Mr. William Allan Cullop* for plaintiff in error.

*Mr. Walter S. Horton* for defendants in error.

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

The general policy of the act of March 3, 1887, corrected by the act of August 13, 1888; 24 Stat. c. 373, p. 552; 25 Stat. c. 866, p. 433, as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the Circuit Courts. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 462, and cases cited.

And it is well settled that a case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. *Walker* v. *Collins*, 167 U. S. 57.

It has also been determined that when the application rests on that ground, and there is more than one defendant, all the defendants must join. *Railway Company* v. *Martin*, 178 U. S. 245.

And in respect of the removal of actions of tort on the ground of separable controversy, that the existence of such controversy must appear on the face of the plaintiff's pleading, and that it does not so appear, if the defendants are charged with direct or concurrent or concerted wrongful action. *Chesapeake & Ohio Railway Company* v. *Dixon*, *ante*, 131.

In this case the pleadings are not before us, and the certifi-

cate states that the receiver removed the cause into the Circuit Court, on his sole petition, "upon the ground that it was a case arising under the Constitution and laws of the United States." A motion to remand was made and denied. 82 Fed. Rep. 791. This decision was afterwards reversed by the Circuit Court of Appeals, but, as is admitted, a rehearing was granted, and this certificate was then made. 101 Fed. Rep. 1.

The receiver rested his contention that the case arose under the Constitution and laws of the United States on the single ground of his appointment by the Federal court; and, upon this record, our opinion of the tenability of that ground is requested.

Section 3 of the acts of 1887 and 1888 reads:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.

The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act.

As, however, the receiver, as the officer of the court, holds the property for the benefit of all who have an interest in it, and is not to be interfered with in its administration and dis-

posal by the judgment or process of another court, the closing clause of the section, out of abundant caution, provides that when the receiver is sued, without leave, "such suit shall be subject to the general equity jurisdiction of the court in which said receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

Of course it devolves on the court in possession of the property or funds out of which judgments against its receiver must be paid to adjust the equities between all parties, and to determine the time and manner of payment of judgment creditors necessarily applying for satisfaction from assets so held to the court that holds them. But, as we observed in *Texas & Pacific Railway Co.* v. *Johnson*, 151 U. S. 81, 103, "the right to sue without resorting to the appointing court, which involves the right to obtain judgment, cannot be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it."

In *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239, 243, we said, in the language of previous opinions, that when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained. *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505.

The inquiry we are pursuing does not fall within the ruling that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation it may have, except as specifically restricted.

Nor are the cases against United States officers as such, or on bonds given under acts of Congress, or involving interference

with Federal process, or the due faith and credit to be accorded judgments, in point.

The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general law, and his defence does not rest on any act of Congress. We are of opinion that this question must be answered in the negative, and that this has been heretofore so determined as the Circuit Court of Appeals properly held in this case. *Bausman* v. *Dixon*, 173 U. S. 113; *Pope* v. *Railway Company*, 173 U. S. 573; *McKenna* v. *Simpson*, 129 U. S. 506; *Provident Savings Society* v. *Ford*, 114 U. S. 635.

In *Bausman* v. *Dixon* we ruled that a judgment against a receiver appointed by a Circuit Court of the United States, rendered in due course in a state court, does not involve the denial of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. That was an action to recover for injuries sustained by reason of the receiver's negligence in operating a railroad company chartered by the State of Washington, though the receiver was the officer of the Circuit Court, and we said: "It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law

applicable to the facts, and not in any way on the terms of the order." And although that was the case of a writ of error to a state court, we applied the reasoning in *Pope* v. *Louisville &c. Railway Company*, in which the right of appeal to this court from the Circuit Court of Appeals was asserted on the ground that the case arose under the Constitution and laws of the United States, because Pope was a receiver of a Federal court. We decided that the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent on the ground of jurisdiction in those cases, and we also held that the receiver's orders of appointment were not equivalent to laws of the United States in the meaning of the Constitution, and that the mere order of a Federal court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction. We said: "The bill nowhere asserted a right under the Constitution or laws of the United States, but proceeded on common-law rights of action. We cannot accept the suggestion that the mere order of a Federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the Circuit Court of Appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made. The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the Constitution or laws of the United States."

The question there was as to whether or not the decision of the Circuit Court of Appeals was made final by the sixth section of the judiciary act of March 3, 1891, and we held that it was, and dismissed the appeal. We could not, however, have arrived

at that conclusion if the jurisdiction had rested on the ground that the case arose under the Constitution or laws of the United States, as such cases are not among the classes enumerated in that section, in which the decisions of that court are made final. We have repeatedly held that the jurisdiction of such proceedings is dependent upon that of the main case. *Rouse* v. *Letcher*, 156 U. S. 49; *Gregory* v. *Van Ee*, 160 U. S. 143; *Carey* v. *Railroad Company*, 161 U. S. 115. In *Rouse* v. *Letcher*, we pointed out that the intention could not be attributed to Congress of allowing judgments on every incidental controversy to be brought to this court for review, while denying such review to the principal decree; and any other conclusion would be manifestly inconsistent with the avowed object of the act of March 3, 1891.

It should be added that while these actions against receivers may be brought in other courts, they may, nevertheless, also be brought in the court by which the receiver was appointed, inasmuch as the judgments recovered are payable from the property or funds in the course of administration, and the actions may be regarded as ancillary in the sense of subordination to such administration.

We have just held in *Baggs, Receiver*, v. *Martin*, *ante*, 206, that where a receiver sued in the state court had removed the action to the Circuit Court, which had appointed him, and the plaintiff had not moved to remand but had accepted the jurisdiction thus invoked, a judgment in that court in plaintiff's favor might be sustained, because the court would have had original jurisdiction, and it did not lie in the mouth of the receiver, under such circumstances, to deny the jurisdiction he had sought.

The judgments in *Texas & Pacific Railway Company* v. *Cox*, 145 U. S. 593; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; and *Hornsby* v. *Rouse*, 161 U. S. 588, cited by counsel, are consistent with the result reached in the *Baggs*' case as well as in this, although there are expressions in the opinions in those cases which are modified by what has since been said.

*The questions propounded are answered in the negative.*

# AUSTIN *v.* TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 25. Argued November 9, 10, 1899.—Decided November 19, 1900.

Tobacco being a legitimate article of commerce, the court cannot take judicial notice of the fact that it is more noxious in the form of cigarettes than in any other. It is, however, to the same extent as intoxicating liquors, within the police power of the State.

It is within the province of the legislature to declare how far cigarettes may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against those imported from other States, and there be no reason to doubt that the act in question is designed for the protection of the public health.

Original packages are such as are used in *bona fide* transactions carried on between the manufacturer and wholesale dealers residing in different States. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the State to which it is sent, it will not be protected as an original package against the police laws of that State.

Where cigarettes were imported in paper packages of three inches in length and one and one half in width, containing ten cigarettes, unboxed but thrown loosely into baskets: *held*, that such paper parcels were not original packages within the meaning of the law, and that such importations were evidently made for the purpose of evading the law of the State prohibiting the sale of cigarettes.

THIS was a writ of error to review the conviction of Austin for the sale of cigarettes in violation of an act of the General Assembly of Tennessee, (chap. 30, Acts of 1897,) the material portion of which reads as follows:

"Be it enacted by the General Assembly of the State of Tennessee, That it shall be a misdemeanor for any person, firm or corporation to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor punishable by a fine of not less than fifty dollars."

Defendant was convicted in the Circuit Court of Monroe

County; fined fifty dollars and committed until the fine should be paid; and upon appeal to the Supreme Court of Tennessee the judgment of the Circuit Court was affirmed. 101 Tenn. 563.

*Mr. W. W. Fuller* and *Mr. John G. Johnson* for plaintiff in error. *Mr. J. Parker* was on their brief.

*Mr. G. W. Pickle* for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

It is charged that the act in question, in its application to the facts of this case, is an infringement upon the exclusive power of Congress to regulate commerce between the States. This is the sole question presented for our determination.

We are not disposed to question the general principle that the States cannot, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless, *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78, or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the State, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. *The Passenger Cases*, 7 How. 283; *Welton* v. *Missouri*, 91 U. S. 275; *Henderson* v. *New York*, 92 U. S. 259; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Guy* v. *Baltimore*, 100 U. S. 434; *Ward* v. *Maryland*, 12 Wall. 418; *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59. In this connection we indorse fully what was said by this court in *Mugler* v. *Kansas*, 123 U. S. 623, 661: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the Constitution."

The Supreme Court of Tennessee placed its decision of this case upon two grounds: First, that cigarettes were not legiti-

mate articles of commerce; second, that the sale shown to have been made was not the sale of an original package in the true commercial sense.

1. We are not prepared to fully indorse the opinion of that court upon the first point. Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce although it may to a certain extent be within the police power of the States. Of this class of cases is tobacco. From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit or other articles, the use of which is a menace to the health of the entire community. Congress, too, has recognized tobacco in its various forms as a legitimate article of commerce by requiring licenses to be taken for its manufacture and sale, imposing a revenue tax upon each package of cigarettes put upon the market, and by making express regulations for their manufacture and sale, their exportation and importation. Cigarettes are but one of the numerous manufactures of tobacco, and we cannot take judicial notice of the fact that it is more noxious in this form than in any other. Whatever might be our individual views as to its deleterious tendencies, we cannot hold that any article which Congress recognizes in so many ways is not a legitimate article of commerce. The language of Chief Justice Taney in the *License Cases*, 5 How. 504, with reference to intoxicating liquors is so pertinent to this case that it deserves to be here repeated:

"But spirits and distilled liquors are universally admitted to be subject of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may

prescribe what article of merchandise shall be admitted and what excluded; and may, therefore, admit or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction."

"But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from restraining the traffic, or from prohibiting it altogether, if it thinks proper."

The same ruling with regard to the power of the States to prohibit the sale of intoxicating liquors was made in *Bartemeyer* v. *Iowa*, 18 Wall. 129, in which it was held the right to sell such liquors was not a privilege or immunity which, by the Fourteenth Amendment, the States were forbidden to abridge. And in the later case of *Beer Co.* v. *Massachusetts*, 97 U. S. 25, it was held that a company chartered "for the purpose of manufacturing malt liquors in all their varieties" held its franchise subject to the police power of the State, and that, if the public safety or public morals required the discontinuance of such

manufactures, the legislature might so provide, notwithstanding individuals and corporations might thereby suffer inconvenience. In *Mugler* v. *Kansas*, 123 U. S. 623, and *Kidd* v. *Pearson*, 128 U. S. 1, the principle of this case was extended so far as to hold that such laws might be enforced against persons who, at the time, happened to own property whose chief value consisted in its fitness for manufacturing intoxicating liquors, without compensating them for the diminution in value resulting from such prohibitory enactments; and in *Foster* v. *Kansas*, 112 U. S. 201, it was regarded as the settled doctrine of this court that such laws, prohibiting the sale and manufacture of intoxicating liquors, were not repugnant to the Constitution of the United States.

How far such laws could be made applicable to articles admitted to be innocuous has never been decided by this court. Nor is it necessary to the decision of this case. It was held, however, in *Powell* v. *Pennsylvania*, 127 U. S. 678, that a statute of Pennsylvania prohibiting the manufacture or sale of oleomargarine was a lawful exercise by the State of its power to protect by police regulations the public health, and that it neither denied to persons within the jurisdiction of the State the equal protection of the laws, nor deprived them of their property without compensation, and was not otherwise repugnant to the Fourteenth Amendment. Said Mr. Justice Harlan: "It [this court] cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to these objects. The court is unable to affirm that this legislation has no real or substantial relation to such objects." So, too, in *Plumley* v. *Massachusetts*, 155 U. S. 461, a statute of Massachusetts prohibiting the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, and so brought into the State, was decided not to be in conflict with the commerce clause of the Constitution.

These cases recognize the fact that intoxicating liquors belong to a class of commodities which, in the opinion of a great many estimable people, are deleterious in their effects, demoralizing in their tendencies, and often fatal in their excessive indulgence; and that, while their employment as a medicine may sometimes be beneficial, their habitual and constant use as a beverage, whatever it may be to individuals, is injurious to the community. It may be that their evil effects have been exaggerated, and that, though their use is usually attended with more or less danger, it is by no means open to universal condemnation. It is, however, within the power of each State to investigate the subject and to determine its policy in that particular. If the legislative body come deliberately to the conclusion that a due regard for the public safety and morals requires a suppression of the liquor traffic, there is nothing in the commercial clause of the Constitution, or in the Fourteenth Amendment to that instrument, to forbid its doing so. While, perhaps, it may not wholly prohibit the use or sale of them for medicinal purposes, it may hedge about their use as a general beverage such restrictions as it pleases. Nor can we deny to the legislature the power to impose restrictions upon the sale of noxious or poisonous drugs, such as opium and other similar articles, extremely valuable as medicines, but equally baneful to the habitual user.

Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the Supreme Court of Tennessee that "they are inherently bad and bad only." At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold,

or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other States, and there be no reason to doubt that the act in question is designed for the protection of the public health.

We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce. While, as was said in *Holden* v. *Hardy*, 169 U. S. 366, 392, "the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what means are necessary for the protection of such interests." Thus, while in *Railroad Co.* v. *Husen*, 95 U. S. 465, it was held that a statute of Missouri, prohibiting the driving or bringing of any Texas, Mexican or Indian cattle into the State, was in conflict with the interstate commerce clause of the Constitution, it was subsequently held that the introduction of diseased cattle might be prohibited altogether, or subjected to such regulations as the legislature chose to impose. *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613. So, too, although it was held in *Barbier* v. *Connolly*, 113 U. S. 27, and in *Soon Hing* v. *Crowley*, 113 U. S. 703, that a municipal ordinance prohibiting laundry work within certain territorial limits and within certain hours was purely a police regulation, such an ordinance was void, if it conferred upon the municipal authorities arbitrary power at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of

the place selected for carrying on business. *Yick Wo* v. *Hopkins*, 118 U. S. 356. In delivering the opinion Mr. Justice Matthews observed: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

We are therefore of opinion that although the State of Tennessee may not wholly interdict commerce in cigarettes it is not, in the language of Chief Justice Taney in the *License Cases*, "bound to furnish a market for it, [them] nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the General Government."

2. There is no reason to doubt the good faith of the legislature of Tennessee in prohibiting the sale of cigarettes as a sanitary measure, and if it be inoperative as applied to sales by the owner in the original packages, of cigarettes manufactured in and brought from another State, we are remitted to the inquiry whether a paper package of three inches in length and one and a half inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the State while in the hands of the importer? This we regard as the vital question in the case.

The whole law upon the subject of original packages is based upon a decision of this court, in *Brown* v. *Maryland*, 12 Wheat. 419, in which a statute of Maryland, requiring all importers of foreign articles, "by bale or package," or of intoxicating liquors, and other persons selling the same, "by wholesale, bale or package, hogshead, barrel or tierce," to take out a license, was held to be repugnant to that provision of the Constitution forbidding States from laying a duty upon imports, as well as to that declaring that Congress should have power to regulate commerce with foreign nations. There was thought to be no difference between a power to prohibit the sale of an article while it was

an import and the power to prohibit its introduction into the country. The one would be the necessary consequence of the other. No goods would be imported if none could be sold. But, in delivering the opinion of the court, Mr. Chief Justice Marshall observed: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so formidable a structure has been attempted to be erected in subsequent cases. Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume that it did not occur to the Chief Justice that, by a skilful alteration of the size of the packages, the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several States.

A casual remark, however, made by Chief Justice Marshall in that case, that "we suppose the principles laid down in this case to apply equally to importations from a sister State" was subsequently considered in *Woodruff* v. *Parham*, 8 Wall. 123, and was held to have no application to commerce between the States, the court deciding that the term "import," as used in that clause, which declares that "no State shall levy any imposts or duties on imports or exports," did not refer to articles imported from one State into another, but only to articles imported from foreign countries into the United States. In

that case an ordinance of the city of Mobile, authorizing a tax upon sales at auctions, was held to be applicable to products of States other than Alabama, although the articles were sold in the original and unbroken packages.

The principle of this case was subsequently applied in *Brown* v. *Houston*, 114 U. S. 622, in which it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, became intermingled, on arrival there, with the general property of the State of Louisiana, and was subject to taxation under the laws of that State, although it might be, after arrival, sold from the vessel upon which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port. In delivering the opinion of the court Mr. Justice Bradley observed:

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the city of New York, for example, when the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, *still in the original packages*, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, *being there for the purpose of remaining there until used or sold*, and constituting part of the great mass of commercial capital — provided, always, that the assessment be a general one, and made without discrimination between goods the product of New York and goods the product of other States? Of course, the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States as such, or by reason of their so coming, would be a discriminating tax against them as imposts, and would be a regulation of inter-

state commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But, if, after their arrival within the State—that being their place of destination for use of trade—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

The principle of this case was applied subsequently in that of *Pittsburgh & Southern Coal Co.* v. *Bates*, 156 U. S. 577.

In *Leisy* v. *Hardin*, 135 U. S. 100, 122 quarter barrels of beer, 171 one eighth barrels of beer and eleven cases of beer were seized by the city marshal of Keokuk under a state statute prohibiting the sale of intoxicating liquors. It was held that, being articles of lawful commerce, the State could not, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State; or, when imported, prohibit their sale by the importer, and that they did not become a part of the common mass of property within the State so long as they remained in the casks in which they were imported and continued to be the property of the importer. No question was made with regard to the casks being original packages, or as to the fact that, according to the custom of brewers, beer was usually and ordinarily imported from one State to another in casks of this size.

In the still later case of *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, oleomargarine was recognized as a lawful article of commerce, and one which could not be wholly excluded from importation into a State from another State where it was manufactured, and so long as it remained in its original packages could be sold, notwithstanding a statute of the State prohibiting such sale. The oleomargarine in that case was imported and sold in packages of ten pounds weight; but it appeared in the special verdict that the package was an original package, as required by the act of Congress, and was of such "form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course

of actual commerce, and the said form, size and weight were adopted in good faith, and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant."

Most pertinent to this case, and, as we think, covering its principle completely, is the opinion of this court in *May* v. *New Orleans*, 178 U. S. 496, decided at the last term. This involved the validity of certain tax assessments made by the city of New Orleans upon the merchandise and stock in trade of the plaintiff, which consisted of dry goods imported from foreign countries, upon which duties had been levied by and paid to the General Government. The goods were put up and sold in packages, a large number of such packages being inclosed in wooden cases or boxes for the purposes of importation. Upon arrival at New Orleans the boxes were opened, the packages taken out and sold unbroken. The question was whether the box or case containing these packages, or the packages themselves were the original packages within the case of *Brown* v. *Maryland*, 12 Wheat. 419. It was conceded that, so long as the packages remained in their original cases, they were not subject to taxation, but the court held that this immunity ceased as soon as the boxes were opened. As stated by Mr. Justice Harlan in delivering the opinion of the court (p. 508):

"In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import, and became property subject to taxation by the State as other like property situated within its limits. The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing the things imported into the State. It was not a tax on the plaintiff's goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. We cannot impute to the framers of the Con-

stitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the State the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the Government, and, in many instances, with the intent to protect the industries of this country against foreign competition."

The case under consideration is really the first one presenting to this court distinctly the question whether, in holding that the State cannot prohibit the sale in its original package of an article brought from another State, the size of the package is material, although some of the expressions in the *License Cases* seem to foreshadow the consequences likely to result from the argument of the defendant. Thus, it is stated by Mr. Justice Catron, 5 How. 608, that "to hold that the state license law [of New Hampshire] was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequences of which would be that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire." And also in the opinion of Mr. Justice Woodbury, rendered in the same case (p. 625): "If the proposition was maintainable, that, without any legislation by Congress as to the trade between the States, (except that in coasting, as before explained, to prevent smuggling,) anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or any internal regulation of a State,

then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring State. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity." These words are certainly prophetic in their applicability to this case.

Similar questions have arisen in the Federal courts of original jurisdiction, whose decisions have generally been in favor of the position taken by the plaintiff in error in this case. The same question has been considered in the courts of several States, and their decisions have been with almost equal unanimity the other way.

In *Commonwealth* v. *Zelt*, 138 Penn. St. 615, a distiller manufacturing over the state line established a store or agency within the State, put up his liquors in bottles ranging in capacity from one quart down to one half pint, and, packing them in unsealed barrels, sent them to the Pennsylvania store, where they were taken from the barrels, put upon the shelves and sold to customers. The question was submitted to the jury, which, as stated by the court, evidently regarded defendant's method as a trick and an evasion of the state statute. The judgment was affirmed. In *Commonwealth* v. *Schollenberger*, 156 Penn. St. 201, (not the case reported in 171 U. S. 1,) an original package is defined to be "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling, and security in transportation of merchandise between dealers in the ordinary course of actual commerce." Where a mode of putting up a package is not adapted to meet the requirements of interstate commerce, but the requirements of an unlawful domestic retail trade, the dealer will not be protected on the ground that he is selling an original package. The opinion contains a very vigorous denunciation of the methods resorted to by this class of dealers. The following paragraphs are sufficiently illustrative of the general purport of the decision: "Intrenched behind the

interstate commerce clause so construed, citizens of other States could prey upon our people, trample upon our laws, and make gain out of a traffic forbidden to our citizens only to be delivered up absolutely and unconditionally to them. It would require only that such citizen of another State should establish a local store in some of our towns and cities, or in all of them, conduct a local business, to meet a local demand, and, when called upon by the officers of the law, make the reply that he made the goods in some other State, and, as a manufacturer, supplied himself, as a local dealer, with wares of a foreign origin. Neither the foreign origin of the goods sold, nor of the seller, nor of both together, will convert a business that is local and interstate into one that is general and interstate within the meaning of the Constitution of the United States. . . . One who plants his foot squarely upon the police laws of this State and defies its officers to suppress or to punish his unlawful trade, must show a clear legal right to take and maintain his position as a public enemy, or suffer the penalty of the broken law. To hold otherwise would make it impossible for the people of any State to protect themselves from evils that by common consent throughout the civilized world need to be restrained and removed by suitable legislation. It would also strike a blow of absolutely crushing weight at the existence of the police power in the several States, and render all attempts at its exercise ineffectual and useless."

In the case of *Commonwealth* v. *Bishman*, 138 Penn. St. 639, defendant sold liquor in pint and quart bottles, each of which was enclosed in a pasteboard box, sealed with a strip of paper pasted across the lid, and stamped with the name of the firm. These packages were shipped in boxes and barrels to defendant's agent, who unpacked them when they arrived, and placed the pasteboard packages on his shelves. The court held that there was abundance of evidence to submit to the jury whether the whole matter was not a scheme to evade the license laws. Said the court: "The defendant was engaged in selling liquor at retail, and his claim that he was selling only original packages was little better than a burlesque."

In *Commonwealth* v. *Paul*, 170 Penn. St. 284, a small tub of

oleomargarine, containing ten pounds, prepared in another State and brought into Pennsylvania to be sold unbroken to a customer for his use as an article of food upon his table, and actually so sold, was held not to be an original package within the meaning of the law relating to interstate commerce. Said the court: "If a pint bottle of whiskey is an original package under the protection of Congress, and can be sold as such, regardless of the police legislation of the State, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce, intended to guard against stoppage along state lines for examination or the collection of customs duties, has been extended by construction until it is made to reach and protect a retail traffic carried on within any State, if the things sold have come into the retailer's store from a non-resident manufacturer or shipper. . . Our question is whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages in another State, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate interstate commerce, and set the police laws of the State at defiance?"

In *Haley* v. *Nebraska*, 42 Nebraska, 556, the same result was reached upon precisely the same state of facts; as well as in *State* v. *Chapman*, 1 South Dakota, 414; and *Smith* v. *State*, 54 Arkansas, 248.

In *McGregor* v. *Cone*, 104 Iowa, 465, the question arose as to packages of cigarettes of the same size as those involved in the present case. These packages were placed in a common pine box for convenience of shipment without any other packing or enclosure about the packages, and were shipped by the company from its factory in New York to its warehouse in Chicago, and thence to the defendant's place of business in Iowa. Upon the arrival of the box the defendant opened the box by taking the lid off, and sold one of the packages containing cigarettes. It was held that the pine box was the original package, and that

the defendant was liable, notwithstanding that the internal revenue department had, for the purposes of taxation, declared the small packages sold by defendant to be original packages. This case seems to have overruled the cases of *State* v. *Coonan*, 82 Iowa, 400; *Collins* v. *Hills*, 77 Iowa, 181; *Hopkins* v. *Lewis*, 86 Iowa, 638; *State* v. *Miller*, 84 Iowa, 690, where a contrary view was expressed.

The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words "original package" in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a *bona fide* package of

a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disasterous. For the purpose of aiding a manufacturer in evading the laws of a sister State, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities.

There could hardly be stronger evidence of fraud than is shown by the facts of this case, which we quote from the opinion of the court:

"The defendant purchased from the American Tobacco Company, at its factory, in Durham, North Carolina, a lot of cigarettes manufactured by that company at that factory, and there by it put into pasteboard boxes, in quantities of ten cigarettes to each box; that each of these boxes, known as packages, was separately stamped and labeled, as prescribed by the United States revenue statute; that after defendant's purchase the American Tobacco Company piled upon the floor of its warehouse, in Durham, North Carolina, the number of boxes or packages sold, and, having done so, notified the Southern Express Company to come and get them, and said company, by its agent, took them from the floor and placed them in an open basket already and previously in the possession of the Southern Express Company, and in that basket had them transported by

express to the defendant's town in Tennessee, and there an agent of the same express company took the basket to defendant's place of business and lifted from it on to the counter of the defendant the lot of detached boxes or packages of cigarettes, and thereupon took a receipt and departed with the empty basket. Thereafter the defendant sold one of these boxes or packages without breaking it, and for that sale he stands convicted."

And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discreditable subterfuge, to which this court ought not to lend its countenance. If there be any original package at all in this case we think it is the basket and not the paper box.

Suppose the State of Tennessee in the exercise of its police powers should prohibit the manufacture within its limits of cigarettes, whether they were manufactured to be sold in that State, or to be sent to other States for sale, could the validity of such legislation be questioned, as in violation of the Constitution of the United States, upon the ground that it infringed the liberty which is secured to the citizens by the Fourteenth Amendment? "The liberty mentioned in that amendment," this court has said, "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589.

There is doubtless fair ground for dispute as to whether the use of cigarettes is not hurtful to the community, and therefore it would be competent for a State, with reference to its own people, to declare, under penalties, that cigarettes should not be manufactured within its limits. No one could say that such

legislation trenched upon the liberty of the citizen by preventing him from pursuing a lawful business. Now the result of defendant's argument in this case is that citizens of Tennessee may, under the commerce clause of the Constitution of the United States, bring into that State from other States cigarettes in unlimited quantities, and sell them despite the will of Tennessee as expressed in its legislation. In other words, it is decided, that the commerce clause of the Constitution, by its own force, without any legislation by Congress, overrides the action of the State in a matter confessedly involving, in the judgment of its legislature, the health of its people. We cannot accept this view. The doctrine that the silence of Congress as to what property may be of right carried from one State to another means that every article of commerce may be carried into one State from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that the reserved power of the State to protect the health of its people, by reasonable regulations, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the State, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one State from another State, then the action of a State by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. If Congress possesses no such power, it is because the framers of the Constitution never intended that the mere grant of power to regulate commerce should override the power reserved by the States to pass laws that had substantial relations to the health of their people. Of course, it is one thing to force into a State, against its will, articles or commodities that can have no possible connection with or relation to the health of the people. It is quite a different thing to force into the markets of a State, against its will, articles or commodities which, like cigarettes, may not unreasonably be held to be injurious to health.

MR. JUSTICE WHITE, concurring.

Practically the only argument relied upon in support of the theory that these packages of ten cigarettes are original packages is derivable from the Revised Statutes, section 3392, which requires that manufacturers shall put up all cigarettes made by or for them, and sold or removed for consumption or use, in packages containing ten, twenty, fifty or one hundred cigarettes each. This, however, is solely for the purpose of taxation—a precaution taken for the better enforcement of the internal revenue law, and to be read in connection with section 3243, which provides that "the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State." As was said in *Plumley* v. *Massachusetts*, 155 U. S. 461, 466, it is manifest this section was adopted to make it clear that Congress had no purpose to restrict the power of the State over the manufacture and sale of particular articles. "The taxes prescribed by that act were for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture and sale." The question is not in what packages the law requires the cigarettes to be packed for the purpose of taxation, but what are the packages in which they are usually transported from one State to another where the transaction is *bona fide* and for the legitimate purposes of trade and commerce.

We are satisfied the conclusion of the Supreme Court of Tennessee was correct, and it is therefore

*Affirmed.*

MR. JUSTICE WHITE, concurring.

I do not understand that anything in the opinion of the court impairs the doctrine protecting original packages from interference by the police or any other power of a State, as announced by so many opinions of this court, especially as ex-

pounded in *Leisy* v. *Hardin*, 135 U. S. 100, and *Rhodes* v. *Iowa*, 170 U. S. 412, and the authorities which are cited in the opinions of the court in both of those cases. If I thought either the opinion of the court just announced or the conclusion which it reaches had the effect of weakening the doctrine upheld by the authorities to which I have just referred, I should be unable to concur. Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is, Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their shipment, they could not, under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package.

MR. JUSTICE BREWER, with whom concurred the CHIEF JUSTICE, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM, dissenting.

I dissent from the opinions and judgment in this case. The plaintiff in error was convicted of a violation of the following act of the General Assembly of Tennessee:

"Be it enacted by the General Assembly of the State of Tennessee, That it shall be a misdemeanor for any person, firm or corporation to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor punishable by a fine of not less than fifty dollars."

The facts shown by the testimony, as appears from the record, are as follows:

"This defendant was on the 1st day of November, 1897, a

resident of and merchant in the town of Madisonville, said Monroe County, Tennessee, and in no way connected with the American Tobacco Company, as agent or otherwise; that just prior to said November, 1897, the defendant purchased, in the State of North Carolina, from the American Tobacco Company, a corporation of the State of New Jersey, and having a factory for the manufacture of cigarettes in Durham, N. C., and similar factories at other points in the United States, but having no factory, office, nor warehouse in the State of Tennessee, a number of packages, each containing 10 Duke of Durham cigarettes; that these cigarettes were manufactured by the American Tobacco Company at its factory in said town of Durham, and were packed by it in quantities of 10 in pasteboard slide-boxes, upon each of which such box or package were printed the names of the manufacturers of the cigarettes therein contained, the name or brand of the cigarettes therein contained, the number of the factory and internal revenue collection or manufacturing district in which said factory was located, the number of cigarettes contained in the box or package, the caution notice required by the laws of the United States, the internal revenue stamp for 10 cigarettes pasted across the end of such box or package, so as to act as a seal thereon and thereof, and which had to be broken and destroyed to open said box or package, and all the other requirements of the laws and regulations of the United States governing the packing and sale of cigarettes. A package in all respects similar to those bought by defendant at Durham, N. C., is hereto attached, marked 'Exhibit A.' These packages were packed and manufactured by said American Tobacco Company at Durham, N. C., and were by it shipped from said town of Durham, N. C., to defendant by the Southern Express Company, without case, covering, or enclosure of any kind around or about any of said packages, but were by said American Tobacco Company piled upon the floor of its warehouse in Durham, N. C., and said Southern Express Company notified to come and get them, and said express company, by its agent, took them, the said enclosed packages, and placed them in an open basket, already and heretofore in the possession of said Southern Express Company; that these

packages were brought to the place of business of defendant by an agent of said express company in the same open basket in which they had been placed by said express company at Durham, N. C., and by said agent lifted from said basket on to the counter in the place of business of defendant, and so delivered to and receipted for by the defendant; that said basket was not left with defendant at all, but was carried away from defendant's business by said agent of said express company immediately upon the delivery of said packages of cigarettes; that defendant immediately upon his receipt of said packages, as aforesaid, put them on sale, without breaking, and sold one of them on said November 1, 1897, to W. G. Brown, an adult resident of said Monroe County, Tennessee, said sale being in Monroe County, Tennessee, and within one year before the finding of this indictment."

Upon these facts the Supreme Court of Tennessee sustained the conviction, and thereupon the defendant sued out this writ of error. His contention is that the act is, as applied to the importation of cigarettes and subsequent sale thereof in the packages in which they were imported, in conflict with the Constitution of the United States.

It will be perceived that the statute in terms expressly prohibits the sale of cigarettes, or the bringing them into the State for the purpose of sale. If valid, it not only prohibits an individual within the State from selling cigarettes manufactured therein, but also prohibits any one bringing cigarettes from another State into Tennessee for the purpose of sale. It will, therefore, stop all importations of cigarettes for sale, and the only permissible importations will be those for personal use. The power of the State, therefore, to put an end to commerce between other States and itself, except so far as the importation is for the use of the importer, is broadly and distinctly asserted by this statute. Claiming the right to determine absolutely what shall be sold within its limits, Tennessee attempts to prohibit the sale, or the importation for sale, of cigarettes. As said by its Supreme Court: "The statute under which the conviction was had unconditionally prohibits all sales of cigarettes, whether manufactured in this State or elsewhere."

JUSTICES BREWER, SHIRAS, PECKHAM and the CHIEF JUSTICE, dissenting.

It may be well to consider what this statute is not. It has none of the elements of inspection. It does not attempt to distinguish between cigarettes made of tobacco free from any drug, wrapped in paper untouched by any poison, from those (of which we are assured by counsel in their argument there are many) whose tobacco has been mixed with opium or some other drug, and whose wrapper has been saturated in a solution of arsenic. There is no attempt to distinguish between the pure and impure; no attempt to protect a purchaser from the purchase of an adulterated article. On the contrary, it stamps tobacco wrapped up in the form of a cigarette as in and of itself noxious, and to be wholly forbidden. The Supreme Court of Tennessee rightly interpreted this statute as an absolute prohibition of the sale of cigarettes, no matter what the character of the paper wrappers or the condition of the tobacco within them, and it asserted the power of the State to enact the statute on the ground that cigarettes are "inherently bad, and bad only." I quote from its opinion:

"Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward the impairment of physical health and mental vigor.

"There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which by human observation and experience have become well and generally known to be true, *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; 1 Greenl. Evi. sec. 6; 1 Whart. Evi. sec. 282; 1 Jones' Evi. secs. 129 and 134; *Lanfear* v. *Mestier*, 18 La. Ann. 497; *S. C.*, 89 Am. Dec. 658 and note 693; *State* v. *Goyette*, 11 R. I. 592; *Watson* v. *State*, 55 Ala. 158; nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take

judicial notice of them. *Boullemet* v. *State*, 28 Ala. 83; 12 Am. & Eng. Enc. L. 199.

"It is a part of the history of the organization of the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that among the applicants who were addicted to the use of cigarettes more were rejected by examining physicians on account of disabilities thus caused than for any other, and perhaps every other reason.

"It is also a part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction of the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea and alone for the protection of the people of the State from an unmitigated evil."

No one can question the sincerity of the legislature of Tennessee in thus enacting what it deemed for the health of its citizens, or the conviction of the members of its Supreme Court of the validity of such legislation by reason of the greatness of the supposed evil which it was intended to restrain. And yet there is no consensus of opinion as to the fact of such evil. As illustrative of which statement see the articles in the Medico-Legal Journal of March and September, 1898, and the large collection therein of the opinions of medical and other scientific gentlemen in respect to the matter. Further, the report for 1899 of the Commissioner of Internal Revenue (p. 436) shows that the number of cigarettes manufactured in the United States during the year 1899 was two billion eight hundred and five million one hundred and thirty thousand seven hundred and thirty-seven, (2,805,130,737) on which the government collected a tax of four million two hundred and thirteen thousand and two hundred and fifteen dollars and twenty-five cents ($4,213,215.25). These figures are enormous, and in addition this fact may be noted, a fact obvious to all who have had occasion to travel in other countries, (particularly those occupied by different branches of the Latin race,) that the use of cigarettes is there far more common than in this country.

In view of these and other facts it is perhaps not surprising

to find Mr. Justice Brown, speaking for himself and three associates, stating, "we are not prepared to fully indorse the opinion of that court" (Supreme Court of Tennessee) "that cigarettes are not legitimate articles of commerce," or that "they are inherently bad, and bad only." The truth is that, whatever differences of opinion may exist as to whether cigarettes are or are not hurtful, they are confessedly a common and well recognized article of commerce, and as such when the subject of interstate commerce are under the control of that body to which by the Constitution of the United States is given the power to regulate commerce between the States.

It will be seen by an inspection of the opinion of the Supreme Court of Tennessee that that court sustained the conviction on two grounds: First. That cigarettes were not a legitimate article of commerce, and therefore the State of Tennessee by virtue of its police power had a right to prohibit absolutely their importation and sale, no matter in what form they were so imported and sold; and, secondly, that if it had no such general power it could prohibit the importation and sale of cigarettes in packages of the size in which these were imported and sold. In view of the adherence by Mr. Justice White to the opinions heretofore announced by this court in *Leisy* v. *Hardin*, 135 U. S. 100, and other cases in respect to the inability of the State by virtue of its police power to prohibit the importation and sale in original packages of articles, which are recognized articles of commerce although the subjects of conflicting opinions as to the deleteriousness of their use, it would seem unnecessary to enter into any lengthy consideration of the first ground. Especially is this so inasmuch as there is no expressed attempt to overrule *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, decided two years ago last May, in which decision three of the justices concurring in the affirmance of the judgment herein concurred, and in which it was distinctly ruled (p. 23): "In the absence of congressional legislation, therefore, the right to import a lawful article of commerce from one State to another continues until a sale in the original package in which the article was introduced into the State." Although it may be noticed in passing that this case, as decided by the Supreme Court of

Pennsylvania, where it is reported under the title, *Commonwealth* v. *Paul*, 170 Penn. St. 284, (see 171 U. S. 5,) is both cited and quoted from in support of this decision. A ruling we have reversed is the authority now relied upon. Inasmuch however as Mr. Justice Brown, in his opinion, has, in addition to this citation, quoted some expressions which may seem to tend towards giving an enlarged scope to the police power of the State, it may not be a waste of time to show concisely what this court has decided, and what may, therefore, now be considered settled law.

In the first place, Congress has supreme and exclusive control over interstate commerce. I shall not attempt to restate the oft-repeated historical argument that one of the chief reasons leading to the formation of the Federal Constitution was the necessity, disclosed by the experience of the colonies under the confederation, of preventing any discriminating or retaliatory legislation by any State in respect to the commodities produced or manufactured in another, and the consequent importance of having commerce between the States placed absolutely within the control of a legislative body representing all the States. And yet it may not be out of place to quote these words from the concurring opinion of Mr. Justice Johnson, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 224:

"For a century the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and, now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad. This was the immediate cause that led to the forming of a convention."

And these from Chief Justice Marshall, in *Brown* v. *Maryland*, 12 Wheat. 419, 446:

"It may be doubted whether any of the evils proceeding

from the feebleness of the Federal government contributed more to the great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States."

The plain language of the Constitution affirms this. Second only to the power "to collect taxes" and "to borrow money" is the power given to Congress by section 8, article 1, of the Constitution "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Thus next in order, as though next in importance to the power of maintaining itself by taxation and borrowing money, is the power to regulate commerce between the States as well as between the United States and foreign nations.

While this nation is as between it and the States one of enumerated powers, it is within the scope of those enumerated powers supreme, and, as the power to regulate commerce between the States is expressly given to Congress, and no division provided for, it follows that it is wholly withdrawn from state control; and such has been the uniform ruling of this court. In the case just quoted from, *Gibbons* v. *Ogden*, Chief Justice Marshall, delivering the opinion of the court, on page 196, thus declared the scope and limit of that power:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restric-

tions on the exercise of the power as are found in the Constitution of the United States."

And in the other case referred to, *Brown* v. *Maryland*, on page 446, the Chief Justice put this question and gave this answer:

"What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

"This question was considered in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior."

In *The Passenger Cases*, 7 How. 283, Mr. Justice McLean, after referring to many prior cases, to the discussions in the convention which formed the Constitution, and the language, among others, of Mr. Madison in that discussion, that "he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority," summed up his conclusion in these words (p. 400):

"Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, reiterated in *Brown* v. *Maryland*, 12 Wheat. 419, and often reasserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion that the power 'to regulate commerce with foreign nations, and among the several States,' by the Constitution, is exclusively vested in Congress."

In *The Head Money Cases*, 112 U. S. 580, 590, Mr. Justice Miller, considering a statute passed by Congress requiring the master or owner of every vessel bringing immigrants into the United States to pay a tax of fifty cents for each immigrant, to create a fund for the expense of regulating immigration, the care of immigrants and for the relief of such as were in distress, and holding that it constituted a regulation of commerce, said in reference to it and other like statutes:

"That the purpose of these statutes is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the

protection of the people in whose midst they are deposited by the steamships, is beyond dispute. That the power to pass such laws should exist in some legislative body in this country is equally clear. This court has decided distinctly and frequently, and always after a full hearing from able counsel, that it does not belong to the States. That decision did not rest in any case on the ground that the State and its people were not deeply interested in the existence and enforcement of such laws, and were not capable of enforcing them if they had the power to enact them; but on the ground that the Constitution, in the division of powers which it declares between the States and the general government, has conferred this power on the latter to the exclusion of the former."

In *Leisy* v. *Hardin*, 135 U. S. 100, 108, Chief Justice Fuller thus stated the rule:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' is the power to prescribe the rule by which their commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

I might multiply quotations like these, but it is unnecessary. See the following among other cases for like affirmations: *United States* v. *Coombs*, 12 Pet. 72, 78; *Case of the State Freight Tax*, 15 Wall. 232, 279, 281; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 10; *Mobile County* v. *Kimball*, 102 U. S. 691, 696, 697, 699, 700, 702; *Webber* v. *Virginia*, 103 U. S. 344, 351; *Telegraph Company* v. *Texas*, 105 U. S. 460, 466; *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 60; *Moran* v. *New Orleans*, 112 U. S. 69, 72, 73; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, 204, 211; *Brown* v. *Houston*, 114 U. S. 622, 630, 631, 632; *Philadelphia*

*& Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *In re Rahrer*, 140 U. S. 545, 554, 555.

The power of Congress to regulate commerce between the States being, as we have seen, supreme, its failure to impose any restrictions or regulations is to be taken as a declaration that, in its judgment, such commerce shall be free. There is no necessity of an affirmative declaration on its part, for, as it alone has power to restrict or prescribe regulations, its failure to do so leaves the commerce unburdened. This, too, is a proposition which has been so often declared by this court as to be one of the settled rules of constitutional law. Thus, in *Welton* v. *Missouri*, 91 U. S. 275, 282, it was said:

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

In *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493, Mr. Justice Bradley summed up the matter in these words and with these citations:

"Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons* v. *Ogden*, 9 Wheat. 1, 222; by Mr. Justice Grier in *The Passenger Cases*, 7 How. 283, 462; and has been affirmed in subsequent cases. *State Freight Tax Cases*, 15 Wall. 232, 279; *Railroad Co.* v. *Husen*, 95 U. S. 465, 469; *Welton* v. *Missouri*, 91 U. S. 275, 282; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622, 631; *Walling* v. *Michigan*, 116 U. S. 446, 455; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557."

See also *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125

U. S. 465; *Leisy* v. *Hardin*, *supra*; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204.

In this case the words of Mr. Justice Brown were, (page 212):

"But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammeled."

It is true there are many cases in this court in which have been sustained acts of a State which do in a measure affect interstate commerce, but the thought underlying those cases has been that the acts complained of were not direct regulations of interstate commerce, not in restriction but in furtherance of it, and being purely local in character might rightfully be upheld until Congress should by its legislation direct the contrary.

That the transportation from one State of its products into another State for purposes of sale is not a matter of purely local interest to the latter State is evident. It concerns the right of the producer or manufacturer in the former State to his market. We are told by the learned attorney general of Tennessee, as an evidence of the good faith of the State in this legislation, that it has many areas of territory especially valuable for the growth of tobacco, and that it is one of the large tobacco producing States in the nation. That is, therefore, a valuable industry in Tennessee. Suppose the legislatures of all the other States should become possessed of the idea that the use of tobacco was injurious, and prohibit the importation and sale thereof. Could it fairly be said that such legislation was in respect to a matter of only local interest in the separate States passing such legislation? Could not Tennessee rightfully contend that it was a matter affecting one of its large industries, and which was likely to be destroyed by such adverse legislation?

It is undoubtedly true that the police power is not by the Constitution delegated to Congress. It may, therefore, under article 10 of the Amendments, be regarded as reserved to the States respectively, or to the people, but it is equally clear that no power which is impliedly reserved to the States can limit or detract from the full scope of any power expressly delegated

to the nation, to be exercised by Congress. In other words, the State cannot in the exercise of the police power interfere with the supreme control by Congress over interstate commerce. This has been repeatedly affirmed by this court. In *Henderson* v. *New York City*, 92 U. S. 259, 271, it was said by Mr. Justice Miller:

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution."

In *Railroad Company* v. *Husen*, 95 U. S. 465, 471, 472, it was said by Mr. Justice Strong:

"But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. . . . It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

Again, by Mr. Justice Harlan, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661:

"Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land."

Again, in reference to quarantine laws, by Mr. Justice Miller, in *Morgan Steamship Co.* v. *Louisiana*, 118 U. S. 455, 464:

"For, while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such

powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Henderson* v. *The Mayor*, 92 U. S. 259, 272; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661."

Further may well be quoted the words of Mr. Justice Catron in the *License Cases*, 5 How. 504, 599, quoted with approval in *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465, 489, and again referred to with like approval in *Leisy* v. *Hardin*, 135 U. S. 100, 113, and also in *In re Rahrer*, 140 U. S. 545, 557:

"The assumption is that the police power was not touched by the Constitution, but left to the States, as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to and is subject to be regulated as part of foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the Federal power, that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons* v. *Ogden*, *Brown* v. *The State of Maryland* and *New York* v. *Miln*. What, then, is the assumption of the state court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular

State; and having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

See also *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Voight* v. *Wright*, 141 U. S. 62; *Gulf, Colorado & Santa Fé Railway* v. *Hefley*, 158 U. S. 98.

We have thus, first, the express language of the Constitution delegating to Congress the power "to regulate commerce . . . among the several States;" second, the repeated rulings of this court that that power is supreme and exclusive; third, an equal volume of decision that the failure of Congress to prescribe any limitations to interstate commerce in respect to any particular article is equivalent to a declaration by that

body that it intends that such commerce shall be free; and, fourth, the equally often repeated ruling that the reserved police power of the States is subordinate to and does not limit or take from the supreme control by Congress over matters of interstate commerce.

It would seem from this concurrence of rulings that the decision in *Leisy* v. *Hardin*, *supra*, had now become the settled law, and that henceforth it is not to be questioned; that no State can, under the guise of a police regulation, directly restrain the importation and sale of articles brought in from other countries and other States, which are recognized articles of commerce, no matter what may be the local opinion as to the injurious effects of the use of such articles. The opinion of the Supreme Court of Tennessee on the first proposition suggested must, therefore, be considered as definitely overruled.

I pass now to the second proposition, which is that the packages in which these cigarettes were imported are so small, or the manner of their importation so peculiar, that the power of Congress over interstate commerce is as to them lost and the power of the State has become controlling. That this is the question upon which alone the reversal is ordered is evident, for it is said by Mr. Justice Brown, in his opinion, after referring to the matter of the police power:

"We are remitted to the inquiry whether a paper package of three inches in length and one and a half inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the State while in the hands of the importer? This we regard as the vital question in the case."

And by Mr. Justice White, in his concurring opinion:

"Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is: Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court?"

I come to the consideration of this question with the conceded fact that Congress has supreme and exclusive control over interstate commerce; that no State in the exercise of its police power

can directly restrain such commerce; and inquire why the size of the package or the manner of importation determines the limit of national control?

And first as to the matter of size, we are told that the cigarette package is three inches in length and one and a half inches in width, and contains ten cigarettes. I have no doubt of the accuracy of this measurement, but I in vain search the Constitution of the United States for any intimation that the power of Congress over interstate commerce ceases when the packages in which that commerce is carried on are of any particular size. Mr. Justice Brown quotes this language of Chief Justice Marshall, in *Brown* v. *Maryland*, 12 Wheat. 419, wherein, having adverted to the fact that the importer might after the importation so break up the packages, or so handle the goods, as to show an intent to incorporate them into the mass of the general property of the State, he says:

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

And upon this quotation this observation is made:

"This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so formidable a structure has been attempted to be erected in subsequent cases."

And yet, curiously enough, after this declaration, although the cigarettes sold by the defendant were "in the original form or package in which they were imported," although there had been no breaking of any package, it is held that the power of the nation does not protect him in that sale. Necessarily, there is impliedly added to the language of the Chief Justice words like these, "provided such package be of considerable size, at least larger than three inches in length and one and a half inches in width." Of all the justices of this court, Chief Justice Mar-

shall has hitherto been credited with marvelous accuracy of statement, but it would seem from the construction now given that he omitted a most important particular in defining the relative powers of the nation and the State. Even now there is a singular failure to give the size of the package which takes the importation out of the power of Congress and entrusts it to the control of the State. Recently, in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, we held that an importer had a right to import oleomargarine in ten-pound packages, and sell it in such a package at retail to a consumer. Apparently, the dividing line as to the size of packages must be somewhere between that of a ten-pound package of oleomargarine and that of a package of ten cigarettes; but where? Must diamonds, in order to be within the protecting power of the nation, be carried from State to State in ten-pound packages?

If it be said that diamonds are not a subject of police regulation, and that a different rule obtains in reference to them than to matters of police regulation, (as might be implied from the scope of the opinion,) I can only say that the conclusion seems to me strange. Concretely, it amounts to this: The police power of the State, the power exercised to preserve the health and morals of its citizens, may prevent the importation and sale of a pint of whiskey, but cannot prevent the importation and sale of a barrel; or, in other words, the greater the wrong which is supposed to be done to the morals and health of the community, the less the power of the State to prevent it. That may be constitutional law, but to my mind it lacks the saving element of common sense. I see no logical half way place between a recognition of the power of the nation to regulate commerce between the States in all things which are the subjects of commerce (in whatever form or manner they may be imported) and a concession of the power of the State to prevent absolutely the importation and sale of articles deemed by it prejudicial to the health or morals of its citizens. Either the State has, in the exercise of its police power, the right to prohibit the importation and sale of articles deemed by it injurious to the health and morals of the community—no matter in what size or form of package the importation is made—or else it has no

such power, and the determination of the question of importation and sale is one to be left to Congress. The attitude of one who affirms the supreme power of the Nation over interstate commerce, including therein the right of Congress to regulate the importation and sale in large packages of things whether or not deemed by any State deleterious in their use, and yet holds that that supreme power of Congress is exhausted the moment the importation is in a package of small size, finds something of a parallel in the attitude of the citizen of a State, which has adopted prohibition, who upholds the law, but objects to its enforcement.

The size of the package seems to be the troublesome matter in the minds of some of my brethren. Let me put that question of size to this test. Suppose Congress, assuming that it had power over interstate commerce, should enact that all transportation of cigarettes between States should be in packages of ten cigarettes each, would that be a regulation of interstate commerce? Or would my brethren say that that was beyond the power of Congress? The power of Congress over commerce between the States is given in the same section and in the same language as its power over commerce between this Nation and foreign nations. Is this court prepared to say that, if Congress should enact that no importations of cigarettes from abroad should be otherwise than in packages of ten cigarettes each, such legislation was beyond its power because it affected a package of a small size? Mr. Justice White, evidently appreciating the logic of these suggestions, escapes their force by this declaration, and I quote from his opinion that which succeeds the quotation heretofore made:

"I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their shipment, they could not, under all the

facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package."

I regret that the decision of a great constitutional question like that here presented turns on the shifting opinions of individual judges as to the peculiar facts of a particular case. No one can tell from this annunciation where is the dividing line between the power of the State and the power of the nation. Obviously the mere size of the package does not in this view determine. It would seem that constitutional limitations should be stated by the courts with precision. I think, and I say it with all respect, that no case involving a constitutional question should be turned off on the simple declaration that upon its peculiar facts it falls on one side or the other of some undisclosed line of demarcation. It seems to me, and yet I speak hesitatingly, in view of the indefiniteness of his declarations, that Mr. Justice White thinks there was something in the conduct of this importer in evasion of the state statute. But can any statute be deemed to be evaded which has no application to the particular matter? If the regulation of interstate commerce is a matter within the sole jurisdiction of Congress, surely no act of the State restraining an importation and sale can have any application thereto. If the State may not say whether the importation shall be in large or small packages, if that is a regulation of interstate commerce within the sole power of the United States, then no act of the importer in fixing the size of the package can be adjudged either in conflict with or an evasion of any state statute. There is but one of two alternatives. Either the State may regulate the size of the package or Congress has the power. If a State has the right, then of course it may prevent the importation of packages other than those of a large size; but if Congress alone can regulate it, then the State has nothing to do with the question of the size of the package, and no act of the importer in fixing the size of the package can be adjudged in conflict with its statute.

Congress has prescribed the sizes of the packages in which cigarettes are to be put up, and while it is true, as indicated in *Plumley* v. *Massachusetts*, 155 U. S. 461, that the primary purpose of such legislation is the collection of internal revenue

taxes, and not the regulation of commerce between the States, yet it is also true that it is not within the power of the States to declare that the use of packages of the size prescribed by Congress is illegitimate. There cannot be imputed to Congress the purpose to in any way interfere with the full power of the States over matters committed to their care, nor can the use by an individual of packages such as Congress has authorized be condemned as an evasion of state laws. The use of such a package legitimate for one purpose is legitimate for others, and a State by its statutes cannot in any way nullify or weaken the effect of congressional enactment. So, although these packages are small in size, they have the approbation of Congress and must be considered as legal, and their use cannot be made illegal by state laws.

And here it is well to refer to the language of Chief Justice Marshall, quoted, *supra*. It is: "In the original form or package in which it was imported." Not in which "it might have been" or "ought to have been imported." Obviously, it did not occur to him that the form or package which the importer might adopt in any way affected the power of Congress over the importation. One will search the opinion of the Chief Justice in vain to ascertain the size or form of the package then before the court. If Congress should see fit to describe a form or package, it was within its power. If it did not do so, it left the matter to the determination of the importer. There seems to be in the minds of those of my brethren with whom I differ the thought that, because this importer did not import in a customary way, the control of Congress in the matter ceased. The cost of transporting a single package of cigarettes from the manufactory in Durham, N. C., to any part of Tennessee may be great, and therefore such transportation is not ordinarily undertaken. It may be true, and undoubtedly is true, that a manufacturer of yeast cakes in the city of New York would not feel warranted in going to the expense of shipping a single yeast cake, or, for that matter, a hundred, to Covington, Ky., and yet that same individual, if he had a manufactory in Cincinnati, might find that the most convenient and inexpensive way of filling orders from Covington was to send them in sep-

arate packages in his delivery wagons across the bridge from the one city to the other. In each case the transportation would be one of interstate commerce, and it cannot be possible that Congress has the power to regulate the transportation from New York to Covington and not that from Cincinnati to Covington.

Another matter which must not be ignored in measuring the control of Congress over interstate commerce is the changes in the modes of transportation. At the time that Chief Justice Marshall wrote the opinion in *Brown* v. *Maryland* transportation was carried on by water in sailing vessels and by land largely in lumber wagons. It is not strange that at such time all transportation was of goods packed in large boxes, securely fastened to prevent accidents from the rough and tumble way of transportation. There were then no express companies for carrying small packages. All that mode of transportation has grown up in this country within the last sixty years, but the express companies carrying their small packages from State to State are just as certainly engaged in interstate commerce as the old-fashioned lumber wagons carrying commodities between the same places. The facilities of transportation are increasing rapidly, and with them the cost of such transportation is diminishing, so that more and more will it be true that the smallest packages will be the frequent subject of transportation, even between State and State. But it has often been said that the grants of power in the Constitution to the national government were expressed in such broad and general language that, notwithstanding the many changes in the modes of doing business, in the forms and conditions of social life, the needed control was still found to be vested in Congress. Can it be that an exception to this rule is now to arise in the matter of the full and complete power given by that instrument to Congress over interstate commerce?

Again, let me go back to the opinion of Chief Justice Marshall, and quote pages 439–446:

"There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence

of the other. No goods would be imported if none could be sold.

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"If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

Now, if cigarettes cannot be brought into the State of Tennessee and sold in the packages in which they were manufactured, but must be brought in and sold only in barrels or boxes of large size, the right of importation is practically defeated, for no consumer would buy a barrel or box for his own use, and no importer could sell it to a second party with the idea of a resale, because the moment the first sale is accomplished, the law of the State interposes to prevent the second. In other words, this contention that an imported package must be of a large size in order to secure the right of sale is simply a convenient way of declaring that the right of importation for purposes of sale may be denied. Not such was the thought of this court, as expressed in the opinion of Chief Justice Marshall. The idea then was that the right of sale was an incident to the right to import; that the State could neither directly forbid the importation, nor indirectly prevent it by embarrassing the right of sale with restrictions which, in fact, stop all importation for purposes of sale.

JUSTICES BREWER, SHIRAS, PECKHAM and the CHIEF JUSTICE, dissenting.

I do not doubt that the importation and sale of many things may wisely be restrained, but the question is as to the body by which such regulations shall be made. We may all agree that the importation and sale of liquors should be restrained or prohibited. We may doubt as to whether a like rule obtains as to the importation and sale of oleomargarine. Believing that the settled ruling of this court has been that that question is one to be determined by Congress, I think that this decision is a plain departure therefrom.

Nor is there reason to apprehend that any unfortunate results will flow from the supreme power of Congress in the matter. Take the case of intoxicating liquors. When it was found by the decision in *Leisy* v. *Hardin*, *supra*, that interstate commerce in such liquors (they being recognized articles of commerce) could not be regulated by the States, Congress promptly passed an act providing that liquors imported into any State should upon arrival therein be subject to the local laws, 26 Stat. 313, c. 728, the validity of which legislation was sustained in *In re Rahrer*, 140 U. S. 545. So it cannot be doubted that if that body which represents all the States shall be of opinion that the use of any particular article is freighted with injury to public health, morals or safety, it will absolutely prohibit interstate commerce therein, or if in its judgment (as in the case of intoxicating liquors) there is in certain localities such a feeling in reference to any article that commerce therein may wisely be regulated by the State, it will provide therefor. Although some temporary disadvantage or inconvenience may result from this assertion of the supremacy of Congress, it is not fitting, in view of the constitutional provisions, to ignore or limit the full scope of that supremacy; and, it may properly be added, it is better that in certain instances one State should be subjected to temporary annoyance rather than that the whole framework of commercial unity created by the Constitution should be destroyed by relegating to each State the determination of what particular articles it will permit to be imported into its borders.

"The power cannot be conceded to a State to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such com-

merce, without congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any State, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances." *Lyng* v. *Michigan*, 135 U. S. 161, 166.

For these reasons I dissent from the opinions and judgment in this case.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM concur in this dissent.

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## CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* KENTUCKY.

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

No. 103. Argued November 13, 14, 1900.—Decided December 3, 1900.

The separate coach law of Kentucky, being operative only within the State, and having been construed by the Supreme Court of that State as applicable only to domestic commerce, is not an infringement upon the exclusive power of Congress to regulate interstate commerce.

THIS was a writ of error to review the conviction of the Railway Company for failing to furnish separate coaches for the transportation of white and colored passengers on the line of its road, in compliance with a statute of Kentucky enacted May 24, 1892, c. 40, the first section of which reads as follows:

"§ 1. Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches by steam or otherwise, on any railroad line or track within this

State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach, within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart."

The second section requires such companies to make no difference or discrimination in the quality, convenience or accommodations in such coaches; and the fifth provides that conductors "shall have power, and are hereby required to assign to each white or colored passenger his or her respective car, or coach, or compartment, and should any passenger refuse to occupy the car, coach or compartment to which he or she might be assigned by the conductor or manager, the latter shall have the right to refuse to carry such passenger," and may put him off the train. The seventh section contains an exception of employés of railroads, or persons employed as nurses, or officers in charge of prisoners.

The indictment followed the language of the statute above quoted. The defendant demurred upon the ground that the law was repugnant to the Constitution of the United States, in that it was a regulation of interstate commerce. The demurrer was overruled, and the case tried before a jury, which found the defendant guilty, and fixed its fine at five hundred dollars. The case was carried by appeal to the Court of Appeals, and

the conviction affirmed. The court delivered a brief opinion to the effect that its judgment was concluded by the case of the *Ohio Valley Railways' Receiver* v. *Lander*, 47 S. W. Rep. 344.

*Mr. John T. Shelby* for plaintiff in error. *Mr. H. T. Wickham* was on his brief.

No appearance for defendant in error.

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

This case turns exclusively upon the question whether the separate coach law of Kentucky be an infringement upon the exclusive power of Congress to regulate interstate commerce. The law in broad terms requires all railroad companies operating roads within the State of Kentucky, whether upon lines owned or leased by them, as well as all foreign companies operating roads within the State, to furnish separate coaches or cars for the travel or transportation of white and colored passengers upon their respective lines of railroad, and to post in some conspicuous place upon each coach appropriate words in plain letters indicating the race for which it is set apart.

Of course, this law is operative only within the State. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the State. The real question is whether a proper construction of the act confines its operation to passengers whose journeys commence and end within the boundaries of the State, or whether a reasonable interpretation of the act requires colored passengers to be assigned to separate coaches when traveling from or to points in other States.

Similar questions have arisen several times in this court. In *Hall* v. *De Cuir*, 95 U. S. 485, 489, an act of the general as-

sembly of Louisiana prohibited common carriers of passengers within that State from making any rules or regulations discriminating on account of race or color. Plaintiff took passage upon a steamboat up the river from New Orleans to a landing place within the State, and, being refused accommodations on account of her color in the cabin especially set apart for white persons, brought an action under the provisions of this act. The vessel was engaged in trade between New Orleans and Vicksburg, Mississippi, and defendant insisted that the act was void as a regulation of commerce between these States. The state court held it to be constitutional. This court held "that while the act purported only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

In *Louisville &c. Railway Company* v. *Mississippi*, 133 U. S. 587, 591, an act of the legislature of Mississippi required almost in the terms of the Kentucky act that "all railroads carrying passengers in this State . . . shall provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations." The road was indicted for a violation of the statute in failing to provide separate accommodations for the two races. It will be observed that it was not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or for being prevented from riding on the train; but in that case, as in this, the prosecution was public. As the Supreme Court of Mississippi had held that the statute applied solely to commerce within the State, 66 Miss. 662, that construction was accepted as conclu-

sive here; and being a matter respecting commerce wholly within the State, and not interfering with commerce between the States, there was obviously no violation of the commerce clause of the Federal Constitution. Said Mr. Justice Brewer, in delivering the opinion of this court: "So far as the first section is concerned, (and it is with that alone we have to do,) its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State. No question arises under this section as to the power of the State to separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commerce clause."

In *Plessy* v. *Ferguson*, 163 U. S. 537, the petitioner Plessy had engaged and paid for a first-class passage on the East Louisiana Railway from New Orleans to Covington in the same State, took possession of a vacant seat in the coach where white passengers were accommodated, and was ejected therefrom under the separate coach law of Louisiana, which was practically in the same terms as the statute of Kentucky under consideration. Upon being subjected to a criminal charge, he applied for a writ of prohibition upon the ground of the unconstitutionality of the act. The Supreme Court of Louisiana held the law to be constitutional and denied the prohibition. On writ of error from this court, it was held that no question of interference with interstate commerce could possibly arise, since the East Louisiana Railway was purely a local line, with both its termini within the State of Louisiana. Indeed, the act was not claimed to be unconstitutional as an interference with interstate commerce, but its invalidity was urged upon the ground that it abridged the privileges or immunities of citizens, deprived the

petitioner of his property without due process of law, and also denied him the equal protection of the laws. His contention was overruled, and the statute held to be no violation of the Fourteenth Amendment.

As already stated, the Court of Appeals of Kentucky did not discuss the constitutionality of the act in question, but held itself concluded by its previous opinion in the *Lander* case. That was an action instituted by Lander and his wife against the receiver of the Ohio Valley Railway, running from Evansville, Indiana, to Hopkinsville, Kentucky. Plaintiff's wife, who was joined with him in the suit, purchased a first-class ticket from Hopkinsville to Mayfield, both within the State of Kentucky; took her place in what was called the "ladies' coach" and was ejected therefrom by the conductor and assigned a seat in a smoking car, which was alleged to be small, badly ventilated, unclean, and fitted with greatly inferior accommodations. It was held by the Court of Appeals that the decisions of this court in *Louisville, New Orleans &c. Railway* v. *Mississippi*, 133 U. S. 587, and *Plessy* v. *Ferguson*, 163 U. S. 537, were conclusive of the constitutionality of the act so far as plaintiffs were concerned; and that the mere fact that the railroad extended to Evansville, in the State of Indiana, could in nowise render the statute in question invalid as to the duty of the railroad to respect it. It was urged in that case, as it is in this, that the act undertook to regulate or control as to interstate passengers, and that that portion of the statute was invalid, as being in conflict with the interstate commerce clause of the Constitution; and, further, that the act was inseparable, and, therefore, must all be held invalid. In disposing of this the court observed: "We do not think that such contention is tenable. It seems to us that such contention is in conflict with the decision hereinbefore referred to, (in the Mississippi case,) and also in conflict with the well-settled rules of construction." In winding up its opinion the court made the following observation: "If it were conceded (which it is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the

State, and, therefore, it should be held valid as to such passengers. It seems to us that a passenger taking passage in this State, and railroad companies receiving passengers in this State, are bound to obey the law in respect to this matter so long as they remain within the jurisdiction of the State."

This ruling effectually disposes of the argument that the act must be construed to regulate the travel or transportation on railroads of *all* white and colored passengers, while they are in the State, without reference to where their journey commences and ends, and of the further contention that the policy would not have been adopted if the act had been confined to that portion of the travel which commenced and ended within the state lines. Indeed, it places the Court of Appeals of Kentucky in line with the Supreme Court of Mississippi in *Louisville &c. Railway Co.* v. *Mississippi*, 66 Mississippi, 662, which had held the separate coach law of that State valid as applied to domestic commerce. Granting that the last sentence from the opinion of the Court of Appeals, above cited, would seem to justify the railroad in placing interstate colored passengers in separate coaches, we think that this prosecution does not necessarily involve that question, and that the act must stand, so far as it is applicable to passengers traveling between two points in the State.

Indeed, we are by no means satisfied that the Court of Appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. It is scarcely courteous to impute to a legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a separate coach law was unconstitutional, as applied to interstate commerce, the law applying on its face to *all* passengers should be limited to such as the legislature were competent to deal with. The Court of Appeals has found such to be the intention of the General Assembly in this case, or at least, that if such were not its intention, the law may be supported as applying alone to domestic commerce. In thus holding the act to be severable, it is laying down a principle of construction from which there is no appeal.

While we do not deny the force of the railroad's argument

in this connection, we cannot say that the General Assembly would not have enacted this law if it had supposed it applied only to domestic commerce; and if we were in doubt on that point, we should unhesitatingly defer to the opinion of the Court of Appeals, which held that it would give it that construction if the case called for it. In view of the language above quoted from the *Lander* case, it would be unbecoming for us to say that the Court of Appeals would not construe the law as applicable to domestic commerce alone, and if it did the case would fall directly within the *Mississippi* case, 133 U. S. 587. We therefore feel compelled to give it that construction ourselves, and so construing it there can be no doubt as to its constitutionality. *Plessy* v. *Ferguson*, 163 U. S. 537.

The judgment of the Court of Appeals is, therefore,

*Affirmed.*

Mr. Justice Harlan dissented.

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## CINCINNATI STREET RAILWAY COMPANY *v.* SNELL.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 110. Argued November 15, 1900.—Decided December 17, 1900.

The judgment of a state court, reversing the judgment of an inferior court, on account of its refusal to change the venue of the action, and remanding the case for further proceedings, is not a final judgment to which a writ of error will lie.

This was an action of tort instituted by Snell in the Court of Common Pleas of Hamilton County, Ohio, against the Street Railway Company, to recover damages for personal injuries alleged to have been caused by its negligence.

On November 27, 1896, plaintiff Snell made a motion for a change of venue, and in support thereof filed his own affidavit as well as the affidavits of five other persons, in compliance with the following section of the Revised Statutes of Ohio:

"SEC. 5033. When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

This motion was overruled and an exception taken on January 28, 1897. A bill of exceptions was allowed and filed, showing what had occurred upon the motion so overruled.

The case came on for trial before a jury, and resulted in a verdict in favor of the Railway Company. Motion for a new trial was made and overruled, and judgment entered for the defendant upon the verdict.

After this judgment upon the merits, proceedings in error were begun and prosecuted in the state Circuit Court, sitting in Hamilton County, to reverse the judgment by reason of the refusal of the Court of Common Pleas to change the venue under the section of the statute above quoted. By leave of the Circuit Court, the Railway Company filed an amendment to its answer, wherein it alleged, among other things, that section 5033 was in conflict with the Fourteenth Amendment to the Constitution of the United States. The judgment of the Court of Common Pleas was affirmed by the Circuit Court, July 18, 1898, whereupon Snell began a proceeding in the Supreme Court of the State to reverse the judgment of the Circuit Court, the only error assigned being to the judgment of the Circuit Court affirming the judgment of the Court of Common Pleas denying a change of venue.

On May 9, 1899, the Supreme Court of Ohio rendered the following judgment: "On consideration whereof it is ordered and adjudged by this court that the judgment of the state Circuit Court be, and the same is hereby, reversed with costs; and proceeding to render the judgment which the court should have rendered, it is considered and adjudged that the judgment of the Court of Common Pleas be, and the same is hereby, re-

versed, with costs, for error in overruling the motion of the plaintiff for a change of venue. It is further considered and adjudged that the plaintiff in error recover of defendant in error his costs in this court and in the Circuit Court expended, to be taxed, and that the case be remanded to the Court of Common Pleas, with directions to grant the change of venue, and for further proceedings according to law." 60 Ohio St. 256.

*Mr. J. W. Warrington* for plaintiff in error. *Mr. E. W. Kittredge* was on his brief.

*Mr. Thomas L. Michie* for defendant in error. *Mr. John W. Wolfe* was on his brief.

Mr. Justice Brown delivered the opinion of the court.

This writ of error must be dismissed for lack of finality in the order appealed from. We have held in too many cases even to justify citation, that a judgment reversing a case and remanding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court. It is true that the order appealed from finally adjudges that a change of venue should have been allowed; but the same comment may be made upon dozens of interlocutory orders made in the progress of a cause. Indeed, scarcely an order is imaginable which does not finally dispose of some particular point arising in the case; but that does not justify a review of such order, until the action itself has been finally disposed of. If every order were final, which finally passes upon some motion made by one or the other of the parties to a cause, it might in some cases require a dozen writs of error to dispose finally of the case. Moreover, the action of the Railway Company in prosecuting this writ of error is somewhat inconsistent with its position in the Circuit Court, where in its answer it prayed that "since the order overruling the motion for a change of venue was interlocutory and not final, and since no other proceedings in error have been commenced herein, the present petition in error may be dismissed."

It is true that after the change of venue was denied, the case was tried upon the merits, and a verdict and judgment rendered for the defendant, of the benefit of which it was subsequently deprived; but it loses no right by acquiescing for the time being in the action of the state court, since, after judgment ultimately rendered, it may have a writ of error reaching back to the alleged error of the state court, if it involve a Federal question. The case is not unlike that of the refusal of a state court to permit the removal of a cause to the Circuit Court of the United States, or the action of the latter in remanding or refusing to remand. Such removal, although affirmed by the Supreme Court of the State, does not authorize a writ of error from this court until after final judgment, when, if the removal be found to have been erroneous, the subsequent proceedings in the state court go for naught. *Railroad Co.* v. *Wiswall*, 23 Wall. 507; *Moore* v. *Robbins*, 18 Wall. 588; *Illinois Central Railroad* v. *Brown*, 156 U. S. 386. Whether in this case defendant's judgment will be reinstated, as it was originally entered, is a question which does not properly arise at this stage of the proceedings. It is sufficient to say that the order appealed from lacks every element of finality, and the writ of error is therefore

*Dismissed.*

# DAVIS *v.* BURKE.

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

No. 286. Argued December 3, 1900.—Decided December 17, 1900.

Defendant being convicted of murder, carried the case to the Supreme Court of the State, but made no claim there of a Federal question. *Held:* That before applying to a Circuit Court of the United States for a writ of *habeas corpus* he should have exhausted his remedy in the state court, either by setting up the Federal question on his appeal to the Supreme Court, or by applying to the state court for a writ of *habeas corpus.*

The constitution of Idaho, providing for the prosecutions of felonies by information, is so far self-executing that a conviction upon information cannot be impeached here upon the ground that defendant has been denied due process of law.

The question whether a convict shall be executed by the sheriff, as the law stood at the time of his trial and conviction, or by the warden of the penitentiary, as the law was subsequently amended, or whether he shall escape punishment altogether, involves no question of due process of law under the Fourteenth Amendment.

THIS was an appeal from an order denying a writ of *habeas corpus* to the appellant Davis, who was, on April 15, 1897, found guilty of murder in the District Court of Cassia County, Idaho, and sentenced to be hanged June 4, 1897.

Motion for a new trial was denied, an appeal taken to the Supreme Court of Idaho, and on May 6, 1898, the judgment of the lower court was affirmed. 53 Pac. Rep. 678.

His execution having been postponed, an application for pardon was presented to the State Board of Pardons, and was denied January 23, 1899. Thereupon a petition for a writ of *habeas corpus* was presented to the United States District Judge for Idaho, which was denied January 30; and an appeal taken from this order was on April 16, 1899, dismissed by the Circuit Court of Appeals, *Davis* v. *Burke*, 97 Fed. Rep. 501, upon the ground that, as the appeal involved a construction of the Federal Constitution, that court was without jurisdiction.

Section 8021 of the Revised Statutes of Idado provides that executions of defendants convicted of murder in the first degree shall take place at the county jail under the direction of the sheriff; but while this case was pending before the Circuit Court of Appeals this section of the statute was amended, Laws, 1899, page 484, so as to provide for the execution of criminals at the state penitentiary under the direction of the warden. After the passage of this act, February 23, 1899, Davis was removed from the jail of Cassia County to the state penitentiary.

Upon being advised that this proceeding was erroneous, Burke, the sheriff of Cassia County, applied to the Supreme Court of Idaho for a writ of *habeas corpus*. That court decided that the act of February 23, 1899, above mentioned, regulating the time, place and manner of inflicting a death penalty, was not applicable to past offences, and that Davis should be executed in accordance with the law as it stood at the time of the commission of the offence, the trial and original sentence. 59 Pac. Rep. 544. In accordance with that decision appellant was returned to the custody of the sheriff.

After the decision in the Circuit Court of Appeals, and while awaiting a resentence by the state court, appellant presented this petition for a writ of *habeas corpus* to the Circuit Court of the United States for the District of Idaho, and upon the denial of such petition appealed to this court.

*Mr. James H. Hawley* for appellant. *Mr. J. W. Dorsey* and *Mr. Edgar Wilson* were on his brief.

*Mr. Samuel H. Hays* for appellee. *Mr. W. E. Borah* was on his brief.

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

The assignments of error, which are somewhat voluminous, are practically resolvable into two questions, first, whether the petitioner was legally prosecuted by information, and, second, whether the act of February 23, 1899, providing for executions

at the state penitentiary under the direction of the warden, is as to this defendant *ex post facto*, and, as dependent upon this, whether he could be executed under section 8021 of the Revised Statutes as it formerly stood, after that section had been repealed by the act of February 23, 1899.

(1) The constitution of Idaho contains the following clause: "Art. 1, Sec. 8. No person shall be held to answer for any felony or criminal offence of any grade, unless on presentment or indictment of a grand jury, or on information of the public prosecutor, after a commitment by a magistrate." Appellant's answer to this is: (*a*) That the provision is not self-executing. (*b*) That a law passed March 13, 1891, known as the Information Act, is void, because it was not passed in the manner required in the Idaho constitution, and that the journals of the legislature may be resorted to to determine this question.

In reply to his first contention, it is sufficient to say that this case has been twice before the Supreme Court of Idaho, and upon neither occasion was the point made that it could not be prosecuted by information. The first time it was carried there by appeal from the judgment of the lower court, following a trial upon the merits, and was there affirmed. 53 Pac. Rep. 678. After conviction, and after the surrender of Davis by the sheriff to the warden of the penitentiary, in pursuance of the act of February 23, 1899, the sheriff made an original application to the Supreme Court for a writ of *habeas corpus* to obtain the custody of Davis, who had been surrendered to the warden of the penitentiary. This was granted. 59 Pac. Rep. 544. Upon the hearing of that case, counsel, who were admitted to appear on behalf of the prisoner as *amici curiæ*, insisted that the provisions of the Revised Statutes for the execution of prisoners having been repealed, and the provisions of the act of February 23, 1899, being *ex post facto*, there was no law under which Davis could be executed; but no question was made as to the validity of prosecutions by information.

The rule is well settled in this court that, while there may be a power on the part of the Federal courts to issue a writ of *habeas corpus* where the petitioner insists that he has been deprived of his liberty without due process of law, that power will

not ordinarily be exercised until after an appeal made to the state courts has been denied. *Ex parte Royall*, 117 U. S. 241; *Ex parte Fonda*, 117 U. S. 516; *In re Duncan*, 139 U. S. 449; *In re Wood*, 140 U. S. 278; *Cook* v. *Hart*, 146 U. S. 183; *In re Frederich*, 149 U. S. 70; *New York* v. *Eno*, 155 U. S. 89; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284; *Markuson* v. *Boucher*, 175 U. S. 184.

Certain exceptional cases have arisen in which the Federal courts have granted the writ in the first instance, as where a citizen or subject of a foreign State is in custody for an act done under the authority of his own government; or an officer of the United States has been arrested under state process for acts done under the authority of the Federal government, and there were circumstances of urgency which seemed to demand prompt action on the part of the Federal government to secure his release. *Wildenhus's Case*, 120 U. S. 1; *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1. It is recognized, however, that the power to arrest the due and orderly proceedings of the state courts, or to discharge a prisoner after conviction, before an application has been made to the Supreme Court of the State for relief, is one which should be sparingly exercised, and should be confined to cases where the facts imperatively demand it. While the power to issue writs of *habeas corpus* under Rev. Stat. sec. 753, nominally extends to every case where a party "is in custody in violation of the Constitution, or of a law or treaty of the United States," it is not every such case where the interference of the Federal court is demanded, particularly where the state court is executing its own criminal laws, and is asserting a jurisdiction which does not reside elsewhere, to try an accused person for a violation of such laws. The state courts are as much bound as the Federal courts to see that no man is punished in violation of the Constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the State than by an interference, which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there.

This case is peculiarly one for the application of the general

rule. Not only was there ample opportunity for making this defence upon the original hearing in the Supreme Court, or upon an independent application for a writ of *habeas corpus;* not only does the question involve the construction of the constitution and laws of the State with which the Supreme Court of the State is entirely familiar, but a ruling by this court that prosecutions by information in the courts of Idaho are invalid might result in the liberation of a large number of persons under sentence upon convictions obtained by this method of procedure. A step so important ought not to be taken without full opportunity given to the state court to pass upon the question, and without clear conviction of its necessity.

(2) But we are also of opinion that for the purposes of this case the provision of the Idaho constitution must be deemed self-executing. The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (p. 99): "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential."

Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself. When a constitution declares that felonies may be prosecuted by information after a commitment by a magis-

trate, we understand exactly what is meant, since informations for the prosecution of minor offences are said by Blackstone to be as old as the common law itself, and a proceeding before magistrates for the apprehension and commitment of persons charged with crime has been the usual method of procedure since the adoption of the constitution. It is true the legislature may see fit to prescribe in detail the method of procedure, and the law enacted by it may turn out to be defective by reason of irregularity in its passage. In such case a proceeding by information might be impeached in the state court for such irregularity, but it certainly would not be void so long as it was authorized by the Constitution. For us to say that the accused had been denied due process of law would involve the absurdity of holding that what the people had declared to be the law was not the law.

(3) The question whether appellant shall be executed under the act of the legislature by the warden of the penitentiary, or under the Revised Statutes, as the law stood at the time of his trial and conviction, by the sheriff, or whether he shall escape punishment altogether, was determined adversely to him by the Supreme Court of the State, 59 Pac. Rep. 544, and involves no question of due process of law under the Fourteenth Amendment. *McNulty* v. *California*, 149 U. S. 645.

The order of the Circuit Court of the United States for the District of Idaho denying the writ of *habeas corpus* is, therefore,

*Affirmed.*

# TYLER *v.* JUDGES OF THE COURT OF REGISTRATION.

ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 213. Argued October 25, 1900.—Decided December 17, 1900.

A petitioner in an application for a writ of prohibition to the judges of a Court of Land Registration upon the ground that the contemplated proceedings in said court denied to parties interested due process of law, cannot maintain a writ of error from this court to the Supreme Court of the State without showing that he is personally interested in the litigation, and has been, or is likely to be, deprived of his property without due process of law.

The fact that other persons in whom he has no personal interest and who do not appear in the case, may suffer in that particular is not sufficient.

This was a petition by Tyler to the Supreme Judicial Court of Massachusetts for a writ of prohibition to be directed to the Judges of the Court of Registration to prohibit them from further proceeding under what is known as the Torrens Act in the registration of a certain parcel of land described in the application, or in the determination of the boundary between such parcel of land and land of petitioner.

The petition alleged in substance that David E. Gould and George H. Jones, on December 22, 1898, applied to the Court of Land Registration to have certain land in the county of Middlesex brought under the operation and provisions of the Land Registration Act, and to have their title thereto registered and confirmed. The land referred to was shown on a plan filed with the application. The petitioner, who was the owner of an estate in fee simple in a parcel of land adjoining part of the land described in the application, insisted that the boundary line between his land and the part aforesaid was not correctly shown on the plan filed with the application, but encroached upon and included part of his land. The petition prayed for a writ of prohibition, and alleged that the Land Registration Act

under which the proceedings were taken violated the provisions of the Constitution of the United States, first, in making a decree of confirmation conclusive upon persons having an interest in the land, though they may have had no notice of the proceedings for registration, and therefore would have the effect of depriving such persons of their property without due process of law, and otherwise than by the law of the land; second, that the act was also invalid in giving judicial powers to the recorder and assistant recorders therein mentioned, who were not judicial officers under the constitution of the Commonwealth, and also in giving them power to deprive persons of their property without due process of law; third, that the operation of the act in other respects depended for the effect thereby intended upon the conclusiveness of the original decree of registration, and the exercise of nonjudicial powers by the recorder, etc.

Upon the petition and answer, which simply averred compliance with the terms of the act, together with the rules of the land court, etc., the case was reserved for a full bench upon the only question raised at the hearing, namely, the constitutionality of the act. The court decided the act to be constitutional, and dismissed the petition. 175 Mass. 71. Hence this writ of error.

*Mr. J. L. Thorndike*, for plaintiff in error.

*Mr. Hosea M. Knowlton*, for defendants in error. *Mr. Franklin T. Hammond* was on his brief.

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

The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defence set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.

Opinion of the Court.

The very first general rule laid down by Chitty, Pleading, p. 1, is that "the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative." An action on contract (p. 2) "must be brought in the name of the party in whom the legal interest in such contract was vested;" and an action of tort (p. 69) "in the name of the person whose legal right has been affected, and who is legally interested in the property at the time the injury thereto was committed." As stated by another writer: "No one can be a party to an action if he has no interest in it. A plaintiff cannot properly sue for wrongs that do not affect him, and on the other hand, a person is not properly made a defendant to a suit upon a cause of action in which he has no interest, and as to which no relief is sought against him." In familiar illustration of this rule, the plaintiff in an action of ejectment must recover upon the strength of his own title and not upon the weakness of the defendant's, who may even show title in a third person to defeat the action.

Actions instituted in this court by writ of error to a state court are no exceptions to this rule. In order that the validity of a state statute may be "drawn in question" under the second clause of section 709, Rev. Stat., it must appear that the plaintiff in error has a right to draw it in question by reason of an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute. This principle has been announced in so many cases in this court that it may not be considered an open question.

In *Owings* v. *Norwood's Lessee*, 5 Cranch, 344, an action of ejectment, defendant set up an outstanding title in one Scarth, a British subject, who held a mortgage upon the premises. The decision of the court being adverse to Owings, he sued out a a writ of error from this court, contending that Scarth's title was protected by the treaty with Great Britain. It was held that, as the defendant claimed no right under the treaty himself, and that the right of Scarth, if he had any, was not affected by the decision of the case, the court had no jurisdiction. "If," the court said, "he [the defendant] claims nothing under

a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed it would have been a case arising under a treaty. But neither the title of Scarth nor of any person claiming under him can be affected by the decision of this court."

In *Henderson* v. *Tennessee*, 10 How. 311, a similar case, namely, an action of ejectment, an outstanding title in a third person, was set up by the defendant, and alleged to have been derived under a treaty. The court held that an outstanding title in a third person might be set up, and that the title set up in this case was claimed under a treaty, "but," said the court, "to give jurisdiction to this court, the party must claim for himself, and not for a third person in whose title he has no interest. . . . The heirs of Miller," who claimed under the treaty, "appear to have no interest in this suit, nor can their rights be affected by the decision." Like rulings were made under a similar state of facts in *Montgomery* v. *Hernandez*, 12 Wheat. 129; *Hale* v. *Gaines*, 22 How. 144; *Verden* v. *Coleman*, 1 Black, 472; and *Long* v. *Converse*, 91 U. S. 105.

In *Giles* v. *Little*, 134 U. S. 645, the prior authorities are cited, and the law treated as well settled that "in order to give this court jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only." See also *Ludeling* v. *Chaffe*, 143 U. S. 301.

It is true that under the third clause of section 709, where a title, right, privilege or immunity is claimed under Federal law, such title, etc., must be "specially set up or claimed," and that no such provision is made as to cases within the second clause, involving the constitutionality of state statutes or authorities, but it is none the less true that the authority of such statute must "be drawn in question" by some one who has been affected by the decision of a state court in favor of its validity, and that in this particular the three clauses of the section are practically identical.

As we had occasion to observe in *California* v. *San Pablo & Tulare Railroad*, 149 U. S. 308, 314, "the duty of this court, as of every judicial tribunal, is limited to determining rights of

persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties, or counsel, whether in the case before the court, or in any other case, can enlarge the power or affect the duty of the court in this regard." See also *Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 1 Black, 419; *Kimball* v. *Kimball*, 174 U. S. 158.

In the case under consideration the plaintiff in error is the owner of a lot adjoining the one which is sought to be registered, and the only question in dispute between them relates to the location of the boundary line. In his petition he does not set forth that he made himself a party to the proceedings before the Court of Registration, and his name does not even appear in the list of those who are required to be notified, or elsewhere in the proceedings before the court.

In the assignment of error he complains only of the unconstitutionality of the statute, in that it deprives persons of property without due process of law. In his brief his first objection to the validity of the act is that the registration, which deprives all persons, except the registered owner of interest in the land, is obtained as against residents and known persons only by posting notices in a conspicuous place on the land and by registered letters, and as against non-residents and unknown persons by publication in a newspaper; and that the rights of the parties may be foreclosed without actual notice to them in either case, and without actual knowledge of the proceedings. His second objection to the validity of the act is that the registration of dealings with the land after the original registration would, in certain cases, have the effect of depriving the registered owners of their property without due process of law.

His objections throughout assume that he has actual knowledge of the proceedings, and may make himself a party to them

and litigate the only question, namely, of boundaries, before the Court of Registration. In other words, he is not affected by the provisions of the act of which he complains, since he has the requisite notice. Other persons, whether residents or non-residents, whose rights might be injuriously affected by the decision, might lawfully complain of the unconstitutionality of an act which would deprive them of their property without notice; but it is difficult to see how the petitioner would be affected by it. Indeed, if the act were subsequently declared to be unconstitutional, the proceedings against him would simply go for naught. He would have lost nothing, since the action of the court would simply be void, and his interest in the land would remain unaffected by its action.

It is true that his competency to institute these proceedings does not seem to have been questioned by the Supreme Court of Massachusetts. It may well have been thought that to avoid the necessity and expense of appearing before an unconstitutional court and defending his rights there, he had sufficient interest to attack the law, which lay at the foundation of its proposed action; but to give him a *status* in this court he is bound under his petition to show, either that he has been, or is likely to be, deprived of his property without due process of law, in violation of the Fourteenth Amendment; and as no such showing has been made, we cannot assume to decide the general question whether the Commonwealth has established a court whose jurisdiction may, as to some other person, amount to a deprivation of property. If that court shall eventually uphold his contention with respect to the boundary, he will have no ground for complaint. If he be unsuccessful, he may, under the registration act, appeal to the Superior and ultimately to the Supreme Court, whence, if it be made to appear that a right has been denied him under the Fourteenth Amendment, he may have his writ of error from this court.

Our conclusion is that the plaintiff in error has not the requisite interest to draw in question the unconstitutionality of this act, and that the writ of error must be

*Dismissed.*

JUSTICES HARLAN, BREWER, SHIRAS and the CHIEF JUSTICE, dissenting.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE SHIRAS, dissenting.

In order to give this court jurisdiction to review the judgment of a state court on the ground that the validity of a statute of, or an authority exercised under, any State, was drawn in question for repugnancy to the Constitution or laws of the United States, and that its validity was sustained, it is enough that a definite issue as to the validity of the statute is distinctly deducible from the record; that the state court entertained the suit; and that its judgment rested on the conclusion that the statute was valid.

The inquiry is whether the validity of the statute or authority has been drawn in question "in a suit" in the state court and a "final judgment" has been rendered in favor of its validity. If so, we have jurisdiction to review that judgment. *Weston* v. *Charleston*, 2 Peters, 449; *Wheeling & Belmont Bridge Company* v. *Wheeling Bridge Company*, 138 U. S. 287; *Luxton* v. *Bridge Co.*, 147 U. S. 337; *McPherson* v. *Blacker*, 146 U. S. 1.

*Weston* v. *Charleston* was an application to the state court for a writ of prohibition to restrain the levy of a tax under a city ordinance on the ground that it violated the Constitution, and went to judgment in the highest court of South Carolina sustaining the validity of the ordinance.

This court held that the writ of error was properly issued, and Mr. Chief Justice Marshall said:

"The question, therefore, which was decided by the constitutional court, is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?"

After answering this question in the affirmative the Chief Justice thus proceeded:

"We think also that it was a final judgment, in the sense in which that term is used in the 25th section of the judicial act. If it were applicable to those judgments and decrees only in

which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended.

"Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the Constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct the judgment. *The word 'final' must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause.*"

*Wheeling and Belmont Bridge Company* v. *Wheeling Bridge Company* was a petition to condemn land, and it had been held by the Supreme Court of West Virginia that the right to condemn was to be determined before the amount of compensation to be made had been ascertained. The judgment of the inferior court sustained the proceedings to condemn and appointed commissioners, and the state Supreme Court entertained an appeal from that judgment and affirmed it.

A writ of error from this court was brought and a motion to dismiss it denied. Mr. Justice Field said:

"The judgment appears to have been considered by that court as so far final as to justify an appeal from it; and if the Supreme Court of a State holds a judgment of an inferior court of the State to be final, we can hardly consider it in any other light, in exercising our appellate jurisdiction."

In *Luxton* v. *Bridge Company*, which was a proceeding to condemn in a Circuit Court of the United States, we held that an order appointing commissioners to assess damages was not a final judgment. The case of the *Wheeling and Belmont Bridge Company* was cited and distinguished by Mr. Justice Gray, who said:

"Jurisdiction of a writ of error to the Supreme Court of Appeals of West Virginia, affirming an order appointing commissioners under a somewhat similar statute, was there entertained by this court, solely because that order had been held

by the highest court of the State to be an adjudication of the right to condemn the land, and to be a final judgment, on which a writ of error would lie, and could, therefore, hardly be considered in any other light by this court in the exercise of its jurisdiction to review the decisions of the highest court of the State upon a Federal question. 138 U. S. 287, 290. To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States; for if the highest court of the State held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners."

It is true that it appeared in these cases that the interests of plaintiffs in error were directly affected, and it is held that such is not the case here. But that ruling in effect involves inquiry into the merits on a question of procedure, and it seems to me inadmissible for this court to deny, in a case like this, the competency of a party to invoke the jurisdiction of the state court, when that court has exercised it at his instance.

The Supreme Judicial Court of Massachusetts held that prohibition was the appropriate remedy to avert the injury with which petitioner alleged he was threatened, and that petitioner was entitled to make the application for the writ; and thereupon passed upon the question of the validity of the statute, and rendered a final judgment sustaining its validity. The unconstitutionality of the act was the sole ground on which the application for prohibition rested, and the determination of that Federal question determined the cause.

We have then "a suit" and a "final judgment" sustaining the validity of a state statute drawn in question for repugnancy to the Constitution.

Every element requisite to the maintenance of our jurisdiction exists, and I submit that we cannot decline to exercise it because of any supposed error on the part of the state court in respect of entertaining the suit.

JUSTICES HARLAN, BREWER, SHIRAS and the CHIEF JUSTICE, dissenting.

To repeat: The state court ruled that the petition was sufficient to raise the Federal question; that petitioner was competent to raise it; and that he was entitled to preventive relief if his contention was well founded. And these rulings should be accepted on the preliminary inquiry into our jurisdiction.

The objections of plaintiff in error to the proceedings of the land court were not for want of jurisdiction over him personally, but for want of jurisdiction over the subject-matter. In other words, that there was a total want of power on the part of the persons assuming to act as a court to proceed at all. Whether that was so or not is the question which the state court decided, and discussion of that question is discussion on the merits.

Plaintiff in error alleged that the integrity of his boundary line was threatened by these proceedings. The fact that he had actual knowledge of them did not validate them if the act was void. And the answer to the question whether if he were deprived of some part of his real estate, or of the cost of litigation, such deprivation would be deprivation without due process of law, determines the constitutionality of the statute, by which that result was effected.

In my opinion the writ of error was providently issued, and I am authorized to state that MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE SHIRAS concur in that conclusion.

# HUNTTING ELEVATOR COMPANY *v.* BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

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

No 12. Argued October 24, 25, 1899.—Decided December 17, 1900.

This case involves deciding whether the defendants in error are liable for the damage occasioned to certain property, resulting from a fire which occurred on October 28, 1894, in a railroad yard at East St. Louis, Illinois. At the time of the fire Bosworth was operating the railway as receiver. The decision depends largely, if not entirely, on facts, which are stated at great length by the court, both in the statement of the case, and in its opinion. These papers are most carefully prepared. While both deal with facts, those facts are stated with clearness, with fullness, with completeness, and with unusual care. They leave nothing untouched. Without treating them with the same fullness, the reporter feels himself unable to prepare a headnote which could convey an adequate and just account of the opinion and decision of the court. Under these circumstances he deems it best not to attempt an impossibility, but to respectfully ask the readers of this headnote to regard the opinion of the court in this case as incorporated into it.

THIS case involves deciding whether the defendants in error are liable for the damage occasioned to certain property, resulting from a fire which occurred on October 28, 1894, in a railroad yard at East St. Louis, Illinois.

The Chicago, Peoria and St. Louis Railway Company, at the date of the fire in question, was being operated by a receiver appointed on September 22, 1893, in foreclosure proceedings instituted in the Circuit Court of the United States for the Southern District of Illinois.

On the assumption that the receiver was responsible for the damage occasioned by the fire above referred to, various persons and corporations who had suffered loss filed their interventions, asserting a liability on the part of the receiver for such damage. The intervenors were nine in number, and all but

two sought recovery for the loss occasioned by the damage or destruction of barley. The claims other than for barley were asserted by the Chicago, Milwaukee and St. Paul Railway Company, and the Carr, Ryder and Engler Company; the former corporation asking to be allowed for the value of its cars, in which were contained the destroyed or damaged barley, while the latter corporation demanded the value of certain doors, sashes, etc., consigned to Birmingham, Alabama. A list of all the intervenors is given in the margin.[1]

The interventions which related to barley shipments alleged delivery of the cars of barley to an initial carrier, consigned to a named commission merchant in St. Louis *via* East St. Louis; the delivery of the barley so shipped to the receiver of the Peoria Company to be "transported to its destination;" the carriage by that company as far as East St. Louis, and the damage by fire of the barley in the cars "while the same were still in transit and on the way to destination, and in the possession and under the control" of the receiver of the Peoria Company. In the answers filed by the receiver there was no denial of the allegations contained in the intervening petitions as to the shipment of the barley in question and the destination thereof. The answers, in effect, merely averred that after the receipt of the cars and contents by the receiver, they were delivered by him, in the due course of business, to the Terminal Railroad Association of St. Louis, and were damaged or destroyed while in the possession of that association and by its negligence.

It was alleged that the delivery to the Terminal Association had been made by virtue of a contract between the receiver and the Terminal Association, of date June 1, 1891, which contract was annexed as a part of the answer; and that by the custom and course of business existing between the receiver and the Terminal Association for four years prior to the deliveries in question, it resulted that the Terminal Association and not the

[1] Names of the intervenors: The Carr, Ryder and Engler Company; The Chicago, Milwaukee and St. Paul Railway Company; The S. H. Hyde Elevator Company; The W. W. Cargill Company; Jacob Rau; Gilchrist & Company, a partnership; The Huntting Elevator Company; McMichael & Son, a partnership; and Henry Rippe.

receiver was bound for the damage which the fire had brought about. The receiver, moreover, filed a cross petition praying that the Terminal Association be made a party defendant to the intervention proceedings, so that its liability to the intervenors might be decreed. Upon this application the court issued a rule upon the association to show cause why it should not be made a party defendant as prayed. To this action, the Terminal Association appeared, solely for the purpose of objecting to the jurisdiction, and moved to discharge the rule for various reasons, all of which addressed themselves to the want of power to compel the appearance of the Terminal Association as a defendant to the interventions. The cross petition, rule and the motion just referred to were not thereafter pressed upon the attention of the court, and the Terminal Association never appeared as a party to the intervention proceedings.

When the issues on the interventions were thus made up, the court referred the claims of all the intervenors to a master to take testimony and report. Under this reference the testimony as to all the interventions was taken together. During the course of the taking of the testimony before the master, it having developed that the propinquity of a warehouse filled with hay was the proximate cause of the fire, the intervenors added to their petitions the following allegations, as "a further, separate and distinct ground of recovery therein," viz:

"That upon the arrival of the cars mentioned and described in said petition at said East St. Louis, and while the same were still in the possession of said receiver, said receiver negligently caused and permitted them, together with their contents, to be placed upon certain tracks in close proximity to a large wooden warehouse filled with baled and loose hay, and through which said warehouse locomotive engines were frequently passing and repassing during all hours, night and day; that said wooden warehouse was open at the sides and ends, and had railroad tracks passing through it, over which locomotive engines frequently passed, and said hay was generally exposed to fire escaping from said locomotives; that said warehouse and hay was easily ignitible, and on account of the inflammable condition of said hay, the large quantity thereof, and the dimensions of

said wooden warehouse, the same, if set on fire, would burn with great rapidity and produce a great conflagration, all of which the receiver well knew, yet notwithstanding all this he negligently and carelessly caused and permitted said cars and their contents to be placed upon said side track, near said warehouse, and to remain thereon for several days, when said hay and warehouse were in some manner set fire to, and the same burned so rapidly, and produced such a large conflagration, that said cars and their contents were damaged and destroyed, as stated in said several petitions, and the petitioners damaged in the manner and to the extent and amount, as therein stated."

Prior to the filing of the amended petitions of the intervenors as above stated, the testimony before the master had shown that there was keen competition for the carriage of barley and other commodities from points in Iowa, Wisconsin and Minnesota, between roads entering St. Louis from the west side of the river and those which carried freight from the territory named into St. Louis *via* bridge or ferry connections from East St. Louis. Indeed, it was shown that in order to get a proportion of the business the roads on the East St. Louis side of the river were obliged to furnish dealers with facilities equal to those which could be obtained from roads entering St. Louis on the west side. For this purpose a joint through rate to St. Louis for barley was made, and on the arrival of the barley at East St. Louis, unless the consignees had previously directed to the contrary, instead of being immediately transferred across the Mississippi River for delivery to the consignees in St. Louis, it was held in the cars at East St. Louis to enable the consignees to dispose of the same in carload lots; and when so disposed of the cars were either delivered in St. Louis or transferred for shipment elsewhere, as might be ordered by the consignees. To such an extent did this custom prevail that it was testified that East St. Louis had become the market place for barley consigned from the territory named to St. Louis.

On the hearing before the master, after the testimony on the subject just stated had been introduced, an offer of proof and stipulation respecting same was made, to which we shall now call attention. In presenting a motion for a continuance of the

hearing, on the ground that he had been unable to procure the attendance of Mr. Teichman and other commission merchants of St. Louis, counsel for the receiver said:

"We expect to prove by these witnesses that the St. Louis Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee and St. Paul road, on which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all the barley dealers in St. Louis, to whom the particular consignments of barley are made, which are now in litigation; that the Terminal Railroad Association, as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis free of car service, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all of the shippers; by that term, I mean the consignees and shippers except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that at a later day they also secured the business of this last-named firm. And that the solicitation was made in the interest of the Terminal Railroad Association for the express purpose of having the business sent down the east side of the Mississippi River, so as to give them the benefit of the transfer across the river from East St. Louis to St. Louis, in competition with lines west of the Mississippi River."

In the record is next set out the following statements of counsel for the intervenors:

Counsel for intervenors: . . . "Now in reference to the testimony of people at St. Louis, in respect to the arrangement made by the Terminal Railroad Association, by which it would hold these cars of barley and so forth, rather than to postpone this hearing at this time I will consent that the witnesses, if here, would testify as Mr. Wilson has stated. So I do not think a continuance should be granted on that application.

* * * * * * * *

"To expedite matters, it is stipulated that the witnesses Otto Teichman, Henry Grieve of the John Wall Commission Com-

pany, L. Leinke and Charles Orthwein, at St. Louis, if present, would testify substantially as has been stated by Mr. Wilson."

Leave having been granted the receiver to answer the amended petitions, he met the new averments respecting the warehouse contained in the amended petitions, by denying that, while in the possession of the receiver, the latter negligently caused or permitted the property in question to be placed in proximity to the warehouse referred to in the amended petitions, and further averred that after the delivery of the cars to the Terminal Association the receiver no longer controlled and directed the placing of the cars in the yards of the Terminal Association. It was also denied that the receiver had any knowledge of the dangerous character of the warehouse.

So also in the amended answer, doubtless to be able to avail himself of what was deemed to be a defence arising from the testimony as to the custom of detaining shipments of barley, the offer of proof and the stipulation above referred to, the receiver set up a new defence, stated in his answers as follows:

"This receiver, further answering, avers that all of the said intervening petitioners had knowledge, through their consignees, of the condition of affairs that existed in the yards of the said railroad association prior to and at the time said cars and contents were damaged and destroyed.

"This receiver, further answering, avers that the cars and contents mentioned in the said intervening petitions after being placed remained in close proximity to said wooden warehouse until the same were damaged and destroyed, with the full knowledge, approval and consent of the said intervening petitioners, through their agents, their respective consignees; and in fact thus remained for the convenience of said consignees, and at their risk."

In the mean while, as by the proof which had been already introduced before the master, it was shown that the relations between the Terminal Association and the receiver, at the time of the fire, were not controlled by the contract of 1891, which the receiver had annexed to his answers, but were governed by a contract made on August 1, 1892, which had been produced on the hearing before the master, the receiver, in his amended

answer, admitted in effect the error of the averment of his original answer, and conceded that the controversy, in so far as controlled by the contract, depended upon the one made in 1892.

After the conclusion of the testimony the master, in a careful opinion reviewing the law and the facts, reported substantially in favor of the claims of all the intervenors. The testimony which had been taken as to all the interventions was embodied in but one report, that upon the intervention of Jacob Rau, and was referred to in the reports filed upon the other claims.

After hearing on exceptions filed by the receiver to the reports of the master, the court overruled the exceptions, affirmed the reports and decreed the liability of the receiver to the intervenors. An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, not only by the receiver, but, by leave of the court, the Chicago, Peoria and St. Louis Railroad Company—which had become the owner of the Peoria Railway, as assignee of the purchaser at a foreclosure sale—also perfected an appeal. In the Circuit Court of Appeals the decrees of the Circuit Court as to all but one of the intervenors were reversed. The appellate court, however, was divided in opinion as to the reasons for its action in the cases which were reversed, such division of opinion being upon the deductions to be drawn from the evidence, one judge concluding that the Circuit Court erred upon grounds stated in his opinion, while another member of the court, who concurred in the conclusion that the court below had erred, assigned different reasons. A third member of the court dissented because he thought the court below had deduced proper inferences from the proof in the cause. 56 U. S. App. 274; 87 Fed. Rep. 72. Thereupon a writ of certiorari was granted by this court.

*Mr. Burton Hanson* for petitioners in *Jacob Rau* v. *Bosworth*, the Huntting Elevator Co., the Chicago, Milwaukee and St. Paul Railway Co., and for Bosworth, receiver. *Mr. George R. Peck* and *Mr. George P. Cary* were on his brief.

*Mr. Bluford Wilson* for Bosworth. *Mr. Philip Barton Warren* was on his brief.

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

A solution of the issues which arise on this record involves only an analysis of the facts for the purpose of ascertaining the true inferences to be drawn therefrom. In the statement of the case which we have just made we have given an outline of the origin of the controversy and have referred to the facts only so far as essential to elucidate the pleadings. We propose now to review the facts upon which the controversy turns. The testimony to which we shall refer in doing so is contained in the record of the case of *Jacob Rau* number 13 of this term, as in taking the appeals, following the course adopted by the master in making his report, the testimony as to all the interventions was brought up in that case only, and as found in that record has been treated in the argument as applicable to all the interventions.

The Terminal Railroad Association of St. Louis, which will be hereafter, for brevity, styled the Terminal Association, possessed in the city of East St. Louis extensive tracks, yards and facilities for the purpose of successfully carrying on the railroad traffic which came to that point. It was connected with and operated lines of railroad running across two bridges, leading to St. Louis, Missouri, and had many transfer tracks in its railroad yards, which were connected not only with its St. Louis tracks, but with the lines of various railroads which reached East St. Louis from different points. The Terminal Association, therefore, controlled the transfer of railroad business arriving at East St. Louis for St. Louis, and from St. Louis to East St. Louis, thence to other points, except to the extent that both of these classes of business were competed for by the Wiggins Ferry Company, a corporation owning and operating a transfer ferry between East St. Louis and St. Louis, which latter company also possessed terminal facilities in East St. Louis.

The Chicago, Peoria and St. Louis Railway, which we shall

hereafter for brevity refer to as the Peoria Company, even when considering the acts of the receiver of that company, operated a line of railroad between Peoria, Illinois, and East St. Louis, in the same State. It commenced business at East St. Louis about January, 1891. The terminus of its main tracks to the latter place was at a point termed Bridge Junction, at a street known as Stockyards Avenue, which was either beyond the city limits, or, if within the city limits, was on the outskirts thereof. At the point where the track of the Peoria Company thus terminated, that road possessed no terminal facilities of any kind for the handling of its freight business. It had no warehouses, no side tracks, no switch engines and no conveniences for the switching or handling of its freight trains. The road therefore was in a position where it was practically impossible for it to handle freight destined for East St. Louis or for carriage beyond that point, and in order to enable it to discharge its duty as a common carrier as to any such business it was absolutely necessary for it to make some arrangement for that purpose. It is true that the Peoria Company had a small freight house on the river front, with one or more side tracks adjacent thereto, which were utilized for the loading and unloading of local freight. But neither this freight house nor the tracks in question were directly connected with the main tracks of the road. To make such connection it was essential therefore for the Peoria Company to use the tracks of some other railroad.

The Peoria Company thus being substantially without any terminal facilities whatever for freight business at East St. Louis, that company as early as June 1, 1891, entered into an agreement with the Terminal Association to supply such deficiency. In August, 1892, the agreement made in 1891 was modified, and governed the relations of the parties when the fire took place. A copy of this agreement is in the margin.[1]

[1] Memorandum of an agreement, made this first day of August, A. D. 1892, by and between the Terminal Railroad Association of St. Louis, party of the first part, and the Chicago, Peoria and St. Louis Railway Company, party of the second part, witnesseth:

That whereas, the party of the first part undertakes to give the party of

Under this agreement, the incoming freight trains arriving at the terminus of the main track of the Peoria road as above stated were handled substantially as follows:

The Peoria train was stopped on a Y track. There the Peoria

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the second part terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions:

First. It is agreed that the party of the first part shall furnish the necessary yard room and track facilities in their yards in East St. Louis, Illinois, as now located, and the necessary switch engines and yardmen to do the switching of the party of the second part, in the making up and breaking up of all freight trains that depart from and arrive at East St. Louis, and to furnish storage room for a reasonable number of cars necessary to properly take care of and handle the business of the party of the second part, not exceeding one hundred and fifty (150) cars at any one time; and the charge for the facilities and the work above named shall be at the rate of fifty cents (50) per loaded car in and out, except cars on which the party of the first part receives a bridge toll, which will be handled free; empty cars in and out free.

Second. Cars made "bad order" by and during the making up and breaking up of trains of the party of the second part to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors.

All cars made "bad order" outside of the yards set aside for the use of the party of the second part shall be repaired by the party causing the damage.

Third. For all loads to and from the National stock yards the party of the second part is to pay the party of the first part one (1) dollar per car in and out, inclusive of the charge for making up and breaking up of trains, but not the trackage charge at National stock yards.

Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part to be switched to and from the Wiggins transfer tracks without extra charge. Regular switching charges and rules to apply on all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on billing to it as to who should pay. In the absence of any instructions, the switching charges will follow the car.

Fifth. The party of the first part to furnish track room upon which the engines of the party of the second part can be switched and cared for and turned, as may be required; the care of such engines to be under the supervision of the party of the first part; the price for the service rendered to be agreed upon by the master mechanic of the party of the first part and the superintendent of motive power and machinery of the party of the second part.

engine was detached and was placed on a stub track reserved for the purpose. A switch engine of the Terminal Association then took hold, broke up the train and distributed the cars on the tracks set apart for the Peoria Company under the agreement.

The evidence shows that the place assigned for the use of the Peoria Company by the Terminal Association, in compliance with the contract, was a particular portion of the yard of the latter corporation, viz., eleven tracks, numbered from 40 to 50, and that these tracks were commonly used for such purpose. This latter fact was expressly admitted by the receiver in a stipulation made during the taking of testimony before the master on the interventions, in subdivision numbered 2 of which it was agreed that the cars and other property were damaged by the fire in question "while on the tracks of the Terminal Railroad Association of St. Louis in its yard at East St. Louis, *commonly used by the receiver herein under the agreement between said association and the Chicago, Peoria and St. Louis Railway Company, dated August* 1, 1892." Though the stipulation referred to was amended in January, 1896, on motion of the receiver, by the elimination of certain admissions contained therein, which it was asserted had been discovered to be incorrect, no attempt was made to seek a correction of the stipulation so far as respected the use of the deposit tracks.

Besides the freight trains coming into East St. Louis from the main track of the Peoria road, as above stated, they were brought to the aforesaid deposit tracks the empty as well as

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This contract to be in force from and after the 1st day of August, 1892, and to continue for six months from that date, and to be renewed from time to time, as desired, at the expiration thereof, if satisfactory to both parties.

In witness whereof, the parties hereto have caused the same to be executed in duplicate this—day of——, A. D. 1892.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
By J. O. VAN WINKLER, *General Superintendent.*
Attest: ————, *Secretary.*

CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,
By W. S. HOOK, *President.*
Attest: MARCUS HOOK, *Secretary.*

the loaded cars of the Peoria road, coming from the freight house above referred to, and also the loaded or empty cars destined for the Peoria Company from other points and coming into East St. Louis over any other road connecting with the Terminal Association. On the tracks to which all these cars were taken substantially, therefore, all the freight business of the Peoria Company, whether it arose from dealings with the Terminal Association or with any other railroad corporation, was carried on, and there all the outgoing freight trains of the Peoria Company were made up. It followed also that the freight cars of the Peoria Company, whether inbound or outbound, whether destined to be carried to some ultimate point by the Terminal Association or intended for delivery by that association if carried over other roads, remained upon the tracks set apart in the yard of the Peoria Company until all such purposes could be accomplished. In other words, under the agreement, all the ingoing and outgoing terminal freight business of the Peoria Company was in effect ultimately handled by the Terminal Association, and the yard in question, as far as set apart, was necessarily a yard for the transaction of every variety of the freight business of the Peoria Company.

The tracks thus set apart under the agreement—that is, tracks numbered from 40 to 50—were capable of holding two hundred cars, whilst under the contract the Peoria road was entitled to storage room for but one hundred and fifty cars. The evidence disclosed that the Terminal Association, whenever it found it convenient to do so, utilized the surplus space for the deposit of cars not belonging to the Peoria Company. The receiver of the Peoria road and his employés (such as the local agent at East St. Louis and his assistants, car inspectors, car repairers, etc.) had access to the deposit tracks. A car used as a work shop by the car repairers of the Peoria Company was placed near to said tracks. The consignees had also ready access to the cars placed on such tracks. Over a portion of the deposit tracks—that is, numbers 42 and 43—passed a structure known as the transfer warehouse, a building some six hundred feet in length. On the night of the fire and some time prior thereto, this transfer warehouse was being used by a St. Louis corporation, under leave of

the Terminal Association, for the storage of loose and baled hay.

Such being the relations between the Peoria Company and the Terminal Association, we are brought to consider the particular shipments which give rise to the controversy in this case.

In September and October, 1894, by three distinct transactions evidenced by telegrams and letters, the Huntting Elevator Company, of McGregor, Iowa, sold to the Teichman Commission Company, of St. Louis, a large quantity of barley. Respecting the first purchase, the commission company, on September 15, 1894, wrote from St. Louis to the Huntting Company: "We have your telegram accepting our bid of 56c. net for 25,000 bushels sample barley, *to be shipped to us here via East St. Louis.*" Five days later the Huntting Company telegraphed to the commission company as follows: "We have yours of the 19th; please wire us best offer on 10,000 or 20,000 of our No. 3 sample barley *delivered St. Louis.*" On November 1, 1894, the commission company telegraphed: "Sold twenty thousand No. 3 fifty-four net *via East St. Louis*," and confirmed the telegram by a letter which read in part as follows: "We wired you sale to-day of 20,000 bus. your No. 3 barley at 54c. *net here*, to be shipped *via* East St. Louis." The third sale was effected on October 10, 1894, in the following manner: After a telegraphic offer of "fifty-five net five thousand McNalley sample" had been declined, the commission company telegraphed, "Bid fifty-six net, leaving small margin, *shipment via East St. Louis.*" The Huntting Company replied: "Accept five thousand Lime Spring barley." The barley was delivered to the Chicago, Milwaukee and St. Paul Railway Company—three cars at Lime Spring, Iowa, and seven cars at Prairie du Chien, Iowa. The freight was prepaid by the elevator company, and instructions were given to the agent of the Milwaukee company to forward the cars to the commission company at St. Louis, *via* East St. Louis.

At the time of the shipment in question no receipts were issued by the initial carrier to the shipper for the cars of barley so delivered. It is shown, however, that it was the invariable

custom of the agent of the railway company to fill out the blanks contained in a printed form of way bill, the pertinent portion of which form is inserted in the margin.[1]

A completed way bill accompanied each car, and in the case of barley consigned to a commission company in St. Louis, it would be recited that the car was "from" the named place of shipment "to East St. Louis," while in the column headed "Consignee and Destination" would be inserted the name of the consignee and the address "St. Louis, Missouri." And the testimony leaves no doubt that a way bill conformably to the course of business referred to accompanied each particular car of the shipments now under consideration.

The cars containing the barley in question were carried to Rock Island, and there delivered with the way bill to the Rock Island and Peoria Railroad Company. The latter road conveyed the cars to Peoria, and delivered them with the way bills to the Peoria and Pekin Union Railroad Company, a switching association, which delivered the cars and way bill to the Peoria Company. They were thence carried by the Peoria Company to the end of its main track, and were there put upon a Y track and carried to the place of deposit under the agreement as above stated.

The trains containing the cars of barley in controversy reached the end of the Peoria main track, and the cars in question were taken by the switch engine of the Terminal Association to the deposit tracks at the times following: 3 cars at 5 P. M., on Wednesday, October 24, 1894; 4 cars, (2 at 4 A. M., 1 at 1:45 P. M. and 1 at 8 P. M., respectively,) on Thursday, October 25, 1894; 1 car at 2:45 A. M., on Friday, October 26, 1894; and

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[1] *Portion of Way Bill.*

Form 287¼.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY.

Car No. Special Way Bill. Way Bill No.

Whose Car, from to . Date 189

This form must be used in all cases in billing Flour or Produce made from Wheat milled "in transit."

| Consignor. | Consignee and Destination. | No. of Pkgs. | Description of Articles. | Weight. | Rate. | Local Unpaid. | Adv. Charges. |
|---|---|---|---|---|---|---|---|

2 cars at 1:45 P. M., on Sunday, October 28, 1894, (the day of the fire).

It is shown beyond dispute that when the train in which these cars were found was taken by the Terminal Association on the Y track to be conveyed to the customary place of deposit, the way bills which accompanied the cars were retained by the Peoria Company, and were not delivered to the Terminal Association.

On the evening of October 28, 1894, there were many cars of the Peoria Company standing on the tracks set apart for its use as above stated, among them those of the present intervenors which had been delivered at the dates previously mentioned. The general character of the cars of the Peoria Company which were in the yard is shown by the fact that on that evening two trains of freight cars outward bound over the line of the Peoria Company were made up and taken by it and carried northward. On the same night, shortly after eleven o'clock, a fire broke out in the southeast corner of the transfer warehouse, extending over a portion of tracks 42 and 43, as above stated. The proof unquestionably establishes that this warehouse, as we have already stated, was filled with hay, loose and in bales; that the warehouse was open at both ends in such a way as to create imminent danger of the igniting of the hay by sparks from passing engines, and that such engines engaged in the work of handling cars were traveling backwards and forwards on the tracks in the vicinity of the warehouse. The dangerous character of the building, as used at the time of the fire, is well stated in the answer of the receiver, as "a veritable fire trap." No reasonable inference can be deduced from the proof other than that the fire was caused by the igniting of the hay from the sparks of a passing locomotive. That the perilous condition of the warehouse was known to the Terminal Association is beyond controversy, since it was shown that the warehouse was leased by that company to the corporation which had stored the hay therein, for the purpose of doing so. That knowledge of the hazardous use made of the building was also known to the Peoria Company is likewise true, as it is shown that the agent of the Peoria Company observed the situation

some time before the fire, and that such official called the attention of representatives of the Terminal Association to the insecurity arising therefrom.

The conflagration destroyed eighty-three cars and their contents. Of these, thirteen were admittedly chargeable to the Terminal Association, either because they had been so dealt with by the Terminal Association as to clearly make it responsible for them, or were cars of the Peoria Company, for which that company had delivered way bills to the Terminal Association for the further movement of such cars, whereby they admittedly passed into the control of the Terminal Company.

Of the remaining seventy cars belonging to the Peoria Company one was filled with outbound freight destined over that road; the others were cars which had come in over the track of the Peoria Company at various times, and had been placed in the yard under the circumstances already mentioned.

With the foregoing facts in mind, we pause in order to state the conflicting deductions which the parties claim should be drawn from them. We do this, because if what is asserted by each side be accurately defined, it will enable us in our further examination of the facts to restrict our inquiry alone to those matters which are necessarily pertinent.

The contentions of the Peoria Company, in every possible aspect, are embraced in three propositions, viz.:

1. That the barley in question was consigned to St. Louis, and therefore the obligation of that company was to carry to the terminus of its line and there deliver to the Terminal Association for the completion of the transit; and that having, prior to the fire, delivered to the Terminal Association at the end of the line of the Peoria road, the responsibility of the latter company to the owners of the merchandise had ceased.

2. That even if the shipment was to East St. Louis only, as the Peoria Company, when the merchandise arrived at the terminus of its road at that point, had delivered the cars to the Terminal Association, that association thereafter held them, not for the account of the Peoria Company, but for the owners, and that this delivery by which the Terminal Association came into possession of the cars for account of the owners, was

sanctioned by the custom of trade as to barley shipments, and was moreover shown to have been expressly authorized by the offer of proof and the stipulation in connection therewith, which, as we have shown in the statement of the case, took place on the hearing before the master prior to the time when the amended answers to the Peoria Company to the amended petitions in intervention had been filed.

3. That as by the custom of trade as to barley, it was shown that such merchandise on the completion of the carriage to East St. Louis was there to be held for an uncertain period to wait the convenience of the owners until direction had been by them given for further shipment, it followed that after the arrival of freight at East St. Louis it was there retained by whomsoever it was held, not as a carrier, but for the benefit of the owners and to aid them in the transaction of their business, as their bailee; and that the Peoria Company was hence not responsible as a carrier under any view, and under the proof was not liable as a warehouseman. In effect, all the contentions of the intervenor rest upon a denial of these propositions.

When the two first propositions above stated are duly weighed, it is seen that although in some respects they contain different elements, in effect they both must rest upon an identical predicate of fact; that is, that the merchandise in question had arrived at East St. Louis and been there delivered to the Terminal Association. This becomes obvious when it is seen that the first proposition asserts a non-liability of the Peoria Company, because as a connecting carrier it had delivered the merchandise to the Terminal Association for further transportation, and that the second proposition rests upon the assertion that on the arrival of the merchandise at East St. Louis it had been delivered to the Terminal Association, which was, under the custom of trade and the offer of proof and stipulation above referred to, the agent or bailee of the owners. The different character in which it is charged that the merchandise was delivered to the Terminal Association, as stated in the two propositions, does not obscure the fact that both propositions essentially depend upon an assumption of fact common to both, that is, the de-

livery of the merchandise to the Terminal Association on its arrival at East St. Louis.

In order to dispose of the two first propositions we come then to consider whether the cars containing the barley, on their arrival at East St. Louis, were delivered, in the legal import of that word, by the Peoria Company to the Terminal Association; and it is perhaps unnecessary to observe that the consideration of this premise of fact will serve completely to dispose of every argument based upon the custom of trade by which cars were held at East St. Louis, and the assumed agreement of the Terminal Association with barley dealers as embraced in the offer and stipulation made in relation therewith. In its best aspect, the custom of trade was simply that the barley be held at East St. Louis by the company in possession of the same until the consignee gave an order for the completion of the transit. And in any view, the offer of proof and stipulation manifested but an agreement that as to consignments of barley which were solicited, the Terminal Association would conform to the course of dealing, and would, when the barley came under its control and possession, not exact a charge for car service. But neither the course of business nor the assumed agreement of the Terminal Association could possibly subject that association to a liability for merchandise before it came into its possession, at a time when it was held for the consignees and subject to their order, by another and different corporation.

This leads us to determine what was the attitude of the respective parties, under the contract, to the freight trains of the Peoria Company which were taken by the switch engines of the Terminal Association and placed on the deposit tracks, set apart for the former company. The legal relation must depend upon the contract, as it is obvious that the Terminal Association was under no obligation, as a common carrier, to accept in train loads freight arriving over the Peoria road, with cars consigned to different points and over different connections, and to subject itself, as a common carrier, to the hazard of sorting out the cars contained in such trains, and this also without delivery to it of way bills showing the further destination of such cars. It is also equally obvious that under its duty as a com-

mon carrier the Terminal Association was under no obligation to allow the use of its yard for all the purposes of the Peoria Company, the handling of its incoming as well as its outgoing freight trains, whether of loaded or empty cars, and the furnishing of all the appliances necessary to do so; and especially to allow a given number of freight cars of the Peoria Company to occupy a designated portion of the yard of the Terminal Association for such time and under such circumstances as the Peoria Company might elect.

Before coming to consider the text of the contract, the circumstances surrounding the parties at the time it was made and the exigencies which caused it to be entered into are rightfully to be borne in mind as means of interpretation if ambiguity exists. We hence recall the facts to which we have previously referred. When the contract was executed, although the Terminal Association possessed extensive terminal facilities at East St. Louis, the Peoria Company had no means whatever for handling the freight business coming in or going out of East St. Louis over its main line. It had neither yards nor switches nor switch engines at East St. Louis, nor any of the appliances or instrumentalities essential to enable it, if it received freight inward or outward bound, to discharge its duty as a common carrier. The purpose of the contract then was to bestow upon the Peoria road the facilities it absolutely required. As the tracks in the yard which the Peoria Company acquired, to carry on its business, were therefore the only terminal facilities which that company had, where its incoming and outgoing freight cars were received, and where all its freight trains were made up, to hold that the yard so far as set aside was not that of the Peoria Company, would be but to say that the Terminal Association and the Peoria Company had been merged into one corporation for the purposes of all the terminal business of the Peoria Company, or that the Terminal Association had become a guarantor to the shippers of freight over the Peoria road for all losses occasioned by the Peoria Company for which it was liable as a common carrier.

We come to a specific examination of the text of the contract. The preamble which announces the intention of the parties

in entering into the contract clearly rebuts the construction that the terminal facilities which it was agreed should be afforded to the Peoria Company were to be enjoyed by that company without any responsibility whatever resting on it; in other words, that it was to have the facilities which were essential to discharge its duty as a carrier, but that the Terminal Association was to bear all the risk of such enjoyment. This results since the preamble recites that the Terminal Association undertakes "to give the party of the second part," (the Peoria Company,) "terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions." Mark, the purpose is to give the Peoria Company "facilities," not to cause the Terminal Association to become responsible for the Peoria Company, whilst the latter was making use of the facilities given to it. The contract also expresses the purpose thus declared in the preamble—that is, that the facilities are to be furnished to the Peoria Company. The agreement is not that the Terminal Association will store cars for the Peoria Company, but that there is to be given to that company "storage room for a reasonable number of cars necessary to properly take care of and handle the business," (not of the Terminal Association, but) of the Peoria Company. The provision in the second paragraph is that "cars made 'bad order' by and during the making up and breaking up of trains of the party of the second part," (the Peoria Company,) "to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors." This makes the meaning yet clearer, since it results that during the making and breaking up of trains all the risk continued to be on the Peoria Company. And this is cogently enforced by the stipulation which immediately follows, that "all cars made 'bad order' *outside of the yards* set aside for the use of the party of the second part *shall be repaired by the party causing the damage.*" That is to say, the contract whilst casting the risk on the Peoria Company during the making and breaking up of its trains, and whilst its cars remained in the yard set apart for the Peoria Company, applied a different rule outside of the yard, when by

an order given to the Terminal Association to move the cars for further transit or delivery they actually came under its control. It is to be considered also that the compensation provided in favor of the Terminal Association by the contract is wholly incompatible with the construction that all the cars in the yard set apart for the Peoria Company were from the mere fact of their deposit there to be at the risk of the Terminal Association. Indeed, the fourth article expressly contemplated that the movement by the Terminal Association of the cars from the yard set apart for the Peoria Company should depend on the orders issued by the Peoria Company in the form of way bills, sinces it provides: "The party of the first part" (the Terminal Association) "to be governed in making its collections" (for cars moved) "by *instruction shown on billing to it* as to who should pay."

From this analysis of the contract, it results that the obligations which it imposed were entirely in accord with the conception naturally suggested by the general considerations to which we adverted before approaching the text. For it will be observed that the several provisions of the contract clearly subject the Peoria Company to all the risk resulting from those acts which that company was obliged to perform as a common carrier before it could effect delivery to a connecting carrier, and on the other hand imposed upon the Terminal Association the risk arising after the performance of such acts. That is, as by the contract the Peoria Company was furnished the facilities for the execution of its obligations as a common carrier, it was submitted to the risk incident to the performance by it of its own duties, and the Terminal Association was subjected to the risk which would likely devolve upon it by a delivery by the Peoria Company after the latter had performed its own duty as a common carrier.

The dealings and conduct of the parties in executing the contract dispel all question as to the proper interpretation to be given it. The proof beyond any doubt establishes that the way bills which we have described, and a sample of one of which we have reproduced, accompanied the freight cars from the initial point to the terminus of the Peoria main tracks. When

the Peoria train was taken charge of by the switch engine of the Terminal Association in order that it might be broken up and the cars composing the train be placed in the portion of the yard set apart for the Peoria, these way bills were retained by the latter company. While the Terminal Association kept a full record of the cars received on its Y tracks from the Peoria Company, and of the particular track on which each car was ultimately placed, presumably in order that it might readily locate a car when it received orders for further movement, as the way bills were retained by the Peoria, the Terminal Company knew officially nothing of the final destination of the cars and as to where they were to be forwarded. It therefore was in a position where it could not move them until it received forwarding instructions or new way bills from the Peoria Company. The proof is that only on receipt of such new instructions or way bills would the Terminal Association card and switch out the cars from the deposit tracks of the Peoria Company, and ultimately deliver them to connections or destinations as ordered by the Peoria. It is established by the evidence, substantially without conflict, that the cars as placed on the tracks in the yard set apart, as above stated, continued to remain there, and were not subject to be moved by the Terminal Association by the orders of the consignee, or any other person, until instructions to do so were given by the Peoria Company. This fact was testified to by the receiver himself and his employés. Thus receiver Bosworth said that when a train of the Peoria Company was broken up by the Terminal Association and the cars put upon the tracks commonly used for the business of the Peoria Company, the cars were not moved by the Terminal Association until instructions to do so were given by the receiver, and that they were subject to the order of the receiver to that extent, and the Terminal Association would not have recognized any instruction that the consignee would have made directly to it. The local agent at East St. Louis of the Peoria road also testified, respecting shipments of barley consigned to commission merchants whose address would be stated merely as "St. Louis," that "*there are a great many of the cars* we have orders for before they arrive, giving us designated

points for delivery." Such cars, however, would be placed on the deposit tracks referred to, until the agent of the Terminal Association had received from the agent of the Peoria road a new way bill or manifest for the freight, indicating the precise destination; while cars of barley consigned as stated, for delivery in St. Louis, for which no orders for further movement were given by the consignees prior to the arrival of the cars, would be allowed to remain on the deposit tracks awaiting instructions to the Peoria Company from the consignee, such freight being, "as a rule, held for the accommodation of the consignee." In substance, this witness further said:

In the case of barley shipments, the time of detention on the deposit tracts would vary from two hours to the same number of months, depending upon whether instructions from the consignees had been received prior to the arrival of the cars, or upon the time, following the deposit of the cars, when the consignee would answer the notice sent to him and direct as to delivery.

Stapleton, the chief clerk of the local agent at East St. Louis of the Peoria road, testified on the subject as follows:

"The cars would come in and be placed on the tracks in the Terminal Association yard wherever they saw fit; we would take the way bill and notify the consignee that we had a car numbered so and so loaded with barley; 'Where do you want it?' That is about the substance of the notice; and at such time as he got ready he would send this notice back, endorsed on the back a great many times, 'Send this car to Hines' Brewery,' or 'Send it to Highland or some other point.' Then we take and make out a way bill; take that to Mr. Felps and take his receipt.

* * * * * * * *

"With reference to Teichman's barley, we would sometimes have orders in our office, in advance of the arrival of the cars, what disposition to make of them; others we would n't. Those we did n't, when they came we sent Mr. Teichman notice that the cars were there, what shall we do with them? Virtually that is the substance; and he would, at his pleasure, advise us to send the car so and so, to Hines' Brewery, say. We would

make out a way bill for the car, consign it that way, and deliver it to Mr. Felps of the Terminal Association.

* * * * * * * *

"If a man would say 'Send this to Highland,' that would be instruction to the Vandalia, but the Terminal Association would handle it."

This testimony as to the relations existing between the parties and the necessity for instructions from the Peoria Company or new way bills before the Terminal Association was empowered to remove the cars standing in the designated yard is well illustrated by the proof, which shows that on October 28, 1894, the day of the fire, among the cars belonging to the Peoria Company, standing in said yard, there were twenty-four cars which had been received at various times, and that on that day for these twenty-four cars new way bills had been delivered by the Peoria Company to the Terminal Association and the cars were moved by the latter corporation, and therefore escaped the fire.

In passing, we note how completely this proof refutes the assumption predicated upon the assumed custom of trade, and the offer of proof and stipulation, since it demonstrates that up to the time of the giving of instructions to the Terminal Association no relation between the Terminal Association and the consignees of the barley had arisen, and that the order of the consignees given to the Terminal Association as to the further movement of the barley would have been wholly without effect and worthless, without the giving of an order by the Peoria Company to the Terminal Association on the subject.

In the course of the dealings between the roads a blank form of order for the movement of the cars was prepared by the Terminal Association, was delivered to the Peoria Company, and was used in the dealings for the purpose intended. One of these blanks was filled by an employé of the receiver during the course of the hearing before the master and was put in evidence. A copy will be found in the margin of the next page.[1]

It will be seen that the blank in question plainly manifests that prior to the giving of the order the car referred to in the document had not been transferred to the Terminal Association,

since it declares that the transfer to that company arises from the order which the paper contains. Another very conclusive fact is likewise shown beyond dispute. By the course of business followed by the Peoria Company that road, where it received cars from other roads, to be further transported, made to the carrier from whom such cars were received what are denominated "junction reports," that is, statements showing when the cars in question were delivered by the Peoria Company to another carrier, and hence passed from its control. Now these reports thus made, in the course of the business, embraced cars which had been taken and placed in the yard after the Peoria Company had issued the new instructions or way bills to the Terminal Association. Thus for the purpose of its dealings with the carrier from whom the cars were received, the Peoria Company, by its whole course of action, constantly avouched that the cars were in its possession and under its control while in the yard up to the time the order to move was given by it to the Terminal Association, yet the claim now asserted is that the cars had passed from the possession and control of the Peoria Company from the mere fact that they had been placed in the yard and before the order to move was given.

A yet further fact of great significance remains to be noticed. The Peoria Company carried one or more insurance policies upon property in its possession. In an affidavit to proofs of loss furnished by the receiver to the insurance companies, verified by agent Calvert, in December, 1894, it was stated:

"During the night of October 28, 1894, a fire occurred on the track of the Terminal Railway Association Company at East St Louis, State of Illinois, (*said tracks being used by the Chicago, Peoria and St. Louis Railway Company,*) and burned the cars, and wholly consumed the property freight *in transit* in said

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[1] Car No. 680. Terminal Railroad Association of St. Louis.
C., M. & St. P. Manifest of freight transferred.
From C. P. & St. L. R. R. To Eads R. R. Oct. 10, 1894.

| Consignor. | Consignee & destination. | Description. | Weight. | Charges. |
|---|---|---|---|---|
| C. M. & St. P. Wykoff. | Teichman Com. Co. 16th St. & Union depot. St. Louis, Mo. | Barley. | 30,000. | $51.00 |

cars, as set forth in statements attached hereto, and forming a part of this proof of loss." [Italics ours.]

The statement attached as part of the proofs of loss embraced the property, the value of which was subsequently demanded in the intervention proceedings. The proof of loss, while enumerating the claim of the Chicago, Milwaukee and St. Paul Railway for thirty-eight of its cars, which had been destroyed, however, contained no reference to seventeen of the cars of that company which had been but partially damaged and were repaired by the receiver without any intimation to the Milwaukee Company that the receiver was not legally required to bear such expense, although, as between the Terminal Association and the receiver, the latter claimed that the former was ultimately liable for such damage.

Concluding that at the date of the fire the merchandise in question had not been delivered by the Peoria Company and was in contemplation of law within its possession and control, the two first propositions are disposed of, and it remains only to consider the third, that is, even if the merchandise was in the possession of the Peoria Company at the time of the fire, by the custom of detaining the barley at East St. Louis for further orders, it was there held by the Peoria Company not as a carrier but as bailee, and under such relation the proof does not establish its liability. But the legal aspects of this proposition need not be considered, since it rests upon an assumption of fact which is unfounded, that the proof is insufficient to fix the responsibility of the Peoria Company, even although it merely held the merchandise as a bailee or warehouseman. We have seen that the amended interventions even under the hypothesis that the Peoria Company did not hold the goods at the time of the fire as a common carrier but as a warehouseman, plainly charged the liability of that company for the destruction of the property because of its negligence in and about the care of the goods. The facts which we have already stated as to the hazardous use of the warehouse and the actual knowledge of the Peoria Company of its condition, clearly sustains this latter ground, of the asserted liability of the Peoria Company. And even although the proof of actual knowledge by the Peoria Company, of the condition of the warehouse, be put out of view and weight be

given alone to the relation which that company bore to the tracks set apart for its use, and to its duty under the law to know the condition of the place where it stored the freight held by it, and the negligence which must be implied if no actual knowledge existed of the use made of the warehouse, from the presence of the officers and employés in that locality in the discharge of their duty, yet the liability of the Peoria Company in the capacity of warehouseman was clearly established by the proof.

Incidentally, it seems to be claimed in argument that the Huntting Elevator Company was not entitled to assert a right of recovery, because it was not the real party in interest. But we need not dwell upon this claim, as it depends upon the contention that the facts established a delivery of the merchandise to the consignees, a contention which has been fully disposed of by what has been previously said. And even if under the custom of trade by which the barley was retained by the Peoria Company at East St. Louis, it resulted that the Peoria Company became a bailee or warehouseman for the consignees, under such hypothesis the right of the Huntting Elevator Company to recover in the intervention proceedings is manifest. The proof shows that after the destruction of the barley by the fire in question, upon the demand of the consignees, the Huntting Elevator Company, in order to comply with its contracts of sale, replaced the damaged or destroyed barley. Under this state of facts, therefore, the Huntting Elevator Company became in effect the assignees of the consignees in respect to any claim which the latter might have asserted. Of course, nothing which we have said in the foregoing opinion or anything which will be contained in the decree which we shall render will preclude any right which may exist or be asserted by the Peoria Company against the Terminal Association for the loss occasioned by the fire in question.

*The decree of the Circuit Court of Appeals is reversed, and the decree of the Circuit Court of the United States for the Southern District of Illinois is affirmed.*

Mr. Justice Brewer did not hear the argument, and took no part in the decision of this cause.

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

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

No. 11. Argued October 24, 25, 1899.—Decided December 17, 1900.

This case having been argued with No. 12, *ante*, 415, at the same time and by the same counsel, the decision of the court in that case is followed in this.

THE case is stated in the opinion of the court.

*Mr. Burton Hanson* for petitioners.

*Mr. Bluford Wilson* for Bosworth.

MR. JUSTICE WHITE delivered the opinion of the court.

The decision of the controversy presented in this record is controlled by the principles announced in the opinion just delivered in *Huntting Elevator Company* v. *Bosworth*, No. 12 of this term. The claim of the railroad company was for the value of certain cars, admittedly owned by it, which had been received by the Peoria Company at various times on and prior to October 28, 1894, from a connecting carrier, upon shipments of barley from various points to commission merchants in St. Louis, the cars, except in one or two instances, being routed on the way bills to East St. Louis. The cars so taken by the Peoria Company were deposited on the tracks at East St. Louis set apart for the use of the Peoria Company under the circumstances disclosed in the opinion in the *Huntting Elevator Company* case, and, while awaiting orders from the consignees for further movement, were destroyed in the fire of October 28, 1894. The Circuit Court entered a decree in favor of the railroad company, but this decree was reversed by the Circuit Court of Appeals.

Opinion of the Court.

For the reasons stated in the opinion in the *Huntting Elevator Company* case

*The decree of the Circuit Court of Appeals must be reversed and the decree of the Circuit Court of the United States for the Southern District of Illinois affirmed.*

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## RAU *v.* BOSWORTH, RECEIVER.

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

No. 13. Argued October 24, 25, 1899.—Decided December 17, 1900.

This case having been argued with No. 12, *ante*, 415, at the same time, and by the same counsel, the decision of the court in that case is followed in this.

THE case is stated in the opinion of the court.

*Mr. Burton Hanson* for Rau.

*Mr. Bluford Wilson* for Bosworth.

MR. JUSTICE WHITE delivered the opinion of the court.

This is another of the claims in intervention which originated from the fire in a railroad yard at East St. Louis on the night of October 28, 1894, referred to in the opinion just delivered in *Huntting Elevator Company* v. *Bosworth*, No. 12 of this term. The claim of Rau was for the value of two cars of barley shipped from Wykoff, Minnesota, consigned to the Orthwein Grain Company, St. Louis, to be sold for the account of the consignor. The cars were delivered by a connecting carrier to the Peoria Company and were deposited on its tracks in a portion of the Terminal Association yards at East St. Louis on the

afternoon of October 25, 1894. While so held, awaiting orders for further movement, the cars and contents were destroyed by the fire in question.

The Circuit Court of Appeals reversed a decree which had been entered by the Circuit Court in favor of the claimant. Applying the principles declared in the opinion delivered in the *Huntting Elevator Company* case,

*The decree of the Circuit Court of Appeals must be reversed and the decree of the Circuit Court of the United States for the Southern District of Illinois affirmed.*

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## BOSWORTH *v.* CARR, RYDER & ENGLER COMPANY.

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

No. 14. Argued October 24, 25, 1899.—Decided December 17, 1900.

This case having been argued with No. 12, *ante*, 415, at the same time, and by the same counsel, the decision of the court in that case is followed in this.

THE case is stated in the opinion of the court.

*Mr. Bluford Wilson* for Bosworth.

*Mr. Burton Hanson* for the Carr, Ryder & Engler Company.

MR. JUSTICE WHITE delivered the opinion of the court.

The claim presented on this record was for the value of a quantity of manufactured doors, sash, blinds and moldings, shipped from Dubuque, Iowa, on October 20, 1894, and consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis. The car containing

the merchandise in question was received by the Peoria Company from the connecting carrier, and, at about three o'clock on the afternoon of October 28, 1894, was deposited in its portion of the yard of the Terminal Association at East St. Louis set apart for the use of the Peoria Company, under the agreement referred to in the opinion just delivered in *Huntting Elevator Company* v. *Bosworth*, No. 12 of this term. On the night of the date last mentioned the car and contents were destroyed by the same fire which consumed or damaged the property of the Huntting Elevator Company. Both of the courts below decreed the liability of the Peoria Company, the Court of Appeals declaring that "though in the physical possession, under its agreement with the receiver, of the car in which the goods were being transported, the Terminal Association had not become responsible as a carrier therefor, because it had not been put in possession of a way bill or other form of information on which it could proceed with the carriage." It necessarily results from the views expressed by us in the *Huntting Elevator Company* case that the courts below did not err in the decrees rendered by them upon this claim.

The decree of the Circuit Court of Appeals, affirming that of the Circuit Court, is accordingly

*Affirmed.*

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## REYMANN BREWING COMPANY *v.* BRISTER.

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

No. 76. Submitted November 7, 1900. — Decided December 17, 1900.

The statute of Ohio, known as the Dow law, 83 Ohio Laws, 157, which levies a tax upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors, carried on within the State, is not in conflict with the provisions of the Constitution of the United States when applied to a corporation of West Virginia, having its principal place of business in Wheeling in that State, and manufacturing there beer which it sends in barrels, or wooden cases containing several bottles each, to Ohio for sale,

or for storing in the original barrels, cases or bottles, to be sent out as stored to the State of Ohio for disposition and sale.

The Dow law is within the scope of the police power of the State, and does not discriminate between foreign and domestic dealers.

On January 13, 1898, the Reymann Brewing Company, a corporation of the State of West Virginia, with its principal office in the city of Wheeling, filed a bill of complaint in the Circuit Court of the United States for the Southern District of the State of Ohio, against Harry Brister, treasurer of the county of Jefferson, State of Ohio, seeking to restrain and enjoin the said Brister from retaining the possession of certain personal property belonging to the brewing company, which he had seized in enforcement of certain laws of the State of Ohio, which provide for the collection of a tax known as the "Dow tax."

The cause was submitted upon the bill, a general demurrer thereto, and a statement of facts agreed upon by the parties. The statement of facts was as follows:

"The Reymann Brewing Company, the complainant, is a corporation resident in and a citizen of the State of West Virginia, and owns and operates a brewery at Wheeling, West Virginia, where it manufactures a beverage of malt and intoxicating liquor commonly known as beer. It packs said beer in wooden barrels of various sizes and also in glass bottles, which bottles are packed in wooden boxes called cases, twenty-four quart bottles or thirty-six pint bottles being packed in each case.

"These barrels and cases are packed at the brewery of the Reymann Brewing Company, at Wheeling, in the State of West Virginia, there delivered to the common carrier, the railroad company, and shipped to Steubenville, in the county of Jefferson, in the State of Ohio, where they are received by Bert Meyers, who is employed by the Reymann Brewing Company in the capacity of soliciting agent, salesman and driver, and who calls on retail dealers in intoxicating liquors at their places of business in and about said city of Steubenville, and as such agent then and there solicits orders for and sells any number of the above-described packages desired. He then loads on the wagon owned by the Reymann Brewing Company the barrels or cases

above-described and delivers them to the purchasers in the original and unbroken packages in the same shape and condition as delivered to the common carrier at the brewery at Wheeling. Said agent also makes sales of said packages at and delivers the same from the place where stored at Steubenville. In no instance are any of the barrels or cases opened until after sold and delivered to the purchaser, and no change is made in any of the packages from the time they are packed at the brewery at Wheeling until delivered to the persons purchasing the same.

"Packages received by the said Bert Meyers at the railway station at Steubenville for which he has not received orders or which he has not already sold are stored in a room on the ground floor of a cold storage house in said city of Steubenville, for which the Reymann Brewing Company pays a regular monthly rental, and of which room the said brewing company has the exclusive use and possession. The packages not delivered directly from the railway station to purchasers are delivered from the said storage house or room upon orders solicited, as aforesaid, and upon sales then and there at said storage room made. The price of the beer thus delivered is collected in some instances from time to time by a collector, from the brewery at Wheeling, who calls on the purchasers and collects, and in other instances such collections are made by said agent, Bert Meyers, at the time of sale and delivery at said storage room.

"During the period for which the assessments hereinafter mentioned were made, the said Reymann Brewing Company carried on its beer business in said city of Steubenville in the same manner as herein described.

"The horses, harness and wagon described in the bill on which the defendant, Harry Brister, has levied, and which he has taken into his possession, are used by the Reymann Brewing Company solely in the matter of delivering to purchasers the packages above described.

"Two barrels and cases of beer described in the bill were packed at the brewery at Wheeling and shipped in the manner above described to Steubenville, Ohio, placed in the storeroom above mentioned, and were to be there sold and delivered in the manner above described, when they were levied on and

taken possession of by the defendant, Harry Brister. The defendant, Harry Brister, is treasurer of Jefferson County, in the State of Ohio, and as such treasurer did so levy upon and take into his possession and has advertised for sale the following personal property of the Reymann Brewing Company:

"Two horses (bay geldings), two horse covers, one set of double harness, one beer wagon, thirty-seven of said original and unbroken cases of beer containing quarts, four of said original and unbroken cases of beer containing pints, sixty-five original and unbroken barrels of beer containing one eighth size, one hundred and fourteen original and unbroken wooden barrels of beer of one quarter size, twenty-nine original and unbroken wooden barrels of beer of one half size; all of which he has done, as said treasurer of Jefferson County, Ohio, for the purpose of collecting from the said Reymann Brewing Company certain taxes or assessments and penalties, amounting to $873.60, and charged against said company on the tax duplicate in the office of said treasurer under and by virtue of a law of the State of Ohio entitled 'An act providing against the evils resulting from the traffic in intoxicating liquors,' passed May 14, 1886, (see Ohio Laws, vol. 83, p. 157,) as amended March 21, 1887, (see Ohio Laws, vol. 84, p. 224,) March 26, 1888, (see Ohio Laws, vol. 85, p. 117,) and February 20, 1896, (see Ohio Laws, vol. 92, p. 34,) known as the Dow law; which said levy and seizure were duly made, and which amount ($873.60) the said Reymann Brewing Company lawfully owes, if, under the circumstances in this statement set forth and the law herein referred to, said company or its business in said city of Steubenville, as herein described, should and may lawfully be assessed, as aforesaid.

"The defendant will, unless restrained by the court, insist on collecting future assessments of the complainant under said Dow law in the manner prescribed by said law—that is to say, by further seizures.

"It is agreed by both parties to the above-styled cause that the foregoing statement is a true statement of the facts, and that the said cause may be submitted to the court on said statement of facts agreed."

The Ohio statute referred to in the agreed statement of facts,

known as the "Dow law," and entitled "An act providing against the evils resulting from the traffic in intoxicating liquors," provides:

"SEC. 1. That upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors, there shall be assessed, yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation or copartnership engaged therein, and for each place where such business is carried on by or for such person, corporation or copartnership, the sum of three hundred and fifty dollars.

"SEC. 2. That said assessment, together with any increase thereof, as penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted, as of the fourth Monday of May each year, and shall be paid at the times provided for by law for the payment of taxes on real or personal property within the State, to wit: one half on or before the twentieth day of June, and one half on or before the twentieth day of December, of each year."

"SEC. 4. That if any person, corporation or copartnership shall refuse or neglect to pay the amount due from them under the provisions of this act within the time therein specified, the county treasurer shall thereupon forthwith make said amount due with all penalties thereon, and four per cent collection fees and costs, by distress and sale, as on execution, of any goods and chattels of such person, corporation or copartnership; he shall call at once at the place of business of each person, corporation or copartnership; and in case of the refusal to pay the amount due, he shall levy on the goods and chattels of such person, corporation and copartnership, wherever found in said county, or on the bar, fixtures or furniture, liquors, leasehold and other goods and chattels used in carrying on such business, which levy shall take precedence of any and all liens, mortgages, conveyances or incumbrances hereafter taken or had on such goods and chattels, so used in carrying on such business; nor shall any claim of property by any third person to such goods and chattels, so used in carrying on such business, avail against such levy so made by the treasurer, and no property, of any kind, of any person, corporation or copartner-

ship liable to pay the amount, penalty, interest and cost due under the provisions of this act, shall be exempt from said levy. The treasurer shall give notice of the time and sale of the personal property to be sold under this act, the same as in cases of the sale of personal property on execution: and all provisions of law applicable to sales of personal estate on execution shall be applicable to sales under this act, except as herein otherwise provided; and all moneys collected by him under this act shall be paid, after deducting his fees and costs, into the county treasury. In the event of the treasurer, under the levy provided for under this act, being unable to make the amount due thereunder, or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on, and the same shall be collected as other taxes and assessments on said premises."

"SEC. 8. The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

Subsequently the defendant, with leave of court, withdrew the demurrer, and the cause coming on to be heard was, after agreement, submitted to the court upon the bill and the agreed statement of facts. On February 25, 1899, a final judgment was entered dismissing the bill at the cost of the complainant. Thereupon an appeal was allowed to this court.

*Mr. J. Bernard Handlan* for appellant.

*Mr. Addison C. Lewis* for appellee.

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

Opinion of the Court.

By the first section of the statute of the State of Ohio, known as the "Dow law," it is provided "that upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors there shall be assessed yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation or copartnership engaged therein, and for each place where such business is carried on by or for such person, corporation or copartnership, the sum of three hundred and fifty dollars." Ohio Laws, vol. 92, p. 34.

The Reymann Brewing Company, a corporation of the State of West Virginia, whose property has been seized to enforce payment of such an assessment, alleges that, as respects such foreign corporation, the statute is void, because it discriminates in favor of manufacturers and brewers of beer who have their plants located within the State of Ohio as against those who have their plants located in other States, and because it constitutes, in its practical operation, a regulation of commerce between the States.

So far as the terms of the statute are concerned, they do not disclose any intention to discriminate between foreign and domestic dealers in intoxicating liquors, as the tax in question is to be assessed upon every person, corporation or copartnership engaged in the business of trafficking in such liquors. But it is contended that the effect of the legislation necessarily results in such a discrimination, because of the provisions of the eighth section of the statute, which is in the following words:

"The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

The effect of this is claimed to be that the domestic manufacturer may sell liquor, in quantities of one gallon or more, at the place of manufacture without being subjected to the tax,

and that thus he has an advantage over the foreign manufacturer, who can only sell, in Ohio, at some other place than the place of manufacture, and is thereby subjected to the tax. In other words, while the domestic manufacturer must pay the tax if he sells at other places than the place of manufacture, yet as he is declared not to be within the act in selling at the place of manufacture in quantities not less than one gallon at any one time, such a provision operates as an illegal discrimination against the foreign competitor, who must necessarily sell at places other than the place of manufacture.

Under this provision, the manufacturers, whether within or without the State, may sell at the manufactory and ship to any part of the State of Ohio, and the incidental disadvantage that the foreign manufacturer is under that if, instead of selling at the place of his plant, he wishes to establish a place within the State of Ohio, he is obliged to pay the tax, does not appear to arise out of any intention on the part of the state legislature to make a hostile discrimination against foreign manufacturers. If an Ohio corporation or copartnership should establish its place of manufacture in another State it would be subjected to the tax if it sold intoxicating liquor at a place within the State of Ohio; and if a foreign corporation should manufacture at a place within Ohio, it would sell its product, in quantities not less than one gallon, without being subjected to the tax.

A similar contention was disposed of by this court in *New York* v. *Roberts*, 171 U. S. 658, 662. In that case a corporation of the State of Michigan, and having its factory within that State, had a warehouse and store for the sale of its products in the city of New York. A statute of the State of New York enacted that "every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State, or in any other State or country and doing business in this State, except manufacturing or mining companies or corporations wholly engaged in carrying on manufacture or mining ores within this State, shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually," and that "the amount of capital stock which shall be the basis for

tax . . . in the case of every corporation, joint stock company and association, liable to taxation thereunder shall be the amount of capital stock employed within this State."

It was claimed that the Michigan corporation, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the State, was denied the equal protection of the law when subjected to a tax from which were exempted other corporations, foreign and domestic, which wholly manufactured the same class of goods within the State, and that such a tax was an unjust discrimination against the corporation, whose place of manufacture was in the State of Michigan. But this court held otherwise, saying:

"If the object of the law in question was to impose a tax upon products of other States, while exempting similar domestic goods from taxation, there might be reason to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that obviously such is not the purpose of this legislation. . . . It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State."

So, in the present case, the exemption is not confined to Ohio corporations or copartnerships, but extends as well to foreign corporations whose place of manufacturing is within the State of Ohio; and so, likewise the tax is imposed on Ohio corporations which manufacture goods in other States and establish places for their sale within the State of Ohio, or which, manufacturing within the State, establish places within the State distinct from the manufactory, where their liquors are sold and delivered.

In exempting sales in quantities exceeding one gallon at the place of manufacture, and in imposing the tax upon such sales

when made at places elsewhere, the legislature of Ohio was, in the exercise of its police power, aiming to restrict the evils of saloons, or places where liquors are drunk. By imposing the tax upon the latter, the law, to some extent, is calculated to lessen an acknowledged source of vice and disorder.

The Supreme Court of the State of Ohio, in construing the statute in question, has clearly pointed out the reasons that actuated the legislature in distinguishing between places where the liquors are manufactured and those where liquors are sold to be drunk on the premises. Thus in the case of *Adler* v. *Whitbeck*, 44 Ohio St. 539, 574, that court said: "It was for the legislature to determine the forms of the traffic that required to be regulated as a source of evil. It has in a measure drawn a line between a distillery and a brewery on the one hand and a saloon on the other. There is nothing unreal in the distinction. It is known by all men, and in one respect probably too well by many men. And unless absolute prohibition is resorted to no more practical distinction could be made."

It remains to consider whether the court below erred in finding, under the facts agreed upon, that the Reymann Brewing Company has established a place in the city of Steubenville, in the State of Ohio, where its beer was sold and delivered, and thus has become liable to the tax prescribed by the law.

It is sufficient to say that it is distinctly admitted that the brewing company not only ships its beer in barrels and cases, in filling orders received, and delivers it directly to the purchasers, (which sales and deliveries are not by the statute subjected to any tax,) but also maintains a storehouse in Steubenville, where it sells and delivers beer and collects payment. Such transactions constitute the brewing company a trafficker in intoxicating liquor having a place, other than the place of manufacture, where the traffic is carried on within the meaning of the law. And, of course, it is obvious that such liquors, sold and delivered within the State of Ohio, are within the provisions of the statute of the United States, known as the Wilson law, (Act of August 8, 1890, c. 728,) which provides that intoxicating liquors transported into any State for sale or storage therein shall be subject to the operation and effect of the laws of such

State, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquor had been produced in such State, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. 26 Stat. 313.

As this statute subjects intoxicating liquors imported into a State to the operation and effect of the laws of such State only when enacted in the exercise of its police powers, it is contended that such is not the character of the Dow law; that, as it contains no prohibition upon the manufacture or sale of intoxicating liquors, and only purports to regulate the trafficking therein, it is not a police measure.

As we have heretofore stated, the Supreme Court of Ohio has construed the law to aim at controlling and regulating sales in quantities less than one gallon in saloons or at places other than the place of manufacture, and to be, therefore, within the scope of the police power. We think that this view of the meaning and intent of the statute is consistent with its language, and, even if not bound by the construction put upon the statute by the state court when applying the provisions of the Wilson law, we do not hesitate to adopt it.

A similar contention was disposed of by this court in the case of *Vance* v. *Vandercook Co.*, 170 U. S. 438, 447, and where it was said:

"From the fact that the state laws permit the sale of liquor, subject to particular restrictions, and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the State. The plain purpose of the act of Congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming from other States, it would destroy its obvious meaning to construe it as permitting the state laws to attach to and control the sale only in case the States absolutely forbade sales of liquor and not to apply in case the States determined to restrict or regulate the same."

These views prevailed in the court below, where it was held that manufacturers of intoxicating liquors within and without the State may sell at the manufactory and ship to any part

of the State of Ohio, and may solicit orders for their goods in any part of the State to be shipped from the manufactory; but that if they establish places within the State, distinct from the manufactory, where their goods are to be stored, for the purposes of sale and delivery, and such goods are there sold and delivered, then they become traffickers within the meaning of the law and are liable to pay the tax. *Reymann Brewing Co.* v. *Brister*, 92 Fed. Rep. 28.

Accordingly the decree of the Circuit Court, dismissing the bill of complaint, is

*Affirmed.*

MR. JUSTICE HARLAN concurs in the result.

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## UNITED STATES *v.* MORRISON.

## UNITED STATES *v.* WOLFF.

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

Nos. 15, 16. Argued December 12, 1899.—Decided December 17, 1900.

These cases are concerned with the classification of certain articles imported by the respondents under the tariff act of 1890. Those imported by E. A. Morrison & Son were variously colored in imitation of "cat's eyes" or "tiger's eyes," and were strung. Others were colored in resemblance to the garnet, aqua marine, moonstone and topaz. Those imported by Wolff & Co. were in imitation of pearls, it is claimed, and were also strung. The contention is as to how they shall be classified or made dutiable—whether under paragraph 108 or under paragraph 454 of the act of 1890.

*Held*, that if the act of 1890 did not as specifically provide for beads as prior acts, glass beads as such were in the legislative mind and their various conditions contemplated. It was impossible to have in contemplation glass beads, loose, unthreaded and unstrung (445), and not have the exact opposite in contemplation—beads not loose, beads threaded and strung, and made provision for them. What provision? Were they to be dutiable at the same or at a higher rate than beads unthreaded or

unstrung? If at the same rate—if *all* beads were to be dutiable at the same rate, why have qualified any of them? Were some to be dutiable at one rate and some at another rate? If made of plain glass, were they to be dutiable at sixty per centum under paragraph 108; if tinted or made to the color of some precious stone, were they to be dutiable at ten per centum under paragraph 454? No reason is assigned for such discrimination, and we are not disposed to infer it. It is a more reasonable inference that beads threaded of all kinds were intended to be dutiable at a higher rate than beads unthreaded, and if there can be a choice of provisions that intention must determine. Indeed, admitting that either provision (paragraph 108 or paragraph 454) equally applied, the statute prescribed the rule to be that "if two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates."

THE case is stated in the opinion of the court.

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

*Mr. Albert Comstock* for Morrison and for Wolff.

MR. JUSTICE MCKENNA delivered the opinion of the court.

These cases are concerned with the classification of certain articles imported by the respondents under the tariff act of 1890. Those imported by E. A. Morrison & Son were variously colored in imitation of "cat's eyes" or "tiger's eyes," and were strung. Others were colored in resemblance to the garnet, aqua marine, moonstone and topaz. Those imported by Wolff & Co. were in imitation of pearls, it is claimed, and were also strung. The contention is as to how they shall be classified or made dutiable — whether under paragraph 108 or under paragraph 454 of the act of October 1, 1890, c. 1244, 26 Stat. 567.

Paragraph 108 provides:

"Thin blown glass, blown with or without a mold, including glass chimneys and all other manufactures of glass, or of which glass shall be the component material of chief value, not specially provided for in this act, sixty per centum ad valorem."

Paragraph 454 provides:

"Precious stones of all kinds, cut but not set, ten per centum ad valorem; if set, and not specially provided for in this act,

twenty-five per centum ad valorem. Imitations of precious stones composed of paste or glass not exceeding one inch in dimensions, not set, ten per centum ad valorem."

The board of appraisers decided that the merchandise was dutiable under paragraph 108, at sixty per cent. The decision was affirmed by the Circuit Court. 84 Fed. Rep. 444. The Circuit Court was reversed by the Circuit Court of Appeals on the appeal of the respondents. 55 U. S. App. 406. The cases are here on certiorari.

There was a dispute between counsel whether the articles represented by Exhibit 3 were involved in the pending appeal. That dispute seems to be settled by the concession of counsel for the United States that they are. At any rate, we do not consider the dispute important. We shall assume that all the articles are beads strung. The opinions of the Circuit Court and the Circuit Court of Appeals dealt with beads strung and their classification, and the same questions involved are here for consideration. At the taking of the testimony counsel for respondents made as to Exhibit 2 (so-called "cat's eyes") the following concession:

"The importer concedes that they were imported upon strings, and that the claim that they were entitled to entry as beads, loose, unthreaded or unstrung, is not insisted on."

And in the Court of Appeals it was stipulated among things (the stipulation is a part of the record here) "that the merchandise herein involved was in fact beads, and was in fact threaded or strung at the time of its importation, and was thereby excluded from classification under paragraph 445, act of October 1, 1890, and that unless this court shall hold that it was dutiable under paragraph 454 of the said act, as imitations of precious stones, etc., it was properly classified by the collector of customs under paragraph 108 of the said act as manufactures of glass not specially provided for."

We have therefore only to consider whether the merchandise represented by all of the exhibits was or was not imitations of precious stones. In passing upon and determining these alternatives, we do not consider it necessary to detail the testimony of the witnesses. If we should regard it literally, and concede,

that though conflicting, it preponderates in favor of the view that the articles imported were known in trade as imitations of precious stones, we do not consider that that alone should determine our judgment. If the testimony shows the articles to be imitations of precious stones, it also shows them to be beads, and it is stipulated that they were "in fact beads," and were "in fact threaded or strung" at the time of their importation. If they are entitled to a double designation, how are they to be classified? The answer would be easy and ready under prior tariff acts.

From an early day up to and including the act of 1883 beads had separate classification, and were dutiable at a higher rate than precious stones or imitations of them. Precious stones set and unset; imitations of them set or unset, and compositions of glass or paste when not set, were separately mentioned, and bore a different rate of duty from beads, and were not confounded with beads by resemblances, indeed not always by identity of material.

As early as 1858 the Treasury Department decided that genuine pearls, when imported strung on a thread to be used as beads for necklaces without further manufacture, were dutiable as beads. And later jet and coral necklaces were classed as beads and bead ornaments. Also glass balls and oval pieces of onyx, and pieces of glass or paste capable of being strung, were held to be beads against a claim of being imitations of precious stones.

A summary of the acts may be useful. In the act of 1832, under the description of "composition, wax or amber beads; all other beads, not otherwise enumerated," they were made dutiable at fifteen per cent ad valorem. In the act of 1842 they were dutiable at twenty-five per cent. In that of 1846 the description was "beads of amber, composition or wax, and all other beads, thirty per cent ad valorem." The description and duty were the same in the act of 1861. In the statutes enacted between 1861 and the Revised Statutes, beads or imitations of precious stones are not specifically mentioned. In the Revised Statutes beads specifically reappear, and were classified "all beads and bead ornaments except amber: fifty per cent

ad valorem." In the act of 1883 the classification was "beads and bead ornaments of all kinds except amber, fifty per cent ad valorem."

The act of 1890, which is now under consideration, does not contain in all respects the specific classification of the prior acts. The only classification of beads by name is in paragraph 445, which provides "that glass beads, loose, unthreaded or unstrung," shall be dutiable at ten per cent ad valorem. The opposite condition—beads not loose, not threaded or strung—is not specifically mentioned.

It cannot be said they ceased to exist with the passage of the act of 1890 or were unprovided for by it. They necessarily must be classified some other way than by name; but do they thereby lose their distinction, and, while they are "in fact beads threaded and strung at the time of importation," do they cease to be that for lower duties by being made to resemble something else—to make the application to the pending case, to resemble some precious stone? That its purpose was to impose lower duties cannot be said of the act of 1890, nor can it be contended that such result was attained by any change of its provisions in regard to precious stones or their imitations.

In prior acts the rates on beads were higher than the rates on precious stones or imitations of them. Precious stones bore no higher rate than ten per cent ad valorem. They, however, were not specifically mentioned in all acts. They were mentioned in the act of 1816, and were dutiable at seven and one half per cent. They were mentioned in the act of 1842, and were dutiable at ten per cent. Imitations were dutiable at the same rate. The description was on "gems, pearls or precious stones seven per centum ad valorem; on imitations thereof, and compositions of glass or paste . . . set or not set, seven and a half per centum ad valorem." There was no specific enumeration in the act of 1861 of precious stones or imitations of them, nor of the latter in any act until the publication of the Revised Statutes, where they appear as follows: "Precious stones and jewelry—diamonds, cameos, mosaics, gems, pearls, rubies, and other precious stones, when not set, ten per centum ad valorem;

when set in gold, silver, or other metal, or on imitations thereof and all other jewelry—twenty-five per centum ad valorem."

In the act of 1883 precious stones not set bore a duty of ten per cent. Imitations of precious stones were not specifically mentioned. They came under the provision for compositions of glass or paste, not set, and were dutiable at ten per cent. If set (and precious stones if set), were classified as jewelry, and were subject to a duty of twenty-five per cent.

In the act of 1890 pearls are not grouped, as in some prior acts, with the diamond and ruby as precious stones. They have a separate classification, and are dutiable, if not set, at ten per cent. Precious stones are more carefully distinguished than under the act of 1883. The provision for them is as follows:

454. Precious stones of all kinds, cut, but not set, ten per centum ad valorem; if set, and not specially provided for in this act, twenty-five per centum ad valorem.

Imitations of precious stones composed of paste or glass, not exceeding one inch in dimensions, not set, ten per centum ad valorem.

If set, they seem to become jewelry under paragraph 452, and dutiable at fifty per centum ad valorem.

From this review it is evident that in prior tariff acts beads were classified separately from imitations of precious stones, and were regarded as distinct from them and dutiable at a much higher rate. Can it be said that the act of 1890 suddenly changed a purpose so constant throughout previous legislation, and did not express the change but left it to be inferred from indefinite and ambiguous provisions—provisions which had not had that effect nor were intended to have that effect? We think not.

If it be said they were only precluded from that effect by the specific provisions for beads and that such provisions are not in the act of 1890, the answer is twofold (1) that there is provision which applies to and embraces them. They are undoubtedly "glass and manufactures of glass," and the adequacy of that description, which is the description of paragraph 108, to include them cannot be denied. An imitation of a precious stone may be a manufacture of glass, but the latter is not nec-

essarily an imitation of a precious stone, or, more narrowly, an imitation of a precious stone within the meaning of a tariff statute. Every resemblance would not make such imitation, and the suggestion of the counsel for the United States is not without its weight, that the capability and purpose of setting must be considered. The condition seems to have been contemplated by the statute, and in the testimony for the importers there was an attempt to satisfy it. Witnesses testified that while the articles were beads, they could be set and sometimes were set. Undoubtedly they could be fixed in metal, and so arranged as to conceal their perforations, but that was not their purpose or use. Their purpose and use were for hat or dress trimmings, or to ornament embroideries. It may be that in construing a tariff act it is the essential nature of the article, not the purpose of the importer, which determines its classification; but if color may be regarded to bring the article to the resemblance of a precious stone its other conditions may be regarded to bring it to the character of a bead—a manufacture of glass, a mere hat or dress trimming, or an ornament for embroidery.

(2) If the act of 1890 did not as specifically provide for beads as prior acts, glass beads as such were in the legislative mind and their various conditions contemplated. It was impossible to have in contemplation glass beads, loose, unthreaded and unstrung (445), and not have the exact opposite in contemplation —beads not loose, beads threaded and strung, and made provision for them. What provision? Were they to be dutiable at the same or at a higher rate than beads unthreaded or unstrung? If at the same rate—if *all* beads were to be dutiable at the same rate, why have qualified any of them? Were some to be dutiable at one rate and some at another rate? If made of plain glass, were they to be dutiable at sixty per centum under paragraph 108; if tinted or made to the color of some precious stone, were they to be dutiable at ten per centum under paragraph 454? No reason is assigned for such discrimination, and we are not disposed to infer it. It is a more reasonable inference that beads threaded of all kinds were intended to be dutiable at a higher rate than beads unthreaded, and if there can be a choice of provisions that intention must determine. Indeed, admitting

that either provision (paragraph 108 or paragraph 454) equally applied, the statute prescribed the rule to be that "if two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates." Section 5.

*The judgment of the Circuit Court of Appeals is reversed, and that of the Circuit Court is affirmed.*

MR. JUSTICE PECKHAM dissented.

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## ROTHSCHILD *v.* UNITED STATES.

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

No. 59. Argued October 31, November 1, 1900.—Decided December 17, 1900.

It is the meaning of the tariff act of July 24, 1897, to subject to different rates of duty the leaves of tobacco suitable for cigar wrappers and those not suitable when mixed in the same commercial bale or package.

It is the meaning of said act to subject to the duty of one dollar and eighty-five cents per pound the leaves of tobacco suitable for cigar wrappers intermingled in the bales or packages of tobacco (unstemmed) of the description which, in their entirety at the date of the enactment, were commercially known in this country as "filler tobacco," and bought and sold by that name, notwithstanding such leaves constitute less than fifteen per centum of the contents.

THIS case is here on certificate of the Court of Appeals of the Second Circuit. The case went to that court by appeal from the Circuit Court for the Southern District of New York which reversed a decision of the board of general appraisers. 87 Fed. Rep. 798.

The statement of facts made by the Circuit Court of Appeals is as follows:

"The appellant imported from San Domingo into the port of New York in September, 1897, certain bales of unstemmed leaf

Counsel.

tobacco, the product of San Domingo, in which bales there was mixed or packed with filler tobacco less than four per centum of leaves suitable for wrappers. The collector of the port assessed duty upon the leaves of filler tobacco in each bale at the rate of thirty-five cents per pound, and upon the leaves suitable for wrapper at one dollar and eighty-five cents per pound, assuming to do so conformably with the provisions of the tariff act of July 24, 1897, (Schedule F, 213, 214,) imposing duty on wrapper and filler tobacco as follows: 'Par. 213. Wrapper tobacco and filler tobacco when mixed or packed with more than fifteen per centum of wrapper tobacco, and all leaf tobacco the product of two or more countries or dependencies, when mixed or packed together, if unstemmed, one dollar and eighty-five cents per pound; if stemmed, two dollars and fifty cents per pound; filler tobacco not specially provided for in this act, if unstemmed, thirty-five cents per pound; if stemmed, fifty cents per pound.' 'Par. 214. The term wrapper tobacco as used in this act means that quality of leaf tobacco which is suitable for cigar wrappers, and the term filler tobacco means all other leaf tobacco.'"

The following questions are propounded:

"1. Is it the meaning of the tariff act of July 24, 1897, to subject to different rates of duty the leaves of tobacco suitable for cigar wrappers and those not suitable when mixed in the same commercial bale or package?

"2. Is it the meaning of said act to subject to the duty of one dollar and eighty-five cents per pound the leaves of tobacco suitable for cigar wrappers intermingled in the bales or packages of tobacco (unstemmed) of the description which, in their entirety at the date of the enactment, were commercially known in this country as 'filler tobacco,' and bought and sold by that name, notwithstanding such leaves constitute less than fifteen per centum of the contents?"

*Mr. E. R. Gunby* and *Mr. H. T. Cookinham* for Rothschild.

*Mr. John S. Wise* for the United States.

MR. JUSTICE MCKENNA, after stating the case, delivered the opinion of the court.

In paragraph 214, the statute defines wrapper tobacco to be that quality of leaf tobacco which is suitable for cigar wrappers, and filler tobacco to be all other leaf tobacco. Paraphrasing the paragraph and paragraph 214, Judge Lacombe classified the tobacco, and assigned duty as follows:

"A duty of 35 cents per pound shall he paid on (A) all leaf tobacco not suitable for cigar wrappers and not otherwise provided for.

"A duty of one dollar and eighty-five cents per pound shall be paid on—

"(A) All leaf tobacco of any kind, and wherever grown, which may be packed or mixed with any other leaf tobacco, which other tobacco is the product of any other country or dependency.

"(B) All leaf tobacco not suitable for cigar wrappers, which shall be found to be mixed or packed with more than fifteen per cent of tobacco which is suitable for cigar wrappers.

"(C) All leaf tobacco suitable for cigar wrappers."

To this classification the appellants oppose that of the board of appraisers, as follows:

"First. Wrapper tobacco.

"Second. Filler tobacco mixed or packed with more than 15 per cent of wrapper tobacco.

"Third. All other *filler* tobacco."

If the classification of Judge Lacombe is correct the questions certified should be answered in the affirmative; if the classification of the board of appraisers is correct they should be answered in the negative.

The language and arrangement of paragraph 213 supports Judge Lacombe. Regarding the language of the paragraph alone, it requires some ingenuity to create ambiguity. Dealing with wrapper tobacco, the paragraph provides, "wrapper tobacco . . . $1.85 per lb." That is all unstemmed wrapper tobacco. There is no limitation or exception whatever. Dealing with filler tobacco, the paragraph provides, "filler tobacco,

when mixed or packed with more than 15% of wrapper tobacco, if unstemmed, $1.85 per lb.; if stemmed, $2.00 per lb.; filler tobacco not specially provided for in this act, if unstemmed, 35 cts. per lb.; if stemmed, 50 cts. per lb." In other words, so mixed, and as it is stemmed or unstemmed, $2.00 or $1.85 per lb. Filler not so mixed, as it is stemmed or unstemmed, 50 cts. or 35 cts. per lb. But all wrapper tobacco is dutiable at least at $1.85. There is no condition except being stemmed or unstemmed that excepts any part of it or affects the rate upon it. And all filler tobacco is dutiable, but not all at the same rate. There is a condition which affects the rate. That condition is to be mixed with wrapper tobacco. The statute deals with each kind of tobacco separately. It does not qualify wrapper; it does qualify filler—mix wrapper with filler to the extent of more than 15 per cent and the wrapper does not become dutiable as filler—but filler becomes dutiable as wrapper—the mixture becomes in legal effect wrapper, and is dutiable at the same rate.

The appellants contest this interpretation, and contend that wrapper so mixed with filler, by the very terms of the statute escapes duty or would escape duty, "except that it falls under the last clause of the statute and is to be classified as filler tobacco, not specially provided for in this act." If this contention is justified, it would seem as if wrapper tobacco becomes filler even by name and the provisions of the statute are reversed, and their care to make wrapper dutiable and prevent and penalize evasions of the duty becomes a means of either exempting fifteen per cent of it from duty or making it dutiable only as filler.

Considerations outside of the statute are, however, urged as tests of its meaning, and two propositions are advanced which, it is claimed, Congress must be presumed to have known and to which it addressed its legislation.

These are, (1) that in commerce and among dealers in leaf tobacco the bale is the unit; (2) there is in bales of wrapper a certain amount of filler, and in filler bales there may be a small per cent of wrapper, but in trade it is not recognized. It is therefore contended (and we quote counsel) "that the words

'wrapper tobacco' in this section (213) have reference to the commercial terms 'wrapper tobacco,' meaning thereby bales of tobacco known as wrapper, although in every bale there is a quantity of tobacco not suitable for wrapper." That is not the tobacco as such, but the form of its importation determines the duty. The bale is the unit, and the unit must always be regarded. The different kinds of tobacco cannot be separated; they mingle in the unit bale as (the illustration is) different percentages of blood mingle in an animal, and by holding in mind that the bale is the unit, it will be seen that wrapper tobacco (fifteen per cent or less) cannot be "segregated and assessable as such any more logically than could the fifteen per cent of Holstein blood in an eighty-five per cent Ayreshire cow."

But the difficulty is not holding in mind the idea that the bale is the unit, but in accepting it. To accept it we should have to impose it upon the statute. It is certainly not there by expression, and it is not new. It was contended for under the act of 1883 and supported by about the same arguments upon which it is now attempted to be supported. It was rejected in *Falk* v. *Robertson*, 137 U. S. 225, in which the leaf and not the bale was decided to be the unit, and the act of 1883 dealt with percentages as much as the act of 1897. The act of 1883 provided that "leaf tobacco of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound."

But it is claimed that *Falk* v. *Robertson* is distinguishable from the case at the bar in that the different kinds of tobacco were not mingled, but were carefully separated and distinguishable in quantity and quality. Upon principle we think the difference does not distinguish the case from that at bar. The contention is besides answered by *Erhardt* v. *Schroeder*, 155 U. S. 124, 133. To the claims of the parties — one that the bale was the unit — the other that the different kinds of tobacco were, the court, by Mr. Justice Shiras, said:

"The proper answer to this question seems to depend upon the particular circumstances of a given case.

* * * * * * * *

"If, then, a bale or other separate and concrete quantity of leaf tobacco contained only leaves of such uniformity of character as to be, in their collective form, of one class, the bale, or other separate collection, would be the unit contemplated in the percentage and weight tests of paragraph 246. On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class."

It is conceded that in *Erhardt* v. *Schroeder* it was decided that the bale was not the unit, but it is claimed that the decision was based upon the fact that the "whole importation was wrapper, and it made no difference what the unit was as the result would be the same if the wrapper tobacco in every bale was eighty-five per cent." We think not. Tobacco of different kinds in one bale was respectively assessed at seventy-five cents and thirty-five cents a pound. The tobacco in the other bales was assessed at seventy-five cents a pound. The claim of the importers was that it all should have been assessed at thirty-five cents, and in passing on the diverse contentions of the parties it was decided that the statute did not make an inflexible unit. What the unit would be, it was said, would depend upon the "particular circumstances of a given case." And speaking of the bale as such unit the court used the language we have already quoted.

Succeeding the act of 1883 came the act of 1890, 26 Stat. c. 1244. Paragraph 242 provided as follows:

"Leaf tobacco, suitable for cigar wrappers, if not stemmed, $2 per lb. Provided, That if any portion of any tobacco imported in any bale, box or package, or in bulk, shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such bale, box or package, or bulk, shall be dutiable; if not stemmed, at $2 per lb.; if stemmed, at $2.75 per lb.

"All other tobacco in leaf unmanufactured and not stemmed, 35c. per lb.; if stemmed, 50c. per lb."

This language is seemingly very explicit as to the duties on the different kinds of tobacco, and very unambiguous as to the

effect of mingling them in bale, bag, package or bulk. And Circuit Judge Coxe pronounced it so in *Stachelberg et al.* v. *United States*, 72 Fed. Rep. 50.

We are, however, referred to an opinion of the board of appraisers, in the matter of the protest of Emilio Pons & Co., which, it is claimed, was an administrative interpretation of such paragraph, which not only determined its meaning but the meaning of the provisions of subsequent laws.

The importation passed upon was of Havana tobacco, and the conclusions of the board were very disputable even on the specific facts of that case. The board found there was well defined difference between Havana wrapper and filler and that in the best selected grades of each there was from five to fifteen per cent of the other, and that filler bales having less than fifteen per cent of wrapper were not recognized in trade as filler having any portion suitable for wrappers; over that percentage the bales were known as part wrapper, and also known as self-working bales. From these facts the board concluded that less than fifteen per cent was not an appreciable quantity, and made the following special finding of facts:

"(1) That the tobacco is semi-Vuelta, uniform in quality, length and color, and is of the kind known in trade as Havana filler tobacco, leaf, unstemmed.

"(2) That it contains from 10 to 15 per cent of leaves that can be used for wrappers for inferior cigars, but no portion thereof is of the quality known as wrapper tobacco.

"(3) That it is of a kind used exclusively by larger manufacturers of cigars as fillers for cigars.

"We hold that, within the meaning of the statute, there is no portion of the tobacco covered by this protest suitable for wrappers for cigars.

"The protest is sustained."

Counsel for the appellants say that the reasoning and spirit of this decision was accepted by the Treasury Department, but that its percentage was rejected. And well it might have been. The act which expressed in clear and definite words that the effect of mixing "any portion" of wrapper tobacco with filler tobacco in an importation was to make "the entire quantity"

dutiable as wrapper, was interpreted to admit at filler duty fifteen per cent of wrapper, a fraction less than was necessary to make a working bale, a bale with enough wrapper to use up the filler. This was a very liberal application of the maxim which expresses the disregard of the law for small things. If Congress did not intend to penalize an accidental or inevitable mixing of some leaves of wrapper with filler, it certainly did not intend to defeat or weaken its legislation. Giving the bale as a unit, as contended for; giving a fraction less than fifteen per cent of its contents, though wrapper to be admitted at filler duty, how much wrapper would be otherwise imported?

However, the decision was rendered; how far was it a factor in determining the provisions of the act of August 27, 1894, (the Wilson act) and that of 1897, the act under consideration, must be passed upon.

Of the Wilson act we need only quote the following:

"Wrapper tobacco, unstemmed, imported in any bale, box, package or in bulk, $1.50 per lb.; if stemmed, $2.25 per lb.

"Filler tobacco, unstemmed, imported in any bale, box, package or in bulk, 35c. per lb. if stemmed 50c. per lb. Provided, that the term wrapper tobacco, whenever used in this act, shall be taken to mean the quality of leaf tobacco known commercially as wrapper tobacco.

"Provided further: That the term filler, whenever used in this act, shall be taken to mean all leaf tobacco unmanufactured, not commercially known as wrapper tobacco.

* * * * * * * *

"Provided further: That if any bale, box, package or bulk of leaf tobacco, of uniform quality, contains exceeding 15% thereof of leaves, suitable in color, fineness of texture and size for wrappers for cigars, then the entire contents of such bale, box, package or bulk shall be subject to the same duty as wrapper tobacco."

As it will be observed, the act was more circumstantial than the act of 1890. It defines wrapper tobacco as meaning that "quality of leaf tobacco *known commercially as wrapper.*" And filler to mean "all leaf tobacco unmanufactured, not *commercially known* as wrapper tobacco." It did not provide, as the act

of 1890 provided, if any portion of any tobacco imported be wrapper the entire quantity should be dutiable as wrapper. It fixed the wrapper which would have that effect at an amount exceeding fifteen per cent of leaves in any bale, box, package or bulk of leaf tobacco of *uniform quality* . . . *suitable* in *color*, fineness *of texture and size*, for cigars.

If anything can be inferred from the qualifications which we have put in italics as connecting the act with the decision of the board of appraisers in the *Pons* case the inference must be dropped as to the act of 1897. All those qualifications are omitted except that the quantity of wrapper tobacco in the importation which will affect with wrapper duty the filler with which it is mixed is retained. But it is retained in such context, as we have already said, so as not to exempt any wrapper tobacco from duty as such, though it may charge filler tobacco with wrapper duty. It would make this opinion too long to analyze the Wilson act. We are inclined to think it should be interpreted as we have interpreted the act of 1897. But if we concede the construction of the appellants, it can only come from the qualifying words we have indicated. If their presence in the Wilson act determines the construction contended for, their absence from the act of 1897 determines against the construction of the latter act contended for, as it is also determined against by the character of the act. It precludes the view that any wrapper tobacco is to be admitted to importation under filler duty. And why should it be? There is nothing in the trade conditions urged upon our consideration which requires it. The mixing of the tobacco which may accidentally or necessarily attend the manner of picking and packing is provided for, and the indulgence of the statute so clearly expressed and defined should not be extended to exempt any portion of either tobacco from its full duty by assuming or accepting the arbitrary idea that the statute addressed itself to bales of tobacco and not to the tobacco in the bales.

*We therefore answer the questions certified by the Circuit Court of Appeals in the affirmative.*

Counsel for Parties.

## LOEB *v.* COLUMBIA TOWNSHIP TRUSTEES.

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

No. 42. Argued April 27, 1900.—Decided December 10, 1900.

In a case brought here from a Circuit Court, the opinion regularly filed below, and which has been annexed to and transmitted with the record, may be examined in order to ascertain, in cases like this, whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part was in contravention of the Constitution of the United States; but this must not be understood as saying that the opinion below may be examined in order to ascertain that which, under proper practice, should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.

If a claim is made in the Circuit Court that a state law is invalid under the Constitution of the United States, this court may review the judgment at the instance of the unsuccessful party.

As the bonds in suit in this case were executed by the defendant township, a corporation, and are payable to bearer, the present holder, being a citizen of a State different from that of which the township was a corporation, was entitled to sue upon them, without reference to the citizenship of any prior holder.

The Circuit Court erred in holding that the petition in this case made a case that brought it within the decision in *Norwood* v. *Baker*, 172 U. S. 269.

Even if the third section of the statute in question be stricken out, the petition makes a case entitling the plaintiff to a judgment against the township.

The contention that, independently of any question of Federal law, the statute of Ohio under which the bonds were issued was in violation of the constitution of that State in that, when requiring the defendant township to widen and extend the avenue in question the legislature exercised administrative, not legislative, powers, is not supported by the decisions of the Supreme Court of Ohio made prior to the issuing of these bonds.

THE case is stated in the opinion of the court.

*Mr. C. Hammond Avery* for plaintiff in error. *Mr. J. W. Warrington* and *Mr. H. D. Peck* were on his brief.

*Mr. Wallace Burch* for defendants in error. *Mr. Simeon M. Johnson* and *Mr. Oliver G. Bailey* were on his brief.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in the court below by Loeb, a citizen of Indiana, against the Trustees of Columbia Township in Hamilton County, Ohio.

The petition was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against the township. After argument the demurrer was sustained and, the plaintiff electing not to plead further, judgment was rendered for the defendant.

The suit is upon bonds issued by the township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits.

The questions to be considered relate to the jurisdiction of this court, the validity under the Constitution of the United States of an act of the General Assembly of Ohio in virtue of which the bonds in suit were issued, and the applicability in this case of certain decisions of the Supreme Court of the State rendered after such bonds were executed and delivered.

The pleadings and orders of court make the following case:

The petition alleged that on April 27, 1893, the General Assembly of Ohio passed an act by the first section of which the trustees of that township were authorized and *required* to widen and extend Williams avenue between certain points named and to appropriate and enter upon and hold any real estate within the township necessary for such purpose;

That by the second section of the act the township trustees were directed to "immediately make application to the probate court of the county as provided in section 2236 of the Revised Statutes of Ohio, and thereafter, as far as practicable, the proceedings shall conform to and be had under the provisions of sections 2236 to 2261, inclusive, of the Revised Statutes of Ohio;" and,

That by the fourth section it was provided that "for the purpose of raising money necessary to meet the expense of the improvement, the trustees of said township are hereby authorized and *directed* to issue the bonds of the township, payable in instalments or at intervals not exceeding in all the period of

six years, bearing interest at the rate of six per cent per annum, which bonds shall not be sold for less than their par value." 90 Ohio Local Laws, 251.

The petition did not set out the third section of the act. But as it was the duty of the Circuit Court to take notice of its provisions, and as it must be referred to in order to dispose of the questions arising on this record, it is here given in full:

"The trustees shall receive reasonable compensation for their services, which shall not exceed the sum of twenty-five dollars each, which, with all costs and expense of constructing said improvement, together with the interest on any bonds issued by the trustees for the same, shall be levied and assessed upon *each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned in section one hereof*, and shall be a lien from the date of the assessment upon the respective lots or parcels of lands assessed; said assessment shall be payable in five annual payments, and shall be paid to the township treasurer; and the option of paying his portion of such assessment in full within a period of twenty days from the date of the levy thereof shall be given to each of the property owners, but no notice to the property owners of such option shall be necessary. The township treasurer shall, on or before the second Monday of September, annually, certify all unpaid assessments to the county auditor, and the same shall be placed on the tax list, and shall be, with ten per cent penalty to cover interest and cost of collection, collected by the county treasurer in the same manner as other taxes are collected, and when collected he shall pay the same to the township treasurer; and all moneys received by the township treasurer on such assessments shall be applied to the payment of the bonds issued under this act, and for no other purpose; and for the purpose of enforcing the collection of the assessments so certified to him, the county treasurer shall have the same power and authority now allowed by law for the collection of state and county taxes." 90 Ohio Local Laws, 251.

It further appears from the petition that the township trustees appropriated land for the avenue in the manner provided in the act; and that for the purpose of raising the money necessary to

meet the expense of the appropriation the trustees, on or about September 29, 1894, duly executed and issued, in proper form and in accordance with the terms and provisions of the act, twenty-five bonds of Columbia Township of $500 each, five payable respectively in one, two, three, four and five years each, and one for $432 payable one year from date, all of the above date, and numbered consecutively from one to twenty-six inclusive, and all payable to the order of the bearer, at the office of the treasurer of the county, and bearing interest represented by coupons attached, at the rate of six per cent per annum, payable semi-annually, on the 29th days of March and September of each year; that on or about September, 1894, the bonds were sold by the township to a *bona fide* purchaser and the highest bidder for $13,325 and accrued interest; that on or about September 29, 1895, the trustees paid bonds Nos. 1, 2, 3, 4 and 5, then due, each for $500, and No. 26 for $432, and the interest coupons payable on the date last named on the entire issue of the twenty-six bonds; and that on March 29, 1896, the trustees paid the interest coupons, due on that day, on the twenty bonds remaining unpaid, including bonds numbered 6, 7, 8, 9 and 10.

The petition set out each of the bonds last named, and alleged that the plaintiff was the *bona fide* owner and holder for value of each of them, and had demanded payment of each in accordance with its terms, but that payment was refused.

The bonds, dated September 29, 1894, were signed by the trustees and attested by the seal of the township, and were alike in form. Each recited that it was "one of a series of 25 bonds of $500 each, issued by virtue of an act of the General Assembly of the State of Ohio, passed April 27, 1893, authorizing the trustees of Columbia Township to levy an assessment on the real estate abutting on the Williams avenue between Duck Creek road and Madison pike, and one bond for four hundred and thirty-two dollars, for the payment of twelve thousand nine hundred and thirty-two dollars, for widening and extending said avenue;" and that "by virtue of said act, the Trustees of Columbia Township hereby acknowledge said township indebted to the bearer in the sum of five hundred dol-

lars, which sum they, as trustees, and for their successors in office, promise to pay to the bearer hereof, upon the surrender of this bond, at the office of the treasurer of said township, on the 29th day of September, 1896, and also interest thereon at the rate of six per cent, per annum, payable semi-annually, on the 29th days of March and September of each year, during the continuance of this loan, on presentation to the township treasurer of the respective coupons hereto attached."

A judgment was asked for the amount of bonds 6 to 10 inclusive, with the interest thereon.

The record contains in full the opinion rendered and filed by the court when disposing of the demurrer. 91 Fed. Rep. 37. In that opinion it is expressly stated that the following points were made in argument in support of the demurrer:

1. That the petition did not show that the plaintiff was the original holder of the bonds sued on, and if he were an assignee or subsequent holder thereof he was not entitled to maintain the action, because the bonds were payable to bearer, and were not made by a corporation.

2. That act of the General Assembly, under and by virtue of which the bonds were issued, was in violation of the constitution of the State, and therefore the bonds were invalid.

3. That the act contravened the provisions of the Constitution of the United States, and therefore the bonds were invalid.

It appears from the opinion of the Circuit Court that the first and second of these points were ruled in favor of the plaintiff. But the third point was decided for the defendant, the court being of opinion that according to the principles laid down in *Norwood* v. *Baker*, 172 U. S. 269, the law under which the bonds sued on were issued was repugnant to that clause of the Fourteenth Amendment of the Constitution of the United States forbidding a State to deprive any person of property without due process of law. In disposing of the third point the court referred to the propositions made in its support as having been "claimed" by the township.

I. The first question to be considered is one of the jurisdiction of this court to proceed upon writ of error directly to the Circuit Court.

Opinion of the Court.

By the fifth section of the Circuit Court of Appeals Act of March 3, 1891, appeals or writs of error may be prosecuted to this court from the Circuit Courts "*in any case* in which the constitution or law of a State is *claimed* to be in contravention of the Constitution of the United States." 26 Stat. 826, 827–8, c. 517.

The petition shows that the parties are citizens of different States. It states no other ground of Federal jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the Circuit Court.

Is not this court, however, sufficiently informed by the record that the defendant township, under its general demurrer, "claimed" in the Circuit Court that the statute of Ohio by the authority of which the bonds were issued was in contravention of the Constitution of the United States?

It is said that even if the record shows such a claim to have been made it will not avail the plaintiff; for, it is argued, when the jurisdiction of the Circuit Court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the *defendant* of the repugnancy of a state law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the Circuit Court sustaining such claim. Such an interpretation of the fifth section is not justified by its words. Our right of review by the express words of the statute extends to "any case" of the kind specified in the fifth section. And the statute does not in terms exclude a case in which the Federal question therein was raised by the defendant. That section differs from section 709 of the Revised Statutes relating to the review by this court of the final judgment of the highest court of a State in this, that under the latter section we can review the final judgment of the state court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed *by him* under the Constitution or laws of the United States; whereas the Circuit Court of Appeals Act does not declare that the final judgment of a Circuit Court in a case in which there was a claim of the repugnancy of a state statute to the Consti-

tution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the Circuit Court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.

It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a state law is in contravention of the Constitution of the United States. If the Circuit Court had adjudged in this case that the township's claim of unconstitutionality was without merit and had given judgment for the plaintiff, can it be doubted for a moment that the township could have brought the case here directly from the Circuit Court upon writ of error? But if the township, upon a denial of its claim, could invoke our jurisdiction, as of right, upon what principle can the plaintiff be denied the like privilege if the state law upon which his action depended was, upon his adversary's claim, stricken down as void under the Constitution of the United States? Can the case, so far as the township is concerned, be regarded as belonging to the class which the act of Congress brings directly within the cognizance of this court, and yet not be regarded as a case of that class with respect to the plaintiff? The answer to these questions has already been indicated.

It is true that the plaintiff might have carried this case to the Circuit Court of Appeals, and a final judgment having been rendered in that court upon his writ of error, he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the Circuit Court; for, as said in *Robinson* v. *Caldwell*, 165 U. S. 359, 362, "it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals," although the latter

court, before disposing of a case which might have been brought here directly from the Circuit Court, may certify to this court questions or propositions as indicated in the sixth section of the above act. But the plaintiff was not bound to go to the Circuit Court of Appeals, and thereby cut himself off from the right to have this court declare whether the Circuit Court erred in holding that the state law upon which he relied for judgment was repugnant to the Constitution of the United States.

Cases in this court are cited which hold that where the plaintiff invokes the jurisdiction of the Circuit Court solely upon the ground of diverse citizenship, and where the claim of the invalidity of a state statute under the Constitution of the United States came from the defendant or arose after the filing of the petition or during the progress of the suit, then the judgment of the Circuit Court of Appeals is final within the meaning of the sixth section of the act of 1891, 26 Stat. 826, 828, c. 517, declaring that "the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." *Colorado Central Consolidation Mining Co.* v. *Turck*, 150 U. S. 138; *Borgmeyer* v. *Idler*, 159 U. S. 408, 414; *Ex parte Jones*, 164 U. S. 691, 693.

When the question is whether a judgment of the Circuit Court of Appeals is final in a particular case, it may well be that the jurisdiction of the Circuit Court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the Circuit Court is prescribed by the fifth section. Our jurisdiction depends only on the inquiry whether that judgment was in a case in which it was claimed that a state law was repugnant to the Constitution of the United States. In the present case the Circuit Court, upon the claim of one of the parties,

applied the Constitution to the case, and put the plaintiff out of court. *Cornell* v. *Green*, 163 U. S. 75. Any other interpretation of the statute is inconsistent with the equal right of the plaintiff with the defendant to come here, if unsuccessful, in a case embraced by the fifth section. Here the plaintiff could not have raised in his petition any question of a Federal right. He sued on the bonds held by him, and sought only a judgment for money. His cause of action was not Federal in its nature. He therefore could not have invoked the jurisdiction of the Circuit Court upon any ground except that of diverse citizenship. He could not have added to or enforced jurisdiction by anticipating the defence and alleging in his petition that the defendant township would in its answer claim that the state statute in question was in contravention of the Constitution of the United States; for that would have been matter of defence, and the allegation could, on motion, have been properly stricken from the petition. Nevertheless, the case is one in which there was a claim that a state law was repugnant to the Constitution of the United States.

The views expressed by us as to the scope of the act of 1891 are supported by *Holder* v. *Aultman*, 169 U. S. 81, 88. That was an action in the Circuit Court of the United States for the Eastern District of Michigan upon a written contract relating to agricultural machines, the plaintiff being a corporation of Ohio, and the defendant a corporation of Michigan. No question of a Federal nature appeared in the plaintiff's petition. The defendant, however, claimed that a certain statute of Michigan stood in the way of the plaintiff maintaining its action. This court said: "The Circuit Court, in giving judgment for the plaintiff, held that the contract was made in the State of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that State under the contract, was in conflict with the Constitution of the United States authorizing Congress to regulate interstate commerce. 68 Fed. Rep. 467. This was therefore a 'case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States,' and was rightly brought directly to this court by writ of error under the act of March 3,

1891, c. 517, § 5, 26 Stat. 828. Upon such writ of error, differing in those respects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn. Ins. Co.* v. *Austin*, 168 U. S. 685."

This brings us to the inquiry whether it can be assumed from the present record that a claim was made in the Circuit Court that the statute of the State under the authority of which the bonds in suit were issued was invalid under the Constitution of the United States. There can be but one answer to this question, if we may look to the opinion filed by the Circuit Court when it disposed of the demurrer. Although the demurrer was general in its nature, it referred to the petition and its allegations, and thus brought to the attention of the court the state enactment under which the bonds were issued; and it was certainly competent for the township to claim at the hearing of the demurrer that such enactment upon its face was repugnant to the Constitution of the United States and therefore void. Turning to the opinion of the Circuit Court, made part of the transcript, we find it expressly stated therein not only that such a claim was made by the township on the hearing of the demurrer, but that the judgment sustaining the demurrer and dismissing the petition was placed upon the sole ground that the claim that the state law contravened the Constitution of the United States was well made.

Is the opinion of the Circuit Court of no value to us when considering this case? May we not look to it for the purpose of ascertaining whether it was claimed that the state law contravened the Constitution of the United States? It is said that we cannot, and that view is supposed to be sustained by *England* v. *Gebhardt*, (1884) 112 U. S. 502, 505, 506, which was a writ of error to review a judgment of a Circuit Court remanding to the state court a case removed therefrom under section five of the act of March 3, 1875, c. 137, 18 Stat. 472. In the

petition for removal in that case it was averred that the parties to the suit were citizens of different States, and it was stated generally in the order remanding the case that there was a finding of the court that they were not. That finding was, of course, based upon facts brought to the attention of the court in the proper form. But the facts bearing upon the question of divers citizenship did not appear in a bill of exceptions, nor in an agreed statement of facts, nor in a special finding in the nature of a special verdict, nor in any other proper or appropriate mode. It, however, did appear from the record that certain affidavits copied into the transcript had been filed in the case. This court held that the affidavits formed no part of the record, saying: "The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. *Sargeant* v. *State Bank of Indiana*, 12 How. 371, 384; *Fisher* v. *Cockerell*, 5 Pet. 248, 254. This must be done by a bill of exceptions, or something which is equivalent. Here, however, that has not been done." The opinion thus concluded: "Neither is the opinion of the court a part of the record. Our Rule 8,[1] section 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below." That language is not to be taken too broadly or without reference to the particular case then before the court. What was said may undoubtedly be taken as an adjudication that the opinion of the court cannot, under our rule, be referred to for the purpose of ascertaining the evidence or the facts

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[1] 8.

WRIT OF ERROR, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which said judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

found below upon which the judgment was based; but not as precluding this court from looking into the opinion of the trial court for any purpose whatever, as for instance for the purpose of ascertaining whether either party claimed, in proper form, that a state law, upon which some of the issues depended, was in contravention of the Constitution of the United States. The principal if not the only object of requiring the opinion to be annexed to and transmitted to this court was that we might be informed of the grounds upon which the court below proceeded. Unless the rule had at least that object, why should it have been adopted?

In *United States* v. *Taylor*, 147 U. S. 695, 700, which came from a Circuit Court of the United States, this court said: "It was formerly held that, even in writs of error to a state court, the opinion of the court below was not a part of the record, *Williams* v. *Norris*, 12 Wheat. 117, 119; *Rector* v. *Ashley*, 6 Wall. 142; *Gibson* v. *Chouteau*, 8 Wall. 314; but the inconvenience of this rule became so great that it was subsequently changed, *Murdock* v. *Memphis*, 20 Wall. 590, and, finally, the eighth rule of this court was so modified, in 1873, as to require a copy of the opinion to be incorporated in the transcript."

In *Sayward* v. *Denny*, 158 U. S. 180, 181, in which the question was whether it sufficiently appeared from the record that the state court had denied any Federal right or immunity specially set up or claimed by the party who invoked our jurisdiction, the Chief Justice observed that certain propositions must be regarded as settled—one of which was that the arguments of counsel formed no part of the record, "though the opinions of the state courts are now made such by rule"—citing, among other cases, *United States* v. *Taylor*, above referred to.

The rule of our court referred to does not apply alone to cases brought here from the highest court of a State. It applies, in terms, to all cases brought to this court by writ of error or appeal. What therefore was said in the above cases as to the object and effect of the rule applies to records from a Circuit Court of the United States.

Some light is thrown upon this question by the decisions in cases from the highest courts of the States. In *Murdock* v.

*Memphis*, 20 Wall. 590, 633, it was said that in determining whether a Federal question was actually raised and decided in the state court, "this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' What was the record of a case was pretty well understood as a common-law phrase at the time that statute [act of 1789] was enacted. But the statutes of the State and new modes of proceedings in those courts have changed and confused the matter very much since that time." After observing that it was in reference to one of the necessities thus brought about that this court had long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana, it was said: "And though we have repeatedly decided that the opinions of other state courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question."

The subject was again considered in *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 486, which came from the Supreme Court of Illinois. After referring to what was said in *Murdock* v. *City of Memphis*, this court said: "We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the Supreme Court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the state court adversely to a right, title, or immunity under the Constitution or laws of the United States and specially set up and claimed by the party bringing the writ." It is true that in that case the court stated that any difficulty upon the subject was removed by the statutes of Illinois regulating that subject; but the decision was not placed upon that ground.

It has long been the practice of this court in cases coming from a state court to refer to its opinion made part of the record for the purpose of ascertaining whether any Federal right, specially set up or claimed, had been denied to the plaintiff in error, or whether the judgment rested upon any ground of

local law sufficient to dispose of the case without reference to any question of a Federal character. And we have done this without stopping to inquire whether there was any statute of the State requiring the opinion of the court to be filed in the case as part of the record.

For the reasons we have given it must be held that in a case brought here from a Circuit Court the opinion regularly filed below, and which has been annexed to and transmitted with the record, may be examined in order to ascertain, in cases like this, whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the Constitution of the United States. By this however we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.

The result is that this court has jurisdiction to review the judgment of the Circuit Court, and to determine every question properly arising in the case. We may therefore determine whether the court below erred in sustaining the demurrer to the petition.

II. One of the questions arising upon the record is whether the defendant township is a corporation within the meaning of that clause of the Judiciary Act of August 13, 1888, c. 866, 25 Stat. 433, 434, § 1, which excludes from the cognizance of a Circuit or District Court of the United States "any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." This question affects the jurisdiction of the Circuit Court to take cognizance of this case.

When the act of 1888 was passed it was the established law that a municipal corporation created under the laws of a State with power to sue and be sued and to incur obligations was to

be deemed a citizen of that State for purposes of suit by or against it in the courts of the United States. In *Cowles* v. *Mercer County*, 7 Wall. 118, 122, this court said: "It is enough for this case that we find the Board of Supervisors [of the county] to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution." *Lincoln County* v. *Luning*, 133 U. S. 529, 531; *McCoy* v. *Washington Co.*, 3 Wall. Jr. C. C. R. 381, 384; Dillon's Removal of Causes, § 105. We perceive nothing in that act indicating any purpose of Congress to exclude from the jurisdiction of the Circuit Courts of the United States suits by or against municipal corporations having authority by the laws creating them to sue or to incur liabilities in their corporate name. It must therefore be taken that the words "any corporation" in the act of 1888 include municipal as well as private corporations. And it is the settled law of Ohio that a township is suable on account of any liabilities incurred by it. *Harding* v. *Trustees of New Haven Township*, 3 Ohio, 227; *Trustees of Concord Township* v. *Miller*, 5 Ohio, 184; *Wilson* v. *Trustees of No. 16*, 8 Ohio, 174. Now by the statutes of Ohio the defendant township was constituted a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conferred upon it by law, and was made capable of suing and being sued, pleading and being impleaded. 1 Bates' Anno. Stat. Ohio, § 1376. It was created for purposes of local administration, and is a corporation. *Fairfield Township* v. *Ladd*, 26 Ohio St. 210, 213; *Lane* v. *State*, 39 Ohio St. 312. As therefore the bonds in suit were executed by the defendant township, a corporation, and are payable to bearer, the present holder, being a citizen of a State different from that of which the township was a corporation, was entitled to sue upon them without reference to the citizenship of any prior holder. *Thompson* v. *Perrine*, 106 U. S. 589, 592–3. This point was properly decided for the plaintiff.

III. Was the statute under which the bonds in suit were issued in violation of the Constitution of the United States?

Opinion of the Court.

The Circuit Court held that it was; and the plaintiff having elected to stand upon his petition, the action was dismissed.

Looking at all the provisions of the statute that court held that the case was embraced by *Norwood* v. *Baker*, 172 U. S. 269, 279, 297, and upon the authority of that case held that the bonds were issued in contravention of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law.

In *Norwood* v. *Baker* it was said that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation," and that the assessment involved in that case, made against abutting property, to pay the cost and expense of opening a street in a village, was illegal and void because made "under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefit accruing to the abutting property therefrom, to take private property for public use without compensation."

We are of opinion that the Circuit Court erred in holding that the petition made a case that necessarily brought it within the decision in *Norwood* v. *Baker* so far as the relief sought by the plaintiff was concerned.

We have seen that the first section of the act of 1893 authorized and required the improvement to be made, and directed the township to appropriate, enter upon and hold any real estate necessary for such purpose; that the second section directed that proceedings for condemnation be immediately taken in the probate court under specified sections of the Revised Statutes of Ohio; that the third section prescribed how the assessment to meet the cost of improvement shall be made, namely, "upon each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned;" and that a separate section, the fourth, directed bonds to be issued "for the purpose of raising money necessary to meet the expense of the improvement."

The second section of the act directed the trustees of the township to make immediate application to the probate court of the county, as provided in section 2236 of the Revised Statutes of Ohio, and declared that the proceedings thereafter, as far as practicable, should conform to the provisions of sections 2236 to 2261, inclusive. Those sections do not relate to modes of assessment, but only to the steps to be taken by a municipal corporation when it appropriates private property for public purposes. From other sections of those statutes it appears that when the municipal corporation appropriates or otherwise acquires lots or lands for the purpose of laying off, opening, extending, straightening or widening a street, alley or other public highway, or is possessed of property which it desires to improve for street purposes, the council may decline to assess the cost and expenses of such appropriation or acquisition, and of the improvement, upon the general tax list, in which case the same "shall be assessed upon all the taxable real and personal property in the corporation." § 2263. But by section 2264 it is provided that in all cases where an improvement of any kind is made of an existing street, alley or other public highway, and the council declines to assess the costs and expenses or any part thereof on the general tax list, the amount not so assessed shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improvements, *or* according to the value of the property assessed, *or* by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance, "setting forth specifically the lots and lands to be assessed, may determine before the improvement is made" —the assessments to be payable in one or more instalments, and at such times as the council might prescribe.

Now let it be supposed that the third section of the special act in question prescribed a rule by which all inquiry is precluded in respect of special benefits accruing to the adjoining property owners, and that an assessment under that section would be invalid under the decision in *Norwood* v. *Baker*, as taking private property for public use without just compensa

tion—upon which question we express no opinion—would it follow that the township would escape liability on the bonds? We think not. The fourth section of the act, authorizing and *directing* bonds to be issued for the purpose of raising the money necessary to meet the expenses of the improvement in question, may stand with sections one and two, even if section three were held to be void as prescribing an illegal mode of assessment. The power to issue bonds to raise the money, and the mode in which the township should raise the necessary sums to pay the bonds when due as well as the interest accruing thereon from time to time, are distinct and separable matters.

If the act under which the bonds were issued had not contained any provision whatever for an assessment to raise money to meet them, the township could not have repudiated its obligation to pay the bonds; for in the act would be found the command of the legislature to widen and extend Williams avenue, to immediately secure by proceedings in the probate court the land required for the proposed work, and to issue bonds to raise the money necessary to meet the expenses of the improvement. We ought not to hold the statute invalid if it failed to provide some legal mode of assessment to raise money to pay the bonds when they matured, with the interest accruing thereon. The statute, so far as the question of the power to issue bonds and put them on the market is concerned, may be carried into effect without reference to the third section. So that if that section were held void under *Norwood* v. *Baker*, the remaining sections, being valid, can stand and their provisions be executed.

There is some ground for saying that the legislature would not have passed the act without the third section; and that was the view expressed by the learned judge who tried the case below. But we do not think that such is so manifestly the case as to justify the courts in refusing to execute the valid parts of the statute when that can be done in harmony with the intention of the legislature to have the improvement in question made by the township and its cost met by issuing bonds. We think the case comes within *Treasurer* v. *Bank*, 47 Ohio St. 503, 523, in which the court said: "The question

arises, however, whether, if that portion of the section is declared wholly or in part unconstitutional and void, it may not result in invalidating the entire section. As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject matter, meaning or purpose, that the good cannot remain without the bad. The point is, not whether the parts are contained in the same section, for, the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other."

The relief asked and the only relief that could be granted in the present action, is a judgment for money. If the township should refuse to satisfy a judgment rendered against it, and if appropriate proceedings are then instituted to compel it to make an assessment to raise money sufficient to pay the bonds, the question will then arise whether the mode prescribed by the third section of the act of 1893 can be legally pursued; and if not, whether the laws of the State do not authorize the adoption of some other mode by which the defendant can be compelled to meet the obligations it assumed under the authority of the legislature of the State. All that we now decide is that, even if the third section of the state statute in question be stricken out as invalid, the petition makes a case entitling the plaintiff to a judgment against the township. Whether a judgment if rendered could be collected, without further legislation, depends upon considerations that need not now be examined.

IV. But it is contended that, independently of any question of Federal law, the statute of Ohio under which the bonds were issued was in violation of the constitution of that State in that when requiring the defendant township to widen and extend the avenue in question the legislature exercised administrative, not legislative powers. This contention is not supported by the de-

cisions of the Supreme Court of Ohio made prior to the issuing of these bonds. Those decisions were to the contrary.

In *Hibbs* v. *Commissioners*, 35 Ohio St. 458, 467, decided in 1880, the question was directly presented as to the validity under the constitution of Ohio of a statute authorizing and directing a particular county to levy a special tax, not to exceed a given amount, for the purpose of building, grading and gravelling or macadamizing a named public highway. On behalf of the county it was insisted that the legislature could not constitutionally compel it or the people to make an improvement of merely a local character, for the reason that the local authorities were made by the constitution the sole judges of the necessity of such an improvement. The Supreme Court of the State said: "The power of the legislature to pass a mandatory statute, requiring the commissioners to levy the tax and improve the road in question, is denied by the defendant. The only provision which the constitution contains with respect to the county commissioners is the following: 'The commissioners of counties, the trustees of townships, and similar boards, shall have power of local taxation as may be prescribed by law.' Art. 10, Sec. 7. Manifestly this is no limitation on the power of the General Assembly; and the inquiry therefore is as to the extent of such power. That it is only legislative is conceded, but that is undeniably a very broad power and includes, generally, the right to direct, *in invitum*, the construction and repair of public highways, and the levy of taxes to defray the necessary expenses thereof. That the power is liable to great abuse is denied by no one, but the responsibility, as well as the power, rests with the legislature."

But in *State* v. *Commissioners*, 54 Ohio St. 333, and *Hixson* v. *Burson*, 54 Ohio St. 470, decided in 1896, the principle announced in *Hibbs* v. *Commissioners* was declared to be unsound. In the first case the Supreme Court of Ohio held to be invalid an act of the legislature which, without the petition of any one interested, authorized certain local improvements to be made with the consent of the county commissioners, but which was so framed as to require the commissioners to proceed in the way and to the extent mapped out by the legislature. The court

said that the act was "an assumption of powers over the affairs of a county not possessed by the General Assembly—it is administrative in character and not legislative." "It is simply a usurpation of the powers heretofore always allowed to the proper administrative boards selected by the people of the localities concerned in the exercise of the right of local self-government." In the latter case the court expressly overruled the second syllabus in *Hibbs* v. *Commissioners*, (which under the statutes of Ohio is to be regarded as presenting the point adjudged,) stating that "an act providing for the improvement of a designated county road is local in its nature, and not in conflict with article 2, section 26, of the constitution, which provides that 'all laws of a general nature shall have a uniform operation throughout the State.'"

What, under these circumstances, was the duty of the Circuit Court? That court, speaking by Judge Thompson, held that its duty was to enforce the provisions of the constitution of Ohio as interpreted by the Supreme Court of that State at the time the bonds were issued, and not permit the contrary decisions, made after the bonds were issued, to have a retroactive effect. This was in accordance with the long-established doctrine of this court, to the effect that the question arising in a suit in a Federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the State when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation. Our decisions to that effect are so numerous that any further discussion of the question is unnecessary, and we need only cite some of the adjudged cases. *Rowan* v. *Runnels*, 5 How. 134; *Ohio Life Ins. and Trust Co.* v. *Debolt*, 16 How. 416, 432; *Olcott* v. *The Supervisors*, 16 Wall. 678; *Douglass* v. *County of Pike*, 101 U. S. 677; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 71; *County of Ralls* v. *Douglass*, 105 U. S. 728; *Green County* v. *Conness*, 109 U. S. 104, 105; *Anderson* v. *Santa Anna*, 116 U. S. 356, 361–2;

*German Savings Bank* v. *Franklin County*, 128 U. S. 526, 539; *Wade* v. *Travis County*, 174 U. S. 499, 510.

It should be here said that the doctrine of prior cases was not in anywise changed or impaired by the decision in *Central Land Company* v. *Laidley*, 159 U. S. 103, 111, in which it was held that, under the statute giving this court authority to review the judgment of the highest court of the State, we were without jurisdiction if the action of that court was impeached simply on the ground that it had not determined the rights of the plaintiff in error in accordance with its decisions in force when those rights accrued, but had followed its decisions of a contrary character rendered after his rights had accrued. This court held that a mere change of decision in the state court did not present a question of Federal right under that clause of the Constitution of the United States prohibiting a State from passing any law impairing the obligation of contracts — that the question of such impairment did not arise unless the judgment complained of gave effect to some provision of the state constitution or some enactment claimed by the defeated party to impair the obligation of the particular contract in question. As, however, the Circuit Courts of the United States are courts of "an independent jurisdiction in the administration of state laws, coördinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws," *Burgess* v. *Seligman*, 107 U. S. 20, 33, 34; *Folsom* v. *Ninety-six*, 159 U. S. 611, 624, 625, they may, in suits within their jurisdiction, properly hold, as in numerous cases this court has held, that the rights of parties arising under contracts not involving questions of a Federal nature are to be determined in accordance with the settled principles of local law as maintained by the highest court of the State at the time such rights accrued. The statutory provision that the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply, Rev. Stat. § 721, has not been construed as absolutely requiring conformity, in such cases, to decisions of the

state courts rendered after the rights of parties have accrued under the previous decisions of those courts of a contrary character.

It results that the Circuit Court did not err in overruling the point raised under the demurrer at the hearing below, to the effect that the state enactment was invalid under the constitution of the State.

The judgment is reversed and the cause remanded with directions for further proceedings consistent with law and this opinion.

*Reversed.*

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## UNITED STATES *v.* CHOCTAW NATION AND CHICKASAW NATION.

## WICHITA AND AFFILIATED BANDS OF INDIANS *v.* CHOCTAW NATION, CHICKASAW NATION AND UNITED STATES.

## CHOCTAW NATION AND CHICKASAW NATION *v.* UNITED STATES AND WICHITA AND AFFILIATED BANDS OF INDIANS.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 88, 89, 90. Argued March 7, 8, 9, 1900.—Decided December 10, 1900.

On the 4th day of June, 1891, the United States and the Wichita and Affiliated Bands of Indians entered into an agreement whereby the Indians ceded to the United States a tract of land which is described in the opinion of the court in this case, and the United States agreed in consideration thereof that out of the territory so ceded there should be allotted to each member of the Wichita and Affiliated Bands of Indians in the Indian Territory, native and adopted, one hundred and sixty acres of land in the manner and form described in the agreement. This agreement was ratified by the Indian Appropriations Act of March 2, 1895, which further conferred jurisdiction upon the Court of Claims, to hear and determine the claim of the Choctaws and the Chickasaws to a right, title

Counsel for Parties.

and interest in the lands so ceded, and to render judgment thereon, with a right of appeal to this court. Pursuant to that act this suit was brought. The Court of Claims, after reciting that the lands in dispute were acquired by the United States "*in trust* for the settlement of Indians thereon, and in trust and for the benefit of said claimant Indians when the aforesaid trust shall cease;" that "the Wichita and Affiliated Bands of Indians were by the United States located within the boundaries of the lands hereinbefore described;" that they "now number not more than one thousand and sixty persons;" and that the location of the Wichitas and Affiliated Bands within said boundaries was "for the purpose of affording them permanent settlement therein," adjudged that the lands in dispute had been acquired and were held by the United States in trust for the purpose of settling Indians thereon, and that whenever that purpose was abandoned as to the whole or any part thereof then all the lands not so devoted to Indian settlement should be held in trust by the United States for the Choctaw and Chickasaw Indians exclusively. It was also adjudged that the members of the Wichita and Affiliated Bands, not exceeding one thousand and sixty, were equitably entitled to one hundred and sixty acres of land each out of the lands in dispute and that the same should be set apart to them by the United States, due regard being had to any improvements made thereon by them respectively for their permanent settlement. It was further adjudged that the Choctaw and Chickasaw Nations were in law and equity entitled to and were the owners of such of the lands ceded to the United States by the Wichita and Affiliated Bands as remained, after satisfying the provisions for the Wichitas and Affiliated Bands, and that in the event of the sale thereof by the United States, the Indian plaintiffs should be entitled to and receive the proceeds of such sale. This judgment being brought here on appeal, this court, in its opinion, carefully reviewed all the legislation, and all the Indian treaties on the subject, and, as a result, *Held*, that for the reasons given the decree must be reversed with directions to dismiss the petition of the Choctaw and Chickasaw Nations, and to make a decree in behalf of the Wichita and Affiliated Bands of Indians fixing the amount of compensation to be made to them on account of such lands in the Wichita Reservation as are not needed in order to meet the requirements of the act of Congress of March 2, 1895, c. 188, and for such further proceedings as may be consistent with law and with this opinion.

THE case is stated in the opinion of the court.

*Mr. George T. Barnes* and *Mr. Jeremiah M. Wilson* for the Choctaw Nation.

*Mr. Philip Walker* and *Mr. Andrew A. Lipscomb* for the Wichita and Affiliated Bands of Indians. *Mr. Josiah M. Vale* and *Mr. William C. Shelley* were on their brief.

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

*Mr. Halbert E. Paine* for the Chickasaw Nation. *Mr. Robert L. Owen* filed a brief on behalf of the Choctaw Nation.

Mr. Justice Harlan delivered the opinion of the court.

On the 4th day of June, 1891, an agreement was entered into between commissioners on behalf of the United States and the Wichita and Affiliated Bands of Indians, in the Indian Territory, whereby those Indians did "cede, convey, transfer, relinquish, forever and absolutely, without any reservation whatever," to the United States "all their claim, title and interest of every kind and character" to the land embraced in the following boundary: "Commencing at a point in the middle of the main channel of the Washita [Wichita] River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the channel of the main Canadian River, thence down the middle of the channel of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning." 28 Stat. 876, 895, c. 188.

In consideration of that cession, it was agreed on behalf of the United States that out of the territory ceded there should be allotted to each member of the Wichita and Affiliated Bands of Indians in the Indian Territory, native and adopted, one hundred and sixty acres of land in the manner and form described in the agreement. It was provided that upon the allotments being made the titles should be held in trust for the allottees for a period of twenty-five years, in the manner and to the extent provided for in the act of Congress of February 8, 1887, 24 Stat. 388, 389, c. 119; and at the expiration of that period the titles should be conveyed in fee simple to the allottees, or their heirs, free from all incumbrances. 28 Stat. 876, 895, 896, c. 188.

This agreement recited that in addition to the allotments pro-

vided for, and the other benefits to be received, the Wichita and Affiliated Bands of Indians claimed and insisted "that further compensation, in money, should be made to them by the United States, for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments." And it was stipulated in the agreement that "the question as to what sum of money, if any, shall be paid to said Indians for such surplus lands shall be submitted to the Congress of the United States, the decision of Congress thereon to be final and binding upon said Indians; provided, if any sum of money shall be allowed by Congress for surplus lands it shall be subject to a reduction for each allotment of land that may be taken in excess of one thousand and sixty at that price per acre, if any, that may be allowed by Congress." Art. 5.

It was further stipulated in the agreement that "there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement." 28 Stat. 876, 896, c. 188.

This agreement of 1891 was ratified by the act of Congress known as the Indian Appropriation Act of March 2, 1895. 28 Stat. 876, 894, 897, c. 188.

By that act it was among other things provided:

"The compensation to be allowed in full for all Indian claims to these lands which may be sustained by said court in the scrip hereinafter provided for shall not exceed one dollar and twenty-five cents per acre for so much of said land as will not be required for allotment to the Indians as provided in the foregoing agreement, subject to such reduction as may be found necessary under Article 5 of said agreement: *Provided*, That no part of said sum shall be paid except as hereinafter provided."

"That whenever any of the lands acquired by this agreement shall, by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of under the general provisions of the homestead and town-site laws of the United States: *Provided*, That in addition to the

land-office fees prescribed by statute for such entries the entryman shall pay one dollar and twenty-five cents per acre for the land entered at the time of submitting his final proof: . . . *Provided*, That said lands shall be opened to settlement within one year after said allotments are made to the Indians.

"That sections 16 and 36, 13 and 33, of the lands hereby acquired, in each township, shall not be subject to entry, but shall be reserved, sections 16 and 36 for the use of the common schools, and sections 13 and 33 for university, agricultural college, normal schools and public buildings of the Territory and future State of Oklahoma; and in case either of said sections or parts thereof is lost to said Territory by reason of allotment under this act or otherwise the Governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss: *Provided*, That the United States shall pay the Indians for said reserved sections the same price as is paid for the lands not reserved.

"That as fast as the lands opened for settlement under this act are sold, the money received from such sales shall be deposited in the Treasury subject to the judgment of the court in the suit herein provided for, less such amount, not to exceed fifteen thousand dollars, as the Secretary of the Interior may find due Luther H. Pike, deceased, late delegate of said Indians, to be retained in the Treasury to the credit and subject to the drafts of the legal representative of said Luther H. Pike: *Provided*, That no part of said money shall be paid to said Indians until the question of title to the same is fully settled.

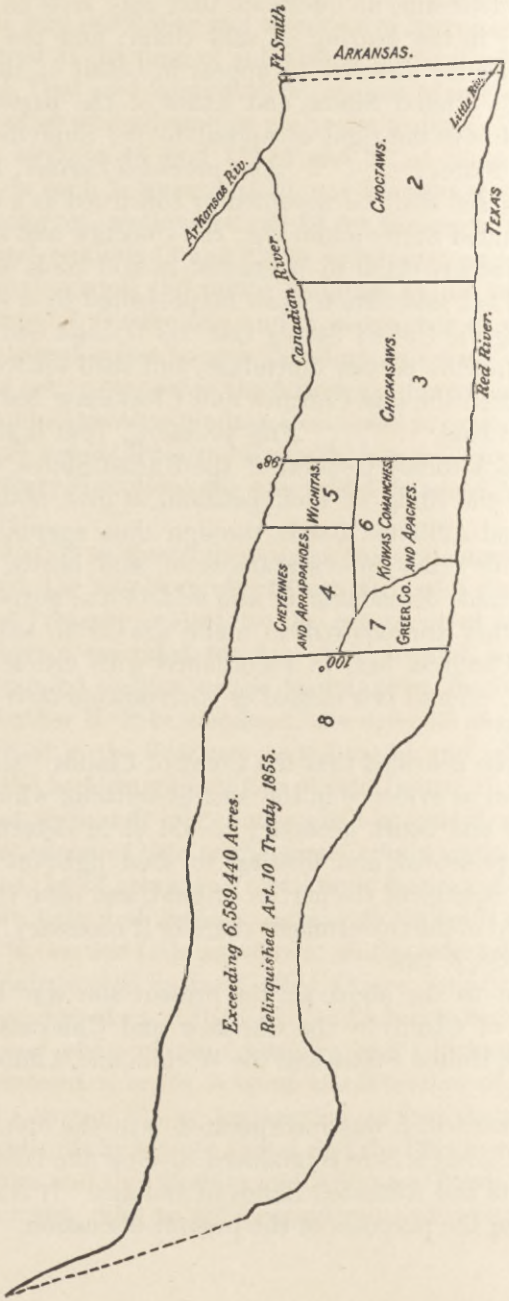
"That as the Choctaw and Chickasaw Nations claim to have some right, title and interest *in and to the lands ceded by the foregoing agreement* [the agreement above referred to], which claim is controverted by the United States, jurisdiction be and is hereby conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw Nations and the Wichita and Affiliated Bands of Indians in the premises, shall be fully considered and determined, and

to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney General is hereby directed to appear in behalf of the Government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States: . . . *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof. That said action shall be presented by a single petition making the United States and the Wichita and Affiliated Bands of Indians parties defendant, and shall set forth all the facts on which the said Choctaw and Chickasaw Nations claim title to said land. . . . *And provided*, That it shall be the duty of the Attorney General of the United States, within ten days after the filing of such petition, to give notice to said Wichita and Affiliated Bands through their agents, delegates, attorneys, or other representatives of said bands, that said bands are made defendants in said suit, of the purpose of said suit, that they are required to make answer to said petition, and that Congress has, in accordance with article 5 of said agreement, *adopted this method of determining their compensation, if any.*"

It was also provided that the Court of Claims "shall receive and consider as evidence in the suit everything which shall be deemed by said court necessary to aid it in determining the questions presented, and tending to shed light on the claim, rights and equities of the parties litigant, and issue rules on any Department of the Government therefor if necessary." 28 Stat. 876, 897, 898, c. 188.

Pursuant to the above act the present suit was brought in the Court of Claims by the Choctaw and Chickasaw Indians against the United States and the Wichita and Affiliated Bands of Indians.

A diagram which was incorporated into the opinion of the Court of Claims is here reproduced to show the land ceded by the Wichita and Affiliated Bands of Indians. It is sufficiently accurate for the purposes of the present discussion.


Ft. Smith
ARKANSAS.
Little Riv.
Ark. Kansas Riv.
CHOCTAWS.
2
TEXAS
Canadian River
CHICKASAWS.
3
Red River.
.98
WICHITAS.
5
6
KIOWAS COMANCHES
AND APACHES.
CHEYENNES
AND ARRAPAHOES.
4
7
GREER CO.
.001
8
Exceeding 6.589.440 Acres.
Relinquished Art. 10 Treaty 1855.

Tract 5, marked "Wichitas," is the particular land now in dispute, containing, it is stated, 743,257.19 acres; and, with tract 4, marked "Cheyennes and Arrappahoes," tract 6, marked "Kiowas, Comanches and Apaches," and tract 7, marked "Greer Co.," constituted what has been known as the "Leased District," containing, it is supposed, 7,713,239 acres. That District, it will be observed from the diagram, did not extend west of the 100th degree of west longitude.

It may be here remarked that according to the census report for 1890 the Choctaws then numbered between 14,000 and 15,000 people, of whom about 10,000 were Indians and about 4500 were of African descent; the Chickasaws about 7000, of whom about 3400 were Indians and 3700 were of African descent; and the Wichitas and Affiliated Bands, known as Caddoes, Wacoes, Towacanies, Keechies, Delawares and Ionies, about 1100 people, of whom not exceeding 175 were Wichitas and about one half Caddoes.

The decree of the Court of Claims recited that by the treaties between the United States and the Choctaw Nation or tribe of Indians, and between the United States and the Choctaw and Chickasaw Nations or tribes of Indians, the lands in dispute and other lands were acquired by the United States "*in trust* for the settlement of Indians thereon, and *in trust* and *for the benefit* of said claimant Indians when the aforesaid trust shall cease;" that "the Wichita and Affiliated Bands of Indians were by the United States located within the boundaries of the lands hereinbefore described;" that they "now number not more than one thousand and sixty persons;" and that the location of the Wichitas and Affiliated Bands within said boundaries was "for the purpose of affording them permanent settlement therein."

It was then adjudged—Mr. Justice Peele dissenting—that the lands in dispute had been acquired and were held by the United States in trust for the purpose of settling Indians thereon, and that whenever that purpose was abandoned as to the whole or any part thereof then all the lands not so devoted to Indian settlement should be held in trust by the United States for the Choctaw and Chickasaw Indians exclusively.

It was also adjudged and decreed that the members of the Wichita and Affiliated Bands, not exceeding one thousand and sixty, were equitably entitled to one hundred and sixty acres of land each out of the lands in dispute and that the same should be set apart to them by the United States, due regard being had to any improvements made thereon by them respectively for their permanent settlement.

It was further adjudged that the Choctaw and Chickasaw Nations were in law and equity entitled to and were the owners of such of the lands ceded to the United States by the Wichita and Affiliated Bands as remained, after satisfying the provisions for the Wichitas and Affiliated Bands, and that in the event of the sale thereof by the United States the Indian plaintiffs should be entitled to and receive the proceeds of such sale.

From this decree the United States, the Wichita and Affiliated Bands, and the Choctaw and Chickasaw Nations severally appealed. 34 C. Cl. 17.

The fundamental question to be determined on these appeals arises out of the treaty concluded April 28, 1866, between the United States and the Choctaw and Chickasaw Nations, 14 Stat. 769, relating to the lands constituting what has been known as the Leased District, north of Red River and between the 100th and 98th degrees of west longitude—the lands marked on the above map as tracts 4, 5, 6 and 7. By that treaty the Choctaws and the Chickasaws, in consideration of the sum of $300,000, *ceded* to the United States the territory known as the Leased District.

The Government insists that this cession was absolute and unaccompanied by any trust upon the termination or abandonment of which the Indians would be entitled either to the territory ceded or to the proceeds of its sale.

The Choctaw and Chickasaw Nations deny such to be the effect of the treaty of 1866, and insist that the United States took the lands *in trust* to be used only for the settlement of Indians, and that on the abandonment of such trust the lands reverted, or should be adjudged to have reverted, to the Choctaws and Chickasaws.

The Wichita and Affiliated Bands of Indians contend that

they are entitled to compensation in money for all the lands left in the territory in dispute after making the allotments provided for in the agreement of 1891, and that it should have been so adjudged.

The Choctaws also contend that they once owned, by transfer from the United States, a vast body of lands west of the Leased District, for which they have never received anything, and that the treaty of 1866 must be interpreted in the light of that fact. What connection such a fact, if it had any existence, could have with the construction of the treaty of 1866 it is not easy to perceive. But as the proposition just stated was the subject of much consideration in the Court of Claims, and as it is earnestly pressed upon our attention, we will first inquire whether the Choctaws ever owned any lands west of the Leased District, that is, west of the 100th degree of west longitude, and then bring into view the circumstances leading up to the treaty of 1866 which, it is argued, throw light on its interpretation. This being done, we will examine the provisions of that treaty so far as they bear upon the title to the particular lands in dispute.

I. By a treaty concluded August 24, 1818, an Indian tribe called the Quapaws, in consideration of certain promises and stipulations, did "cede and relinquish" to the United States all the lands within the following boundaries: "Beginning at the mouth of the Arkansaw River; thence extending up the Arkansaw to the Canadian Fork, and up the Canadian Fork *to its source;* thence south to Big Red River, and down the middle of that river to the Big Raft; thence, a direct line, so as to strike the Mississippi River, thirty leagues in a straight line, below the mouth of the Arkansaw; together with all their claims to lands east of the Mississippi and north of the Arkansaw River, included within the colored lines 1, 2 and 3 on the above map,[1] with the exception and reservation following, that is to say: the tract of country bounded as follows: Beginning at a point on the Arkansaw River, opposite the present post of Arkansaw, and running thence, a due southwest course, to the

[1] A map which accompanied the treaty of 1818.

Washita [Wichita] River; thence, up that river, to the Saline Fork; and up the Saline Fork to a point from whence a due north course would strike the Arkansaw River at the Little Rock; and thence, down the right bank of the Arkansaw, to the place of beginning; which said tract of land, last above designated and reserved, shall be surveyed and marked off, at the expense of the United States, as soon as the same can be done with convenience, and shall not be sold or disposed of, by the said Quapaw tribe or nation, to any individual whatever, nor to any State or nation, without the approbation of the United States first had and obtained." Art. 2, 7 Stat. 176.

Observe in this boundary the words "extending up the Arkansaw to the Canadian Fork, and up the Canadian Fork to its *source*." One of the questions much discussed is whether the Quapaws owned and really intended to cede lands situated as far west as the source of the Canadian Fork or river—that point being far west of the 100th degree of west longitude. Did the United States understand that it acquired by the Quapaw treaty of 1818 lands as far west at that time as the *source* of the Canadian Fork or river, which (as is now known, but was not known in 1818) rises in the northeastern part of New Mexico, 36° north latitude by 105° west longitude, while the Red River rises in the Staked Plains and arid table lands near the eastern border of New Mexico, about latitude 35° north and longitude 103° 10′ west? This question cannot well be determined without referring to other documents pertinent to the present inquiry.

By a treaty signed within a few months after the date of the treaty with the Quapaws, that is, on February 22, 1819, the United States and Spain agreed:

"Art. 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course of the Rio Roxo westward, *to the degree of longitude* 100 *west from London and* 23 *from Washington;*

then crossing the said Red River, and running thence, by a line *due north*, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But if the source of the Arkansas River shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea. . . . The two high contracting parties agree to cede and renounce all their rights, claims and pretensions to the territories described by the said line; that is to say; the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims and pretensions to the *territories lying west* and south of the above described line; and, in like manner, His Catholic Majesty cedes to said United States all his rights, claims and pretensions to any territories east and north of the said line; and, for himself, his heirs and successors, renounces all claim to the said territories forever." 8 Stat. 252, 254, 256.

We here remark that the words in this treaty, "then following the course of the Rio Roxo [Red River] westward, to the degree of longitude 100 west from London and 23 from Washington, then crossing the said Red River, and running thence, by a line due north, to the river Arkansas," indicate that in the judgment of the United States at the time the treaty with Spain was signed the lands west of the 100th degree of west longitude and south of the 42° parallel of latitude constituted or should constitute part of the possessions of that country.

The treaty with Spain, although signed in 1819, was not finally ratified until February 19, 1821. But between the signing of that treaty and its ratification, namely, on the 18th day of October, 1820, a treaty was concluded between the United States and the Choctaw Nation, whereby the latter ceded to the United States certain lands east of the Mississippi River. The main object of that treaty with the Choctaws was to exchange some of the lands then occupied by them for "a coun-

try beyond [west of] the Mississippi, where all, who live by hunting and will not work, may be collected and settled together." The second article of that treaty was in these words: "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi River situate between the Arkansas and Red Rivers, and bounded as follows: Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same *to its source;* thence *due south to the Red River;* thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning." 7 Stat. 210, 211.

Those who supervised the drawing of the treaty of 1820 evidently did not closely scrutinize the provisions of the treaty with Spain signed the year previous; for the line "up the same [Canadian Fork] to its source, thence due south to the Red River" was in conflict with the Spanish treaty of 1819 which fixed the dividing line, running north and south, between the United States and Spain on the 100th degree of west longitude. This is clear from the use of the words in the Choctaw treaty of 1820, "up the Arkansas to the Canadian Fork, and up the same to its source, thence due south to the Red River." Or, perhaps, those who drew the treaty of 1820 assumed without inquiry that the source of the Canadian River was not farther west than the 100th degree of west longitude, which the treaty of 1819 designated as the dividing line between the United States and Spain. As the westernmost point of the Canadian River or Fork is 105° west, and the westernmost point of Red River is about 103° 10′ west longitude, a line running up the Canadian Fork "to its source, thence due south to Red River," was an impossible line; for necessarily a line directly south from the actual source of the Canadian River would never strike Red River; while a line drawn from the actual source of the Canadian River to the westernmost point of Red River would cross

the Canadian River several times, striking Red River about longitude 103° 10′ west.

The difficulties arising from the conflicting description of boundaries as given in the Quapaw, Spanish and Choctaw treaties, above referred to, seem to have been recognized when the United States and the Choctaws, in execution, or in further recognition, of the treaty of 1820, made another treaty on the 27th of September, 1830. 7 Stat. 333, 334.

By the latter treaty it was provided:

"ART. 2. The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it; beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork, *if in the limits of the United States, or to those limits;* thence *due* south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present treaty shall be ratified.

"ART. 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States the entire country they own and possess east of the Mississippi River; and they agree to remove beyond the Mississippi River as early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one half of the whole number, shall depart during the falls of 1831 and 1832; the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the Government to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes.

"ART. 4. The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and

property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the United States shall forever secure said Choctaw Nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the Constitution, treaties and laws of the United States; and except such as may and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing, by their own laws, any white man who shall come into their nation and infringe any of their national regulations." 7 Stat. 333, 334.

It cannot be doubted that the purpose of Article 2 of the treaty of 1830 was to provide for a special grant to the Choctaws of the lands intended to be ceded to them by Article 2 of the treaty of 1820, and no others. It was as if the parties declared that the words in the treaty of 1820, "thence up the Arkansas to the Canadian Fork, and up the same to its source, thence due south to the Red River," should be held to mean the same as the words in the treaty of 1830, "thence to the source of the Canadian Fork, *if* in the limits of the United States, *or to those limits, thence* due south to Red River." The treaty of 1830 plainly imports the understanding of the parties at that time that whatever might be the wording of the treaty of 1820, the United States had not thereby intended to grant, and the Choctaws had not thereby expected to receive, any lands at or near the source of the Canadian Fork unless that point was within the limits of the United States — that both parties had in view at that time only lands within the limits of the United States.

As the treaty of 1820 provided that the Choctaws should have lands as far west as the source of the Canadian River, it is suggested that the United States could not legally modify that provision by the subsequent ratification in 1821 of the

treaty with Spain signed in 1819. But it was entirely competent for the parties, without any new or valuable consideration intervening, to rectify a mistake in the description of boundaries, and to agree, as in effect they did by the treaty of 1830, that the words "to the Canadian Fork, and up the same to its source," in the treaty of 1820, were to be interpreted as meaning "to the source of the Canadian Fork, if in the limits of the United States, or to those limits"—thus relieving the United States from any obligation to make a special grant to the Choctaws of lands which by the treaty with Spain, ratified in 1821, had been recognized as part of Spanish territory. After the treaty of 1830 the line "thence due south to the Red River" was to be taken as running from a point on the dividing line between the United States and Spain, the 100th degree of west longitude as established by the treaty of 1819–1821, *thence due* south to that river.

In confirmation of the view we have taken of the treaty of 1830, we may refer to the agreement made January 17, 1837, by which the Choctaws assented to the formation by the Chickasaws of a district "within the limits of *their country*." 11 Stat. 563. In the description of the boundaries of that district, which adjoins the district of the Choctaws on the west, it appears that one of the lines ran to a point ten or twelve miles above the mouth of the south fork of the Canadian River, "thence west along the main Canadian River to its source, *if* in the limits of the United States, *or to those limits;* and thence, due south to Red River, and down Red River to the beginning." Here was a repetition of the words of the treaty of 1830 and a distinct recognition of the fact that the Choctaw country was not to be regarded as embracing any lands not then, in 1837, within the limits of the United States. It cannot be contended that any lands west of the 100th degree of west longitude were within such limits as then established.

It is an important fact in this connection that prior to the treaty of 1830 the United States of America and the United Mexican States, by the treaty between them of January 12, 1828, recognized the boundaries of the respective countries to be as fixed by the treaty of 1819–1821. 8 Stat. 372, 374. And

this position was maintained; for by a treaty concluded in 1838 between the United States and the Republic of Texas, the latter recognized as binding upon it the treaty made in 1828 with the United Mexican States. Treaties and Conventions, (1776–1887) p. 1079. And in the settlement made in 1850 between the United States and the State of Texas the latter agreed that its boundary on the north should commence at the point at which *the meridian of* 100 *degrees west* from Greenwich is intersected by the parallel of 36° 30′ north latitude, and run from that point west to the meridian 103 degrees west from Greenwich, then due south to the 32d degree of north latitude, thence on that parallel to the Rio Bravo del Norte, and thence with the channel of that river to the Gulf of Mexico. 9 Stat. 446, c. 49; *United States* v. *Texas*, 162 U. S. 1, 39.

It is said that the United States made a gift to Texas of the lands west of the 100th degree of west longitude, but that it could not give away lands previously ceded by the treaty of 1820 to the Choctaws. We have already shown that the United States and the Choctaws substantially stipulated in the treaty of 1830 that the lands to be transferred to the Choctaws in consideration of the transfer by the Choctaws of lands east of the Mississippi River were only such as were within the limits of the United States. But we add, as a fact of significance, that in 1842 the special grant provided for by the treaty of 1830 to be made to the Choctaws described one of the lines of the lands granted to those Indians as "running thence to the source of the Canadian Fork, *if in the limits of the United States, or to those limits*, thence due south to the Red River." This grant was accepted by the Choctaws, and we find no evidence in the record tending to show that they at that time or at any time prior thereto claimed that the United States was under any obligation to transfer to them, or to compensate them for any lands west of the 100th degree of west longitude which the United States had recognized to be within the limits of Spain. There is no suggestion even in the petition in this case that the treaty of 1830 did not properly express the intention of the parties as to the lands to be transferred to the Choctaws.

II. Proceeding in our examination of the facts supposed to

throw light upon the meaning of the treaty of 1866, we find that in 1854, for the first time, the Choctaws, acting under some influence not explained by the record, insisted that their country extended west of the 100th degree of west longitude. In a letter dated July 11, 1854, and addressed to the Commissioner of Indian Affairs by Choctaw delegates, it was said: ". . . We shall therefore have to demand the immediate removal of the several bands of Texas and other Indians, who have settled within our limits; and if this demand be not complied with, we will remove them ourselves, using force if necessary. The Government must look to the consequences, whatever they may be. Our country extends west *to the headwaters of the Canadian, about the* 103*d degree of west longitude*, and we are prepared to maintain our rights to a boundary that far west by facts and evidence which cannot be disputed. In the compromise with Texas in 1850 that portion of our country west of the 100th degree of west longitude was assigned to that State, in direct and palpable violation of our rights. We must demand to be repossessed of this portion of our country; and if this is not done our people will take possession of it, and leave the Government to settle with Texas and the Indians upon it for such damages as they claim."

Under date of April 9, 1855, the United States agent for the Choctaws, acting under instructions from the Commissioner of Indian Affairs, asked the Choctaw delegates, then in Washington, for a conference—submitting to them certain interrogatories to be answered in writing—"for the purpose of ascertaining what arrangements, if any, can be made with them, having in view the adjustment of all differences between their tribe and the Chickasaw tribe of Indians, the Government of the United States, and the permanent settlement of the Wichita and other bands of Indians in the Choctaw country."

The Choctaw delegates, in reply, said among other things: "Respecting the Wichita and other bands of Indians, who have intruded themselves within the limits of our country, we have to remark they are, as you know, a nuisance, and we had far rather be rid of them altogether. In our communication to the acting Commissioner of Indian Affairs of the 11th of July

last, we demanded their removal as we had a right to do; but we are not aware that any order has been given on the subject. We have had it in contemplation to renew this demand, and if not complied with to remove them by force if necessary. We and our people have, however, as we have ever had, every disposition to comply with the policy and wishes of the Government; and if it be an object of importance to it to have these Indians accommodated with a home within the boundaries of our country, though such an arrangement would be greatly repugnant to our inclinations and feelings, we would consent to it on fair and reasonable terms, if it can be made a part of a just and equitable adjustment of all the matters involved in the existing controversy between the Choctaws and the Government; otherwise we could not take the serious responsibility of encountering the prejudices and opposition of our people to the measure."

The Chickasaw delegates, with whom a conference was also sought, said, under date of April 14, 1855: "In regard to the third point, they have only to say that, in conjunction with the Choctaws, they are willing to enter into an arrangement with the United States Government for the permanent settlement of the Wichita and other bands of Indians in the Choctaw country, upon terms just, fair and safe for both the Choctaws and Chickasaws."

Under date of April 21, 1855, the Secretary of the Interior wrote to the Commissioner of Indian Affairs: "If you have any plan for settlement of these difficulties, or if the Choctaws will submit a distinct offer, as the terms on which they will settle with the Chickasaws, and provide for the Wichitas and other Indians within the limits of the Choctaw country, the Department will give it prompt consideration, and with every disposition to award to them and the Chickasaws such degree of favor as may not be incompatible with the rights and interests of the United States."

On the 24th of April, 1855, the Choctaw delegates wrote to the Indian agent: "2. We will agree to provide, in the same convention or supplemental treaty, that the Government shall have the permanent use of a limited portion of the western

part of our country, for the accommodation of the Wichita and other bands of Indians, for a fair and just consideration, the amount to depend, of course, upon the extent of country required for the purpose. The Commissioner of Indian Affairs, in his letter, requires you to ascertain our terms for the use of that portion of our country west of the 98th degree of west longitude, and also for that west of the 99th degree. We are unwilling to lease, for the purpose mentioned, any portion of our country east of the 99th degree; but for the lease of that west of that degree we will consent, in behalf of our people, to take the sum of $400,000."

Two days later, April 26, 1855, the Commissioner of Indian Affairs thus wrote to the Indian agent: ". . . You will also ascertain upon what terms the Choctaws will arrange with the United States, for the use of their country west of 98° west longitude, for the Wichitas and such other bands of Indians as the Government may desire to settle permanently west of that degree of longitude, also upon what terms the right to settle said Indians west of 99° west longitude can be obtained, and report to this office with the least delay possible."

On the day last named the Indian agent sent a letter to the Commissioner, enclosing "a proposition for the lease of the Choctaw possessions west of the 99th degree of west longitude to the Government, for the permanent settlement of the Wichita and other bands of Indians within the Choctaw country."

Under date of April 27, 1855, the Secretary of the Interior wrote to the Commissioner of Indian Affairs: "As I have heretofore said, I have every disposition to act towards these Indians in a spirit of the utmost liberality consistent with the just rights and interests of the United States; and, all things considered, am disposed to think the proposition for the permanent accommodation of the Wichita and other Indians, and the amount demanded therefor, worthy your consideration; and you are authorized to enter into negotiations with the Choctaws on that basis. I think, however, that, notwithstanding their claim to an extent of country west of the 100th meridian of longitude is regarded by the Department as without any foundation in law or equity, *it might prevent further trou-*

*ble, in regard to it, to insert an article in the supplemental treaty or convention, now to be held, requiring the Choctaws to relinquish and abandon all right or claim to the same.*"

Under date of May 2, 1855, the Indian agent wrote to the Choctaw delegates: "In view of the probability that an arrangement will be effected between the Choctaw and Chickasaw tribes, restricting the western boundary of the 'Chickasaw district' to the 98° of west longitude, west from Greenwich, I desire to ascertain whether you will agree, the Chickasaws assenting, to *lease* the country between 98° and 100° west longitude and between Red and Canadian Rivers to the United States, for the permanent settlement of the Wichita and other bands of Indians within the territorial limits of the Choctaw Nation; and if so, upon what terms, *it being understood that the Choctaws shall relinquish and quitclaim, in favor of the United States, whatever interest they may have in the country lying west of the* 100° *of west longitude.*"

On the 3d of May, 1855, the Choctaw delegates wrote to the Indian agent: "In our communication to you of the 9th ultimo, we referred to the prejudices and opposition of our people to the location of the Indians referred to within the limits of our country, and our repugnance to such an arrangement; but we stated that we had every disposition to comply with the policy and wishes of the Government on the subject; and that, if the measure were one of importance to it, we would take the responsibility and consent to it, on fair and reasonable terms. In our subsequent communication of the 24th instant, we stated our unwillingness to lease, for that purpose, any portion of our country east of the 99° of west longitude, but that we would agree to lease that west of that degree, for the sum of four hundred thousand dollars. On further consideration of the subject, however, since the receipt of your letter, we have concluded, in the same spirit of accommodation, to agree to comply with the wishes of the Government by leasing to it the further portion of our country between the 98° and 100° of west longitude. The question of the total relinquishment of any portion of our territorial rights is one of even greater delicacy and difficulty. We have fully acquainted you with the grounds of our

claim to title *to the headwaters of the Canadian River, extending as far west as at least to the* 103° *of west longitude.* We believe our title to be perfectly valid and good; but as it is questioned, if not disputed, by the Government, west of the 100° of west longitude, and we are anxious to put at rest all questions of controversy with it, *we will relinquish and quitclaim to it our rights west of that degree of longitude, on fair and equitable terms.* The extent of country involved is large; we know it to be valuable, and we believe the acquisition of our title to it to be important to the Government; still we have no disposition to be exorbitant. As a consideration for the whole arrangement, we would consent to take eight hundred thousand dollars—one half thereof for the lease of the country between the 98° and 100° west longitude, and the other half for the relinquishment of our right west of the latter degree. The above proposition has reference to the arrangement as a whole. Were it to be confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should for obvious reasons feel constrained to ask not less than six hundred thousand dollars therefor."

On May 4, 1855, the Indian agent wrote to the Choctaw delegates: "If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude, (the Chickasaws assenting,) and couple with it a relinquishment of all claims west of 100° west longitude, the Government will agree to pay them $600,000."

Under date of June 7, 1855, the Commissioner of Indian Affairs wrote to the Acting Secretary of the Interior: ". . . After consultation with the Secretary of the Interior, and with his concurrence, Agent Cooper was instructed, verbally, to inform the delegation that if they would accept the sum of $600,000 for the lease of the country between the two degrees, *and the relinquishment west of the* 100°, the Government would give that sum. The delegation assented to this proposition, and agreed to take the sum of $600,000 for the lease of the territory within the two degrees mentioned, and the relinquishment of their claims to the country west of the 100th degree. The Chickasaw delegation also assented and agreed to the terms of

the lease, and the question was settled, as I supposed; but both delegations now contend that the United States shall be restricted, in the number of bands of Indians to be located in the country leased, to such as are now residing in it. With such a limitation on the use of the country, the lease would be of little value, and I have, therefore, declined to assent to the limitation which the Indians desire to impose, and have claimed that the Government must be left free to locate such Indians as it may desire within the ceded country. . . . The delegations propose, as a compromise, *that the Choctaws quitclaim to the country west of* 100°, and that they and the Chickasaws will *lease the country between* 99° *and* 100° for the permanent settlement of any Indians whom the Government may desire to locate therein, for the sum of $600,000."

Under date of June 14, 1855, the Choctaw delegates thus addressed the Commissioner of Indian Affairs: "The lease we had consented to agree to was a limited one, viz., for the permanent settlement, within the country leased, of the Wichita and several alien tribes and bands now in our country, the Government to have the control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the Government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with a discordant, restless and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us practically of our jurisdiction and necessarily exclude Choctaws and Chickasaws from settling within the district, if they so desired. Such an arrangement would be a virtual sale of that portion of our country, to which we could under no circumstances submit. Moreover the consideration offered would be entirely inadequate. We had agreed to relinquish our claims to territory west of the 100° of west longitude, embracing at least six and a half millions of acres. The district desired to be leased contains quite seven millions more; so that practically the Government would have acquired from us some thirteen and a half

millions of acres of land, for the certainly insufficient sum of six hundred thousand dollars."

We have made this extended reference to the correspondence between the Indians and the officers of the United States for the purpose, not only of showing that the Choctaws had no claim, legal or equitable, to territory west of the 100th degree of west longitude, but of indicating the situation and relations of the parties when the treaty of 1855, to be presently referred to, was concluded.

The facts, above stated, so far as they relate to lands west of the 100th degree of west longitude, may be thus summarized:

1. By the treaty of 1818 two of the boundary lines of the tract of country ceded by the Quapaws to the United States were described as extending "up the Arkansaw to the Canadian Fork, and up the Canadian Fork to its source; thence south to Big Red River."

2. By the treaty signed in 1819, the dividing line between the United States and Spain, running north from Red River, was established on the *100th* degree of west longitude.

3. In 1820, before the treaty of 1819 was ratified, the United States made a treaty with the Choctaw Nation ceding certain territory, two of the lines of which were described by the treaty of 1820 as extending "up the Arkansas to the Canadian Fork, and up the same *to its source;* thence due south to the Red River." But those were impossible lines, because the source of the Canadian River or Fork was at the 105th degree of west longitude, while the source of Red River was at the 103d degree of west longitude, and a line running due south from the source of the Canadian River would not strike Red River.

4. When the treaty of 1830 was made with the Choctaws the fact was recognized that the United States had apparently ceded to the Choctaws lands west of the 100th degree of west longitude, which by the previous treaty with Spain signed in 1819 and ratified in 1821 had been recognized as within Spanish territory. But that the United States might not appear to cede or agree to cede lands outside of its limits, the treaty of 1830 corrected or qualified the description in the treaty of 1820 of the line running up the Canadian Fork to its source by using

the words "if in the limits of the United States, or to those limits; thence due south to Red River." This change in the wording of the treaty of 1820 was recognized by the agreement between the Choctaws and Chickasaws of 1837, and was confirmed by the Choctaws when they accepted the special grant executed in 1842.

5. It does not appear that the Choctaws made any claim between 1830 and 1854 to have derived by cession from the United States any title to lands west of the dividing line between the United States and Spain, that is, west of the 100th degree of west longitude, or that the Choctaws complained during that period that any lands ceded to them by the treaty of 1820 were wrongfully or illegally recognized by the treaty of 1819 as belonging to Spain.

6. In 1854–'5 the Choctaws, for the first time, asserted title to lands west of the 100th degree of west longitude as far west at least as the 103d degree. This claim was disputed by the United States, and pronounced by the Secretary of the Interior to be wholly without any foundation in law or equity, although that officer deemed it wise that the new treaty then (1855) contemplated to be made should embrace a relinquishment by the Choctaws to the United States of any interest they might have in lands west of the 100th degree of west longitude.

7. The Choctaws expressed their willingness to make a treaty leasing to the United States certain territory in their country east of the 100th degree of west longitude, *and* relinquishing any and all claim to lands west of that degree.

III. Such was the situation when the parties entered upon negotiations resulting in another treaty. We allude to the treaty of June 22, 1855, upon some of the provisions of which much stress has been placed by the parties.

The preamble to that treaty recites:

"Whereas the political connection, heretofore existing between the Choctaw and Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and whereas the United States desire that the Choctaw Indians *shall relin-*

*quish all claim to any territory west of the* 100*th degree of west longitude*, and also to make provision for the permanent settlement, within the Choctaw country, of the Wichita and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to *lease*, on reasonable terms, to the United States that portion of their common territory which is west of the 98th degree of west longitude [that is, the territory between the 98th and 100th degree of west longitude]; and whereas the Choctaws contend that by a just and fair construction of the treaty of September 27, 1830, they are of right entitled to the net proceeds of the lands ceded by them to the United States, under said treaty, and have proposed that the question of their right to the same, together with the whole subject-matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said treaty, shall be referred to the Senate of the United States for final adjudication and adjustment; and whereas it is necessary, for the simplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied in one comprehensive instrument. Now, therefore," etc.

The boundaries of "the Choctaw and Chickasaw country," as established by Article 1 of this treaty, were as follows: "Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point *where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian, to the main Canadian River;* thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning;" and pursuant to the act of Congress approved May 28, 1830, 4 Stat. 411, c. 148, the United States forever secured and guaranteed the lands embraced within those limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe should have an equal and undivided interest in the whole, subject, however, to the condition that no part thereof

should ever be sold without the consent of both tribes; and that the land should revert to the United States if the Indians and their heirs became extinct, or abandoned the same.

It will be observed that "the Choctaw and Chickasaw country," as thus established, embraced no lands west of the 100th degree of west longitude.

Article 2 of the treaty established the boundary of the Chickasaw district—the district marked on the diagram heretofore made part of this opinion as tract 3.

By Article 3 it was provided that "the remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district, and their officers and people shall at all times have the right of safe conduct and free passage through the Chickasaw district." This territory is designated on the diagram as tract 2.

Article 4 provided that the government and laws then in operation, and not inconsistent with the treaty, should remain in full force within the limits of the Chickasaw district, until the Chickasaws should adopt a constitution.

Article 5 secured to the members of either tribe the right freely to settle within the jurisdiction of the other, and have all the rights, privileges and immunities of citizens thereof, except that no member of either tribe should participate in the funds belonging to the other tribe.

Article 6 provided for the surrender of fugitives from the justice of either tribe.

Article 7 secured to each tribe the unrestricted right of self-government, and, with certain exceptions not necessary to be here stated, full jurisdiction over persons and property within their respective limits.

Article 8 provided that in consideration of the foregoing stipulations, and immediately upon the ratification of the treaty, there should be paid to the Choctaws, in such manner as their national council should direct, out of the national fund of the Chickasaws held in trust by the United States, the sum of $150,000.

Articles 9 and 10 are the important parts of the treaty of

1855 so far as the present litigation is concerned. We therefore give them here in full:

"ART. 9. The Choctaw Indians do *hereby absolutely and forever quitclaim and relinquish* to the United States *all* their right, title and interest in and to any and *all lands west of the* 100th *degree of west longitude;* and the Choctaws and Chickasaws do hereby *lease* to the United States all that portion of their common territory west of the 98th degree of west longitude, for the *permanent settlement* of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government; *Provided, however*, the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

"ART. 10. *In consideration* of the foregoing relinquishment *and* lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct." 11 Stat. 611, 612, 613.

The treaty of 1855 contains other articles, but they do not affect the determination of the present issues, and therefore we need not advert to them.

The lands described in this treaty as having been leased to the United States constituted what is called the "Leased District," no part of which, as we have seen, was west of the 100th degree of west longitude.

There can be no doubt as to the meaning and scope of the treaty of 1855. In order simply to avoid future dispute, the United States desired the relinquishment by the Choctaw Nation

of all claim to any territory west of the 100th degree of west longitude, and, in addition, it obtained a lease of the territory between the 98th and 100th degrees of west longitude for the permanent settlement of the Wichita and certain other tribes or bands of Indians, the right being reserved to the Choctaws and Chickasaws to settle on the leased territory as theretofore. The consideration for the "relinquishment *and* lease" was $800,000. It is immaterial to inquire as to the value placed by the Indians or by the United States upon the relinquishment and lease respectively. The Indians accepted for both the aggregate amount named. It is idle therefore to contend that the Indians had any claim upon the United States, after the treaty of 1855, for lands west of the 100th degree of west longitude. The treaty closed that dispute forever, if it had not been closed by previous treaties and by the special grant of 1842 made pursuant to Article 2 of the treaty of 1830, and which, as we have said, estopped the Indians from claiming any lands not within the limits of the United States. As to the lands the control of which was acquired by the lease embodied in the treaty of 1855, it may be assumed that the United States did not then desire to obtain the fee, but took the lands for specifically defined objects, upon the accomplishment of which the Indians could insist as a condition of the lease.

After the treaty of 1855 it was not possible for the Choctaws to assert any claim to lands west of the 100th degree of west longitude, and as to the lands between that and the 98th degree of west longitude, the United States held them under a permanent lease given in 1855, which practically divested the Choctaws of all interest in the territory constituting the Leased District, except that they could settle in it if they so desired.

IV. Subsequently to the making of the treaty of 1855, and until the Civil War intervened, the relations between the United States and these Indians were, so far as the record discloses, entirely harmonious. But their relations changed when that war opened and the Choctaws and Chickasaws coöperated with the Confederate forces, making war upon Indians adhering to the United States. As early as February 7, 1861, the General Council of the Choctaw Nation passed resolutions declaring that

in the event of a permanent dissolution of the Union the natural affections, education, institutions and interests of its people indissolubly bound them to the Confederate States; Reb. Rec. Series I, Vol. 1, p. 682; and on the 25th of May, 1861, the legislature of the Chickasaws passed resolutions declaring that in the war then opening the Confederate States were their natural allies, and called upon the neighboring Indian nations to coöperate with them in the defence of the territory they inhabited "from Northern invasion by the Lincoln hordes and Kansas robbers." Reb. Rec. Series I, Vol. 3, p. 585.

The Civil War having ended, a council was held in September, 1865, at Fort Smith, Arkansas, which was attended by D. N. Cooley, Commissioner of Indian Affairs, and others named by the President. There were also in attendance representatives of the Choctaws, Chickasaws, Creeks, Cherokees, Seminoles, Osages, Senecas, Shawnees, Quapaws, Wyandottes, Wichitas and Comanches. What was said at that meeting by the commissioners on behalf of the United States is supposed to have some bearing upon the present issues. An address was made by Chairman Cooley to the Indian delegates, the substance of which was printed in a newspaper, and was as follows:

"Brothers: After considering your speeches made yesterday the commissioners have decided to make the following reply and statement of the policy of the Government. Brothers: We are instructed by the President to negotiate a treaty or treaties with any or all of the nations, tribes or bands of Indians in the Indian Territory, Kansas or of the plains west of the Indian Territory and Kansas. The following-named nations and tribes have by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, forfeited all right to annuities, lands and protection by the United States. The different nations and tribes having made treaties with the rebel government are as follows, viz.: The Creek Nation, July 10, 1861; Choctaws and Chickasaws, July 12, 1861; Seminoles, August 1, 1861; Shawnees, Delawares, Wichitas and affiliated tribes residing in leased territory, August 12, 1861; the Comanches of the Prairie, August 12, 1861; the Great Osages, October 2, 1861; the Senecas, Senecas and Shawnees

(Neosho Agency), October 4, 1861; the Quapaws, October 4, 1861; the Cherokees, October 7, 1861. By these nations having entered into treaties with the so-called Confederate States, and the rebellion being now ended, they are left without any treaty whatever, or treaty obligation for protection by the United States.

"Under the terms of the treaties with the United States and the law of Congress of July 5, 1862, all these nations and tribes forfeited and lost all their rights to annuities and lands. The President, however, does not desire to take advantage of or enforce the penalties for the unwise actions of these nations. The President is anxious to renew the relations which existed at the breaking out of the rebellion. We, as representatives of the President, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian Territory and others above named living west and north of the Indian Territory. Such treaties must contain substantially the following stipulations: 1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States. 2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States. 3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for. 4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation except in punishment of crime. 5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government. 6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated govern-

ment, after the plan proposed by the Senate of the United States in a bill for organizing the Indian Territory. 7. No white person except officers, agents and employés of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band.

"Brothers: You have now heard and understand what are the views and wishes of the President, and the commissioners, as they told you yesterday, will expect definite answers from each of you upon the questions submitted. As we said yesterday, we say again, that in any event those who have always been loyal, although their nations may have gone over to the enemy, will be liberally provided for and dealt with."

The committee on the part of the Choctaws and Chickasaws, in reply to the proposition submitted by the commissioners of the United States as the basis of new treaties, said:

"We are pleased to learn that you propose to renew your previous relations with us, and we are willing to go into negotiations for the making of a new treaty with the United States, and as a basis of this new treaty accept articles 1st and 7th. In reference to the requirements of the article 2d, we desire to say that we wish as far as possible to avoid coming in conflict with our red brethren, should any of them be so unfortunate as to get into conflict with the United States authorities. We are willing to guarantee all our influence in favor of peace in all its bearings with our red brethren, and will not object to any of our citizens volunteering in any war in which the United States may become involved, for the aiding of the United States. We are willing to enter into negotiations for the settlement of all the points contained in the 3d and 4th articles. On certain terms, on which we can doubtless agree with you, we are willing to admit the settlement of other tribes within our territory, as proposed in the 5th article. We are willing to submit the territorial bill referred to in the 6th article for the consideration of our respective general councils, and for this purpose request a copy of that bill for the principal chief of the Choctaw Nation and for the governor of the Chickasaw

Nation. We accept article 7th, and are willing to have the provisions thereof incorporated into the treaty. We are also willing to incorporate a provision that no individual shall be proscribed, or any act of forfeiture or confiscation passed against those who remain friendly to the United States, and that they shall enjoy equal privileges with other members of the nation."

Among the documents in the record is a draft of a treaty between the United States and the Choctaw and Chickasaw tribes which, it was stated, was submitted by the United States commissioners at the council held at Fort Smith. It is said in the opinion of the Court of Claims—and we think correctly—that this treaty was never agreed upon or executed. It need not therefore be set out here.

The reports, official and unofficial, of what was said and done before and at the Fort Smith council, show that the persons in attendance there were aware of the exact situation. They separated with the expectation or understanding that the matters then under consideration were to be further discussed and a conclusion reached in Washington in the spring of 1866, at which place delegates from the Indian tribes would attend.

In 1866 the negotiations between the United States and the Choctaw and Chickasaw Nations were resumed at Washington. The result was the treaty concluded April 28, 1866. 14 Stat. 769. The respective rights of the Choctaws and Chickasaws and of the United States, as involved in the present case, depend upon the construction of that treaty.

It is to be taken as beyond dispute that when the parties entered upon the negotiations resulting in that treaty, neither overlooked the fact that the Choctaws, by the treaty of 1855, had forever quitclaimed any claim they had to territory west of the 100th degree of west longitude. Nor could either have forgotten that the United States had, by the same treaty, acquired the control of the Leased District, without limit as to time, for the permanent settlement of certain Indians, excluding other Indians. Bearing these facts in mind, let us see what was effected by the treaty of 1866.

By Article 1, permanent peace and friendship were established between the United States and those nations—the Choctaws and

Chickasaws binding themselves respectively to use their influence and to make every exertion to induce Indians of the plains to maintain peaceful relations with each other, with other Indians, and with the United States.

By Article 2, the Choctaws and Chickasaws covenanted and agreed that neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties had been duly convicted in accordance with laws applicable to all members of the particular nation, should ever exist in those nations.

Article 3—the important part of that treaty—was in these words: "The Choctaws and the Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby *cede* to the United States *the territory west of the* 98° *of west longitude, known as the Leased District*, provided that the said *sum* shall be invested and held by the United States, at an interest not less that five per cent, *in trust* for the said nations, until the legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three fourths to the former and one fourth to the latter—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from the said nations respec-

tively. And should the said laws, rules and regulations not be made by the legislatures of said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

The Choctaws and Chickasaws further agreed in the same treaty (Art. 4) that "all negroes not otherwise disqualified or disabled shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair renumeration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon the Choctaws, Chickasaws and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree that while the said freedmen, now in the Choctaw and Chickasaw Nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules and regulations aforesaid the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid."

By Articles 30 and 43 it was provided:

"ART. 30. The Choctaw and Chickasaw Nations will receive into their respective districts *east* of the 98th degree of west longitude, in the proportion of one fourth in the Chickasaw and three fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw Nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow citizens, governed by the same laws, and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same or the proceeds thereof be divided per capita among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made as aforesaid by said Choctaws and Chickasaws; and the Choctaw and Chickasaw Nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw Nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws; and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty shall make their selections as therein provided, in the event of the making of the laws, rules and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections as therein provided, and the actual occupancy of such persons of African descent shall have the same effect in their behalf as the occupancies of the Choctaws and Chickasaws."

"ART. 43. The United States promise and agree that no white person, except officers, agents and employés of the Government,

and of any internal improvement company, or persons traveling through, or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into *said territory*, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they deem essential to the welfare and prosperity of the community, or be taken to interfere with, or invalidate, any action which has heretofore been had, in this connection, by either of the said nations."

By Article 46 it was provided: "Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the *cession* of the Leased District, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said money or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five per cent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively."

"Art. 51. It is further agreed that all treaties and parts of treaties inconsistent herewith be, and the same are hereby, declared null and void." 14 Stat. 769–781.

It is unnecessary to refer to any other provisions of the treaty

of April 28, 1866; for none of them throw any light on the present inquiry.

The lands in dispute—being tract 5 and marked Wichitas on the above map—constitute a part of the Leased District which was *ceded* to the United States by the third section of the treaty of 1866. That is admitted. Did that treaty make an absolute, unconditional cession to the United States of these lands, free of any trust, express or implied? Or, stating the question in another form, is it consistent with that treaty to hold, as the court below did, that the lands were ceded to the United States in trust that the lands themselves, or, if they were appropriated or taken by the United States, their value, should be paid to the Indians whenever they ceased to be used exclusively for the settlement of Indians thereon?

There was much discussion at the bar as to the principles that should govern the court when determining the scope and effect of a treaty between the United States and Indian tribes. All agree that as a general rule in the interpretation of written instruments the intention of the parties must control, and that such intention is to be gathered from the words used—the words being interpreted, not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room to doubt what the parties intended, they must be interpreted according to their natural and ordinary significance. If the words are ambiguous, then resort may be had to such evidence, written or oral, as will disclose the circumstances attending the execution of the instrument and place the court in the situation in which the parties stood when they signed the writing to be interpreted.

To what extent, if at all, have these rules been enlarged or modified when the instrument to be interpreted is a treaty between the United States and Indian tribes? In *The Kansas Indians*, 5 Wall. 737, 760, it was said that enlarged rules of construction have been adopted in reference to Indian treaties, citing as the words of Chief Justice Marshall in *Worcester* v. *Georgia*, 6 Pet. 515, 563, 582 (but which were in fact the words of Mr. Justice McLean in his concurring opinion in that case), the following: "The language used in treaties with the Indians

should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." Mr. Justice McLean further said: "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." In *United States* v. *Kagama*, 118 U. S. 375, 383, 384, the Indian tribes in this country are spoken of as wards of the Nation, communities dependent for their food and their political rights, as well as for protection, on the United States. And in *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, it was said that the relation between the United States and the Indian tribes was that of superior and inferior, and that the rules to be applied in the case then before the court were those that govern public treaties, which, even in case of controversies between nations equally independent, were not to be interpreted as rigidly as documents between private persons governed by a system of technical law, "but in the light of the larger reason and the superior justice that constitute the spirit of the law of nations." In *Jones* v. *Meehan*, 175 U. S. 1, 11, it was said that a treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine

whether the United States had, in its treaty with the Indians, violated the principles of fair dealing. What was said in *The Amiable Isabella*, 6 Wheat. 1, 71, 72, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: "In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind. . . . In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal part of the treaty, equally give the rule to the judicial tribunals."

So in *Beecher* v. *Wetherby*, 95 U. S. 517, 525, which involved the question whether the fee to certain lands was in the United States, with the right of occupancy only in certain Indians, this court said: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter

open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government."

The same principle was announced in *United States* v. *Old Settlers*, 148 U. S. 427, 468. That suit was brought under an act of Congress authorizing the Court of Claims to pass upon a claim preferred by an Indian tribe, the intention of Congress, as stated in the act, being "to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined." In that case it was sought to have the claimants relieved of certain provisions of a treaty, because of fraud and duress alleged to have been practised by the United States. But this court said: "There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846, (or any other,) and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference."

In the jurisdictional act of March 2, 1895, 28 Stat. 876, 898, c. 188, Congress authorized suit to be brought in the Court of Claims, so that the rights, legal and equitable, of the United States and of the Choctaw and Chickasaw Nations, and the Wichita and Affiliated Bands of Indians in the premises "shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party"—taking care, however, to add that nothing in the act "shall be accepted or construed as a confession that the United States admit that

the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof." It is thus clear that the Court of Claims was without authority to determine the rights of parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty. Its duty was to ascertain the intent of the parties according to the established rules for the interpretation of treaties. Those rules, it is true, permit the relations between Indians and the United States to be taken into consideration. But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any trust, then the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the Government to determine.

It is said in the present case that the interpretation of the treaty in accordance with the views of the United States would put the Government in the attitude of having acquired lands from the Indians at a price far below their real value. Even if this were true it would not authorize the court in determining the legal rights of the parties to proceed otherwise than according to the established principles of interpretation, and out of a supposed wrong to one party evolve a construction not consistent with the clear import of the words of the treaty. If the treaty of 1866, according to its tenor and obvious import, did injustice to the Choctaws and Chickasaws, the remedy is with the political department of the Government. As there is no ground to contend in this case that that treaty, if interpreted according to the views of the Government, was one beyond the power of the parties to make, it is clear that even if the United States did not deal generously with the Choctaws and Chicka-

saws in respect of the lands in dispute—and we do not mean to say that there is any ground whatever for so contending—the wrong done must be repaired by Congress, and cannot be remedied by the courts without usurping authority that does not belong to them.

Looking now at the treaty of 1866, we are unable to concur in the interpretation placed upon it by the Court of Claims. In our opinion its words plainly and obviously import a cession to the United States of the territory constituting the Leased District unaccompanied by any condition in the nature of a trust, express or implied, except that the *money* to be paid by the United States in consideration of the cession was to be invested and held by the United States "in trust" for certain specified objects. The declaration of a trust touching the money, and the failure to accompany the cession of the lands with any declaration of a trust in respect to them, manifestly shows that there was an intention to pass to the United States an absolute title to the lands and to abrogate the existing lease. The words in Article 3 of the treaty, "the Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby *cede* to the United States *the territory* west of the 98° of west longitude *known as the Leased District*," and the words in Article 46, "of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty *for the cession of the Leased District*," so clearly exclude the idea of trust in reference to the lands, that a different meaning cannot be attached to them without doing violence to the words used by the parties. It cannot be doubted, as we have heretofore said, that during the negotiations resulting in the treaty of 1866 the parties well knew that the territory constituting the Leased District was held by the United States, not absolutely or in fee, but under lease, for the permanent settlement thereon of the Wichita and certain other tribes or bands of Indians. The treaty of 1855 shows that upon its face. Now there is nothing whatever in the treaty of 1866 that evinces a purpose to preserve the relations of lessor and lessee in respect to the lands constituting the Leased District. On the contrary, the relations of the parties having been disturbed or destroyed by the Civil War, there was

a manifest purpose not to renew and continue the relations of lessor and lessee, but to have the territory in question ceded absolutely to the United States.

It is said that the treaty of 1866, if interpreted in the light of what occurred at the Fort Smith council held in September, 1865, shows that the parties expected and intended that the lands ceded should be accompanied with a trust in reference to the use of the Leased District for the settlement of Indians. We cannot assent to this view. The persons at that council who represented the United States stated that the new Indian treaties to be made must contain certain stipulations. But no one of those stipulations had specific reference to the lands constituting the Leased District. It is true that of the stipulations mentioned by Commissioner Cooley at the Fort Smith council, the fifth declared that "a portion of the lands hitherto owned and occupied by you [the Indians] must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government;" and that by the seventh it was provided that "no white person except officers, agents or employés of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory unless formally adopted into some tribe according to the usages of the band." But those stipulations had no reference to the Leased District then held by the United States under the treaty of 1855 for the permanent settlement of Indians. The reference in the fifth and seventh proposed stipulations related, so far as the Choctaws and Chickasaws were concerned, to lands "owned *and occupied* by them," that is to the territory, respectively, of the Choctaws and Chickasaws east of the 98th degree of west longitude, which was controlled by them and in which their laws and usages prevailed. Those nations did not then occupy the Leased District, but did own and occupy lands east of that district, and in that territory their laws and usages controlled.

The treaty of 1866 contains no word or clause qualifying or limiting the absolute cession made by Article 3 of the territory constituting the Leased District. If the parties to it intended

that the lands constituting that district should continue to be held and used by the United States as they were then held and used under the treaty of 1855—this is, under lease—the treaty of 1866 would not have declared, without qualification, that the Choctaws and Chickasaws "*hereby cede*" to the United States the territory known as the Leased District, and omitted all words that would, under the most liberal interpretation, either import a continuation of the lease then existing or any trust connected with the territory ceded. It is a fact not without significance that one of the persons attesting the treaty of 1866 as a witness was an eminent lawyer who was of counsel for the Choctaws and Chickasaws during the negotiations at Washington resulting in that treaty. In the view we take of the matter, we cannot suppose that he advised the Indians that the treaty made any other than an unconditional cession of the territory known as the Leased District.

If the Indians intended, so far as they were concerned, to pass an absolute, unincumbered title to the United States, it would, we think, have been impossible to employ language more appropriate to that object than is to be found in the treaty of 1866. Our convictions upon this point are so decided that we feel constrained to say that if some of the parties had not been Indians it would never have occurred to any one that the cession of territory made by that treaty was attended by conditions in the nature of a trust. While the dependent character of the Indians makes it the duty of the court to closely scrutinize the provisions of the treaty and to interpret them "in the light of the larger reason and the superior justice that constitute the spirit of the law of nations," *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, the court must take care, when using its power to ascertain the intention of the parties, not to disregard the obvious import of the words employed, and thereby, in effect, determine questions of mere governmental policy. We may repeat, that if wrong was done to the Indians by the treaty of 1866, interpreted as we have indicated—and we are not to be understood as expressing the opinion that they were not under all the circumstances fairly dealt with—the wrong can be repaired by that branch of the Government having full power over the subject.

It is said that the interpretation placed by us upon the Choctaw-Chickasaw treaty of 1866 is inconsistent with that placed by the United States upon the treaties made in the same year with the Seminoles and the Creeks—all of which treaties contemplated a new policy for the Indian country and for the Indians. Let us see what are the facts in relation to those treaties.

The preamble of the treaty with the Seminoles, (which was concluded March 21, 1866, and proclaimed August 16, 1866, 14 Stat. 755,) recited: "Whereas existing treaties between the United States and the Seminole Nation are insufficient to meet their mutual necessities; and whereas the Seminole Nation made a treaty with the so-called Confederate States, August 1, 1861, whereby they threw off their allegiance to the United States, and unsettled their treaty relations with the United States, and thereby incurred the liability of forfeiture of all lands and other property held by grant or gift of the United States; and whereas a treaty of peace and amity was entered into between the United States and the Seminole and other tribes at Fort Smith, September 10, 1865, whereby the Seminoles revoked, cancelled and repudiated the said treaty with the so-called Confederate States; and whereas the United States, through its commissioners, in said treaty of peace, promised to enter into treaty with the Seminole Nation to arrange and settle all questions relating to and growing out of said treaty with the so-called Confederate States; and whereas the United States, in view of said treaty of the Seminole Nation and the enemies of the Government of the United States, and the consequent liabilities of said Seminole Nation, and in view of its urgent necessities for more lands in the Indian Territory, requires a *cession* by said Seminole Nation of a part of its present reservation, and is willing to pay therefor a reasonable price, while at the same time providing new and adequate lands for them." And by the 3d article of that treaty it was provided: "*In compliance with the desire of the United States to locate other Indians and freedmen thereon*, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek Nation under the provision of article first, treaty

of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856. In consideration of said grant and cession of their lands, estimated at 2,169,080 acres, the United States agrees to pay said Seminole Nation the sum of $325,362, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians."

The treaty concluded with the Creeks June 14, 1866, and proclaimed August 11, 1866, 14 Stat. 785, contained a preamble similar to the one in the treaty with the Seminoles, and which, in addition, stated that "the United States *required* of the Creeks a portion of their land whereon to settle other Indians." And by the 3d article of that treaty it was provided: "*In compliance with the desire of the United States to locate other Indians and freedmen thereon*, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek Lands being retained by them shall, except as otherwise herein stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their lands, estimated to contain 3,250,560 acres the United States agree to pay the sum of thirty cents per acre, amounting to $975,168, in the manner hereinafter provided."

By the Indian Appropriation Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, the sum of $1,912,942.02 was appropriated "to pay in full the Seminole Nation of Indians for all the right, title, interest and claim which said nation of Indians may have in and to certain lands ceded by Article 3" of the above treaty with the Seminoles. And by an act approved March 1, 1889, c. 317, 25 Stat. 759, 799, Congress appropriated $2,280,857.10 to pay the Creek Nation for the lands ceded by the treaty of 1866 with them—the agreement with those Indians which was the basis of the above act reciting, among other things, that

the United States desired that "all of said ceded lands may be entirely freed from any limitation in respect to the use and enjoyment thereof."

Now, it is argued that if the interpretation placed by the United States upon the treaty of 1866 with the Choctaws and Chickasaws is accepted the result will be that the General Government has been more liberal towards the Seminoles and Creeks than it has been with the Choctaws and Chickasaws. But that cannot constitute a reason why the court should depart from the ordinary signification of the words used in the treaty with the Choctaws and Chickasaws. If Congress chose to adopt one course towards the Seminoles and Creeks, and a different course towards the Choctaws and Chickasaws, it is not for the judiciary to defeat the will of the legislative branch of the Government by giving to an Indian treaty a meaning not justified by its words.

Apart from this last view we find clauses in the treaties with the Seminoles and Creeks which are not in the treaty with the Choctaws and Chickasaws, and which throw light upon the refusal of the United States to make an appropriation to the latter tribes on account of the particular lands here in question. In the treaties of 1866 with the Seminoles and Creeks, respectively, by which they ceded certain lands to the United States, it is expressly stated that the cession was made "in compliance with the desire of the United States to locate other Indians and freedmen thereon." No such words are found in the treaty of cession concluded with the Choctaws and Chickasaws. When the United States concluded the treaty of 1866 with the Choctaws and Chickasaws it did not need a cession of the lands here in question in order simply to locate Indians and freedmen on them. It already had, by the treaty of 1855, a perpetual lease of those lands for the settlement of Indians. What it needed, perhaps what it required—at any rate, what it obtained—was an unqualified cession of the territory, unaccompanied by any declaration as to the use intended to be made of it, or by any words qualifying the absoluteness of the title passed to the United States. It took an absolute cession, without any declaration as to the uses to which the territory ceded was to be devoted.

It may be that other considerations than those referred to caused the use of the words in the treaties with the Seminoles and Creeks that are not to be found in the treaty with the Choctaws and Chickasaws. But in our judgment the words of the treaty of 1866 with the Choctaws and Chickasaws so clearly import a cession of title without limitation as to the uses to which the ceded territory was to be devoted, that the claim of those Indians can derive no support from the transactions between the United States and the Seminoles and Creeks.

But the Choctaws and Chickasaws lay great stress on the following paragraph in section 15 of the Indian Appropriation Act of March 3, 1891, 26 Stat. 989, 1025, c. 543: "And the sum of $2,991,450 be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded in trust by Article 3 of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain 2,393,160 acres; three fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Chickasaw Nation; this appropriation to be immediately available and to become operative upon the execution, by the duly appointed delegates of said respective nations specially authorized thereto by law, of releases and convey-

ances to the United States of all the right, title, interest and claim of said respective nations of Indians in and to said land (not including Grier County, which is now in dispute), in manner and form satisfactory to the President of the United States; and said releases and conveyances, when fully executed and delivered, shall operate to extinguish all claim of every kind and character of said Choctaw and Chickasaw Nations of Indians in and to the tract of country to which said releases and conveyances shall apply."

It is argued that the words in the above paragraph, "said lands have been ceded in trust by Article 3 of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28, 1866," must be taken as an admission by the United States in 1891 that the cession made by the treaty of 1866 was not intended to be absolute and unconditional, but in trust to be used for the settlement of Indians, upon the abandonment of which object by the United States the ceded lands reverted to the Indians.

There would be force in this contention if it appeared that the legislative and executive branches of the Government had adhered to the declaration in the act of March 3, 1891. But such is not the fact. For at the next session of Congress, President Harrison, by special message, dated February 18, 1892, called attention to the above paragraph, and among other things said: "If this section had been submitted to me as a separate measure, especially during the closing hours of the session, I should have disapproved it; but as the Congress was then in its last hours a disapproval of the general Indian appropriation bill of which it was a part would have resulted in consequences so far-reaching and disastrous that I felt it my duty to approve the bill. But as a duty was devolved upon me by the section quoted, viz.: the acceptance and approval of the conveyances provided for, I have felt bound to look into the whole matter, and in view of the facts which I shall presently mention, to postpone any executive action until these facts could be submitted to Congress."

After referring to some matters that have no connection with the inquiry as to the meaning of the treaty of 1886 with the

Choctaws and Chickasaws, the President proceeded: "After a somewhat careful examination of the question, I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill, already set out, 'ceded in trust by Article 3 of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28, 1866,' etc. It is agreed that the treaty contained no express limitation upon the uses to which the United States might put the territory known as the Leased District. The lands were ceded by terms sufficiently comprehensive to have passed the full title of the Indians. The limitation upon the use to which the Government might put them is sought to be found in a provision of the treaty by which the United States undertook to exclude white settlers, and in the expressions found in the treaties made at the same time with the Creeks and other tribes of the purpose of the United States to use the lands ceded by those tribes for the settlement of friendly Indians. The stipulation as to the exclusion of white settlers might well have reference solely to the national lands retained by the Choctaw and Chickasaw tribes, and the reason for the nonincorporation in the treaty with them of a statement of the purpose of the Government in connection with the use of the lands is well accounted for by the fact that as to these lands the Government had already, under the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the lands of the other tribes referred to. The United States paid to the Choctaws and Chickasaws $300,000, and the failure to insert the words that are called words of limitation in this treaty points, I think, clearly to the conclusion that the commissioners on the part of the Government, and the Indians themselves, must have understood that this Government was acquiring something more than a mere right to settle friendly Indians, which is already possessed, and something more than the mere release of the right which the Choctaws and Chickasaws had under the treaty of 1855 to select locations on these lands if they chose. Undoubtedly it was the policy of this Government for the time to hold these and the adjacent lands as Indian country, and many of

the expressions in the proclamations of my predecessors and in the reports of the Indian Bureau and of the Secretary of the Interior mean this and nothing more. This is quite different from a conditional title which limits the grant to a particular use and works a reinvestment of full title in the Indian grantors when that use ceases. But those who hold most strictly that a use for Indian purposes, where it is expressed, is a limitation of title seem to agree that the United States might pass a fee absolute to other Indian tribes in the land ceded for their occupancy. Certainly it was not intended that in settling friendly Indians upon these lands the Government was to be restrained in its policy of allotment and individual ownership. If, for an adequate consideration by treaty, the United States placed upon these lands other Indian tribes, it was competent to give them patents in fee for a certain and agreed reservation. This being so, when the policy of allotment is put into force the compensation for the unused lands should certainly go to the occupying tribe, which, in the case supposed, had paid a full consideration for the whole reservation. It will hardly be contended that in such case this Government should pay twice for the lands. . . . It is right also, I think, that Congress in dealing with this matter should have the whole question before it; for the declaration of Indian title contained in this item of appropriation extends to a very large body of land and will involve very large future appropriations. The Choctaw and Chickasaw Leased District, embracing the lands in the Indian Territory between the 98th and 100th degrees of west longitude and extending north and south from the main Canadian River to the Red River, including Greer County, contains, according to the public surveys, 7,713,239 acres, or, excluding Greer County, 6,201,663 acres. This Leased District is occupied as follows: Greer County, by white citizens of Texas, 1,511,576 acres. The United States is now prosecuting a case in the courts to obtain a judicial declaration that this county is part of the Indian country. If a decision should be rendered in its favor, the claim of the Choctaws and Chickasaws to be paid for these lands at the rate named in this appropriation would at once be presented. . . . Under the treaty of 1855 the Choctaws and Chickasaws quit-

claimed any supposed interest of theirs in the lands west of the 100th degree. The boundary between the Louisiana purchase and the Spanish possessions by our treaty of 1819 with Spain was, as to these lands, fixed upon the 100th degree of west longitude. Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It follows, of course, that these lands were included within the boundaries of the State of Texas when that State was admitted into the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the State of Texas, and not of the United States. The lands became public lands of that State. For the release of this claim and for the lease of the lands west of the 98th degree the Government of the United States paid the sum of $800,000. In the calculations which have been made to arrive at the basis of the appropriations under discussion, no part of this sum is treated as having been paid for the lease. I do not think that this is just to the United States. It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians. The sum of $300,000, paid under the treaty of 1866, is deducted, as I understand, in arriving at the sum appropriated. It seems to me that a considerable proportion of the sum of $800,000 previously paid should have been deducted in the same manner. I have felt it my duty to bring these matters to the attention of Congress for such action as may be thought advisable."

The president's message having been referred by the Senate to its committee on Indian affairs, that committee made a report accompanied by the following resolution: "*Resolved*, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw Nations for their interest in the Cheyenne and Arapahoe reservation in the Indian Territory, submitted with this resolution, it is the opinion of the Senate that there is no sufficient reason for interference in the due execution

of the law referred to." Congr. Rec. 52d Cong. 1st Sess. vol. 23, Pt. 5, p. 4093. The resolution was adopted, and one of similar import was adopted by the House of Representatives.

But on the 15th day of December, 1892, the House of Representatives passed the following resolution: "*Resolved by the Senate and House of Representatives*, That the Secretary of the Treasury be, and he is hereby, directed to retain and cover back into the Treasury $48,800 of the appropriation made by Congress to pay the Choctaw and Chickasaw tribes of Indians for their interest in lands of the Cheyenne and Arapahoe reservation, dated March 3, 1891, which amount has been ascertained, by a recount of the allottees of said Cheyennes and Arapahoes to be by that amount more than is due the said Choctaws and Chickasaws upon the purchase and settlement for their said interest." The Senate amended that resolution by adding thereto this proviso: "*Provided, however*, That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe reservation, dated March 3, 1891, nor of this joint resolution shall be held in any way *to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the Leased District.*" In this amendment the House concurred, and on January 18, 1893, the resolution as amended was approved by the President. Congr. Rec. 52d Cong. 2d Sess. vol. 24, Pt. 1, pp. 173, 379, 868; 27 Stat. 753.

Then followed the act of 1895, 28 Stat. 876, 898, c. 188, under which the present suit was instituted, and which related to the lands in the Leased District covered by the agreement of June 4, 1891, with the Wichita and Affiliated Bands of Indians—the lands in dispute. That act contained the proviso that nothing in it "shall be accepted or construed *as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof.*"

It thus appears that while the majority of the members of the two Houses of Congress, at one time, were apparently of the opinion that the cession made by the treaty of 1866 with

the Choctaws and Chickasaws was incumbered with a trust that the lands be used only for purposes connected with the settlement of Indians, the Head of the Executive Department of the Government in 1892 was of opinion that no such trust existed or was intended. Evidently, the legislative branch of the Government, when it came to deal with the lands occupied by the Wichita and Affiliated Bands of Indians, under the treaty of 1855, declined to apply the rule adopted in the act of 1891 in reference to the lands in the Leased District occupied by the Cheyennes and Arapahoes, and intended by the act of 1895 to leave the whole question as to the legal and equitable rights of the United States and of the Choctaw and Chickasaw Nations in the lands now in dispute to be determined by the courts. In other words, the rights of the parties are to be determined by the rules established for the interpretation of such instruments as the treaty of 1866, giving due weight to every fact proper to be considered in ascertaining the intention of the parties. In this view, we cannot hold that the above declaration in the act of March 3, 1891, 26 Stat. 989, 1025, c. 543, that the cession made by the treaty of 1866 was attended by a trust is sufficient to defeat such interpretation of the treaty as is required by its words when reasonably interpreted or interpreted in the sense in which they were naturally understood by the Indians when they assented to the treaty.

V. We come to the material questions arising upon the appeal of the Wichita and Affiliated Bands of Indians.

We have seen in the statement of the case that by the agreement of June 4, 1891, between the United States and the Wichita and Affiliated Bands of Indians (ratified by the act of Congress of March 2, 1895, 28 Stat. 876, 895, 896, 897, c. 188) the latter ceded to the United States, without any reservation whatever, all their claim and title in and to the lands embraced in tract 5 on the above diagram, known as the Wichita Reservation. That agreement shows that in addition to the allotment of lands therein provided for, the Wichita and Affiliated Bands insisted that further compensation, in money, should be made to them by the United States for their possessory right in and to the above lands in excess of that required for the allotments.

And it was agreed that the question "as to what sum of money, if any, shall be paid to said Indians for such surplus lands" should be submitted to Congress, its decision thereon "to be final and binding upon said Indians;" provided, if any sum of money was allowed by Congress for surplus lands, it should be subject to a reduction for each allotment of land that was taken in excess of the one thousand and sixty at that price per acre, if any, that might be allowed by Congress. It was further stipulated in the agreement of 1891 "that there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement"—the tract numbered 5 and marked "Wichitas."

The relief asked by the Wichita and Affiliated Bands was that the petition of the Choctaws and Chickasaws be dismissed; and that it be decreed that they were entitled to the proceeds of the sale of all the lands involved in this case, to be paid to them from time to time after being deposited in the Treasury as required by the act of 1895.

The Court of Claims having decided that the Choctaws and Chickasaws were entitled to such of the lands of the Wichita Reservation as remained after making the allotments required by the act of 1895, the only relief given by the decree to the Wichita and Affiliated Bands was to adjudge that the members of those tribes were each entitled to 160 acres of land out of the lands in dispute, to be set apart for them by the United States, having due regard to any improvements made thereon by them respectively, for their permanent settlement. Of this decree the United States does not complain, but the Choctaws and Chickasaws do complain of it so far as it assigned 160 acres of land to each member of the Wichita and Affiliated Bands.

Under the views we have expressed, the Choctaws and Chickasaws have had no interest in the particular lands in dispute since the absolute cession made by them to the United States in the treaty of 1866. They have therefore no concern in the questions that have arisen between the United States and the Wichita and Affiliated Bands of Indians as to the disposition

of those lands. And as the United States does not complain of the decree in favor of the latter Indians, awarding to each 160 acres of land, the only question that remains to be considered arises on the appeal of the Wichita and Affiliated Bands, namely, whether the court below erred in not decreeing those Indians to be entitled to the proceeds of the sale of such of the lands in question as may be left after making the allotments in severalty required by the act of Congress.

The question last stated does not require any extended discussion; indeed, we are relieved of the necessity of discussing it, for the United States at the present hearing concedes that the removal of the Wichita and Affiliated Bands from their former habitations and their permanent settlement upon the Wichita Reservation invested them with a full right of occupancy of the lands in dispute and with all the incidents of such right, and that each member of those tribes is now entitled to receive 160 acres in severalty, and "also the proceeds of the balance of the land whenever such sales are made as authorized by the jurisdictional act." "If this were all," say the representatives of the Government, "that the Wichita and Affiliated Bands claimed, the United States would indorse the appeal of these Indians instead of opposing it." The Government itself suggests—and we recognize its right under all the circumstances of this case to ask—that the decree as to the Wichita and Affiliated Bands be reversed and set aside and the cause remanded with directions that, in addition to the dismissal of the petition of the Choctaw and Chickasaw Nations, and ordering the allotment of 160 acres of land in the Wichita Reservation to each member of those tribes, they have the benefit of the proceeds of the sale of such lands in the Wichita Reservation as are not needed for the purposes indicated in the act of Congress.

To what compensation are the Wichita and Affiliated Bands entitled on account of the lands not needed for the allotments required by the act of Congress? Upon this question this court does not feel bound to express any opinion. The agreement of 1891 between the United States and the Indians shows that the question of the amount of money, if any, to be paid to the Indians on account of the surplus lands was in dispute and was

left to the determination of Congress, whose action, it was agreed, should be final and binding on the Indians; and then by the act of Congress that question was referred to the Court of Claims, with a right of appeal to this court. But Congress did not indicate any rule for the guidance of the Court of Claims in fixing the amount due the Indians. It only declared that the compensation allowed in the present suit should not exceed one dollar and twenty-five cents per each acre of land not required for the allotments in severalty. This implied that in the judgment of Congress a less amount might suffice to meet the legal and equitable rights of the Indians and the ends of justice. For the purpose of fixing that compensation, should the surplus lands be valued as of the date the Indians were located on the Reservation, or of the date the agreement of 1891 was ratified by Congress, or of the date when this suit was brought, or of the date when the allotments are all made? Upon these points the act of Congress is silent. The decree in the present suit should declare that the Wichita and Affiliated Bands are entitled to compensation in money for such of the lands as are not needed to meet the requirements of the act of March 2, 1895, 28 Stat. 894, 897, c. 188, leaving the amount to be fixed upon such evidence as may be adduced by the parties, but not, in any event, exceeding the limit prescribed by Congress.

The United States insists that it should be made a condition of any decree recognizing the right to compensation on account of the surplus lands, that the Wichita and Affiliated Bands should execute a release to the United States of all right, title, interest and claim of every nature whatsoever in and to any lands within the limits of the United States except those allotted to them. This view cannot be adopted, because the pleadings do not inform the court of the existence of any claims of that kind; indeed, the pleadings could not properly embrace any claim to lands, or to the proceeds of any lands, except those within the Wichita Reservation. The court below could not make any decree in reference to claims that have not been referred to it by Congress. It is manifest that while Article 6th of the agreement of 1891 between the United States and the Wichita and

Affiliated Bands of Indians reserved the right of the latter to prefer against the United States any and every claim they believed they had the right to make, the only suit authorized by the jurisdictional act of 1895 was one that would determine the claim of the Choctaws and Chickasaws of an interest *in the particular lands here in dispute*, and the claim of the Wichita and Affiliated Bands to be compensated in money for their possessory right *in such lands*. No suit was authorized by that act that would embrace any and every claim that the Wichita and Affiliated Bands might elect to prefer against the United States.

For the reasons given the decree must be reversed with directions to dismiss the petition of the Choctaw and Chickasaw Nations, and to make a decree in behalf of the Wichita and Affiliated Bands of Indians fixing the amount of compensation to be made to them on account of such lands in the Wichita Reservation as are not needed in order to meet the requirements of the act of Congress of March 2, 1895, c. 188, and for such further proceedings as may be consistent with law and with this opinion.

*It is so ordered.*

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## WORKMAN *v.* NEW YORK CITY, MAYOR, ALDERMEN AND COMMONALTY.

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

No. 1. Argued April 17, 1899. — Decided December 24, 1900.

In June, 1893, the Linda Park was moored to a dock at pier 48, East River, New York City. While there she was struck and injured by the steam fire-boat New Yorker, as it was running into the slip between piers 48 and 49, for the purpose of getting near another fire-boat then in the slip. Both boats had been called to aid in extinguishing a fire in a warehouse near the slip bulkhead. A libel was filed by Workman in the District Court of the United States to recover for the damage occasioned to his vessel

Statement of the Case.

by the collision. This libel was amended by adding as respondents the fire department of New York and Gallagher, who was in charge of the navigation of the New Yorker and the necessary allegations were made. The District Court entered a decree in favor of the libellant against the city and Gallagher, and dismissed the libel as to the fire department. The Circuit Court of Appeals affirmed the decree against Gallagher and in favor of the fire department, but reversed that portion which held the city liable. The case being brought here on certiorari, it is *held* that the District Court rightly decided that the mayor, aldermen and commonalty of the city of New York were liable for the damages sustained by the owner of the Linda Park.

Where both courts below have concurred in a finding of fact, it will, in this court, be accepted as conclusive, unless it affirmatively appears that the lower courts obviously erred.

The local decisions of a state court cannot, as a matter of authority, abrogate maritime law.

Under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel, committing a maritime tort is responsible, under the rule of *respondeat superior*.

There is no limitation taking municipal corporations out of the reach of the process of a court of admiralty.

The public nature of the service upon which a vessel is engaged, at the time of the commission of a maritime tort, affords no immunity from liability in a court of admiralty, when the court has jurisdiction.

While it is true that the emergency of fire was an element to be considered, in determining whether or not those in charge of the fire-boat were negligent, it does not follow that it exempted from the exercise of such due care as the occasion required towards property which was in the path of the fire-boat as it approached the slip.

A ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of the vessel.

A recovery can be had *in personam* for a maritime tort, when the relation existing between the owner and the master and crew of the vessel, at the time of the negligent collision, was that of master and servant.

WORKMAN, the libellant below, was the owner, on June 11, 1893, of the British barkentine Linda Park. On the date named, while the vessel was moored to a dock at pier 48 in the East River in New York City, she was struck and injured by the steam fire-boat New Yorker. At the time of the collision the New Yorker was running into the slip between piers 48 and 49 for the purpose of getting near to another fire-boat which had shortly prior thereto safely entered the slip. Both the fire-boats had been called in order to aid in extinguishing a fire in a warehouse situated a distance of eighty-five to one hundred

feet from the slip bulkhead. To recover the damage occasioned to his vessel, Workman filed, in the District Court of the United States for the Southern District of New York, a libel *in personam* against the mayor, aldermen and commonalty of the city of New York. This libel was subsequently amended by adding the allegations essential to make, as additional respondents, the fire department of the city of New York and James A. Gallagher, the person in charge of the navigation of the New Yorker at the time of the collision.

The District Court entered a decree in favor of the libellant against the city of New York and Gallagher, and dismissed the libel as to the fire department. 63 Fed. Rep. 298.

The Circuit Court of Appeals, to which the case was taken, affirmed the decree of the District Court against Gallagher and in favor of the fire department. The appellate court, however, reversed that portion of the decree of the District Court which held the city of New York liable, and remanded the case with instructions to dismiss the libel as against the city. 35 U. S. App. 201; 67 Fed. Rep. 347.

The case was then brought to this court by the allowance of a writ of certiorari.

*Mr. Harrington Putnam* for Workman. *Mr. Charles C. Burlingham* was on his brief.

*Mr. Theodore Connoly* for the Mayor, Aldermen and Commonalty of the city of New York and Gallagher. *Mr. John Whalen* and *Mr. James M. Ward* were on his brief.

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

It is clearly deducible from the record that the courts below concurred in dismissing the libel as against the fire department of the city of New York, upon the contention made in the answer of the department that under the provisions of a named statute of the State of New York, the fire department of the city of New York was neither a corporation nor a *quasi*-cor-

poration, but was merely a department of the city. As no controversy is made respecting the correctness of the decree in this particular, we dismiss this subject from view.

With reference to the decree rendered by both courts against Gallagher, the district judge held that, giving due consideration to the emergency of fire, "the running into the Linda Park arose through lack of reasonable prudence, and was unnecessary and negligent." 63 Fed. Rep. 298. The Circuit Court of Appeals, in its opinion, affirming the decree against Gallagher, said:

"The evidence in the record adequately supports the conclusion of the court below that the injuries caused to the libellant's vessel by the impact of the fire-boat were caused by the negligent manner [management?] of the fire-boat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libellant's vessel was moored."

There is no substantial controversy raised on the record as to the premise of fact upon which the personal decree against Gallagher was rendered by both the courts below. And even if such were not the case, the facts upon which Gallagher's liability depends are not now open to controversy, because of the well settled doctrine that where both courts below have concurred in a finding of fact, it will, in this court, be accepted as conclusive, unless it affirmatively appears that the lower courts obviously erred. *The Carib Prince*, 170 U. S. 655, 658, and cases there cited. It is clear that if it was seriously claimed that both the courts below had manifestly erred in their appreciation of the facts as to negligence in the management of the fire-boat, the testimony would not justify the assertion. We shall therefore no further consider this feature of the case.

In order to elucidate the serious question which arises for discussion, we briefly state the reasons by which the courts below were led to reach opposing conclusions as to the liability or non-liability of the city.

The District Court, on the assumption that the local law controlled, determined that by that law, as declared in decisions of the courts of the State of New York, the city was

liable for the injury caused by the negligent management of its fire-boat. The Circuit Court of Appeals, however, was of opinion that the city of New York was not answerable for the injury inflicted, for the reasons which it thus stated. 35 U. S. App. 204:

"It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers; and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates.

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"It is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality; the test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged; if these, being for the general good of the public as individual citizens, are governmental, they act for the State. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents."

Having thus determined the general principle by which the

liability of the city was to be judged, the court reviewed some of the decisions of the Court of Appeals of New York, and deduced from them that the city, in the operation of the fire-boat, performed a governmental and not a corporate function, and, therefore, under the assumption that the decisions in question were authoritatively controlling, held the city not liable.

Whilst it is contended at bar that the District Court correctly decided, considering the local law of New York alone, that the city was liable, it is also asserted that even if by such law there was no responsibility on the part of the city of New York, nevertheless the Circuit Court of Appeals erred in deciding that the city was not bound, because by the maritime law the liability existed, and such law should have controlled, although the local law was to the contrary.

We come then to consider first, whether, in the decision of the controversy, the local law of the city of New York or the maritime law should control; and, second, if the case is solely governed by the maritime law, whether the city of New York is liable.

In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit* v. *Osborne*, (1890) 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (art. III, sec. 2) upon the courts of the United States.

The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decisions therein. And this, not

because, by the rule prevailing in the State, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted.

The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels.

This follows if a corporation must for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign State.

The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice. This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor. It cannot be doubted that the greater part, if not the whole, of the maritime commerce of the country is either initiated or terminated in ports where municipal corporations exist. All the vessels, whether domestic or foreign, in which this vast commerce is carried on, under the rule referred to, could be subjected to injury and wrong without power to obtain redress, since every municipality would be hedged about with the attributes of supreme sovereignty. For the principle which would exempt the municipal owner of a fire-boat from legal responsibility would be equally applicable to boats used by a street department for the removal of refuse, to ferries, to pilot boats, to training-school ships—one of which, it is suggested in argument, the city of New York now actually operates, and to all other vessels which the municipality might consider it necessary or desirable to use. The wrong and injustice which would thus arise need not be commented upon.

The evil consequences growing from thus implanting in the maritime law the doctrine that wrong can be done with impunity were very aptly pointed out in *Mersey Docks and Harbour Board, Trustees*, v. *Gibbs*, (1866) L. R. 1 H. L. 122. In that

case it was sought to hold the dock trustees liable for damage occasioned to a ship and cargo in striking a mud bank while attempting to enter a dock. The trustees asserted an exemption on the ground that they did not collect tolls for their own profit, but merely as trustees for the benefit of the public. Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

And still later, in deciding the case of *Currie* v. *McKnight*, (1897) A. C. 97, the House of Lords declared that while the admiralty law as known in England differs from the common law of England, and the common law of Scotland differs from the common law of England, because they were derived from divergent sources, yet the admiralty laws were derived both by Scotland and England from the same source, and "it would be strange as well as in the highest degree inconvenient if a different maritime law prevailed in two different parts of the same island."

Potential, however, as may be these arguments, predicated on the inherent injustice of the doctrine contended for, and the serious inconvenience which must result from an attempt to apply it, we are not thereby relieved from considering the question in a more fundamental aspect. In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.

In *The Key City*, (1872) 14 Wall. 623, 660, it was held that Federal courts of admiralty were not governed by state statutes of limitation in the enforcement of maritime liens. In *The*

*Lottawanna*, (1874) 21 Wall. 558, 578, it was held that the maritime law as accepted and received in this country did not confer a lien upon a vessel in favor of those who had furnished necessary materials, repairs and supplies for such vessel in her home port, but that the District Courts of the United States, having jurisdiction of the contract as a maritime one, might enforce liens given for its security, even when created by the state law.

In the course of the opinion, speaking through Mr. Justice Bradley, the court said (pp. 572, 573, 574):

"Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other."

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"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

"Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary: It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood.

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could

not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States."

In *Liverpool Steam Co.* v. *Phœnix Insurance Co.*, (1889) 129 U. S. 397, 443, a maritime contract executed in New York was held to be an American contract, and the local law of New York was declared not to govern in its construction. In *Butler* v. *Boston Steamship Company*, (1889) 130 U. S. 527—a case growing out of a collision in navigable waters within the territorial boundaries of Massachusetts—it was held that a state statute could not operate to deprive the owner of the offending ship of the benefit of the limited liability act, and that state legislatures could not change or modify the general maritime law. In *The Max Morris*, (1890) 137 U. S. 1, 14, the question for decision was, whether, in a court of admiralty, in a case where recovery was sought for personal injuries to the libellant arising from his negligence, concurring with that of the vessel, "any damages can be awarded, or whether the libel must be dismissed *according to the rule in common law cases.*" (p. 8.) It was held (p. 15) that "The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery." In *The J. E. Rumbell*, (1893) 148 U. S. 1, 17, it was held that any priority given by a state statute, or by decisions in common law or in equity, to a mortgage upon a vessel as against a claim for supplies and necessaries furnished to the vessel in her home port, was immaterial, "and that the Federal courts of the United States, enforcing the lien because it is maritime in its nature, arising out of the maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

True, it is well settled that in certain cases where a lien is given by a state statute, the admiralty courts will enforce rights so conferred when not in absolute conflict with the admiralty law. *The Lottawanna*, (1874) 21 Wall. 558. Moreover, it has

been decided that although at the time of the adoption of the Constitution, in courts of admiralty as in courts of common law, a cause of action for a personal injury abated by the death of the injured party, nevertheless, when, by a state statute, a right of recovery in such a case was conferred, the admiralty courts would recognize and administer the appropriate relief. *The Albert Dumois*, (1900) 177 U. S. 257–259, and cases cited. But such cases afford no foundation for the proposition that state laws or decisions can deprive an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed, and can destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong in every case where they have jurisdictional power over the person by whom the wrong has been committed. The cases in question on the contrary but illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court, and they hence do not support the contention that there is a want of power in admiralty courts to give redress in every case within their jurisdiction where the duty to do so is imposed by the maritime law. This distinction is well illustrated by the ruling in *The Max Morris*, *supra*. There it was asserted that by the universal principles of the common law, as well as of the local laws of the States, no right to recover for a wrong committed could be enforced in favor of one who had himself contributed to the producing cause of the injury. Whilst the premise was conceded, the soundness of the inference deduced from it was denied, and it was held that as by the general principles of the maritime law a measure of relief would be afforded to a person who had suffered a wrong, even although he had contributed thereto, *it was the duty of the admiralty courts to grant relief* in accordance with the principles of the maritime law.

It being then settled that the local decisions of one or more States cannot, as a matter of authority, abrogate the maritime law, we are brought to consider whether, under the maritime

law, the city of New York was liable for the injury inflicted by the fire-boat. As a prerequisite to a solution of this question it is necessary to determine what relation the city of New York bore to the fire-boat and those in control of it.

The fire department of the city of New York, as constituted when the collision in question occurred, was established by chapter 410 of the New York Laws of 1882. In the statute it was declared (sec. 27) that "for all purposes the local administration and government of the city and county of New York shall continue to be in and be performed by the corporation aforesaid," *i. e.* "the mayor, aldermen and commonalty of the city of New York." By section 34 were established eleven enumerated "departments in said city," among them a fire department. By sections 40, 106 and 108, provision was made for a board of fire commissioners, to act as the executive head of the department, to be nominated by the mayor, by and with the consent of the board of aldermen, and to be removable for cause by the mayor, subject to the approval of the governor of the State. The ministerial direction of the affairs of the department, including the preservation of the real and personal property used by it, was confided to this board of commissioners, but the city was made liable for all expenses of maintenance and operation, and was the owner of all the property of the fire department. Sec. 424 *et seq.* In addition to making the city liable for all expenses connected with the maintenance and operation of the department, it was provided in section 450 of the statute that any damage caused by the authorized destruction of buildings to stay the progress of fire should be borne by the city of New York.

In order to emphasize these material facts we repeat that it unquestionably appears that the fire department of the city of New York was an integral branch of the local administration and government of that city. The ministerial officers who directed the affairs of the department were selected and paid by the city; all the expenses of the department of every kind and nature were to be borne by the city, which was bound by all contracts made for such purpose; all the property of the department, including the fire-boats, belonged to the city; and the

city was liable in case of an authorized destruction on land of property of individuals to prevent the spread of a conflagration.

That, upon such a state of things, the relation of master and servant existed between the city of New York and those in charge of the fire-boat is clear. And that under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of *respondeat superior*, is elementary. *Thorpe* v. *Hammond*, (1871) 12 Wall. 408; *The Plymouth*, (1866) 3 Wall. 35.

It is not gainsaid that, as a general rule, municipal corporations, like individuals, may be sued; in other words, that they are amenable to judicial process for the purpose of compelling performance of their obligations. True it is, that under the general law, growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the levy on property held by the corporation for public uses. *Meriwether* v. *Garrett*, (1880) 102 U. S. 472.

As a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is no limitation taking such corporations out of the reach of the process of a court of admiralty, as such courts, within the limit of their jurisdiction, may reach persons having a general capacity to stand in judgment. True, also, where admiralty process has been set in motion against a municipal corporation, public policy, it has been held, restrains a seizure of property used for public purposes by such corporation. *The Fidelity*, (1879) 16 Blatchford, 569. This conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation, to which we have referred, and its existence in the admiralty law in all cases has also been denied. *The Oyster Police Steamers of Maryland*, (1887) 31 Fed. Rep. 763. Which of these conflicting conclusions, as to the exception in question, is correct, we are not called upon on the present record to determine, since no levy of process upon the fire-boat was made or attempted to be made.

The contention is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all maritime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted.

The decisions of this court clearly expound the principles we have stated. *The Exchange*, (1812) 7 Cranch, 116, involved the

right of a court of admiralty to enforce, by a proceeding *in rem*, an alleged maritime claim against a vessel of war of a foreign nation. The right to relief was denied exclusively because of a want of jurisdiction over the foreign sovereign or his property.

*The Siren*, (1869) 7 Wall. 153, involved the liability of a prize ship in the possession and control of the officers of the United States for an injury inflicted by a collision of the ship with another vessel, averred to have been occasioned by the negligent management of those in charge of the prize ship. In considering the power of the court to adjudicate the controversy, the court said (p. 185):

"For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

"In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the Lords of the Admiralty requesting an appearance on behalf of the crown —which is generally given—when the subsequent proceedings to decree are conducted as in other cases. Coote's New Admiralty Practice, 31. In the case of *The Athol*, 1 W. Robinson, 382, the court refused to issue a monition to the Lords of the Admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they

are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only results of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. *The Clara*, 1 Swabey, 3, and *The Swallow*, 1 Swabey, 30. The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared."

As the prize vessel had been condemned and sold at the instance of the United States, and the proceeds were in the registry of the court for distribution, the court gave the relief sought against the proceeds of the sale, because the facts stated established, not only the liability of the offending ship, but also furnished the basis of jurisdiction.

The same principle was applied in the later case of *The Davis*, (1869) 10 Wall. 15, where it was held that personal property of the United States on board of a vessel for transportation from one point to another was liable to a lien for salvage service rendered in saving the property from a peril of the sea, and that such lien might be enforced by a proceeding *in rem*, when the process of the court might be used without disturbing the possession of the government.

The statement of the maritime law of England on the subject now being considered made in *The Siren*, *supra*, makes it clear that, in harmony with the maritime law of this country, the fact that a wrong has been committed by a public vessel of the crown affords no ground for contending that no liability arises, because of the public nature of the vessel, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. This is well illustrated by the cases to which we shall now refer.

*The Athol*, (1842) 1 Wm. Rob. 374, was the case of a British troopship which had run down a brig in the English Channel. The Lords of the Admiralty having refused a petition for compensation, the owner of the brig applied to the High Court of

Admiralty to decree a monition to issue against those officials. In declining to issue the monition, for want of power, Dr. Lushington said (p. 382):

"Under the circumstances of this case then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge, in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty in her office of Admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say, that they will be themselves the exclusive judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition."

The Lords of the Admiralty subsequently directed that an appearance should be made on behalf of *The Athol*, and as by this act the court had jurisdiction to determine the controversy, it did so, held *The Athol* to have been in fault, and, despite the public nature of the vessel, "the damages and costs were pronounced for."

*The Parlement Belge*, (1879) 4 P. D. 129, was an action instituted on behalf of the owners of a steam tug against the steamship Parlement Belge and her freight to recover damages sustained by the tug in a collision with the steamship. The latter vessel was, at the time of the collision and when the action was instituted, a public vessel of the Government of the sovereign state of Belgium, navigated and employed by and in the possession of such government, and officered by officers of the royal Belgium navy, holding commissions from His Majesty, the King of Belgium, and in the pay and service of his government. Besides carrying the mails, between Dover and Ostend, the Parlement Belge carried passengers and merchandise, and was employed in earning passage-money and freight. Sir Robert Phillimore declared (p. 144) that the case was one of first impression, and to be decided upon general principles and the analogies of law rather than upon any direct precedent, and it was held that the Parlement Belge did not come within the category of a ship of war or a pleasure vessel belonging to the

crown of Belgium, and was not exempt from the process of the court. On appeal, however, (5 P. D. 197,) it was held that the admiralty court was concluded by the declaration of the sovereign authority that the vessel was a public vessel of the state, and, further, that the mere fact of the ship having been used subordinately for trading purposes did not take away the immunity attaching to the public vessel of an independent sovereignty, and that the vessel could not be proceeded against.

It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged—even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed.

And these considerations would dispose of the case, were it not for two subordinate contentions which we deem it essential to notice before reaching a conclusion. The first, as expressed in the brief of counsel, is that the injury to the Linda Park should have been held to have been the result of inevitable accident, because "whatever was done in regard to the navigation of the New Yorker was done in the excitement of the moment, and in view of the extent of not only the possible but probable spread of the fire, under pressure of necessity." Pausing for a moment to analyze this contention it results that it involves the self-destructive assumptions that the maritime law, in order to render the person and property of the individual safe, in case of an emergency arising from the happening of fire, causes both the person and property of the individual to be unsafe, since without necessity and through negligence injury can be inflicted or destruction be brought about, without power, in the admiralty courts, to redress the wrong, although the wrongdoer

be amenable to their jurisdiction. But, while it is true that the emergency of fire was an element to be considered in determining whether or not those in charge of the fire-boat were negligent on the occasion in question, since negligence is relative, that is, depends upon whether there was an absence of the care which it was the duty to exercise under the particular circumstances, it does not follow that the emergency of fire exempted from the exercise of such due care as the occasion required towards property which was in the path of the fire-boat as it approached the slip for the purpose of getting into a position where it might assist in extinguishing the fire in question.

This principle has been heretofore applied by this court. Thus, in *The Clarita*, (1875) 23 Wall. 1, a tugboat, whose business it was to give relief to vessels on fire, in towing a vessel on fire from out of a dock, used a manila hawser. While so engaged the hawser was burnt, and the burning vessel getting loose from the tug, drifted, and set fire to another vessel. It was urged upon the court "that it is the interest of shipping that an enterprising company, like the one which owned this tug —a company which at great expense fits up a tug with powerful steam pumps, and keeps the vessel with her fires banked, night and day, to move on a moment's notice everywhere about a harbor for useful service—should be encouraged;" and the emergency of the occasion it was claimed ought to exempt from liability. In holding that the tug was in fault this court said (p. 15):

"Even ordinary experience and prudence would have suggested that the part of the hawser made fast to the ferryboat should be chain, and that it would be unsafe to use a hawser made of manila. Where the danger is great the greater should be the precaution, as prudent men in great emergencies employ their best exertions to ward off the danger. Whether they had a chain hawser on board or not does not appear, but sufficient does appear to satisfy the court that one of sufficient length to have prevented the disaster might easily have been procured, even if they were not supplied with such an appliance."

And in accord with this doctrine is the local law of New

York. Thus, in *Farley* v. *Mayor*, (1897) 152 N. Y. 222, in speaking of the obligation to exercise due care devolving upon the driver of a fire engine, while responding to an alarm of fire, the court said (p. 227):

"The conduct of the plaintiff was for the consideration of the jury. . . . He was bound in driving to exercise the care which a prudent person would ordinarily exercise under similar circumstances. It was for the jury to say whether he was alert on this occasion, watchful to avoid obstructions which might be in his path, and whether there was any omission on his part of reasonable circumspection and diligence which contributed to the accident."

And indeed, although there are a number of cases holding that a municipal corporation is not liable for a positive injury to the person or property of an individual inflicted by its fire department, they do not rest upon the doctrine of emergency, which we are now considering. On the contrary, *all these cases but expound the theory of sovereign attribute*, which we have seen does not control the maritime law, and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so.

The remaining suggestion is that as a proceeding *in rem* could not have been maintained against the fire-boat because it was the property of the city of New York, and therefore an instrumentality employed in the performance of its municipal functions, no action *in personam* was available to the owner of the injured vessel. As we at the outset said, there is contrariety of opinion in the lower admiralty courts of the United States as to whether the rule of the courts of common law which exempts from seizure the property of a municipality devoted to its municipal uses obtains in a court of admiralty of the United States. This conflict, as we have also said, we deem it unnecessary to determine in this case, because, even if it be conceded that the fire-boat could not have been seized by process from a court of admiralty, the proposition that, therefore, the owner could not be called upon, in an action *in personam*, to respond for the damages inflicted by the boat, is without foundation. Of course, as has been repeatedly declared by this

court, by the general admiralty law of this country, subject to the exemption from process possessed by the national government, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel. *The John G. Stevens*, (1898) 170 U. S. 113, 120, and cases cited, 122. A liability of the owners *in personam*, however, is not dependent upon ability to maintain a proceeding *in rem* because of the maritime tort. A maritime lien may not exist in a cause of collision, for instance, when the thing occasioning the tort was not the subject of a maritime lien, *The Rock Island Bridge*, (1867) 6 Wall. 213; or such a lien, if it exist, may not be enforceable, and so may be said to render the offending thing not the subject of a maritime lien, because of the ownership and possession of such thing being in the government of the nation. *The Siren*, (1869) 7 Wall. 152. Or the remedy *in rem* may not be available owing to the offending thing being actually in another country, or because of its loss intermediate the collision and the institution of legal proceedings.

A recovery can be had *in personam*, however, for a maritime tort when the relation existing between the owner and the master and crew of the vessel, at the time of the negligent collision, was that of master and servant. *Thorpe* v. *Hammond*, (1871) 12 Wall. 408; *The Plymouth*, (1866) 3 Wall. 35.

The prerequisite in admiralty to the right to resort to a libel *in personam* is the existence of a cause of action, maritime in its nature. That a collision upon navigable waters of the United States, between vessels, by the fault of one of such vessels, creates a maritime tort and a cause of action within the jurisdiction of a court of admiralty, is of course unquestioned. And, as said by this court in *In re Louisville Underwriters*, (1890) 134 U. S. 488, 490:

"By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libellee, or an attachment made of any personal property or credits of his."

Because we conclude that the rule of the local law in the

State of New York—conceding it to be as held by the Circuit Court of Appeals—does not control the maritime law, and, therefore, affords no ground for sustaining the non-liability of the city of New York in the case at bar, we must not be understood as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong. That question, from the aspect of both the common and municipal law, was considered by this court in *Weightman* v. *Corporation of Washington*, (1861) 1 Black, 39; *Barnes* v. *District of Columbia*, (1875) 91 U. S. 540; and in *District of Columbia* v. *Woodbury*, (1890) 136 U. S. 480. And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law which benignly above all considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so. For these reasons we are sedulous to say that we must not be understood as in anywise doubting the correctness of the doctrines expounded by this court in the cases just cited or as even impliedly approving contentions which may conflict with the principles announced in those cases.

Our conclusion is that the District Court rightly decided that the mayor, aldermen and commonalty of the city of New York were liable for the damages sustained by the owner of the Linda Park.

*The decree of the Circuit Court of Appeals for the Second Circuit is reversed, and the decree of the District Court is affirmed.*

Mr. Justice Gray, for himself and Mr. Justice Brewer, Mr. Justice Shiras and Mr. Justice Peckham, dissenting.

We are unable to concur in this decision; and the case ap-

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pears to us of such importance as to warrant, if not to require, a statement of the grounds of our dissent.

The question presented by the record is whether the owner of a vessel lying at a dock in the port of New York can maintain a libel in admiralty *in personam* against the city of New York for an injury to his vessel from being run into through the negligence of those in charge of a fire-boat, owned by the city and in the custody and management of its fire department, while hastening to assist in putting out a fire raging in a building at the head of the dock.

We had supposed it to be well settled, on authority and on principle, that no private suit could be maintained against a municipal corporation for an injury to person or property caused by negligence of members of its fire department while engaged in the performance of their official duties.

How far a municipal corporation may be held liable to a private action for the neglect of itself, or of its officers, in the performance of duties imposed upon it or upon them by law, is a subject upon which, in some of its aspects, there has been much difference of opinion in the courts of this country.

The difference has been most marked in actions against a city for injuries from a defect in a highway which the city is bound by its charter to repair. Such actions, when not expressly given by statute, have been held not to be maintainable by the courts of the New England States, and by those of New Jersey, Michigan, Wisconsin, South Carolina, Arkansas and California; but have been held to be maintainable by the courts of every other State in which the question has arisen. The decisions upon that point, in either class of States, are fully collected in 1 Shearman & Redfield on Negligence (5th ed.), §§ 258, 289.

What kinds of cases may fall within the same rule has been the subject of much doubt and discussion. But it has never, so far as we are aware, been held by the highest court of any State, that an action at law may be maintained against a municipal corporation for any injury to person or property caused by the negligence of the members of its fire department while engaged in the line of their duty.

It is not only in States whose courts hold that, unless author-

ized by express statute, no action can be maintained against a city for the neglect of itself or its officers to keep a highway in repair—as throughout New England, and in New Jersey, Wisconsin and California—that no action has been held to be maintainable against a city for negligence of members of its fire department while discharging their duty as such. *Hafford* v. *New Bedford*, (1860) 16 Gray, 297; *Fisher* v. *Boston*, (1870) 104 Mass. 87; *Pettingell* v. *Chelsea*, (1894) 161 Mass. 368; *Burrill* v. *Augusta*, (1886) 78 Maine, 118; *Edgerly* v. *Concord*, (1879) 59 New Hampshire, 78, and (1882) 62 New Hampshire, 8; *Welsh* v. *Rutland*, (1883) 56 Vermont, 228; *Dodge* v. *Granger*, (1892) 17 Rhode Island, 664; *Jewett* v. *New Haven*, (1870) 38 Connecticut, 368; *Wild* v. *Paterson*, (1885) 18 Vroom, (47 N. J. Law) 496; *Hayes* v. *Oshkosh*, (1873) 33 Wisconsin, 314; *Howard* v. *San Francisco*, (1875) 51 California, 52.

But the same view has prevailed in those States where a different view is taken of the question of the liability of cities for defects in highways and bridges. In the States of New York, Pennsylvania, Ohio, Illinois, Kentucky, Missouri, Mississippi, Iowa, Minnesota, Nebraska and Washington, (as appears in Shearman and Redfield on Negligence, *ubi supra*,) cities are held liable to private actions for damages from defects in highways. Yet in each of those States it has been adjudged that cities are not liable to actions for negligence of members of their fire department engaged in the line of their duty.

In the case at bar, the decree of the District Court in favor of the libellant against the city of New York proceeded upon the ground that by the local law of New York an action could be maintained against the city by the owner of property injured by the negligence of members of its fire department. The Circuit Court of Appeals came to the opposite conclusion; and upon careful examination of the New York decisions we are satisfied that the Circuit Court of Appeals was right upon that question.

In the Court of Appeals of the State of New York, the law has long been settled that a municipal corporation having a charter from the State, which requires it to construct and maintain highways and bridges, is liable to a person suffering injury

in person or property by a defect in the construction or repair of either by the negligence of the commissioner of highways. *Hutson* v. *New York*, (1853) 9 N. Y. 163; *Conrad* v. *Ithaca*, (1857) 16 N. Y. 158, 161; *Requa* v. *Rochester*, (1871) 45 N. Y. 129; *Hume* v. *New York*, (1878) 74 N. Y. 264; *Ehrgott* v. *New York*, (1884) 96 N. Y. 264; *Hughes* v. *Monroe*, (1895) 147 N. Y. 49, 57; *Missano* v. *New York*, (1899) 160 N. Y. 123.

But that court has constantly held otherwise in regard to negligence of members of the fire department, the police department, or even of the department of public charities, of public health, or of public instruction.

In *Maxmilian* v. *New York*, (1875) 62 N. Y. 160, which has always been considered a leading case, Judge Folger, delivering the unanimous judgment of the court, said: "There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user nor for misuser by the public agents." 62 N. Y. 164, 165. The previous decisions holding municipal corporations liable to private actions for defects in highways or bridges were placed upon the ground that "the duty of keeping in repair streets, bridges and other common ways of passage, and sewers, and a liability for a neglect to perform that duty, rest upon an express or implied

acceptance of the power, and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act." 62 N. Y. 170. But it was adjudged that the city was not liable for a personal injury caused by the negligence of the driver of an ambulance employed by the commissioners of public charities and correction, because the powers and duties of those commissioners were such as were to be exercised and performed, in every local political division of the State, not for the peculiar benefit of that division, but for the whole public, in the discharge of its duty to care for paupers, lunatics and prisoners. 62 N. Y. 168.

In *Ham* v. *New York*, (1877) 70 N. Y. 459, the decision in *Maxmilian's* case was approved, and was followed in holding that the city was not liable to one whose property was injured in consequence of the negligent construction of a schoolhouse by the department of public instruction of the city.

More directly in point is *Smith* v. *Rochester*, (1879) 76 N. Y. 506, in which it was held that no action against the city could be maintained by a person injured by the negligent driving of a hose cart along the street, pursuant to a vote of the city council directing the fire department to assemble in front of the city hall at midnight, as part of a celebration of the centennial anniversary of the National Independence. The judgment was put, not only upon the ground that the city had no authority to employ the horses and wagons of the fire department for a midnight parade of the fire department to celebrate the centennial anniversary of the Nation, but upon the additional and distinct ground that, assuming that the city had such authority under the statutes of New York, "the difficulty in maintaining the plaintiff's action is the well settled rule, that a municipal corporation is not liable for the negligence of firemen while engaged in the line of their duty." 76 N. Y. 513.

In *Terhune* v. *New York*, (1882) 88 N. Y. 247, it was held that an officer of the fire department could not maintain an action against the city for his wrongful dismissal from office by the fire commissioners, because, as was said by Judge Earl, citing the cases of *Maxmilian*, of *Ham* and of *Smith*, above

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referred to, "the fire commissioners were public officers, and not agents of the city." 88 N. Y. 251. See also *Springfield Ins. Co.* v. *Keeseville*, (1895) 148 N. Y. 46.

Quite in line with these decisions is *Farley* v. *New York*, (1897) 152 N. Y. 222, 227, which was an action by the driver of a hose carriage against the city to recover damages for injuries caused by driving against an obstruction in the highway. The New York statute of 1882, c. 410, (consolidating the laws affecting public interests in the city of New York,) provides in § 444 that "the officers and men of the fire department, with their apparatus of all kinds, when on duty, shall have the right of way at any fire, and in any highway, street or avenue, over any and all vehicles of any kind, except those carrying United States mails;" and in § 1932 that no person shall drive or ride any horse through any street in the city faster than five miles an hour. The Court of Appeals, speaking by Chief Justice Andrews, said: "The safety of property and the protection of life may and often do depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the fire department in going to fires. Section 1932 was intended to regulate the speed of horses travelling on the streets and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires." The further decision that negligence on the part of the driver would defeat his action against the city has no tendency to show that such negligence could render the city liable to third persons.

In the very recent case of *Missano* v. *New York*, 160 N. Y. 123, in which it was held that keeping the streets clean stood upon the same ground as keeping them in repair, and that the city was therefore liable for a personal injury caused by the negligence of the driver of an ash cart of the street-cleaning department, the court again affirmed the established distinction between such cases and those in which the corporation exercised a public and governmental power for the benefit of the whole public and as the delegate and representative of the State; and quoted with approval the statement of Judge Wallace in a simi-

lar case in the Circuit Court of the United States, where, speaking of the commissioner of the street-cleaning, he said, "His duties, unlike those of the officers of the departments of health, charities, fire and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them." *Barney Co.* v. *New York*, (1889) 40 Fed. Rep. 50. See also *Hughes* v. *Auburn*, (1899) 161 N. Y. 96, 103, 104; and the decisions of the District Court of the United States for the Southern District of New York in *Haight* v. *New York*, (1885) 24 Fed. Rep. 93, and in *Edgerton* v. *New York*, (1886) 27 Fed. Rep. 230.

The highest courts of the States of Pennsylvania, Ohio, Illinois, Kentucky, Missouri, Mississippi, Iowa, Minnesota, Nebraska and Washington, also, as already mentioned, have adjudged that no private action can be maintained to recover damages against a city for an injury caused by negligence of members of its fire department while engaged in their official duties. The decisions are so uniform, and treat the point as so well settled, that it is enough to cite them, without stating them in detail. They are as follows: *Knight* v. *Philadelphia*, (1884) 15 Penn. Weekly Notes, 307; *Fire Insurance Patrol* v. *Boyd*, (1888) 120 Penn. St. 624, 646; *Kies* v. *Erie*, (1890) 135 Penn. St. 144, 149; *Frederick* v. *Columbus*, (1898) 58 Ohio St. 538, 546; *Wilcox* v. *Chicago*, (1883) 107 Illinois, 334, 338–340; *Greenwood* v. *Louisville*, (1877) 13 Bush, 226; *Davis* v. *Lebanon*, (Kentucky, 1900) 57 Southwestern Reporter, 471; *Heller* v. *Sedalia*, (1873) 53 Missouri, 159; *McKenna* v. *St. Louis*, (1878) 6 Missouri App. 320; *Alexander* v. *Vicksburg*, (1891) 68 Mississippi, 564; *Saunders* v. *Fort Madison*, (Iowa, 1900) 82 Northwestern Reporter, 428; *Grube* v. *St. Paul*, (1886) 34 Minnesota, 402; *Gillespie* v. *Lincoln*, (1892) 35 Nebraska, 34, 46; *Lawson* v. *Seattle*, (1893) 6 Wash. St. 184.

The law on this point, as understood and administered throughout the country by the highest courts of all the States in which the question has arisen, is unqualifiedly recognized by the principal text-writers. Mr. Dillon, for instance, after observing that

"police officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties," goes on to say: "So, although a municipal corporation has power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, it is not liable for the negligence of firemen appointed and paid by it, who, when engaged in their line of duty upon an alarm of fire, ran over the plaintiff, in drawing a hose-reel belonging to the city, on their way to the fire; nor for injuries to the plaintiff, caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department; nor for negligence whereby sparks from the fire engine of the corporation caused the plaintiff's property to be burned. The exemption from liability, in these and like cases, is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed by the city corporation, are not the agents and servants of the city for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given; and the maxim of *respondeat superior* has therefore no application." 2 Dillon on Municipal Corporations (4th ed.), §§ 975, 976. See also 1 Shearman and Redfield on Negligence, § 265; Tiedeman on Municipal Corporations, § 333*a*; 1 Beach on Public Corporations, § 744; 13 Amer. & Eng. Ency. of Law (2d ed.), 78.

The libellant relied on *Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 93, in which the members of the town council of Liverpool and their successors, who had been formed by acts of Parliament into a corporation by the style of the Trustees of the Liverpool Docks, were held liable to an action for an injury to a vessel from a bank of mud which had been negligently suffered to remain in the docks. That decision proceeded upon the ground that the trustees of the docks were one of those corporations

formed for trading and other profitable purposes, and in their very nature substitutions on a large scale for individual enterprise; supplying to those using the docks the same accommodation and the same services that would have been supplied by ordinary dock proprietors to their customers; and being paid for such accommodation and services sums of money, constituting a fund which, although not belonging to them for their own use, was devoted to the maintenance of the works, and presumably to pay claims against the corporation for injuries caused by their negligence. See L. R. 1 H. L. 105–107, 122. It was of such bodies, that Lord Cranworth, after observing that the fact that the appellants, in whom the docks were vested, did not collect tolls for their own profit, but merely as trustees for the benefit of the public, made no difference in principle in respect to their liability, went on to say: "It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

But the city of New York, in establishing and carrying on a fire department, is not a substitution for individual enterprise; nor does it perform any such services as ordinary individuals might perform to their customers; nor does it receive any compensation for the use of the fire-boat, or from those benefited by the acts of the fire department.

The decisions of this court contain nothing, to say the least, inconsistent with the conclusion that no action at law could be maintained in such a case as this.

This court, taking the same view of the liability of municipal corporations to actions at law for injuries caused by defects in highways or bridges, which has prevailed in New York and in most of the States, has held that an action of that kind may be maintained in the courts of the District of Columbia; *Weightman* v. *Washington*, (1861) 1 Black, 39; *Barnes* v. *District of*

*Columbia*, (1875) 91 U. S. 540; *District of Columbia* v. *Woodbury*, (1890) 136 U. S. 450; *Bauman* v. *Ross*, (1897) 167 U. S. 548, 597; or in the courts of a Territory; *Nebraska City* v. *Campbell*, (1862) 2 Black, 590; or in the Circuit Court of the United States held in a State whose courts maintain such an action, as in New York, *New York* v. *Sheffield*, (1866) 4 Wall. 189; in Illinois, *Chicago* v. *Robbins*, (1862) 2 Black, 418, and (1866) 4 Wall. 657, and *Evanston* v. *Gunn*, (1878) 99 U. S. 660; in Virginia, *Manchester* v. *Ericsson*, (1881) 105 U. S. 347; or in Ohio, *Cleveland* v. *King*, (1889) 132 U. S. 295; but that in a State where, as in Michigan, its highest court holds that a municipal corporation is not liable to such an action, no such action will lie in the Circuit Court of the United States, because, as was said by Mr. Justice Brewer in delivering judgment, the question "is not one of general commercial law; it is purely local in its significance and extent." *Detroit* v. *Osborne*, (1890) 135 U. S. 492, 498.

In the leading case of *Weightman* v. *Washington*, which was an action against the city of Washington for injuries caused by a defect in a bridge, the court said: "In view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants in consideration of the privileges and immunities conferred by the charter." 1 Black, 51. And the court took occasion, by way of precaution, to observe that powers granted by the legislature to a municipal corporation to pass ordinances prescribing and regulating the duties of policemen and firemen "are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty." 1 Black, 49.

In *Barnes* v. *District of Columbia*, the action was for a defect in a street in the District of Columbia, constituted a municipal corporation by the act of Congress of February 21, 1871, c. 62, which vested in a board of public works appointed by the

President, the entire control and regulation of the streets, avenues and alleys of the city. 16 Stat. 419, 427. The decision proceeded upon the ground that the care of the streets was "peculiarly a municipal duty," and that the board of works, being charged by Congress with the exclusive control of the streets, was, in that respect, like an ordinary agent of the city, and its proceedings were proceedings of the city. 91 U. S. 547, 555.

But there is no ground for assuming that the duty of putting out fires was imposed upon the city of New York "in consideration of the immunities and privileges conferred by the charter," or was "peculiarly a municipal duty."

In *Bowditch* v. *Boston*, (1879) 101 U. S. 16, it was adjudged that no action would lie, either at common law or by statute, against the city of Boston to recover damages for the destruction of a building, blown up under a general order of the chief engineer of the city to prevent the spreading of a conflagration; that the action, not being maintainable at common law, could only be supported by an express statute; and that the statutes of Massachusetts, as construed by the highest court of the State, did not authorize such an action against the city, except for the destruction of a building by specific order of three firewards or engineers acting jointly. In support of the position that the action would not lie at common law, this court relied on the ancient rule, as stated by Coke, that "for the commonwealth a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and a thing for the commonwealth every man may do without being liable to an action." *Case of the King's Prerogative in Saltpetre*, 12 Rep. 12, 13. The expression "the commonwealth" was evidently used by Coke as equivalent to "the common weal" or "the public welfare;" for he added, after the proposition above quoted, "as it is said in 3 H. 8, fol. 15," evidently intending to refer to the Year Book of 13 Hen. VIII, 15, 16, in which the rule is introduced by the words "the common wealth shall be preferred before private wealth;" and in a statement of the rule in a case in 29 Hen. VIII the corresponding expression is "the common weal." *Maleverer* v. *Spinke*, Dyer, 35*a*, 36*b*.

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The precise question whether a municipal corporation is liable to an action at law for injuries caused by negligence of members of its fire department has never been decided or considered by this court.

But the principles affirmed and illustrated in the authorities already cited forbid the maintenance of a private action against a municipal corporation for injuries caused by the negligence of members of a fire department, while engaged in the performance of their official duties.

The putting out of fires which are in danger of spreading is for the benefit of the whole public, and for the protection of the property of all. The danger is so great and imminent that it is especially one of those cases in which the public safety must be preferred to private interests. *Salus populi suprema lex.* It is the public good, the general welfare, that justifies the destruction of neighboring buildings to prevent the spreading of a fire which as yet rages in one building only. The duty of protecting, so far as may be, all property within the State against destruction by fire, is a public and governmental duty, which rests upon the government of the State; and it does not cease to be a duty of that character because the State has delegated it to, or permitted it to be performed by, a municipal corporation. When entrusted by the legislature to a municipal corporation, a political division of the State, it is not for the peculiar benefit of that corporation or division, but for its benefit in common with the whole public. A fire department is established in a municipality, not merely for the protection of buildings and property within the municipality itself, but equally for the protection of buildings and property beyond its limits, to which a fire originating within those limits may be in danger of spreading. Moreover, the necessity and appropriateness of the course and measures to be taken to stay a conflagration must be promptly determined, in the first instance, by those charged with the performance of the duty at the time of the exigency; and often cannot be as accurately judged of long after the fact. The members of the fire department of a city, therefore, whether appointed by the municipal corporation or otherwise, are not mere agents or servants of the corporation,

but are public officers charged with a public service; and for their acts or their negligence in the performance of this service no action lies against the corporation, unless expressly given by statute.

It appears to us to be equally clear that no suit upon a like cause of action can be maintained in a court of admiralty; or, as expressed by the Circuit Court of Appeals in this case, "That the suit is brought in a court of admiralty instead of a common law court, and that the negligence consisted in the improper navigation of the vessel, cannot affect the conclusion." 35 U. S. App. 204.

It was argued that all the admiralty courts of the United States should be governed by one rule of maritime law, without regard to local decisions. Such is doubtless the case in the courts of admiralty, as it is in the other courts of the United States, upon questions of general commercial law. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, (1889) 129 U. S. 397, 443. Courts of admiralty are also governed by their own rules, and not by the common law or by local statute, in matters affecting their own jurisdiction and procedure, as, for instance, in regard to the rules of navigation in navigable waters; *The New York*, (1855) 18 How. 223; to the limitation of the liability of shipowners; *Butler* v. *Boston Steamship Co.*, (1889) 130 U. S. 527; to the duration, the enforcement and the marshalling of maritime liens; *The Chusan*, (1842) 2 Story, 455, 462; *The Lottawanna*, (1874) 21 Wall. 558; *The J. E. Rumbell*, (1893) 148 U. S. 1, 17; and of the effect of contributory negligence of a suitor upon his right to recover and upon the assessment of damages. *Atlee* v. *Packet Co.*, (1874) 21 Wall. 389, 395; *The Max Morris*, (1890) 137 U. S. 1. But the decision of this case does not turn upon any such question.

By the general admiralty law of this country, often declared by this court, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of her master or crew to another vessel. *The Malek Adhel*, (1844) 2 How. 210, 233, 234; *The China*, (1868) 7 Wall. 53, 68; *Ralli* v. *Troop*, (1895) 157 U. S. 386, 403; *The John G. Stevens*, (1898) 170 U. S. 113, 120. But that does not warrant the inference

that a libel *in personam* can be maintained against the owner for a tort which would neither sustain a libel *in rem* against the ship, nor an action at law against her owner.

There is no case, we believe, in which a libel in admiralty has been maintained by this court, as for a tort, upon a cause of action on which, by the law prevailing throughout the country, no action at law could be maintained. On the contrary, it has repeatedly held that, as no action lies at common law for the death of a human being, no suit for a death caused by the negligence of those in charge of a vessel on navigable waters, either within a State or on the high seas, can be maintained in admiralty in the courts of the United States, in the absence of an act of Congress, or a statute of the State, giving a right of action therefor; and in delivering judgment in the leading case Chief Justice Waite said: "We know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched." "The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change the rule." *The Harrisburg*, (1886) 119 U. S. 199, 213; *The Alaska*, (1889) 130 U. S. 201; *The Corsair*, (1892) 145 U. S. 335; *The Albert Dumois*, (1900) 177 U. S. 240, 259.

The cases of *The Siren*, (1868) 7 Wall. 152, and *The Davis*, (1869) 10 Wall. 15, related wholly to claims against the United States, as compared with claims against private persons; no question of the liability of municipal corporations was contested by the parties, or alluded to by the court; and neither decision has any tendency to support the libel in the present case. In *The Siren*, a claim against a prize ship for damages from a collision with her while in the possession of the prize crew was sustained against the proceeds of the sale after condemnation, solely because the United States were the actors in the suit to have her condemned. So in *The Davis*, salvage against goods belonging to the United States, and part of the cargo of a private ship, was allowed because the possession of her master was not

the possession of the United States, and the United States could only obtain the goods by claiming them in court. In short, in each case, as Mr. Justice Miller afterwards pointed out, "the Government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others." *Case* v. *Terrell*, (1870) 11 Wall. 199, 201. The opinion in each of the three cases distinctly affirmed the well settled doctrine of our law, that no suit can be maintained in a judicial tribunal against a State, or against its property, without its consent. See also *Cunningham* v. *Macon & Brunswick Railroad*, (1883) 109 U. S. 446, 451; *Stanley* v. *Schwalby*, (1892) 147 U. S. 508, 512, and (1896) 162 U. S. 255, 270; *Belknap* v. *Schild*, (1896) 161 U. S. 10, 16; *Briggs* v. *Light-boats*, (1865) 11 Allen, 156, 179–185. In England, it is equally well settled that no libel in admiralty can be maintained against the Crown, or against a foreign sovereign, or against any property of either, without his consent. See *The Lord Hobart*, (1815) 2 Dodson, 100; *The Athol*, (1842) 1 W. Rob. 374; *The Parlement Belge*, (1880) 5 Prob. D. 191, in which the Court of Appeal, speaking by Lord Justice Brett, (since Lord Esher, M. R.,) reversed the exceptional decision of Sir Robert Phillimore in 4 Prob. D. 147. The decisions that no suit can be maintained against the sovereign without his consent have certainly no tendency to support a suit against a municipal corporation for negligence in exercising powers delegated to it as a political division of the State, or to its officers, for the benefit of the whole public, and not for the benefit of the corporation only.

The cases of *The Blackwall*, (1869) 10 Wall. 1, *The Clarita and The Clara*, (1874) 23 Wall. 1, and *The Connemara*, (1883) 108 U. S. 352, related to the rights and liabilities of private persons engaged in saving, or attempting to save, vessels from imminent danger of destruction by fire; and decided nothing as to the rights or liabilities of municipal corporations or of their firemen. In *The Clarita*, it was a private corporation owning a ferry boat was held liable for negligence while engaged in an attempt to save a vessel from destruction by fire; and *The Blackwall*, *The Clara* and *The Connemara* concerned the allowance of salvage to private salvors for services in putting out a

fire on a vessel. In *The Blackwall*, the court avoided, as unnecessary to the decision, the expression of any opinion upon the question whether members of a fire department could recover salvage for such services. 10 Wall. 12. It was afterwards decided by Mr. Justice Bradley, sitting in the Circuit Court, that they could not, because "the firemen were merely engaged in the line of their duty," and "the attempt to make the performance of this duty a ground of salvage, when it is a ship that takes fire, is against wise policy." *The Mary Frost*, (1876) 2 Woods, 306; *The Suliote*, (1880) 4 Woods, 19.

In *The F. C. Latrobe*, (1886) 28 Fed. Rep. 377, in the District of Maryland, and in *Gavagnin* v. *Philadelphia*, (1894) 59 Fed. Rep. 303, and 17 U. S. App. 642, and in *Guthrie* v. *Philadelphia*, (1896) 73 Fed. Rep. 688, in the Eastern District of Pennsylvania, in each of which a libel in admiralty was maintained against a city for a collision with the libellant's vessel of a steamboat maintained by the city for the purpose of clearing its harbor of ice, the steamboat, at the time of the collision, was not engaged in its usual public service, but in a special service for a private benefit; and stress was laid upon that fact in each of the opinions.

The decisions of the Circuit Court of the United States in Massachusetts in *Boston* v. *Crowley*, (1889) 38 Fed. Rep. 202, and of the District Court of the United States in Connecticut, in *Greenwood* v. *Westport*, (1894) 60 Fed. Rep. 560; *S. C.*, 63 Connecticut, 587, were only that libels in admiralty *in personam* could be maintained against a city or town for injuries caused to vessels by not keeping open a draw in a bridge. It may also be observed that in *Crowley's* case the decision was not in accord with the earlier decision in *French* v. *Boston*, (1880) 129 Mass. 592, and proceeded upon the assumption (38 Fed. Rep. 204) that the question was one of general municipal or commercial law upon which the courts of the United States were not bound to follow the decisions of the highest courts of the State—an assumption inconsistent with the later judgment of this court in *Detroit* v. *Osborne*, 135 U. S. 492, 498, above cited. In *Greenwood's* case the question was considered to be an open one in the courts of Connecticut; and it has since been decided the

other way by the highest court of the State. 60 Fed. Rep. 569, 575, 576; *Daly* v. *New Haven*, (1897) 66 Connecticut, 644.

The only instance cited at the bar, in which a libel in admiralty has been maintained in such a case as the present, is that of *Thompson Navigation Co.* v. *Chicago*, (1897) 79 Fed. Rep. 984, decided by the District Court for the Northern District of Illinois since this suit was commenced, and avowedly a departure from the case of *The Fidelity*, (1878) 9 Benedict, 333, and (1879) 16 Blatchford, 569, in the Southern District of New York, in which it was held by Mr. Justice Blatchford, then District Judge, and by Chief Justice Waite in the Circuit Court on appeal, that a libel *in rem* could not be maintained in admiralty against a steam tug owned by the city of New York, and under the exclusive control of the commissioners of public charities and correction, and employed in the performance of their official duties, for her collision with the libellant's vessel through the negligence of those in charge of the tug.

The duty of the State to protect the property of all from destruction by fire covers vessels in its harbors, as well as buildings within its territory. The authority of the fire department and its members as to both kinds of property is derived from the municipal law, and not from the maritime law. *Ralli* v. *Troop*, 157 U. S. 386, 419, 420. All the shipping, foreign and domestic, in the port, is under the same safeguard, and subject to the same risks. Prompt, decisive and unembarrassed action of the firemen is necessary to the protection of both buildings and vessels from the dangers of a conflagration. The necessity of allowing a municipal fire-boat to proceed on her way to put out a fire affords a special reason for not allowing her, while so occupied, to be seized on a libel *in rem*. But all the reasons for not maintaining an action of this kind against the city in a court of common law apply with undiminished force to a libel against the city *in personam* in a court of admiralty.

In any aspect of the case, therefore, we are of opinion that this suit cannot be maintained against the city of New York; not by the local law of New York, because that law, as declared by the Court of Appeals of the State, is against the maintenance of such a suit; not by the maritime law, because according to

the municipal law prevailing throughout this country, as declared by the highest court of every State in which the question has arisen, cities are not liable to such suits, and no authoritative precedent or satisfactory reason has been produced for applying a different rule in a court of admiralty.

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## JOYCE *v.* AUTEN.

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

No. 83. Argued November 7, 1900. — Decided December 24, 1900.

A surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee ; or, in other words, the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise.

An assignment in insolvency does not disturb liens created prior thereto expressly or by implication in favor of a creditor.

On March 20, 1893, the plaintiff in error, as a surety, executed with his principal the following note:

"Three years after date, we, or either of us, promise to pay to the order of C. H. Whittemore, as receiver of the McCarthy & Joyce Company, the sum of nine thousand ($9000.00) dollars, with interest at six per cent per annum from date till paid. This is one of the three notes executed for purchase money of the assets of the McCarthy–Joyce Company, this day sold to James E. Joyce & Company.

"James E. Joyce & Co.
"John Joyce.

"Little Rock, Arkansas, March 20, 1893."

This note was transferred before due for value to the First National Bank of Little Rock, which afterwards went into the hands of a receiver. Such receivership was changed, and the defendant in error is the present receiver. The note not having

been paid at maturity, this action was brought in the Circuit Court of the United States for the Southern District of Ohio. The defendant answered, pleading two defences, as follows: First, that the McCarthy & Joyce Company, a corporation of Little Rock, Ark., became involved, and on or about January 16, 1893, assigned its property to one C. H. Whittemore, as assignee, for the benefit of creditors; that such assignment was confirmed by the chancery court of the county, and the assignee appointed receiver; that thereafter the receiver was directed by said court to sell all the property belonging to the insolvent company; that such sale was made on April 20, 1893, to James E. Joyce & Company, the principal in this note, for $38,200, all of which has been paid by the purchaser, except this note and another of like date and amount, signed by another party as surety. The answer then proceeds as follows:

"Defendant further says that at the time the order for the sale of said real and personal property was made it was expressly provided and ordered by the court that the said receiver was, in addition to obtaining endorsers or sureties upon the notes given for the deferred payments, to retain and reserve a lien, under the statutes of the State of Arkansas, upon all the real and personal property so ordered to be sold, and this defendant, knowing that said property was more than sufficient in value to pay all the deferred payments as provided for in said sale, and relying upon the faithful execution of said order by said receiver, became surety upon said note described in the petition herein. Defendant further says that said receiver, after having received said note, in violation of the order of the court, and in violation of the rights of this defendant, negligently and wrongfully failed to retain or reserve a lien upon said property, real and personal, and improperly conveyed all of said real and personal property to the said James E. Joyce & Company, free and clear of any lien whatsoever. The defendant further says that said James E. Joyce & Company, after so receiving said property, have sold and conveyed all the personal property and nearly all the real estate to third persons, who were ignorant of said order of court, made for said sale; whereby the lien which ought to have been retained and reserved has been lost; and

the said defendant further says that said property was sufficient in value to have fully paid said note, as well as the other note given for the deferred payments, and the said First National Bank of Little Rock, Arkansas, as well as its receiver, having received the said note with notice of the foregoing facts, this defendant is discharged and released from the said note, he asks that the plaintiff be compelled to surrender said note and that the same be canceled by order of this court."

The second defence was that, when the McCarthy & Joyce Company made its assignment, a part of the property assigned consisted of certain promissory notes, the dates, amounts and payers of which were specifically described; that such notes at the time of the assignment were in the possession of the First National Bank of Little Rock for collection; that such bank was a preferred creditor to a large amount; that all the property of said McCarthy & Joyce Company, including such notes, was ordered sold, and that the sale was made for $38,200, as heretofore stated; that thereafter the First National Bank and its receivers declined to surrender the notes, or the proceeds of such as had been collected; that the purchaser, James Joyce & Company, paid to the receiver of the McCarthy & Joyce Company $20,200, and that the notes retained by the bank and its receiver were of sufficient value to pay the unpaid purchase price, both this note and the other note heretofore described. A demurrer to such answer was sustained, and judgment entered in favor of the plaintiff, which judgment was affirmed by the Court of Appeals of the Sixth Circuit, 35 C. C. A. 38, and thereafter this writ of error was sued out.

*Mr. Thomas E. Powell* for plaintiff in error. *Mr. Thomas B. Minahan* was on his brief.

*Mr. Talfourd P. Linn* for defendant in error. *Mr. Joseph H. Outhwaite* was on his brief.

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

The surety, defendant below, now plaintiff in error, did not

in his answer aver that the note was not given for value, or that either he or his principal had paid it. His defences were that he was discharged from liability, first, by the conduct of the payee; and, second, by that of the plaintiff.

With regard to the first defence, we may put the plaintiff out of consideration, and inquire whether the defence would have been good if the payee had not transferred the note, but had himself brought the action. For the plaintiff, though charged to have had knowledge of the facts, is, if in no better, certainly in no worse, position than the payee would have been.

That defence was in substance that the receiver was directed in making a sale to retain a lien, as well as to take personal security. The surety knew that such order had been made, expected that it would be complied with, and signed as surety, relying upon compliance; but there is no allegation that he ever notified either his principal or the receiver that he signed upon that condition. So far as the paper disclosed it was an absolute promise on the part of the principal to pay so much money, and an unconditional guarantee by the surety of such payment. Could the principal defend against an action on this note on the ground that no lien was retained upon the property sold by the receiver and purchased by him? Clearly not. But the paper puts both principal and surety on the same plane. If the surety has any other defence it must be because the writing does not fully express his contract. He says that it does not express the contract he intended to make, but no conditions are named. If he wanted to attach conditions to his guarantee he should have stated them in the writing, or, at least, given notice of them to the payee, the other party to the contract. Even if he had told his principal that he signed only upon a condition, such notice would not bind the payee unless communicated to him; much less when, so far as the answer discloses, he never notified either the principal or the payee, but, relying upon the payee's complying with the order of the court, signed an apparently unconditional promise. The receiver was not acting in behalf of the defendant. His duty was to the estate and its creditors. True, he ought, in compliance with the order of the court, to have retained a lien, but his failure so to do was a

breach of duty to the estate in his hands, for which failure the estate and its creditors might hold him responsible. Undoubtedly, one may not after receiving the promise of a surety release other securities which he holds to the prejudice of the surety, but a release of security after the receipt of the promise of a surety is very different from a failure to take more security than such promise. It would seem from the allegations in this answer that the surety signed supposing that he was incurring no liability; that his unconditional promise that the principal should pay the note meant nothing, and this because he expected that other primary and sufficient security would be taken. And yet he gave no notice that such was the condition upon which he signed as surety, and did nothing to compel compliance by the receiver with the order of the court. He was willing to make his unconditional promise and take the chances of the receiver doing as he was ordered, and now seeks to release himself from that promise simply because of the receiver's neglect.

There are many authorities sustaining the proposition that a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee; or, in other words, that the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise. See, among other cases, *Goodman* v. *Simonds*, 20 How. 343, 366; *Dair* v. *United States*, 16 Wall. 1; *Merriam* v. *Rockwood*, 47 N. H. 81; *Selser* v. *Brock*, 3 Ohio St. 302, 308; *Passumpsic Bank* v. *Goss*, 31 Vt. 315; *State* v. *Potter*, 63 Mo. 212; Baylies on Sureties and Guarantors, 440; 2 Brandt on Suretyship and Guaranty, sec. 407. Without citing other of the many authorities to the same effect, it may not be out of place to refer to one decision which presents the question in almost precisely the same form that it is presented here, *Wornell* v. *Williams*, 19 Texas, 180. In that case an administrator sold property of the estate, the order of sale directing that he take from the purchaser two good sureties as well as mortgages upon the property, as provided by the statute. He took the

sureties but failed to take the mortgage. The sureties, when sued, setting forth these facts, averred in their answer:

"Further answering, these defendants say that they became sureties to the note aforesaid in consideration of the requirement made by the statute and said order, that a mortgage should be taken upon the said slave; and they would not have become sureties but for that requirement, and the belief and assurance that it would be complied with."

There was no allegation of notice to the administrator of the condition upon which they signed. The court, overruling the defence, said:

"There is no allegation of any actual deception, imposition or fraud practiced upon the defendants. The only ground for relief really disclosed by the plea is that the plaintiff did not perform his duty by taking the required additional security. The taking of that security should have been contemporaneous with the taking of the note upon which the defendants became sureties. Hart. Dig. art. 1181. If they intended to become such, only upon the taking of the mortgage upon the property, it became them, before giving their note, to see that the mortgage security was taken. There was nothing to prevent them from doing so. If, instead of taking that precaution, they saw fit to trust to the prudence and discretion of the administrator, the estate he represents cannot be made to bear the consequences of the want of their vigilance and care. They cannot make a hardship, against which they had ample power and opportunity to provide, a ground to relieve them from their obligation to the estate."

The demurrer to the first defence in this answer was properly sustained.

The second defence is substantially that the bank was a creditor of the insolvent firm; that it was a preferred creditor; that it had certain notes for collection; that those notes were included in the sale but were not turned over to the purchaser, and that they were of sufficient value to offset the amount due on this note. It is not alleged that the debt due from the insolvent to the bank had been paid by collection of those notes or otherwise, but the defence is rested on the averment that notes

thus deposited and unpaid were of sufficient value to pay the unpaid purchase money. It is familiar law that a bank receiving notes for collection is entitled, in the absence of a contract expressed or implied to the contrary, to retain them as security for the debt of the party depositing the notes. 1 Jones' Liens (2d ed.), § 244; *Bank of Metropolis* v. *New England Bank*, 1 How. 234, 239; *Reynes* v. *Dumont*, 130 U. S. 354, 391, 392. But if such banker's lien existed the sale transferred nothing but the equity in those notes after the payment of the debt secured by their deposit.

The fact, as alleged, that the bank, although a preferred creditor, accepted the assignment, cannot be construed as an admission that the bank waived its lien on the notes deposited with it for collection. Nowhere is there a suggestion that the bank either directly or indirectly consented that the assignment should operate to divest itself of its lien and transfer the notes in its hands to the receiver discharged from such lien. While the amount of the indebtedness of the insolvent to the bank is not in this answer disclosed, counsel refer us to the case of *Cockrill* v. *Joyce*, 62 Ark. 216, a case decided before the commencement of this action, in which the purchaser, the principal debtor, sought to defeat the title of the bank to these notes and compel an inclusion of them *in solido* in the sale to the purchaser discharged of any lien of the bank thereon. And in that case it appeared that prior to the insolvency the company was indebted to the bank in the sum of nearly $100,000, and that these notes were placed in its hands for collection. The court sustained the title of the bank to the notes, and their proceeds as security for its indebtedness, notwithstanding the assignment. While we may not refer to that case for matters of fact, yet the facts therein disclosed add weight to the conclusion to which, irrespective thereof, we have come, that an assignment in insolvency does not disturb liens created prior thereto expressly or by implication in favor of a creditor. We conclude, therefore, that the demurrer to the second defence was properly sustained. The judgment of the Circuit Court of Appeals is

*Affirmed.*

# ARKANSAS *v.* SCHLIERHOLZ.

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

No. 122. Argued and submitted December 6, 1900.—Decided December 24, 1900.

The authority of this court to review the action of the court below in this case must be found in one of three classes of cases, in which, by section 5 of the judiciary act of March 3, 1891, an appeal or writ of error may be taken from a District or Circuit Court direct to this court. The classes of cases alluded to are as follows: 1. Cases in which the jurisdiction of the court is in issue, in which class of cases the question of jurisdiction alone is to be certified from the court below for decision; 2. Cases involving the construction or application of the Constitution of the United States; and, 3. Cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. The court is of opinion that the case at bar is not embraced within either of those classes of cases.

Two indictments were found by the grand jury of Independence County, Arkansas, against Schlierholz, appellee herein, for alleged violations of the statutes of Arkansas. One indictment charged the taking possession, unlawfully, of certain timber; the other, the unlawful marking of timber. Upon such indictments Schlierholz was taken into custody by the appellant John A. Hinkle, as sheriff of Independence County. Thereupon Schlierholz presented a petition in *habeas corpus* to the judge of the District Court of the United States for the Eastern District of Arkansas. In said petition it was alleged, in substance, that the acts complained of in the indictments referred to were done by Schlierholz in the performance of his duty as a special agent of the General Land Office under the Department of the Interior of the United States. A writ of *habeas corpus* was allowed, and it was ordered to be served not only on Hinkle, the sheriff, but on the prosecuting attorney of the State of Arkansas for the third judicial circuit. Issue was joined by a return filed by said prosecuting attorney. On motion, the case was transferred to the District Court of the United States for the

Northern Division of the Eastern District of Arkansas. Hearing having been had, the court found that Schlierholz, in the doing of the things complained of in the indictments, acted in the performance of his duty as a special agent of the General Land Office of the United States, and in strict conformity with the rules and regulations of the Secretary of the Interior, and that his arrest and detention were illegal and void. It was adjudged that the petitioner "be discharged from the custody of the sheriff under the writ in the petition and response set out and go hence without day." Thereupon, the court allowed an appeal to this court, and in the order doing so the following recitals are found:

"And at the request of the said State of Arkansas and John A. Hinkle, as sheriff, the following questions, among others involved herein, are certified to the said Supreme Court of the United States:

"1. Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence County, Arkansas, for the matters and things and under the circumstances set out in the record in this cause.

"2. Whether the proper order of this court under the facts should have been to remand said petitioner to the custody of the said sheriff of Independence County, Arkansas, to be dealt with by the Independence Circuit Court of the State, or to discharge him from said custody."

*Mr. Morris M. Cohn* for appellants, submitted on his brief, on which were *Mr. Jeff. Davis*, *Mr. S. D. Campbell* and *Mr. J. C. Yancey*.

*Mr. Solicitor General* for appellee.

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

Before we can consider the principal propositions which have been argued at bar, we must determine whether on this record jurisdiction exists to entertain this appeal.

The authority of this court to review the action of the court

below must be found in one of three classes of cases, in which, by section 5 of the judiciary act of March 3, 1891, an appeal or writ of error may be taken from a District or Circuit Court direct to this court. The classes of cases alluded to are as follows:

1. Cases in which the jurisdiction of the court is in issue, in which class of cases the question of jurisdiction alone is to be certified from the court below for decision;

2. Cases involving the construction or application of the Constitution of the United States; and,

3. Cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

We are of opinion that the case at bar is not embraced within either of the classes of cases just mentioned.

As respects the first class, it was said in *Huntington* v. *Laidley*, (1900) 176 U. S. 676, as follows:

"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.*, 151 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."

Now, on looking at the proceedings had prior to the judgment rendered below, we do not find even a suggestion that an issue was made and decided by the District Court as to the jurisdiction of that court to hear and determine the controversy presented by the petition in *habeas corpus* and the return thereto. On the contrary, the defence set forth in the return went simply to the merits, being based upon the contention that Schlierholz, in the acts charged in the indictment, had acted outside of his instructions and contrary to law. Nor, if the record imported that an issue as to jurisdiction had been made in the trial court and had been by it decided, do the questions propounded to this court constitute a sufficient certification of such ques-

tion of jurisdiction. The statements in the order allowing the appeal, setting forth the questions propounded for the decision of this court, whether considered by themselves or in connection with the record, cannot in reason be treated as "a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction." *Shields* v. *Coleman*, (1895) 157 U. S. 177. As declared in the case just cited, "no mere suggestion that the jurisdiction of the court was in issue will answer." But in the questions propounded by the District Court there is not even an intimation that the court, in the judgment rendered, did more than pass upon the merits of the controversy. In effect, the questions but imply that the court assumed that it had a discretion either to dispose of the case on its merits or to remand the accused to the state court and require him to resort to his remedy by writ of error, and that the instruction of this court was desired by the court below as to the proper exercise of its discretion in the premises. But the power to certify to this court other than jurisdictional questions is vested only in the Circuit Courts of Appeals. *Bardes* v. *Hawarden First National Bank*, (1899) 175 U. S. 526, 528.

As respects the second and third class of cases. The record does not lend support to the claim that any constitutional question was presented to the court below for its determination. Full opportunity existed in the return filed to the writ to set up any constitutional provision which might have been deemed adequate to defeat the application of Schlierholz for his discharge from custody. The only suggestion, however, of a contention based upon the Constitution of the United States is that contained in the assignment of errors made for the purpose of this appeal. Clearly, therefore, the record presents no constitutional question for review by this court, since it fails to disclose that a controversy on such subject was called to the attention of the court below prior to the hearing, and when it also does not appear that the court below considered or necessarily passed upon an issue of that character. *Chapin* v. *Fye*, (1900) *ante*, 127; *Loeb* v. *Trustees of Columbia Township*, *ante*, 472.

*Dismissed for want of jurisdiction.*

# MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* FERRIS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 349. Submitted December 3, 1900.—Decided December 24, 1900.

**The final ruling of the state court at the trial of this case being based upon a state of facts which put the state statute in question entirely out of the case, no Federal question remained for the consideration of this court.**

THIS was an action commenced in the District Court of Bastrop County, Texas, on January 31, 1899, by the defendants in error, as plaintiffs, to recover damages sustained by the death of their father, charged to have been occasioned through the negligence of the railway company. Judgment having been rendered in favor of the plaintiffs, it was taken on appeal to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, and by that court affirmed. An application to the Supreme Court of the State for a writ of error having been denied, this writ of error was sued out.

The case presents these facts: An act of the legislature of the State of Texas, passed February 5, 1858, appearing in chapter 3, title 40, Revised Statutes of 1895, in the following sections reads:

"ARTICLE 2293. Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness, and his examination shall be conducted, and his testimony received, in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter.

"ARTICLE 2294. It shall not be necessary to give notice of the filing of the interrogatories or to serve a copy thereof on the adverse party, before a commission shall issue to take the answers thereto, nor shall it be any objection to the interrogatories that they are leading in their character.

"ARTICLE 2295. A commission to take the answers of the party to the interrogatories filed shall be issued by the clerk or justice, and shall be executed and returned by any authorized officer as in other cases."

"ARTICLE 2297. If the party interrogated refuses to answer the officer executing the commission shall certify such refusal, and any interrogatory which the party refuses to answer, or which he answers evasively, shall be taken as confessed."

On April 22, 1897, this amendment was made:

"Where either party to any suit is a corporation, neither party thereto shall be permitted to take *ex parte* depositions." Texas General Laws, 1897, p. 117.

Prior to the trial an effort was made to take the testimony of two of the plaintiffs, Sam Ferris and Frank Ferris, the one 14 years of age and the other 12 years of age. Interrogatories were prepared by the defendant, and the clerk of the court was designated as the officer to take the depositions. On the trial he testified in substance that he went to the place where the boys were living with their uncle; that the uncle refused to permit them to be questioned, though neither of the boys was asked any question or declined to answer any interrogatory. He further testifies that the uncle "told me that he had seen no attorney; . . . that he would bring the boys to town that afternoon to see their attorneys, and then if there was no objection Judge Garwood (counsel for defendant) could ask them what he wanted to."

The trial court overruled the motion of defendant to take the interrogatories confessed as against the two plaintiffs. The defendants in error in this court moved to dismiss the writ of error or to affirm the judgment.

*Mr. J. W. Parker* for the motion.

*Mr. H. M. Garwood* opposing.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is before us on a motion to dismiss or affirm. The

parties being citizens of the same State, the jurisdiction of this court is invoked on the alleged ground of a Federal question. It is contended that the amendment of April 22, 1897, which takes away in cases in which a corporation is a party on either side the right to preliminary *ex parte* depositions, is in conflict with the Fourteenth Amendment to the Federal Constitution, inasmuch as it is unwarranted class legislation, and denies the equal protection of the laws.

If we examine the opinion of the Court of Civil Appeals, or the proceedings in the Supreme Court of the State, we find no reference to that question. It either was not called to the attention of those tribunals or was unnoticed by them. Turning to the record of the trial in the District Court it appears that when the interrogatories were presented, together with the certificate of the clerk that the two plaintiffs named had refused to answer, the court ruled that the act of April 22, 1897, was constitutional; that, therefore, the defendant had no right to present such interrogatories, and overruled its motion that they be taken as confessed; and that the defendant excepted upon the ground of a conflict between such statute and the Fourteenth Amendment. It further appears that thereupon the plaintiffs asked permission to introduce testimony in respect to such refusal, and the testimony being produced, it was disclosed that the only refusal was that of the uncle; that the boys not only did not decline to answer, but were not even asked any of the interrogatories; and that the uncle declared that he would take the boys to town that afternoon to consult attorneys, and then, if there was no objection, the defendant's counsel might ask them what he wished. Upon this testimony the court again overruled the motion of the defendant to take the interrogatories as confessed.

While the court, in the first instance, expressed an opinion that the act of 1897 was constitutional, yet its final ruling was based upon the disclosure made by the testimony. That disclosure was of facts which, under the original statute and irrespective of the amendment of 1897, did not, according to the rulings of the Supreme Court of the State, entitle the defendant to have the interrogatories taken as confessed. In *Wofford* v.

*Farmer*, 90 Texas, 651, it appeared that the notary acting for the defendants, without having given any previous notice, came to the plaintiff and demanded that he should answer the interrogatories; that the plaintiff refused to answer, assigning as a reason that he wished to see his attorneys, and that it was necessary that he should examine some papers before giving his answers. The Supreme Court sustained the action of the trial court in declining to hold the interrogatories taken as confessed, saying (p. 654):

"The statute gives a party to whom interrogatories are propounded by his adversary the right 'in answer to the questions propounded to state any matter connected with the cause and pertinent to the issue to be tried.' Rev. Stat. art. 2296. Consultation with his counsel is necessary to a judicious exercise of this right. The privilege given by the statute to a party to a suit to propound interrogatories to the opposite party for the purpose of discovering evidence is an important one; but in our opinion was not given for the purpose of entrapping his adversary, and hence the latter should not be denied the right of consultation with his attorney. A refusal to answer without giving a reasonable time for such consultation should not be deemed contumacious, and a certificate made under such circumstances should, upon a proper motion, supported by proof of the facts, be suppressed. *Bounds* v. *Little*, 75 Texas, 316; *Robertson* v. *Melasky*, 84 Texas, 559."

The cases cited in this quotation go to sustain the proposition that the refusal of the party to answer must be willful and contumacious. Such being the construction placed by the Supreme Court of the State upon the statute, the trial court properly held that the certificate of the officer to the refusal of the plaintiffs was not conclusive, and that upon the facts as disclosed, the interrogatories should not be taken as confessed. Now, whatever may have been the opinion of the trial court as to the validity of the act of 1897, no matter what may have been said in the progress of the trial in respect to its validity, if the final ruling was based upon a state of facts which put the act entirely out of the case, it cannot be that we are called upon to consider any expression of opinion concerning it, for such expression

was not necessary for the decision. Moot questions require no answer.

This being the only matter suggested, and it appearing that the Federal question stated in the record calls for no decision, judgment is

*Affirmed.*

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## KENADAY *v.* SINNOTT.

ERROR TO AND APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 66. Argued November 5, 1900. — Decided December 24, 1900.

Final decrees of the Court of Appeals of the District of Columbia in respect of final settlements in the orphans' court, may be reviewed in this court on appeal.

Where, in a controversy between an executrix and next of kin, a decree of the orphans' court approving the final account of the executrix has been reversed by the Court of Appeals on the appeal of the next of kin, and the cause remanded that the account might be restated in accordance with the principles set forth in the opinion of the Court of Appeals, involving a recasting of the entire account, the decree of the Court of Appeals is not final.

The Court of Appeals of the District of Columbia, sitting as an orphans' court, has jurisdiction over the settlement of estates, and controversies in relation thereto between the next of kin and the executrix, and resort to the chancery court is unnecessary.

Certain familiar rules of construction of wills reiterated: (*a*) That the intention of the testator must prevail; (*b*) that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given; (*c*) that the courts in general are averse from construing legacies to be specific.

Ademption is the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation or clearly indicative of an intention to revoke.

In this case, in view of the general intention of the testator as plainly shown by the provisions of his will taken together, and of the rules against partial intestacy and against treating legacies as specific, the bequest of money as therein made to testator's widow is construed not to have been a specific legacy but rather in the nature of a demonstrative legacy, and a change, between the date of the will and the death of the testator,

Statement of the Case.

from money into bonds, held not to be an ademption, and so a rule of law rather than a question of intention.

THIS was a proceeding for the settlement of the final account of Mary Louise Kenaday, as executrix of Alexander M. Kenaday, in the Supreme Court of the District of Columbia, holding a special term for orphans' court business. Alexander M. Kenaday died in the District of Columbia, March 25, 1897, leaving a will, which was probated in the orphans' court of the District at the April term, 1897, and was as follows:

"In the name of God, Amen. I, Alexander McConnell Kenaday, resident of Washington, District of Columbia, being of sound and disposing mind and memory, calling to mind the frailty and uncertainty of human life, and being desirous of settling my worldly affairs and directing how the estates with which it has pleased God to bless me shall be disposed of—after my decease—while I have strength and capacity so to do, do make and publish this last will and testament, hereby revoking and making null and void all other last wills and testaments by me heretofore made. And first, I commend my mortal being to Him who gave it, and my body to the earth, to be buried with [as[1]] as little expense by my executor hereinafter named.

"*Imprimis.* My will is that all my just debts and funeral charges shall be paid out of my estate, by my executrix.

"*Item.* I give, devise and bequeath to my beloved wife, Mary Louise Kenaday, all my real estate, household furniture, and claims pending in the courts in relation to said real estate, to wit:

"House and lot known as No. 507 & 509 on F street, northwest, Washington, D. C., lot No. 2 (east half) of square 482, 30×101.10.

"House and lot known as No. 621 H street, northwest, lot $\frac{4}{483}$ sq. No. 483, $20\frac{3}{4} \times 133$ to an alley.

"House and lot known as No. 2006 G street, northwest, lot No. 25 in square No. 103, $20\frac{3}{4} \times 120$ ft. to an alley.

[1] Word enclosed in brackets erased in copy.

"And I hereby authorize my wife, as executrix, to convey by deeds in fee simple any or all of said real estate in accordance with the laws of the District of Columbia, under the advice of some competent attorney.

"*Item.* Included as claims pending in the courts are: An account for taxes against the estate of De Vaughn *v.* De Vaughn, unjustly withheld, in charge of my attorney Woodbury Wheeler, Esq. Also, an account for moneys withheld by the trustees of Edwards *v.* Maupin. In charge of my attorney, Frank W. Hackett, Esq., amounting to $1078 with interest at six per cent. per annum from March 7, 1888.

"Also, my business as a claim agent and as publisher of 'The Vedette,' together with all books, papers, files, office furniture, etc., etc. Also, 200 shares of Sutro Tunnel stock and Comstock bonds; also, notes and evidences of indebtedness to me, of more or less value; also, deposits of currency entered on my bank book of the National Metropolitan Bank, amounting to $10,000.00 more or less.

"*Item.* I give, devise and bequeath to my beloved sister Arabella D. Sinnott, residing in New Orleans, La., twelve thousand dollars in registered U. S. 4% bonds, on special deposit in the National Metropolitan Bank.

"*Item.* I give, devise and bequeath to the surviving children of my deceased sister, Martha J. Piles, out of the residue of 4% bonds deposited as aforesaid ($3500.00) as follows: To Mrs. Belle Hubert, $500.00. To Wm. A. Piles, $500.00. To Ida Piles, $500.00. To Eloise Piles, $500.00. To Edith K. Piles, $750.00. To Henry C. Piles, $250.00.

"*Item.* The promissory note for $1100.00 filed with a chattel mortgage in my name in the office of the recorder of deeds, in the District of Columbia, signed by Mrs. Anna Hemenway, shall be cancelled and my executrix may allow Mrs. Hemenway $500 in settlement of her account.

"The bond of the city of Richmond, for $5000.00 bearing 5 per cent interest, payable January and July—(on special deposit with the 4% bonds of the U. S. in the National Metropolitan Bank,) is hereby devised and bequeathed to my wife and executrix.

Statement of the Case.

"The sum of $5000.00 advanced to Wm. C. McGeorge of California, no account of which has been rendered by him, is hereby devoted to the relatives of my wife, and used according to her discretion."

San Francisco,

The will was subscribed by the testator, April 3, 1894, in the presence of three witnesses, whose attestation was sworn to.

Mrs. Kenaday duly qualified as executrix, and proceeded in the discharge of her duties. On June 10, 1898, under the order of the orphans' court, the executrix gave notice, appointing Friday, July 8, 1898, as the day for the settlement of her final account as executrix by that court; and for making distribution of the estate under its orders.

Arabella D. Sinnott, William A. Piles, Ida Piles Miller and Belle Hubert appeared and filed their petition, claiming as distributees as the only surviving next of kin and heirs at law of the decedent. They admitted the receipt from the testatrix of their respective legacies under the will, and that another legatee therein named, Edith K. Piles, since dead, had also received her legacy; and said: "The other two legatees, to wit, Henry C. Piles, and Eloise Piles, have not been paid the amounts left them, the said Eloise having died before the testator, Alexander M. Kenaday, and the said Henry C. not having been heard from during the last six years and who your petitioners believe is dead."

The final account of the executrix was made up and filed July 15, 1898, showing that she charged herself with a $5000 bond of Richmond, Va.; $24,500 United States registered bonds; 200 shares stock Comstock Tunnel Company and one certificate of scrip of that company, appraised as valueless; cash found on deposit in National Metropolitan Bank, $810.60; and some items of interest, etc.; that the Hemenway note had not been found; that she credited herself with disbursements for costs, funeral expenses, etc.; with commissions; and with legacies paid or otherwise satisfied, but not including therein the $810.60 on deposit; and that there was in her hands $9218.76, "consisting mainly of United States bonds and deposits in bank," which the executrix credited herself with "on account

of the bequest to her by the testator of 'notes and evidences of indebtedness to me,' 'deposits of currency entered on my bank book,' and other personal estate," and thus balanced and closed the account in full.

The intervening next of kin claimed the balance on the ground that it was residuary estate, and that, there being no residuary clause in the will, it necessarily belonged to them; and filed their exceptions to the account as stated, particularly excepting to the credit of the $9218.76.

A certificate of the Register of the Treasury was filed, to the effect that the records of his office showed that registered four per cent bonds of the United States were standing in the name of Alexander M. Kenaday on the first day of April, 1897, to the amount of $24,500; of which, bonds to the amount of $15,500 bore date April 23, 1889, and bonds to the amount of $9000 bore date April 1, 1895.

The orphans' court, Hagner, J., presiding, on October 11, 1898, overruled the exceptions, and approved the final account of the executrix as stated. All said next of kin thereupon appealed from this order to the Court of Appeals for the District of Columbia.

At the January term, 1899, the cause was heard, the order was reversed with costs, and the cause was remanded to the court below with a direction "that the account be restated in accordance with the principles of the opinion of this court." 14 App. D. C. 1. The mandate having gone down, the account of the executrix was restated as directed by the Court of Appeals, and approved February 10, 1899.

The balance for distribution according to that account was stated to be $8,285.64, and the distributive shares as follows:

| | |
|---|---|
| "To Arabella D. Sinnott, sister, $\frac{1}{2}$ | $4142 82 |
| " Mrs. Belle Piles Hubert, niece, $\frac{1}{5}$ of $\frac{1}{2}$ | 828 56 |
| " Edith K. Piles, " " " " | 828 56 |
| " Ida Piles Miller, " " " " | 828 56 |
| " William A. Piles, nephew, " " " | 828 56 |
| " Henry C. Piles, " " " " | 828 56 |
| Fractions | 02 |
| | $8285 64" |

Statement of the Case.

On the same tenth of February, Mrs. Kenaday was ordered to pay over and deliver to the said Arabella B. Sinnott, through her attorneys of record, the sum of $4142.82, being her distributive share of said estate, taking receipt for the same. Thereupon Mrs. Kenaday appealed in open court to the Court of Appeals from the order of February 10, approving and passing the account, and from the order directing the distribution to Arabella B. Sinnott of the amount therein mentioned as her share. An appeal bond in the sum of $8000 running to Arabella B. Sinnott, to operate as a supersedeas to the order directing the payment to her of $4142.82 was required by order of court, and it was also directed that the penalty of a bond for costs in the matter of the appeal from the order approving the account, filed the same day, be fixed at $50, or in lieu of such bond for costs, a deposit of that amount in cash. A supersedeas bond in the penalty of $8000 was approved, filed and recorded, and $50 was deposited in lieu of bond on appeal from the order approving the account. The Court of Appeals filed an opinion, *per curiam*, that on examining the transcripts of record it was found that the court below had in the restatement of the account followed and observed the mandate sent down on the former appeal, and that it was ordered that the motion made by the said Arabella D. Sinnott to dismiss or affirm the order of the court below approving and passing said final account of the estate, under rule sixteen of the court, be denied, but that the said final order of said court approving and passing said account, the same bearing date the tenth day of February, 1899, on the appeal of the said Mary L. Kenaday, executrix, be affirmed, "the said account appearing to be stated in accordance with the mandate of this court issued on the former appeal." Thereupon judgment was entered April 5, 1899, "that the order of the said Supreme Court in this cause, of February 10, 1899, approving and passing account be, and the same is hereby, affirmed with costs." A writ of error to remove the cause to this court was thereupon allowed by that court, and issued, a supersedeas bond being given and approved. Subsequently the executrix, being in doubt whether the proceedings to obtain a review should be by writ of error, or appeal, prayed an appeal, which

was granted in the words: "On motion of Mary L. Kenaday, executrix, by her attorney, and it appearing to the court that the practice in cases exactly of the character of the present one has not been established by precedent, it is adjudged and ordered by the court this 17th day of April, 1899, that said executrix be, and she is hereby, allowed an appeal from the order of this court passed herein April 5, 1899, and that the same bond in the sum of ten thousand dollars, to act as a supersedeas upon the issuing a writ of error in this case, shall stand and act as a supersedeas upon said appeal, or according as a writ of error or appeal is ultimately decided to be the method of obtaining a review of the decision of this court in said cause."

The supersedeas bond was in the sum of $10,000, and ran to Arabella D. Sinnott, William A. Piles, Ida Piles Miller and Belle Hubert.

*Mr. William Henry Dennis* for plaintiff in error and appellant.

*Mr. William A. Milliken* and *Mr. F. P. B. Sands* for defendants in error and appellees.

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

The Court of Appeals allowed a writ of error to review its decree approving the final account, and, a few days subsequently, and at the same term, in view of the fact that the practice in cases of this precise character had not been established, also allowed an appeal, the supersedeas bond on the writ to stand on the appeal, if appeal were determined to be the correct method of procedure. The cause was docketed in this court as on writ of error, and as on appeal, and appellees or defendants in error move to dismiss the appeal because the writ of error had previously issued, and the writ of error because the remedy was by appeal. We must decline, however, to sustain both motions on these grounds under the circumstances. The determination of the proper course to be taken in seeking our jurisdiction will dispose of one motion or the other.

Opinion of the Court.

By section 8 of the act of February 9, 1893, 27 Stat. 434, c. 74, final judgments or decrees of the Court of Appeals are to be reexamined by this court on writ of error or appeal in the same manner and under the same regulations as theretofore provided in cases of writs of error or appeals from judgments in the Supreme Court of the District of Columbia.

In *Ormsby* v. *Webb*, 134 U. S. 47, it was ruled that a writ of error would lie to review a judgment of the Supreme Court of the District of Columbia, admitting a will to probate, not merely because in that case a trial by jury had been actually had, but upon the more general grounds, thus stated by Mr. Justice Harlan: "It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this District for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the act of Congress defining the cases in the Supreme Court of this District, the final judgments in which may be reëxamined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity." And see *Campbell* v. *Porter*, 162 U. S. 478.

But while that is the established rule in that class of cases, it by no means follows that it is applicable in this case.

At common law jurisdiction over the estates of deceased persons vested in the ecclesiastical, common law and chancery courts, and, in this country, courts of probate or orphans' courts have universally been created by statute for the general exer-

cise of that jurisdiction, including the exercise of equitable, as well as common-law powers, and the pursuit of appropriate procedure.

The District Supreme Court sits as an orphans' court, and by section 1 of subch. 15, of chap. 101 of the Maryland testamentary act of January 20, 1799, 2 Kilty, November Session, 1798, the orphans' court was instituted "for the purpose of taking the probate of wills, granting letters testamentary and of administration, directing the conduct and settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and administering justice in all matters relative to the affairs of deceased persons, according to law."

By other sections it is made the duty of the executor or the administrator, on settlement of his account, to deliver up the estate, or deliver up and distribute the surplus or residue.

And by section 12, of subch. 15, it is provided that: "The orphans' court shall have full power, authority and jurisdiction to examine, hear and decree upon, all accounts, claims and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

There can be no question that the District Supreme Court was clothed, as an orphans' court, with ample powers to proceed in the settlement of estates and the distribution thereof to those entitled, in accordance with equitable principles and procedure; and we think that the controversy raised by the exceptions of the next of kin to this final account was in its nature of equitable cognizance, and that the decree of the Court of Appeals is properly reviewable on appeal rather than on writ of error.

The reasoning which conducts to this conclusion in proceedings of this character in effect disposes of the contention of appellant that the decree should be reversed because the orphans' court had no jurisdiction over an alleged residue of per-

sonalty in the hands of an executrix undisposed of by the will, as jurisdiction over it belonged solely to a court of equity, as a matter of trust. Alvey, C. J., in the opinion reported 14 App. D. C. 1, 21, discussed the subject at length, and, among other things, said: "The executor, as is well understood, derives his title as executor from the will of the testator, but he takes no beneficial interest in the undisposed of surplus or residue of the personal estate, by mere implication or construction, as by the former English rule. It is true every executor is, in a certain sense and to a certain extent, a trustee for all persons interested in the preservation and distribution of the personal estate of the testator, and he is equally so in respect of the surplus or residue of the estate undisposed of by the will, as of any other portion of the estate. He takes the estate under the will for purposes of administration, and of distribution to those entitled; and while a court of equity has a long established jurisdiction in all matters of trust, of account, of administration, and of construction, in the settlement of estates, yet such jurisdiction is not exclusive of the very ample jurisdiction conferred on the orphans' courts of Maryland, and the special term of the Supreme Court of this District for orphans' court business, by the testamentary act of 1798, ch. 101. That act embodies in its various provisions a testamentary and administrative system, intended to be complete in itself." The Chief Justice then gave a *résumé* of the act, and quoted the sections to which we have already referred.

There being a controversy over the distribution between the next of kin and the executrix, we are entirely satisfied that the powers vested in the orphans' court gave it jurisdiction to dispose thereof, and that appellees were not compelled to go into the equity court.

Appellees also moved to dismiss both the writ of error and the appeal, on the ground that the judgment of the Court of Appeals on the first appeal was a complete and final decree, settling and fixing the rights of the parties, and that appellant, because she did not appeal therefrom, was concluded from any review by this court of the matters then considered.

We do not think so. On the appeal of the next of kin, the

Court of Appeals reversed and remanded the cause "that the account be restated in accordance with the principles of the opinion of this court."

The account was to be entirely recast under the mandate, and the determination of who were the next of kin, the proportions they should take, the effect of the death of one or more of them, and any other questions that might arise, were remitted to the court below. The settlement was to be a final settlement, and the decree reversing and remanding that such a settlement might be had on the principles indicated was not final so as to justify an appeal by the executrix therefrom, although, had it been a decree of affirmance, the present appellees might have appealed.

We come then to the case upon the merits, and it must be determined on the correct construction of the will, arrived at in accordance with well settled applicable rules.

The cardinal rule is that the intention of the testator expressed in his will, or clearly deducible therefrom, must prevail, if consistent with the rules of law. And another familiar rule is that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may be reasonably given. And in principle this must be so when it is contended that the executor takes merely for next of kin claiming as distributees of an alleged undisposed of residue.

The general intention of the testator in this instance is perfectly clear. The will was inartificially drawn, but its various provisions taken together put it beyond doubt that he intended to dispose of all of his property, and we think that he accomplished that purpose. In doing so all property not expressly given another destination was, in substance, devised and bequeathed to his wife, including some $10,000 on deposit. His intention that she should thus take is evident. And if by the will he disposed of all the property he had, there appeared no necessity for a technical residuary clause.

The property enumerated in the will was the property he owned at the time of his death, except that there was but $810.60 on deposit in bank, and he had $9000 in United States bonds more than when the will was executed. These bonds

were of a subsequent date to that of the execution of the will, and were necessarily, therefore, purchased afterwards.

The will, executed April 3, 1894, referred to $15,500 of bonds, and, at his death, he had bonds for $24,500, $15,500 dated April 23, 1889, and $9000 dated April 1, 1895.

The question then really comes to this, whether an irrebuttable presumption arises that the testator, by reducing the amount of money on hand at the date of his will, intended that the amount of such reduction though remaining in his assets in another form should be distributed to his next of kin rather than that his wife should receive it.

And it is to be observed at the outset that to each of the next of kin he made a bequest. To his sister, Mrs. Sinnott, a specific legacy of $12,000 of the $15,500 of bonds, and to the children of a deceased sister legacies aggregating $3000 out of the $3500 of bonds remaining after the delivery of the $12,000 to Mrs. Sinnott. Certain enumerated promissory notes were otherwise disposed of, and all the rest of his property, real estate, household furniture, Richmond city bond, money, etc., was devised and bequeathed to his beloved wife. There was indeed an apparent surplus of $500 of the $3500 of bonds, but the allowance to Mrs. Hemenway of $500 immediately followed the bequests to the next of kin.

At his death there were on hand $9000 more in bonds, and $9000 less in money. Do the rules of law require it to be held that by this change he intended to withdraw so much from what he had designed his wife to have, and to bestow it on the next of kin in addition to what he had originally expressly given them?

The question involved is one of ademption and not of satisfaction. Without going into refinements in respect of the definition of the word ademption, it may be said to be the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation or clearly indicative of an intention to revoke. The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed, and the intention that the leg-

acy should fail is presumed. At least a different intention in that regard which is not expressed will not be implied, although the intention which is expressed relates to something which has ceased to exist.

Williams says in reference to the different kinds of legacies that: "A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. A legacy is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished. . . . A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity *in the nature* of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians *a demonstrative* legacy; and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific, that it will not be liable to abate with *general* legacies upon a deficiency of assets." Vol. 2, p. 1158. And he adds: "The courts in general are averse from construing legacies to be specific; and the intention of the testator, with reference to the thing bequeathed, must be clear."

These rules are considered and applied in well nigh innumerable cases. Many of them will be found cited in the notes to *Ashburner* v. *Macguire*, 2 White and Tudor's Leading Cases in Equity, Part II, Fourth American Edition from Fourth London Edition, p. 600.

In *Walton* v. *Walton*, 7 Johns. Ch. 258, Chancellor Kent reviews the subject at large with his usual ability, and criticises the observation of Lord Thurlow in *Stanley* v. *Potter*, 2 Cox, 180, that the question in these cases does not turn upon the intention of the testator, saying: "But I apprehend the words of Lord Thurlow are to be taken with considerable qualification; and that it is essentially a question of intention, when we are inquiring into the character of the legacy, upon the distinction taken in the civil law, between a demonstrative legacy, where

the testator gives a general legacy, but points out the fund to satisfy it, and where he bequeaths a specific debt."

In *Wilcox* v. *Wilcox*, 13 Allen, 256, Wells, J., said: "Courts do not incline to construe legacies to be specific, and will not do so unless such be the clear intention of the testator. *Kirby* v. *Potter*, 4 Ves. 748; *Attorney General* v. *Parkin*, Ambl. 566; *Briggs* v. *Hosford*, 22 Pick. 288; *Boardman* v. *Boardman*, 4 Allen, 179. If a legacy be given, with reference to a particular fund only, as pointing out a convenient mode of payment, it is to be construed as demonstrative and the legatee will not be disappointed though the fund wholly fail."

In *Tifft* v. *Porter*, 8 N. Y. 516, Johnson, J., speaking for the majority of the court, said: "A legacy is general, when it is so given as not to amount to a bequest of a particular thing or money of the testator distinguished from all others of the same kind. It is specific, when it is a bequest of a specified part of the testator's personal estate which is so distinguished. . . . The inclination of the courts to hold legacies to be general, rather than specific, and on which the rule is based that to make a legacy specific, its terms must clearly require such a construction, rests upon solid grounds. The presumption is stronger that a testator intends some benefit to a legatee, than that he intends a benefit only upon the collateral condition that he shall remain till death, owner of the property bequeathed. The motives which ordinarily determine men in selecting legatees, are their feelings of regard, and the presumption of course is that their feelings continue and they are looked upon as likely to continue. An intention of benefit being once expressed, to make its taking effect turn upon the contingency of the condition of the testator's property being unchanged, instead of upon the continuance of the same feelings which in the first instance prompted the selection of the legatee, requires, as it ought, clear language to convey that intention."

And so Alvey, C. J., in *Gelbach* v. *Shively*, 67 Md. 498: "Ordinarily, a legacy of a sum of money is a general legacy; but where a particular sum is given, with reference to a particular fund for payment, such legacy is denominated in the law a *demonstrative* legacy; and such legacy is so far general, and

differs so materially in effect from one properly specific, that if the fund be called in or fail, or prove to be insufficient, the legatee will not be deprived of his legacy, but he will be permitted to receive it out of the general assets of the estate. *Dugan* v. *Hollins*, 11 Md. 77. But such legacy is so far specific that it will not be liable to abate with *general* legacies, upon a deficiency of assets, except to the extent that it is to be treated as a general legacy, after the application of the fund designated for its payment. *Mullins* v. *Smith*, 1 Drew. & Sm. 204; 2 Wms. Exrs. 995. The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy, or is one dependent *exclusively* upon a particular fund for payment, is a question of construction, to be determined according to what may appear to have been the general intention of the testator. . . . It is certainly true, as a general proposition, as was said by the Vice Chancellor in *Dickin* v. *Edwards*, 4 Hare, 276, that where a testator bequeaths a sum of money in such a manner as to show a *separate and independent intention* that the money shall be paid to the legatee *at all events*, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund."

These references, and rulings of similar import are legion, serve to illustrate the governing principles. The intention of the testator must prevail, and legacies will not be held specific, when the result would be that the mere transmutation of money into securities raised an irrebuttable presumption of ademption inconsistent with the intention of the testator as plainly deducible from all the terms of his will taken together.

As we have already stated, the general intention of the testator in this case was to leave all his property to his wife except what was expressly otherwise disposed of, and among the clauses inserted in effectuation of that result were these: "Also, my business as a claim agent and as publisher of 'The Vedette,' together with all books, papers, files, office furniture, etc., etc. Also 200 shares of Sutro tunnel stock and Comstock bonds; also, notes and evidences of indebtedness to me, of more or less value; also, deposits of currency entered on my bank book of

the National Metropolitan Bank amounting to $10,000.00, more or less." If the latter item stood alone and were not read in connection with the will as a whole, it might well be that it should be held to be a specific legacy, adeemed *pro tanto* by the use of the money except $810.60 in the purchase of additional bonds, or otherwise. But taken in connection with all the provisions of the will; with the manifest general intention of the testator; and with the rules against partial intestacy, and against treating legacies as specific, if that construction can be avoided, we think that it should be regarded as in its nature a demonstrative legacy, and not adeemed by the change from money into property.

Assuming that the testator had at the date of the will about $10,000 on deposit in the bank, his intention was clear that his wife should receive the amount, and we are of opinion that we ought not to defeat that intention by holding that the pecuniary legacy was specific, and that the subsequent change was an ademption, and so a rule of law rather than a question of intention.

In *Towle* v. *Swasey*, 106 Mass. 100, a legacy of "whatever sum may be on deposit" in a certain savings bank was held to be specific, but there the provisions of the will evidenced no intention to the contrary, and the language used essentially differed from that in this case.

It results that Mrs. Kenaday was entitled to credit herself with the $9218.76, and that the original decree of the orphans' court was correct. But in view of the lapse of time and the course of the litigation, we shall simply reverse the decree of the Court of Appeals and remand the cause to that court with a direction to remand it to the court below for a restatement of the final account in accordance with the views we have expressed.

*So ordered.*

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

# BOARD OF LIQUIDATION OF NEW ORLEANS *v.* LOUISIANA.

# DRAINAGE COMMISSION OF NEW ORLEANS *v.* WILDER.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Nos. 114, 119. Argued December 4, 5, 1900.—Decided January 7, 1901.

Without implying that the reasoning of the state court by which the conclusion was reached that under the statute of Louisiana both the Board of Liquidation and the Drainage Commission occupied such a fiduciary relation as to empower them to assert that the enforcement of the provisions of the constitution of the State would impair the obligations of the contracts entered into on the faith of the collection and application of the one per cent tax, and of the surplus arising therefrom, this court adopts and follows it, as the construction put by the Supreme Court of the State of Louisiana on the statutes of that State, in a matter of local and non-Federal concern.

The proposition that the judgment of the Supreme Court of the State of Louisiana rests upon an independent non-Federal ground, finds no semblance of support in the record.

Considering the many, and in some respects ambiguous statutes of the State of Louisiana, this court concludes, as a matter of independent judgment, that the contract rights of the parties were correctly defined by the Supreme Court of that State.

This court's affirmance of the judgment below is without prejudice to the right of the Board of Liquidation and the Drainage Commission to hereafter assert the impairment of the contract right which would arise from construing the judgment contrary to its natural and necessary import, so as to deprive the Board of Liquidation of the power, in countersigning the bonds, to state thereon the authority in virtue of which they are issued.

In 1890 the legislature of Louisiana enacted a law for the refunding or retirement of certain outstanding debts of the city of New Orleans, and for the further carrying out of a plan, relating to a portion of the city debt, known as the Premium Bond Plan. The act specified the debts to be refunded or retired, and provided moreover substantially as follows:

The Board of Liquidation of the City Debt, which we shall

hereafter refer to as the Board of Liquidation, which had been created by previous laws, in addition to the powers which it already possessed, was made a corporation and was authorized to execute the refunding law. The city was directed to deliver to the Board of Liquidation municipal bonds not exceeding in amount ten millions of dollars, the series to be known as the "Constitutional Bonds of the City of New Orleans." The Board of Liquidation was directed to countersign and issue as many of these bonds as might be required for the refunding or retiring operations. To pay the interest on the bonds and to provide for a sinking fund, which the law directed should be accumulated, as well as for the execution of its other provisions, a special ad valorem tax of one per cent was directed to be levied by the municipality annually, upon all the taxable property within the city of New Orleans until "the principal and interest of the bonds herein provided to be issued are fully paid." The proceeds of this tax were directed to be paid over to the Board of Liquidation day by day as collected, and the city was deprived of all control over or custody of the avails of the tax, the disbursement thereof being solely vested in the Board of Liquidation subject to its duty to account to the city for the expenditure. It was recited (sec. 16) "that all of the substantial provisions of this act are hereby declared to be a contract between the State of Louisiana, the city of New Orleans, the taxpayers of said city, and each and every holder of the said constitutional bonds." The law, (sec. 8,) after limiting the purposes to which the funds arising from the one per cent tax should be primarily disbursed by the Board of Liquidation, contained the following:

"After making, in each year, the provisions above required, and after deducting the expenses incurred by such board, and after paying any deficiency in the interest fund of any previous year, one half of the surplus of said tax shall be passed to the credit of a special fund, to be known as the 'permanent public improvement fund,' to be disposed of as hereinafter provided. The other half of said surplus shall be paid over to the school board of the city of New Orleans, in addition to any fund ap-

propriated by said city out of other funds, to be used in the maintenance and support of the public schools in said city."

It was further provided (sec. 10):

"That, the permanent public improvement fund, above provided for, shall be used exclusively for the construction of permanent public improvements in the city of New Orleans, such as levees, canals, drainage stations, pavements, public buildings, public parks and bridges, and an ordinance passed by the said council to be paid out of this fund, shall first be approved by said Board of Liquidation, who shall not draw any check on said fund unless they are convinced, upon proper inquiry, that said ordinance covers the construction of a permanent public improvement within the purview of this act. The true intent and meaning of this clause is not to give said board any authority to say to what permanent public improvement any fund shall be applied, but only to see that said funds shall be applied exclusively to the construction of improvements that are permanent."

The constitution of the State of Louisiana, at the time the foregoing law was passed, contained restrictions upon the authority both of the legislature and the city of New Orleans, with which many of the provisions of the refunding law were in conflict. It was consequently provided that the main provisions of the law should not go into effect until they were ratified by the adoption of a constitutional amendment, which was submitted by an act passed at the same session at which the refunding law was adopted. This amendment to the constitution was ratified at a general election in 1892. The amendment to the constitution, however, was not solely confined to an approval of the refunding act, but contained a provision empowering the city of New Orleans "to examine into and assume the payment of the claims or obligations of the board of school directors for the city and parish of Orleans due for the years 1880, 1881, 1882, 1883 and 1884, now in the hands of original owners, who have in nowise parted with their rights of ownership, or pledged the same, as may be found to be equitably due by said board for services rendered, labor performed or materials furnished by authority of said board." The power of the

city to exercise the discretion thus conferred depended upon the adoption of the amendment to the constitution because the school board was a distinct corporation from the city of New Orleans, and its debts were not debts of the city; and without the amendment the legislature could not have empowered the city to assume to pay a sum which it did not owe, because the amount was solely due by another and distinct corporation.

After the adoption of the amendment the city of New Orleans contracted for various works of public improvement, and the cost of these works, it was either expressly or impliedly agreed, should be paid out of the permanent public improvement fund, to arise from one half the surplus of the one per cent tax, as provided in the amendment of 1892 and the refunding law.

In July, 1895, a plan for the drainage of the city of New Orleans was devised by the municipality. In 1896 a law was enacted creating the Drainage Commission of New Orleans, with authority to execute the aforestated plan of drainage, with such modifications as might be deemed necessary for its successful accomplishment. The law provided (sec. 6) in order "to raise funds for the purpose of doing such work speedily and on an extensive scale, said Drainage Commission of New Orleans shall have power to issue and dispose of its negotiable bonds to an amount not exceeding five millions of dollars. . . . All moneys and funds dedicated and applied by this act to the purposes thereof are consecrated to the payment of the principal and interest on said bonds." The funds thus referred to were enumerated in the act (sec. 3) and consisted of the moneys in the hands of the Board of Liquidation derived from one half the surplus of the one per cent tax levied after January 1, 1898. In other words, as the city had prior to 1896 contracted for public improvements payable out of the surplus, so much of the surplus fund as accrued from taxes levied prior to January 1, 1898, was not transferred to the Drainage Commission, but was left to be applied to the discharge of the sum due on the contracts which the city had theretofore made on the faith of the surplus fund. In addition, the act also "dedicated and applied" to the purposes of the Drainage Commission "all moneys and funds now under the control of the city of New Orleans, and hereafter to

be received, arising from the sale of street railroad franchises and other franchises." In 1898 the law just referred to was amended in various particulars, one of these amendments reducing the amount of bonds which the Drainage Commission was authorized to issue from five millions to fifteen hundred thousand dollars.

The Board of Liquidation received from the city of New Orleans the series of ten millions of constitutional bonds and sold or otherwise issued $8,998,500 thereof, leaving in its hands bonds amounting to $1,001,500. There yet remained, however, certain outstanding debts subject to be refunded or retired, amounting to about $137,050.

The Drainage Commission, as it was authorized to do, caused to be prepared fifteen hundred bonds of $1000 each. Five hundred of these bonds were sold in June, 1898, realizing $505,238. There was paid over to the commission the proceeds of the sale of certain street railroad franchises, amounting to $579,582.12. Between May, 1897, and the 12th of May, 1898, the commission made contracts for the work of draining the city to the amount of $1,834,465.35, and prior to May 12, 1898, had paid on account of these contracts, as the work progressed, $797,363.06, leaving due the sum of $1,037,102.29, which was payable as the work proceeded.

In 1896 a convention to frame a new constitution for the State of Louisiana was assembled, and the instrument which that body adopted was, subsequent to May 12, 1898, declared to be the constitution of the State without submitting the provisions thereof for ratification by a vote of the people. By article 314 of this constitution the constitutional amendment adopted at the election of 1892, relating to the retirement or the refunding of the city debt, was reiterated. The discretion, however, which had been conferred upon the municipal government of the city of New Orleans by the constitutional amendment of 1892, to assume payment of certain claims against the school board, apparently not having been availed of, article 315 of the new constitution imposed a positive duty on the city to examine specified debts due by the school board, and to issue certificates of indebtedness to the amount found to be due.

Statement of the Case.

These debts the constitution provided for in article 317, as follows: "The funds requisite to pay said claims shall be provided by said Board of Liquidation, by the sale of a sufficient number of the constitutional bonds of the city of New Orleans of the issue provided for by act number 110 of the general assembly for the year 1890, and by the amendment to the constitution of the State submitted to the people by said act and adopted at the general election in 1892."

The city of New Orleans ascertained the amount of the claims to be $115,558.33, and issued certificates as required by the constitution. The Board of Liquidation, refusing to sell bonds for the payment of the certificates, proceedings by mandamus to compel it to do so were commenced. The return of the Board of Liquidation to the alternative rule for mandamus denied the right of the relators to the relief by them prayed, for various reasons based upon purely local and non-Federal contentions, to which we need not refer. The return thereupon specially set up and claimed that the carrying out of article 317 of the new constitution, by selling any of the constitutional bonds to provide the funds to pay the debt of the relators, would bring about an impairment of the obligations of certain contracts, and therefore would cause the article of the constitution to be repugnant to section 10, article I, of the Constitution of the United States. The return besides alleged that the sale of the bonds, as required, would deprive the contract creditors of their property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. The grounds upon which the protection of the Constitution of the United States was invoked were stated in the return with much elaboration; all the averments on this subject, however, are reducible to the following:

First. That under the powers conferred upon it the respondent board was qualified in every respect to enforce the rights of all the bondholders and of each and every person having a contract claim to any portion of the one per cent tax.

Second. That as the refunding law and the amendment to the constitution of 1892 had authorized a series of constitutional bonds to be issued solely for certain specified debts, the sale of

any such bonds, as required by the provision of the new constitution, to pay debts other than those originally contemplated, would impair the obligations of the contracts which had arisen from the refunding law and amendment of 1892 in favor of those to whom the constitutional bonds had already been issued, and would also impair the obligation of the contract in favor of the premium bondholders and other creditors who had not exchanged their claims for bonds of the constitutional series.

Third. That as the surplus of the one per cent tax had been directed to be applied, one half to the school board and the other half to a permanent public improvement fund, the issue of bonds payable out of the one per cent tax for any other debts than those originally contemplated would necessarily, to the extent of such issue, increase the payments to be made out of the one per cent tax, and therefore diminish the sum of the surplus. That this decrease in the amount of the surplus would impair the obligations of the contracts existing in favor of the following classes of creditors: First, those who had contracted with the city to execute certain works of public improvement on the faith of the surplus. Second, those bondholders who had taken the five hundred thousand dollars of bonds issued by the Drainage Commission upon the faith of the surplus fund. Third, those who had contracted with the Drainage Commission in reliance upon the surplus fund. The return in addition alleged that the sale of the bonds as prayed would injuriously affect the sale by the Drainage Commission of the million dollars bonds which that board had not yet disposed of, and therefore would further impair the obligation of the contracts existing in favor of all the creditors of the Drainage Commission, as such creditors had contracted with the commission upon the faith of the undiminished and unimpaired power to sell the bonds as originally provided for. It was besides alleged that as one half of the surplus had been consecrated to the school board, the diminution of the surplus which would be occasioned by the sale of bonds for any other debts than those originally provided for would impair the obligations of the contract which had been engendered in favor of the school board as the result of the provision dedicating the one half of that surplus to that board.

Statement of the Case.

The Drainage Commission intervened in the cause, and after asserting its right to protect its own interest so far as the further issue of bonds was concerned, and to champion the interest of those to whom bonds had been issued and with whom contracts had been made, specifically charged that the provision of the new constitution was in violation of the contract clause of the Constitution of the United States and the Fourteenth Amendment upon grounds substantially identical with those which had been alleged in the return of the Board of Liquidation.

After hearing, the trial court dismissed the intervention of the Drainage Commission, because it concluded that the commission had no capacity to stand in judgment for the purpose of protecting either its own right to further issue bonds or in order to protect the rights of the holders of drainage bonds already issued, and those who had contracted to do the drainage work. On the merits, the trial court held that the return made by the Board of Liquidation was insufficient, and it therefore allowed a peremptory mandamus commanding the Board of Liquidation to sell a sufficient quantity of the constitutional bonds to provide the means for paying the sum of the certificates held by the relators, with five per cent interest thereon from the date of the application for mandamus. Both the Board of Liquidation and the Drainage Commission prosecuted appeals to the Supreme Court of the State of Louisiana.

That court, in deciding the appeals, delivered an elaborate opinion. After holding that the school board was a distinct corporation from the city of New Orleans, and, therefore, the debts of the school board were not those of the city, the court determined that it was within the power of the constitutional convention to impose the duty on the city of assuming debts of a different corporation. Having reached this conclusion, the court approached the consideration of the power of the convention to direct the Board of Liquidation to sell a sufficient number of constitutional bonds to pay the debt thus assumed. It considered this question, first, from the aspect of the authority of the convention over the Board of Liquidation and the Drainage Commission, without reference to the limitations im-

posed by the contract clause of the Constitution of the United States, and then passed on the question of contract and its impairment. In the first aspect, it was decided that as the Board of Liquidation and the Drainage Commission were but creatures of the lawmaking power of the State, both these bodies were subject to and controlled by the imperative command of the constitution. That, albeit by the original act of refunding and the amendment which ratified it, the bonds of the constitutional series were only to be issued for particular classes of debt, a subsequent constitutional requirement that certain of the bonds should be sold to pay another class of debts was paramount, and, therefore, must be obeyed by the Board of Liquidation. It was held that although the Drainage Commission, by the act creating it, was empowered to execute a general plan of drainage for the city of New Orleans, its duty in this regard was subject to future control, and hence that it was within the power of a subsequent legislature to modify or wholly suspend the drainage work by discontinuing the duties of the board, and, *a fortiori*, it was within the power of the constitutional convention to bring about the same result. Having established this premise, the learned court reached the conclusion that, even although the future execution of the drainage work, under the plan originally conceived, might be wholly impeded or seriously diminished by making other charges against the surplus than those originally contemplated, nevertheless it was the duty of the board to comply with the state constitution, because whether or not the drainage work should be continued as first designed was a question of public policy, which the convention had a right to determine.

Whilst laying down the foregoing, when the court considered the question of the alleged impairment of contract rights, it held that the propositions which it had previously announced were all qualified and restrained by the contract clause of the Constitution of the United States, and therefore the provision of the constitution requiring the sale of the bonds to produce the funds to pay the school debt would be relatively void if it conflicted with or impaired the contract rights of the following classes of creditors, viz: The holder of the constitutional and of

the premium bonds; those who held debts subject to be funded into constitutional bonds, but who had not yet exercised such right; those who had contracted with the city for works of public improvement on the faith of the surplus; those who held the drainage bonds issued by the Drainage Commission; and finally those who had contracted with that commission prior to the adoption of the constitution.

In coming to consider the question of impairment the court declared that the contract which had arisen with the holders of the constitutional bonds was that no bonds of that series should be issued for any other than the debts specified in the refunding and retiring act and in the constitutional amendment of 1892; that the surplus fund contemplated by the act and the amendment was not simply the surplus arising after applying the one per cent tax to the payment of a ten million issue of bonds, but was the surplus which might arise from the application of the one per cent tax to the payment of such amount of the ten million issue as had been and would be from time to time required in the refunding or retiring of the debts specified in the act and amendment. It was therefore decided that the sale of any bonds of the series for the purpose of paying any other debts than those specified and originally contemplated would impair the obligation of the contract creditors having a right to payment out of the one per cent tax and of the contract creditors having a right to be paid out of the surplus fund. This impairment, however, it was held could only arise in the event the payment of the bonds provided to be sold to pay the school debts assumed by the city interfered in any way with the funds required to discharge the claims of the contract creditors as above stated. But such interference, the court held, did not and could not arise, inasmuch as the bonds which the constitution provided should be sold would be, when issued by the Board of Liquidation, subordinate to all the contract rights above stated. That is to say, that it was the duty of the Board of Liquidation to sell the bonds, but that when issued they would not be entitled to payment out of either the one per cent tax or the surplus fund, until all the contract rights had been provided for, as above enumerated. Indeed, it was held that

if it was necessary for the Drainage Commission to sell the bonds which it was authorized to issue for the purpose of paying for the work contracted for prior to the adoption of the constitution, that these drainage bonds when thus sold would also be entitled to a priority of application of the surplus of the one per cent tax before any part thereof could be used to pay the bonds which the Board of Liquidation was directed to sell for the purpose of the retirement of the school certificates.

Whilst it was thus decided that the bonds to be sold for the school purposes would be subordinate to all the contract rights, and therefore, in the nature of things, could not interfere with or impair such contract rights, the bonds in question were yet declared by the court to be entitled to be paid out of any of the surplus fund which might remain after the discharge of the contract claims, with the preference over any rights which might arise from contracts made by the Drainage Commission after the adoption of the new constitution for the further execution of the drainage plan. This being predicated upon the conclusion that the state constitution, whilst it could not impair contract rights, could yet lawfully diminish or change the plan of drainage in so far as its future execution was concerned. In the margin[1] are excerpts from the opinion of the Supreme

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[1] At page 1870 the court said:

"Defendants assume that the mere fact that constitutional bonds should be sold for the purpose of paying the certificates held by relators or should be given in exchange for those certificates, would of necessity entitle the holders of such bonds to prime the holders of permanent bonds, bonds drawn against the 'surplus' of the one per cent tax dedicated to permanent public improvements, and also to necessarily come in on a footing of equality with all the other holders of consolidated bonds, and they maintain, if this be true, the rights of contract creditors under the funding act, would be impaired.

"Relators on the other hand insist that the only portion of the one per cent tax ever set aside for permanent public improvements was one half of the surplus produced by the tax which would remain after having retained in the hands of the Board of Liquidation enough to meet the payment in full of a ten million issue of consolidated bonds, and that, therefore, it would be legally immaterial to creditors basing contracts on such surplus, to whom the other portion of the fund would go; it would be enough for them to know it would not go to them, and relators urge that other holders

Court of Louisiana, (51 La. Ann. 1849,) which more elaborately state the conclusions which we have above summarized.

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of consolidated bonds would have no ground of complaint; that they should be permitted to share equally with them from the tax fund, as they had accepted their bonds on the expected basis of coming in concurrence with an issue of ten millions of bonds; that they might be interested that the limit as to the amount of the bonds should not be passed, but that they were without legal interest, when the limit should not have been passed, as to who should be the holders of the bonds sharing the fund with them.

"In support of this last position they rely upon the decision of the Supreme Court of the United States in *Board of Liquidation* v. *McComb*, 92 U. S. Reports, 531. If the collection of the one per cent tax would suffice to pay each year the holders of consolidated bonds issued in taking up or retiring the bonds and claims such as were provided for by the Act No. 110 of 1890, and the constitutional amendment of 1892, without any conflict with the bonds, ordered to be sold by Article 317 of the constitution of 1898, the former, of course, would have no cause of complaint, but if from any cause the amount of tax collected would be insufficient for that purpose, we do not think the holders of these latter bonds could force the former to prorate with them the amount in hand.

"This condition of things is not existing. It may never arise, and should it arise, the Board of Liquidation would doubtless have taken steps to distinguish bonds issued under Article 317 from those which had been otherwise issued."

Again the court said (ib. p. 1872):

"There is no constitutional objection to the convention's ordering the Board of Liquidation to sell bonds to take up the relators' certificates, but there would be constitutional objection to be urged if the effect of the issuing of such bonds would be to place the holders thereof on an equality with the holders of bonds issued to take up the bonds and claims provided for as to their funding and payment by Act No. 110 of 1890, Act No. 114 of 1896, and the constitutional amendment of 1892. *Duperier* v. *Police Jury*, 31 Ann. 710; *Shields* v. *Pipes*, 31 Ann. 765."

Yet further, in analyzing the rights of the drainage bondholders and contract creditors, the court said (ib. p. 1875):

"We do not take the same view that relators do as to what was meant and intended to be conveyed by the 'surplus' referred to by Act 110 of 1890, Act 114 of 1896, and the constitutional amendment of 1892. We think the lawmakers intended that any portion of the one per cent tax provided for in Act 110, not needed for the payment or retirement of the particular bonds or claims therein specially provided for as to payment or retirement, should constitute the surplus of the tax. That it was not contemplated when these laws were passed, or the amendment of 1892 adopted, that in order to exhaust any portion of the ten millions of dollars originally expected to be needed to pay the existing bonds and the existing claims therein

And all the views which the court expounded were based on a ruling by it made that the Board of Liquidation, under the

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specially enumerated, which might not be necessary for the purpose, new classes of claims should or would be thrown under the provisions of the original funding law.

"We think the 'surplus' was intended to connect at once and follow immediately behind as to its appropriation the amount beyond that actually needed to carry out the plan as originally mapped out and planned. The surplus was provisionally ascertained each year in a manner particularly specified to be readjusted the next in a manner also particularly specified. All the surroundings and circumstances connected with the legislation negative the idea that the surplus mentioned was to be only any surplus over ten millions of dollars which might result from the collection of the one per cent tax.

"We think the Board of Liquidation, the Drainage Commissioners, and those with whom they contracted were justified in placing that interpretation upon the legislation, and that the contract rights based upon the same should be protected from impairment. The convention, while ordering the payment of the certificates held by the relators, through sales of consolidated bonds, could not confer upon the holders of such bonds rights which in any way would come in competition with the contract rights of creditors existing against the tax at the time of the adoption of the constitution. Though there was no mention in the constitution as to the rank of the bonds which would be issued to take up relators' certificates, that rank resulted from legally existing conditions which could not be constitutionally interfered with."

Summing up its conclusion, the court declared (ib. p. 1873):

"The consolidated bonds which relators seek to have issued upon their prayer will really be drawn against (when issued) any surplus which will remain of the one per cent tax after the payment of all the bonds issued and to be issued by the Board of Liquidation, under Act No. 110 of 1890, and the constitutional amendment of 1892, in order to fund and retire and pay the bonds and debts therein specially enumerated, and also the bonds issued and to be issued by the Drainage Commission under the provisions and authority of Act No. 114 of 1896, to pay the contracts existing at the date of the adoption of the constitution, which were entered into upon the faith of the surplus directed to be set aside to the credit of the permanent improvement fund by the Act No. 110 of 1890, Act No. 114 of 1896, and the constitutional amendment of 1892.

"The effect of this will be to subordinate the rights of holders of bonds issued by the Drainage Commission to pay for contracts entered into after the adoption of the constitution of 1898 to those of the holders of consolidated bonds to be issued under the orders of article 317 of the constitution of 1898. This may check and impede the work of public improvement, but it is a matter which we cannot control."

provisions of the statutes of Louisiana, defining the powers of that board, was invested with such a relation to the contract creditors as empowered it to stand in judgment for the purpose of protecting the contracts from impairment, and hence authorized it to plead the defences which it had asserted in its return to the rule for mandamus. The judgment of the trial court was affirmed.

The Board of Liquidation applied for a rehearing mainly on the ground that although the views expressed in the opinion of the court had fully recognized the rights of the contract creditors, nevertheless the decree had deprived the contract creditors of the protection to which the opinion acknowledged they were entitled under the Constitution of the United States. This was on the assumption that as the decree of the trial court directed the issue of bonds according to the refunding act, and the amendment of 1892, therefore a compliance with its commands would compel the board to sell negotiable bonds undistinguishable from the other bonds of the same series, and hence put those thus sold on exactly the same footing as the bonds previously issued.

The Drainage Commission also applied for a rehearing on grounds substantially identical with those urged by the Board of Liquidation, and upon the further contention that an injustice had been done it, since the court although it, in effect, in its opinion, recognized the right of the commission to intervene, had nevertheless affirmed the judgment of the trial court which dismissed the Drainage Commissioners from the cause upon the assumption that it had no capacity to stand in judgment and champion the rights of the creditors. Both the applicants for rehearing complained of the affirmance of the decree below in so far as it directed the payment of interest on the claims of the certificate holders.

The court granted the rehearing to a limited extent, reversed the judgment below in so far as it dismissed the intervention of the Drainage Commission and to the extent that it allowed interest, and in other respects reiterated the affirmance. These writs of error were then prosecuted. At a previous term of

this court, motions to dismiss or affirm were made, and their consideration was postponed to the hearing on the merits.

*Mr. Branch K. Miller* for the Board of Liquidation of the City Debt.

*Mr. Chester J. Théard* for the Drainage Company. *Mr. Arthur McGuirk* and *Mr. Henry L. Lazarus* were on his brief. *Mr. William Wirt Howe* and *Mr. Walker B. Spencer* filed a brief for same.

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

The motion to dismiss is without colorable support. The contention that as public bodies charged with the performance of ministerial duties, both the Board of Liquidation and the Drainage Commission had not the capacity to plead that the provisions of the state constitution impaired the obligations of contracts in violation of the Constitution of the United States, is foreclosed by the decision of the court below. In that court, as we have said in the statement of the case, the want of capacity in both the bodies to urge the defences in question was expressly put at issue and was directly passed on, the court holding that under the statutes of the State of Louisiana both the bodies occupied such a fiduciary relation as to empower them to assert that the enforcement of the provisions of the state constitution would impair the obligations of the contracts entered into on the faith of the collection and application of the one per cent tax and of the surplus arising therefrom. Without implying that the reasoning by which this conclusion was deduced would command our approval were we considering the matter as one of original impression, and without pausing to note the ulterior consequences which may possibly arise from the ruling of the court below on the subject, we adopt and follow it, as the construction put by the Supreme Court of the State of Louisiana on the statutes of that State in a matter of local and non-Federal concern.

Accepting, then, in this regard, the decision of the state court, the proposition now pressed reduces itself to this: Although under the state law both of the bodies in question bore such a relation to the interests involved as to empower them to assert that the contract rights were impaired, nevertheless they do not possess the capacity to prosecute error to a decision if adverse to the contract rights. This, however, is but to say at one and the same time that there was capacity and incapacity to assert and protect the contract rights. The proposition that the judgment of the Supreme Court of the State of Louisiana rests upon an independent non-Federal ground, finds no semblance of support in the record. It is true the court primarily considered the case from the point of view of the duty and rights of the defendant and intervenor as depending on the law of Louisiana irrespective of the contract rights, but these considerations were by the court declared to be merely a prelude to the decision of the fundamental issue, that is, whether, if the relief prayed was allowed there would arise an impairment of the obligations of the contracts as specifically alleged both in the return made by the Board of Liquidation and in the petition of intervention of the Drainage Commission. Indeed, the opinion of the learned court, which we can consider, *Eagan* v. *Hart*, 165 U. S. 188, expressly announced that the defences asserted under the contract clause of the Constitution of the United States were the real issues and were essentially necessary to be decided in order to dispose of the cause. The argument that no Federal question is presented because the court below awarded to the contract creditors all the rights to which they were entitled, involves the assumption that jurisdiction to review the decision of a state court, disposing of a Federal question, depends upon the conception of the state court or some of the parties to the record as to the correctness of the decision rendered. This in effect denies the power to review a decision disposing of a Federal question in every case where the state court assumes that such question has been by it correctly disposed of. But this necessarily imports that in no case whatever where a state court has decided a Federal question, can review in this court be had, since in every case it must be assumed that a state court of last resort has de-

cided, according to its understanding, the issues presented to it for determination.

On the merits the errors assigned substantially raise all the controversies which were below decided. They hence embrace some subjects not essential to be considered in order to dispose of the Federal question.

The power of the constituent body to direct the Board of Liquidation to sell the bonds and the right to diminish the fund applicable to the drainage of the city of New Orleans, when viewed apart from the contract rights, involve purely local and non-Federal contentions. When the jurisdiction of this court is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract. Nevertheless, when the contract, which it is alleged, has been impaired, arises from a state statute, as said in *Burgess* v. *Seligman*, 107 U. S. 20, 34, "for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt."

It is indeed disputable as a matter of independent judgment whether the rights of the contract creditors were as broad as the court below held them to be. *Board of Liquidation* v. *McComb*, 92 U. S. 531. Considering the many and in some respects ambiguous statutes of the State of Louisiana which are the sources of the contract rights, and permitting the opinion as to those rights entertained by the Supreme Court of the State of Louisiana to operate upon the doubt which must arise from a review of the statutes alone, we conclude as a matter of independent judgment that the contract rights were correctly defined by the Supreme Court of the State of Louisiana. The question then is, taking the contract rights to be as thus declared, were they substantially impaired by the conclusions reached by the Supreme Court of the State? If the answer to this question is to be deduced from the opinion of that court, a negative response is plainly required, since, in the most explicit terms, the opinion holds that the rights to arise in favor of the purchasers of the bonds which the new constitution directed to

be sold, were subordinate in each and every respect, to all the prior contract rights. In the nature of things it cannot be said that subsequent rights which are so limited as to prevent them in any degree from interfering with prior ones, can as a matter of legal conclusion be held to impair such previous contract rights. But it is contended, and this is the controversy most strenuously pressed in the argument at bar, although by the opinion of the Supreme Court of the State of Louisiana the contract rights were protected, the decree of that court in effect brought about the destruction of the identical rights which the opinion held could not be lawfully impaired. This proceeds on the assumption that as the decree of the trial court which was affirmed directed the Board of Liquidation to sell bonds under the refunding act and constitutional amendment of 1892, it therefore imposed the duty of offering bonds for sale exactly in the form required by the prior legislation without affixing any distinguishing statement to them, thereby causing the negotiable bonds, when sold, to be exactly on the same footing of legal right with those previously used for the purpose of retiring or refunding the debt. Under the law of Louisiana, it is asserted, the judgment, and not the reasoning used in the opinion of the court, is conclusive, and therefore the result above indicated must necessarily flow from the judgment which is now under review.

We do not stop to examine the Louisiana authorities cited to sustain the abstract proposition relied upon, as we consider the premise from which the contention is deduced to be unsound. It is to be borne in mind that under the act of 1890 and the amendment of 1892 the city of New Orleans was to issue a series of ten millions of bonds, to be placed in the hands of the Board of Liquidation for the retiring and refunding operations, and these bonds, so delivered to the board for the purposes specified, were required to be countersigned and issued by that body before they became complete and perfect evidences of debt against the city. Now, whilst it is true the mandamus, which was awarded against the board, directed it to sell bonds placed in its hands under the act of 1890, the ground for the allowance of the writ was the duty imposed upon the board to

do so by the new constitution. Indeed, the opinion of the Supreme Court negatives the assumption that there was any authority conferred on the board to issue the bonds for the school debt by the act of 1890 or the amendment of 1892. Conceding, *arguendo* only, that there be as contended an exceptional and narrow rule in Louisiana excluding an examination of the pleadings for the purpose of elucidating the scope of a judgment rendered in a given cause—though the opposite doctrine is upheld by this court, *Hornbuckle* v. *Stafford*, 111 U. S. 389, 393—we do not think there is reason for the assertion that the effect of the judgment below is to preclude the Board of Liquidation, when countersigning the bonds in question for the purpose of sale, from affixing to them a statement that they are issued in virtue of the authority of the new constitution and as a result of the command of the Supreme Court of the State. This being done, beyond peradventure the takers of such bonds would be affected with notice of the legal authority under which they were issued and of the nature of the rights conferred by that authority, and therefore the inconvenience or possible wrong suggested in argument could not in any event arise. It would be beyond reason to assume that a judgment which commanded the performance of a particular act, because of the existence of a legal duty arising from a specified provision of a state constitution, should be construed as excluding the right and duty to refer in issuing the bonds in obedience to its command to the authority by which alone the power exercised could be brought into play. Not only does the reason of things require this conclusion, but so also does the respect which we entertain for the learned tribunal below preclude the possibility of our accepting the impossible and contradictory construction of the effect of the opinion and decree advanced in the argument which we are considering. Of course, if the judgment below was susceptible of the interpretation contended for, in view of the nature of the contract rights as recognized by the Supreme Court of the State and established by the opinion which we have just expressed, it would be our duty to reverse the judgment below rendered.

Our affirmance, however, will be without prejudice to the

right of the Board of Liquidation and the Drainage Commission to hereafter assert the impairment of the contract rights which would arise from construing the judgment contrary to its natural and necessary import so as to deprive the Board of Liquidation of the power in countersigning the bonds to state thereon the authority in virtue of which they are issued.

*Affirmed.*

MR. JUSTICE PECKHAM took no part in the decision of this cause.

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## SOUTHERN RAILWAY COMPANY *v.* POSTAL TELEGRAPH-CABLE COMPANY.

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

No. 64. Argued November 2, 1900.—Decided January 7, 1901.

*Luxton* v. *North River Bridge Company*, 147 U. S. 337, is decisive of the question raised in this case whether a final judgment or order has been entered by the Circuit Court which could be taken by writ of error to the Circuit Court of Appeals.

This court has jurisdiction to examine the proceedings in the Circuit Court of Appeals, and to reverse its order if its ruling is found erroneous, or the reverse if its ruling was correct.

THIS was a proceeding commenced by the Postal Telegraph-Cable Company (hereinafter called the telegraph company) against the Southern Railway Company (hereinafter called the railway company) to acquire by condemnation the right to construct its telegraph line along and over the railway company's right of way through the State of North Carolina. The petition therefor was filed by the telegraph company in the office of the clerk of the Superior Court of Guilford County, North Carolina, on June 11, 1898. A summons was issued requiring the railway company to appear before the clerk of the Superior Court on June 22, 1898, and answer. On that day the railway

Counsel for Parties.

company entered a special appearance and filed a petition and bond for the removal of the case to the United States Circuit Court for the Western District of North Carolina. Sundry proceedings were had in that court, such as a motion to remand, which it is unnecessary to notice. On August 31, 1898, the telegraph company by leave filed an amended petition. On September 15, 1898, the court made an order by which it directed its clerk to appoint three commissioners to assess damages, and prescribed their powers and duties. On September 19, 1898, the clerk appointed the commissioners as directed, and fixed the time and place for their meeting, and on the same day issued a notice to the railway company of his action. These orders were made on the application of the telegraph company and without notice to the railway company. Thereupon the railway company moved the court to set aside its order of September 15, and for leave to answer. On September 23 the court temporarily suspended the order of September 15. On October 24 an answer was filed, a demurrer of the telegraph company was sustained, and when the railway company asked leave to introduce testimony sustaining the averments of its answer the court overruled the application and refused to permit the railway company to introduce testimony, and so far as was needed reinstated its order of September 15, 1898. Before any further proceedings and without waiting for the assessment of damages by the commissioners and the confirmation of their award by the court, a writ of error and supersedeas was obtained by the railway company, and the case was transferred under such writ of error to the Circuit Court of Appeals for the Fourth Circuit. That court, on March 31, 1899, dismissed the writ of error for want of jurisdiction, on the ground that no final order had been entered in the Circuit Court. 35 C. C. A. 366. To review this ruling this writ of error was sued out.

*Mr. Addison Holladay* and *Mr. Robert Stiles* for plaintiff in error.

*Mr. J. R. McIntosh* for defendant in error.

Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

The single question we deem it necessary to consider is whether a final judgment or order had been entered by the Circuit Court which could be taken by writ of error to the Circuit Court of Appeals.

*Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341, is decisive of this question. Indeed, little more seems necessary than a reference to the opinion in that case. There, as here, in condemnation proceedings, an order was made appointing commissioners to assess damages. To reverse this order a writ of error was sued out, and by that writ of error an attempt was made to challenge the constitutionality of the act authorizing the condemnation, but this court dismissed the writ on the ground that the order was not a final judgment, saying, after referring to possible proceedings in the state court, that the action of the United States Circuit Court could be reviewed here "only by writ of error, which does not lie until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error. Act of September 24, 1789, c. 20, § 22; 1 Stat. 84; Rev. Stat. § 691; *Rutherford* v. *Fisher*, 4 Dall. 22; *Holcombe* v. *McKusick*, 20 How. 552, 554; *Louisiana Bank* v. *Whitney*, 121 U. S. 284; *Keystone Co.* v. *Martin*, 132 U. S. 91; *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536."

Reference is made by counsel to *Wheeling & Belmont Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287, in which this court sustained its jurisdiction of a writ of error to the Supreme Court of Appeals of West Virginia, and inquired into the validity of a judgment of that court affirming an order of a trial court appointing commissioners under a somewhat similar statute. But that decision was based on the fact that the order of the trial court had been held by the state Supreme Court to be a final judgment, on which a writ of error would lie, and therefore, being a final judgment in the view of the highest court of the State, it ought to be considered final here for the purposes of review. But no such ruling obtains in the Supreme Court of

North Carolina. On the contrary, that court has repeatedly held that an order appointing commissioners in condemnation proceedings is not a final judgment, nor subject to review until after the confirmation of the award of the commissioners. *American Union Telegraph Company* v. *Wilmington, Columbia & Augusta Railroad Company*, 83 N. C. 420, is a case directly in point. In that case a proceeding was commenced by a telegraph company to obtain a right of way for the construction and operation of its telegraph lines along the roadway of a railroad company, and, as shown by the opinion of the Supreme Court, at a hearing before the trial judge, he adjudged the telegraph company entitled to the right of way, and appointed commissioners to ascertain and report the damages. An attempt was made to take this order to the Supreme Court for review, but the right to do so was denied, the court saying (p. 421):

"Upon a careful examination of the statute, and the portions of the act of February 8, 1872, by reference incorporated with it, and regarding the policy indicated in both to favor the construction and early completion of such works of internal improvement, telegraphic being upon the same footing as railroad corporations, we are of opinion it was not intended in these enactments to arrest the proceeding authorized by them at any intermediate stage, and the appeal lies only from a final judgment. Then and not before may any error committed during the progress of the cause, and made the subject of exception at the time, be reviewed and corrected in the appellate court, and an appeal from an interlocutory order is premature and unauthorized."

In *Commissioners* v. *Cook*, 86 N. C. 18, the same ruling was made and the prior case in terms affirmed. Again, in *Norfolk & Southern Railroad Company* v. *Warren*, 92 N. C. 620, the two prior cases were cited and approved. Still again, in *Hendrick* v. *Carolina Central Railroad Company*, 98 N. C. 431, the same ruling was made, although it appeared that the facts were all agreed upon, the court saying (p. 432):

"That the defendant broadly denies the plaintiff's alleged rights and grievances, and the parties agreed upon the facts, could not give the right of appeal at the present stage of the

proceeding, because the order appealed from was nevertheless interlocutory, and an appeal from the final judgment would bring up all questions arising in the course of the proceeding, without denying or impairing any substantial rights of the defendant.

"The order appealed from is very different from that in the similar case of *Click* v. *The Railroad Co.*, decided at the present term; in the latter the court denied the motion for an order appointing commissioners, and dismissed the proceeding, thus putting an end to the right of the plaintiff therein, and therefore an appeal lay in that case."

The changes in the statute referred to by counsel for plaintiff in error, made subsequently to these decisions, may affect the mode of procedure and the basis for estimating damages, but in no manner affect the question as to the finality of the order appointing commissioners.

Neither does the order made by this court at the last term denying the defendant's motion to dismiss have any bearing on this question. That ruling determines simply our jurisdiction, not that of the Circuit Court of Appeals. That we have jurisdiction in such a case had already been adjudged. *Aztec Mining Company* v. *Ripley*, 151 U. S. 79. Having jurisdiction to examine the proceedings in the Circuit Court of Appeals, if we had found its ruling erroneous, we should have reversed its order dismissing the writ of error, but as we hold that its ruling was correct, its judgment is

*Affirmed.*

Syllabus.

# DOOLEY *v.* HADDEN.
# HADDEN *v.* DOOLEY.

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

Nos. 96, 99. Argued November 9, 12, 1900.—Decided January 7, 1901.

In July, 1895, Harold F. Hadden and James E. S. Hadden brought an action in the New York Supreme Court for the city and county of New York, against the Natchaug Silk Company, Michael F. Dooley, personally and as receiver of the First National Bank of Willimantic, John A. Pangburn, and others, including William I. Buttling, sheriff of Kings County. The complaint alleged certain fraudulent and collusive proceedings between the Natchaug Silk Company, Dooley, receiver of the First National Bank of Willimantic, and John A. Pangburn, and, under a prayer of the bill, an injunction *pendente lite* was granted restraining the sheriff of Kings County from selling property of the silk company in his possession as sheriff upon executions against said company in favor of John A. Pangburn or Dooley, as receiver, and restraining Pangburn and Dooley from further proceedings at law against the property of the silk company in the State of New York. The action was removed to the Circuit Court of the United States for the Southern District of New York, and repeated motions to dissolve the temporary injunction were there made and denied, and the order of the Circuit Court denying the motions was, on appeal, affirmed by the Circuit Court of Appeals. Subsequently, the taking of testimony in the case having been closed, the defendants Dooley and Pangburn made another motion, upon the plenary proofs, to dissolve the injunction, and this motion was granted, after hearing, by Circuit Judge Lacombe, on November 27, 1896. The case came to final hearing in the Circuit Court, and resulted in the decree dismissing the bill on January 27, 1898. Upon appeal by the complainants the Circuit Court of Appeals reversed the decree in part and affirmed it in part. From this decree of the Circuit Court of Appeals the complainants appealed to this court, on the ground that the decree should have adjudged to the complainants priority of lien on all the goods in dispute; and the defendants appealed on the ground that the Circuit Court of Appeals erred in reversing the decree of the Circuit Court. The facts, as stated in the opinion of Circuit Judge Shipman, were substantially these: On April 23, 1895, the Natchaug Silk Company, a Connecticut corporation, owed the First National Bank of Willimantic, a national banking association located in Connecticut, over $300,000, and was entirely insolvent. In consequence of this indebtedness the bank suspended, and Michael F. Dooley

Statement of the Case.

was appointed its receiver on April 26, 1895, by the Comptroller of the Currency. On April 23, 1895, J. D. Chaffee, as president and general manager of the silk company, in consideration of and to reduce this indebtedness, sold to the bank 107 cases of manufactured silk, the value of which cannot be accurately ascertained, but which is said to be about $20,000. They were then, or had been, shipped to New York, where they were subsequently taken by Dooley into his possession, and removed to Brooklyn. On May 8, 1895, he, as receiver, attached the goods by attachment, which was subsequently dissolved. On May 30, 1895, he sold and assigned to Pangburn, who is a resident of the State of New York, notes of the silk company, not paid by this transfer, amounting to about $67,000, for the nominal consideration of $200, which sale Dooley made by virtue of an order of the Circuit Court of the Southern District of New York, with the approval of the Comptroller of the Currency, for the purpose of enabling a suit to be brought in the State of New York, by a resident of that State, in his own name, against the silk company, a foreign corporation. Pangburn did bring suit on said notes against the silk company, on June 1, 1895, in the proper state court, and obtained an order of attachment, a judgment for the full amount thereof, and an execution which was levied by the sheriff of King's County upon these cases of silk. The sale was stopped by this injunction order. On June 6, 1895, the complainants, who are creditors of the silk company to the amount of about $22,000, brought suit against it in a court of the State of New York, and obtained an order of attachment under which the sheriff of Kings County levied an attachment upon the same silk. On July 2, 1895, the complainants brought a bill in equity, upon which the injunction order in question in this suit was issued. *Held*, that the decree of the Circuit Court of Appeals, in so far as it reversed the decree of the Circuit Court, should be reversed, and the decree of the Circuit Court, dismissing the bill of complaint, should be affirmed.

In July, 1895, Harold F. Hadden and James E. S. Hadden brought an action in the New York Supreme Court for the city and county of New York, against the Natchaug Silk Company, Michael F. Dooley, personally and as receiver of the First National Bank of Willimantic, John A. Pangburn, and others, including William I. Buttling, sheriff of Kings County. The complaint alleged certain fraudulent and collusive proceedings between the Natchaug Silk Company, Dooley, receiver of the First National Bank of Willimantic, and John A. Pangburn, and, under a prayer of the bill, an injunction *pendente lite* was granted restraining the sheriff of Kings County from selling property of the silk company in his possession as sheriff upon executions against said company in favor of John A. Pangburn

or Dooley, as receiver, and restraining Pangburn and Dooley from further proceedings at law against the property of the silk company in the State of New York.

The action was removed to the Circuit Court of the United States for the Southern District of New York, and repeated motions to dissolve the temporary injunction were made and denied, and the order of the Circuit Court denying the motions was, on appeal, affirmed by the Circuit Court of Appeals. 38 U. S. App. 651.

Subsequently, the taking of testimony in the case having been closed, the defendants Dooley and Pangburn made another motion, upon the plenary proofs, to dissolve the injunction, and this motion was granted, after hearing, by Circuit Judge Lacombe, on November 27, 1896.

The case came to final hearing in the Circuit Court, and resulted in a decree dismissing the bill on January 27, 1898.

Upon appeal by the complainants the Circuit Court of Appeals reversed the decree in part and affirmed it in part. From this decree of the Circuit Court of Appeals the complainants have appealed to this court, on the ground that the decree should have adjudged to the complainants priority of lien on all the goods in dispute; and the defendants have appealed on the ground that the Circuit Court of Appeals erred in reversing the decree of the Circuit Court.

The facts, as stated in the opinion of Circuit Judge Shipman, were substantially these:

On April 23, 1895, the Natchaug Silk Company, a Connecticut corporation, owed the First National Bank of Willimantic, a national banking association, located in Connecticut, over $300,000, and was entirely insolvent. In consequence of this indebtedness the bank suspended, and Michael F. Dooley was appointed its receiver on April 26, 1895, by the Comptroller of the Currency. On April 23, 1895, J. D. Chaffee, as president and general manager of the silk company, in consideration of and to reduce this indebtedness, sold to the bank 107 cases of manufactured silk, the value of which cannot be accurately ascertained, but which is said to be about $20,000. They were then or had been shipped to New York city, where they were

Counsel.

subsequently taken by Dooley into his possession and removed to Brooklyn. On May 8, 1895, he, as receiver, attached the goods by an attachment, which was subsequently dissolved. On May 30, 1895, he sold and assigned to Pangburn, who is a resident of the State of New York, notes of the silk company, not paid by this transfer, amounting to about $67,000, for the nominal consideration of $200, which sale Dooley made by virtue of an order of the Circuit Court of the Southern District of New York, with the approval of the Comptroller of the Currency, for the purpose of enabling a suit to be brought in the State of New York, by a resident of that State, in his own name, against the silk company, a foreign corporation. Pangburn did bring suit on said notes against the silk company on June 1, 1895, in the proper state court, obtained an order of attachment, a judgment for the full amount thereof and an execution, which was levied by the sheriff of Kings County upon these cases of silk. The sale was stopped by this injunction order.

On June 6, 1895, the complainants, who are creditors of the silk company to the amount of about $22,000, brought suit against it, in a court of the State of New York, and obtained an order of attachment, under which the sheriff of Kings County levied an attachment upon the same silk.

On July 2, 1895, the complainants brought a bill in equity, upon which the injunction order now in question was issued against Dooley, Pangburn, the silk company and others, alleging that all their acts in connection with the silk were fraudulent, and praying for relief by injunction and otherwise.

It thus appears that the bank and the complainants are creditors of the silk company, and that Dooley, as receiver of the bank, and the complainants are each striving to obtain a hold upon the silk as a means of payment for their respective debts.

*Mr. William B. Putney* and *Mr. Lockwood Honoré* for the Haddens. *Mr. Henry B. Twombly* was on their brief.

*Mr. Edward Winslow Paige* for Dooley.

Opinion of the Court.

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

Whether Chaffee, as president and general manager of the silk company, had authority to sell a large portion of the personal property of the company to one of its creditors in part payment of its debt, and whether his action, if regarded as unauthorized, was ratified by the directors of the company, were questions much discussed in the courts below, and which occupy a large part of the briefs of counsel filed in this court, but which, in the view that we take of the case, need not be considered by us.

In both the Circuit Court and the Circuit Court of Appeals it was held, upon all the facts, that the notes of the silk company held by Dooley, as receiver of the First National Bank of Willimantic, were valid obligations of the silk company; that the sale of these notes by Dooley, as receiver, to Pangburn, under the order of the Circuit Court, with the approval of the Comptroller of the Currency, vested a good title in Pangburn, and that the judgment therein obtained, on June 27, 1895, in the Supreme Court of the State of New York, in favor of Pangburn, was a valid judgment.

What remained to consider was the validity of the warrant of attachment issued and served in favor of Pangburn on June 3, 1895, and of the execution levied on the attached property on June 27, 1895, as against the attachment issued on June 6, 1895, upon the property obtained by the complainants Hadden, under their suit brought in the Supreme Court of the State of New York.

The Circuit Court was of opinion that the validity of the notes, of their sale to Pangburn, and of the judgment thereon, having been established, there was nothing in the evidence on behalf of the Haddens, as subsequent attaching creditors, which would justify the court in postponing the prior attachments and judgment of Pangburn, in whole or in part, and accordingly, on January 28, 1898, that court rendered a decree on the merits of the case, dismissing the bill of complaint.

As already stated, the court of appeals concurred with the

Circuit Court in holding that the notes and their sale to Pangburn were valid, and that his judgment and attachment of the goods were valid as against the silk company, but, for reasons which we shall presently state and consider, that court was of opinion that while, as to some of the goods, the attachment and execution of Pangburn could not be disturbed, yet, as to certain other parcels of the goods, the attachment of the complainants was equitably entitled to preference over that of Pangburn, and accordingly rendered the decree from which both parties have appealed.

The facts upon which the Court of Appeals proceeded were not in dispute, and were substantially as follows:

The goods in question consisted of 107 cases of silk. They had been shipped at different times, in April, 1895, to D. E. Adams & Company, 77 Greene street, New York. Adams was a silk merchant who occupied a store at that number, and from him the silk company leased a part of the store, where it transacted its New York business, through John H. Thompson, who also was an employé of Adams, its manager. On April 15, 16, 17 and 19, Fenton, the secretary of the silk company, by direction of Chaffee, sent by railroad forty-three cases of silk goods directed to D. E. Adams & Company. On April 22, Chaffee went to Boston and sent all the silk company's goods in the Boston office, being eighteen cases and a package, to Adams & Company. There were forty-five cases of the silk company's goods in the Adams store before these April shipments from Willimantic and Boston. On May 2, 1895, the sixty-two boxes of goods shipped from Willimantic and Boston to Greene street were removed by Mr. Paige, counsel for Dooley, receiver, and were stored in Paige's name in the storehouse of F. C. Linde & Company, in New York city, and on May 18, 1895, were removed by Mr. Paige to the Brooklyn Storage Warehouse Company in Brooklyn, and were there stored in his name. On May 18, Paige, as attorney for Dooley, as receiver, commenced suit against the silk company in the Supreme Court of New York, and attached the sixty-two cases in the Brooklyn warehouse as the goods of the silk company. On May 25, forty-five boxes of silk goods were removed from the Greene street store

by Paige's orders and placed in his name in the Brooklyn warehouse, and soon after were attached by his direction in the Dooley suit. On May 21, Hadden & Company, the complainants, brought suit in the Supreme Court of New York against the silk company to recover a debt of some twenty-three thousand dollars. A warrant of attachment was served on Thompson, but the sheriff refused to take the goods in the Greene street store until a bond of indemnity was given to protect him. This was subsequently furnished, but in the mean time, on May 25, the goods went to Brooklyn. On June 6, 1895, the goods in the Brooklyn warehouse were attached by Hadden & Company, who obtained judgment against the silk company on June 26 for $22,948, and execution was issued therefor, and levied on the goods in the Brooklyn warehouse. The Dooley attachment was vacated on June 27, 1895, on the application of Hadden & Company, because the suit of a non-resident against a foreign corporation was forbidden by section 1780 of the Code of Civil Procedure. In the mean time, as previously stated, Pangburn, in his suit against the silk company, had issued an attachment on June 1, 1895, which was levied on June 3 on the goods in Brooklyn, and had obtained on June 25, 1895, a judgment for $67,116, and an execution was levied upon the attached property.

In this state of facts Circuit Judge Shipman reasoned as follows (63 U. S. App. 173, 187):

"The 107 cases which were originally in the care of Thompson in Greene street, as the bank's goods, went to Brooklyn, although the exact number which went there on May 25 is not clearly stated in the record. While creditors were inquiring with a sheriff at Greene street in regard to these goods, for the purpose of attachment, they were removed from place to place by the order of Dooley's counsel, were stored in his name and were attached in the suit of the bank against the silk company by his direction. The attempted attachment by the complainants of the forty-five cases in Greene street was prevented by their removal to Brooklyn. The counsel for Dooley distrusted the validity of the bills of sale [made by the silk company's president and manager to the bank,] and desired to secure the

bank by aid of legal proceedings. The receiver of the bank had an equal right with other creditors to take legal steps to secure its debt, but had no right to take unfair steps. The removal of the forty-five cases to Brooklyn and the storage of the property in the name of Mr. Paige, so that it could be in a measure secreted for the purpose of preventing the complainants from completing their attachment of these cases, was an unfair step. Hadden & Company first appeared as attaching creditors on May 21. At this time sixty-two boxes had been attached in the Dooley suit and forty-five were in Greene street. The removal of these boxes after May 21 to prevent the completion of the Hadden & Company attachment was an unfair advantage in this race between creditors, and compels a court of equity to declare that the complainants should have a prior lien upon the cases which were in Greene street when the sheriff's bond was being prepared. There is no apparent equity in giving priority to their attachment upon 107 cases, but they are entitled only to a prior lien upon the goods which they attempted to attach, an attempt the success of which was foiled by a removal of the goods."

Circuit Judge Wallace filed a concurring opinion, in which occur the following observations (p. 188):

"The case resolves itself into a question of priority of liens between judgment creditors of the Natchaug Silk Company having executions levied upon 107 boxes of silk in the storehouse of the Brooklyn Storage & Warehouse Company, and its decision depends upon the priority of the liens acquired by the attachments in the actions in which the judgments were recovered. . . . Of these goods forty-five boxes were removed by Dooley, the receiver of the Willimantic Bank, and stored in Brooklyn clandestinely for the purpose of defeating a levy upon them under the attachment in the complainants' action, until Dooley could procure an attachment and levy upon them through the instrumentality of Pangburn. A creditor having property of a debtor in his possession or under his control cannot thus defeat the rights of another creditor who has been in the mean time using proper diligence to attach it. A race of diligence between creditors is legitimate, but it cannot be won

by the abuse of legal remedies. I cannot doubt that the complainants could recover of Dooley in an action on the case for his acts in frustrating their attempted levy. A court of equity under such circumstances should postpone his lien to theirs. Because the attachment in the Pangburn suit was valid, its lien cannot be displaced in favor of the complainants as respects the goods removed before their attachment was obtained. . . . The theory that the lien of Dooley, as receiver of the bank, should be postponed to that of the complainants because of a conspiracy between the bank and the silk company to defraud the complainants and other creditors is too nebulous upon the proofs for practical consideration."

As the efforts of the complainants to defeat the claims of Dooley, receiver, and of Pangburn on the grounds that the notes of the silk company held by the Willimantic bank were invalid, and that their liens by attachment or execution or otherwise were fraudulent and void because of a conspiracy between the bank and the silk company to defraud the complainants and other creditors, wholly failed in both the courts below, we do not consider it necessary to review the voluminous evidence upon which those courts acted, but think it sufficient to say that we perceive no error in their conclusions on those subjects.

It remains for us to consider whether the Circuit Court of Appeals was right in holding that the attachment and levy of Pangburn, on the forty-five boxes of silk, should be postponed in favor of the subsequent levy of the complainants.

It may well be questioned whether, upon the pleadings, that was an open question.

The only allegation touching the custody of the goods and their removal from one place to another contained in the original bill was as follows:

"That on the 23d day of April, Chaffee (the president and manager of the silk company) illegally and fraudulently, and without any authority of the board of directors of said Natchaug Silk Company, and with full knowledge of the insolvency of the company as aforesaid, executed a paper purporting to be a bill of sale of all the goods belonging to the Natchaug Silk Company, in New York city, to said Michael F. Dooley, re-

ceiver of the First National Bank of Willimantic; that said assignment or transfer was wholly without consideration; it was made to hinder, delay and defraud creditors, and particularly these plaintiffs, and was and is wholly illegal and void.

"That said Dooley, without lawful right or title, took possession of said goods and secretly removed part thereof first, to a storehouse in New York city, and later to the storehouse of the Brooklyn Storage and Warehouse Company in Brooklyn, in the county of Kings; that on the 25th day of May said Dooley secretly removed the remaining boxes of silks to the said storehouse of the Brooklyn Storage and Warehouse Company, where all of said silks, to the number of one hundred and seven boxes, were placed in the name of the attorney of said Dooley."

As those portions of the allegations that assert that there was no consideration for the sale and transfer of the goods to Dooley, receiver, and that it was made to hinder and defraud creditors, have been eliminated from consideration, there remains only the allegation that Dooley took possession of the goods and secretly removed them to the Brooklyn storehouse and there placed them in the name of his attorney.

As the purpose and theory of the bill was to defeat the Pangburn judgment and execution because without consideration and fraudulent as against creditors, it is evident that the allegations respecting Dooley's possession and removal of the goods had reference to the alleged fraudulent scheme, and cannot be regarded as presenting or raising any issue of misconduct on the part of Dooley or Pangburn in pursuing lawful remedies against goods of the silk company in the possession of Dooley and his attorney.

The original bill was filed on July 2, 1895. Subsequently, on January 14, 1897, after all the proofs were in, the complainants, with leave of court, filed an amended bill of complaint, containing more particular statements as to the alleged fraud and conspiracy between the silk company and the bank, but omitting altogether any allegation as to the removal by Dooley of the goods from New York city to the storehouse in Brooklyn, and containing no allegation of fraud or unfairness on the

part of Dooley or his attorney in the management of the Pangburn attachment and execution. Nor does it appear in the several opinions of the Circuit Court, filed from time to time, during the contest in that court, that any specific charge was made or relied on that there had been any unfair or iniquitous practice resorted to on the part of Dooley or Pangburn in the removal of the goods from New York city to Brooklyn, with a view to obtain an unjust advantage.

But, passing by the fact that neither the original nor the amended bill contained apt allegations to make an issue as to unfair or improper conduct by Dooley or Pangburn in the prosecution of the attachment and execution under the Pangburn judgment, and assuming that the complainants had made such allegations, we are unable to concur with the judges of the Circuit Court of Appeals in thinking that the facts, shown by this record, disclose a case of practice of a character to warrant the courts to displace the priority of the Pangburn attachment and execution in favor of those of the complainants.

The essential facts were that the goods were in the possession of Dooley in the city of New York. They had come into his possession by virtue of a formal sale made by Chaffee, the president and manager of the silk company, to Dooley, as receiver of the Willimantic National Bank. Such sale was, indeed, subsequently, in the proceedings in this suit, held to have been ineffectual to pass title to the goods, not because the bank was not a *bona fide* creditor of the silk company, but because the Circuit Court of Appeals was of opinion that Chaffee was without authority, as president and manager, to make such sale. Hence, although Dooley's possession could not avail to protect the goods in his possession from attachment and seizure by creditors of the silk company, yet such possession cannot be regarded as fraudulent or collusive in such a sense as to deprive Dooley, as receiver of the bank, of a right to take legal proceedings, like any other creditor, against the goods. Suppose it be conceded that Dooley was aware, or had reason to apprehend, that there were other creditors of the silk company, who would pursue remedies against the goods in his hand. Such knowledge or apprehension would not devolve upon him, or

upon his attorney, any fiduciary relation towards such creditors. It did not become his duty to inform them of the whereabouts of the goods, in order that they might precede him in the race of diligence. His primary duty was to the Willimantic National Bank and its creditors, and while the law will not permit him to resort to fraudulent devices or to false representations in order to delay or deceive other creditors, we are unable to agree with the learned judges of the Circuit Court of Appeals in thinking that the removing of these goods from New York city to the Brooklyn warehouse and there storing them in the name of a third person, while awaiting the maturity of legal proceedings, invalidated Pangburn's attachment and execution. The learned judges, indeed, speak of Dooley's conduct as being "inequitable" and "unfair," as against the complainants. But such epithets are of very uncertain legal significance. Where courts are dealing with parties between whom exists a fiduciary relation, or where, if the parties are on an equal footing, false representations are made by one party, in circumstances which give the other a right to rely upon them, the courts may rightfully use their power to promote fair dealing, and to defeat an abuse of legal remedies. It is not pretended, in the present case, that Dooley, Pangburn, or their attorney, had any transactions with the complainants, or made any false representations or statements to them. The utmost that can be said is, that Dooley, being in actual possession of the goods under a claim of title to them, which claim was legally unfounded, placed them in the nominal possession of his attorney in a place known only to himself, and was thus enabled to secure a levy on them prior in law to that of the complainants. We do not think that a court of equity in such circumstances should postpone his lien to theirs.

*The decree of the Circuit Court of Appeals, in so far as it reversed the decree of the Circuit Court, is reversed, and the decree of the Circuit Court, dismissing the bill of complaint, is affirmed.*

# PATTON *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

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

No. 123. Argued December 6, 7, 1900. — Decided January 7, 1901.

The plaintiff, an employé of the railway company, was injured while at work for it. With reference to his contention that the trial court erred in directing a verdict for the defendant, and in failing to leave the question of negligence to the jury, this court, after stating the facts, said:

(1) That while in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish, that the employer has been guilty of negligence:

(2) That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence, but the evidence must point to the fact that he was; and where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion:

(3) That while the employer is bound to provide a safe place and safe machinery in which and with which the employé is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employé, it is also true that there is no guaranty by the employer that the place and machinery shall be absolutely safe. He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him.

The rule in respect to machinery, which is the same as that in respect to place, was accurately stated by Mr. Justice Lamar for this court in *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554, 570.

PLAINTIFF in error, plaintiff below, brought his action against the defendant to recover for injuries sustained while in its em-

ploy as fireman. A judgment in his favor was reversed on April 10, 1894, by the Circuit Court of Appeals. 23 U. S. App. 319; 9 C. C. A. 487. On a second trial in the Circuit Court the judge directed a verdict for the defendant, upon which judgment was rendered. This judgment was affirmed by the Circuit Court of Appeals, 37 C. C. A. 56, and thereupon the case was brought here on error.

The facts were that plaintiff was a fireman on a passenger train of the defendant, running from El Paso to Toyah and return. Some three or four hours after one of those trips had been made and while the engine of which he was fireman was being moved in the railroad yards at El Paso, plaintiff attempted to step off the engine, and in doing so the step turned and he fell so far under the engine that the wheels passed over his right foot, crushing it so that amputation became necessary. Plaintiff alleged that the step turned because the nut which held it was not securely fastened; that the omission to have it so fastened was negligence on the part of the company, for which it was liable.

*Mr. Frank W. Hackett* for plaintiff in error. *Mr. Millard Patterson* was on his brief.

*Mr. John F. Dillon* for defendant in error. *Mr. Winslow S. Pierce* and *Mr. David D. Duncan* were on his brief.

Mr. Justice Brewer delivered the opinion of the court.

The plaintiff's contention is that the trial court erred in directing a verdict for the defendant and in failing to leave the question of negligence to the jury.

That there are times when it is proper for a court to direct a verdict is clear. "It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in op-

position to it. *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 32; *Griggs* v. *Houston*, 104 U. S. 553; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 482; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241; *Schofield* v. *Chicago & St. Paul Railway Co.*, 114 U. S. 615, 618;" *Delaware &c. Railroad* v. *Converse*, 139 U. S. 469, 472. See also *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *Elliott* v. *Chicago, Milwaukee &c. Railway*, 150 U. S. 245.

It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43.

Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions.

While it would needlessly prolong this opinion to quote all the testimony, it is proper that its salient features should be noticed. The single negligence charged is in the failure to have the engine step securely fastened. That step, a shovel-shaped piece of iron, is firmly fixed to a rod of iron about an inch in diameter and eighteen inches in length, which passes up through the iron casting at the rear of the engine, about six or eight inches thick. A shoulder to this rod fits underneath the casting and the part

passing through above has threads on the upper end upon which a nut is screwed firmly down on the casting, fastening the rod so that it will not move. That the step, rod and nut were in themselves all that could be required is not disputed. That the nut was properly screwed on at El Paso, before the engine started on its trip, is shown; the plaintiff, who assisted there, testifying to the fact. The engineer testified that he used the step both on the trip to Toyah and the return trip to El Paso and found it secure, and there is nothing to contradict this evidence. The engineer in his report of needed work both at Toyah and on his return at El Paso did not mention the step. He certainly supposed it secure. Competent inspectors were provided by the company both at El Paso and Toyah, and neither of them detected any failure in the secure fastening of the step by the nut. All of the witnesses except the superintendent and foreman of defendant testified that if the nut had been securely fastened at El Paso it would not have worked loose in making the trip from El Paso to Toyah and return by the ordinary jar and running of the engine; that it might be loosened by the step striking something. The superintendent and foreman testified from an experience of twenty years with engines that it might work loose on such trip, but that it was impossible to tell whether it would or not.

It was the duty of the fireman to clean the cab and all that portion of the engine above the running board, and to keep the oil cans and lubricators filled with oil. It was not necessary for him to attend to this work until eight hours after the engine arrived at El Paso, though it was more convenient to do so while the engine was hot and the oil warm, as it would take less time than when the engine was cooled off. After the engine reached El Paso the fireman and the engineer would get off and it would be taken charge of by the yardmen, who would detach it from the train, take it to the yard, coal and sand it and do all things necessary except the matter of repair, then place it in the round house where it would be cleaned by employés other than the fireman in all its parts beneath the running board, and inspected by the machinist and repaired; and after that the fireman would have ample time for all the duties

imposed upon him before the engine started on another trip. All this the plaintiff knew, and simply took the time he did for his work for his own convenience. On this particular day he did not commence work until three or four hours after the arrival of the train at El Paso. Prior to that time the engine had been coaled up, the coal being placed in the tender back of the engine. Some of the pieces of coal were from a foot to eighteen inches in length and from six to eight inches in width, and very heavy, and one of them falling off might strike the step. The engine had not at the time of the accident reached the round house for inspection and repair, and this the plaintiff knew.

From this outline it appears that the master provided perfectly suitable appliances, and appliances in good condition; that they were properly secured when the engine started on its trip, and that it is impossible to tell from the testimony how the step was loosened. It may have been from the ordinary working of the engine, the possibility of which was testified to by the superintendent, who had had long experience with engines. It may have been because the step struck something on its trip, which striking might produce that result according to the testimony of other experts who denied that the ordinary working of the engine would loosen it. We say this notwithstanding the testimony of the plaintiff that the step did not hit anything on the trip, for the step was on the right side of the engine, the side occupied by the engineer, and therefore a striking might have occurred without the knowledge of the plaintiff, whose work did not call him to that side of the engine. It may have resulted from the dropping on the step of some of the large lumps of coal which were thrown into the tender after reaching El Paso. We are not insensible of the matter to which the plaintiff calls especial attention, to wit, a conflict between the testimony given by Alexander Mitchell, the round house foreman at Toyah, at the first trial, and that given by him at the last. At the first trial he testified that the step was not taken off at Toyah. In the last that it was. He also testified that though taken off it was securely fastened before the train left. The inference, of course, sought to be drawn is that the testimony of this witness

is unreliable; that it is to be believed that he unscrewed the nut, but not to be believed that he screwed it up tightly, and therefore another possibility of the cause of the loosening of the step is introduced into this case. But giving full weight to this suggestion, it still appears that it is a mere matter of conjecture as to how the step became loose.

On the other hand, it must be remembered that the plaintiff, who knew that the engine was to be taken to the round house at El Paso and inspected and repaired before he was called upon to perform any duties upon it, for his own convenience, before such inspection and repair went on the engine and attempted to discharge his duties of cleaning, etc. If he, knowing that there was to be an inspection and repair and that he had ample time thereafter to do his work, preferred not to wait for such inspection and repair but to take the chances as to the condition of the engine, he ought not to hold the company responsible for a defect which would undoubtedly have been disclosed by the inspection and then repaired.

Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, *Stokes* v. *Saltonstall*, 13 Pet. 181; *Railroad Company* v. *Pollard*, 22 Wall. 341; *Gleeson* v. *Virginia Midland Railroad*, 140 U. S. 435, 443, a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. *Texas & Pacific Railway* v. *Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the

jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the employé is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employé, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. *Hough* v. *Railway Company*, 10 Otto, 213, 218; *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, 386; *Baltimore & Potomac Railroad* v. *Mackey*, 157 U. S. 72, 87; *Texas & Pacific Railway* v. *Archibald*, 170 U. S. 665, 669. He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.

The rule in respect to machinery, which is the same as that in respect to place, was thus accurately stated by Mr. Justice Lamar, for this court, in *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554, 570:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master

fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employé or servant."

Tested by these rules we do not feel justified in disturbing the judgment approved as it was by the trial judge and the several judges of the Circuit Court of Appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness thereto. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection. No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer.

The judgment is

*Affirmed.*

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## ELGIN NATIONAL WATCH COMPANY *v.* ILLINOIS WATCH CASE COMPANY.

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

No. 121. Argued December 5, 1900. — Decided January 7, 1901.

The term trade mark means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others.

As its office is to point out distinctively the origin or ownership of the ar-

Statement of the Case.

ticles to which it is affixed, no sign or form of words can be appropriated as a valid trade mark, which from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose.

Words which are merely descriptive of the place where an article is manufactured cannot be monopolized as a trade mark, and this is true of the word "Elgin" as in controversy in this case.

Where such a word has acquired a secondary signification in connection with its use, protection from imposition and fraud will be afforded by the courts, while at the same time it may not be susceptible of registration as a trade mark under the act of Congress of March 3, 1881.

The parties to this suit being all citizens of the same State and the word in controversy being a geographical name, which could not be properly registered as a valid trade mark under the statute, the Circuit Court had no jurisdiction.

In view of this conclusion and of the fact that the constitutionality of the act of Congress was not passed on by the court below, that subject is not considered.

THIS was a bill filed in the Circuit Court of the United States for the Northern District of Illinois by the Elgin National Watch Company, a corporation organized under the laws of the State of Illinois, having its principal place of business at Elgin and its office in Chicago, in that State, against the Illinois Watch Case Company, also a corporation of Illinois, with its principal place of business at Elgin, and certain other defendants, citizens of Illinois.

The bill alleged:

"That prior to the 11th day of April, A. D. 1868, your orator was engaged in the business of manufacturing watches at Elgin, Illinois, which was then a small town containing no other manufactory of watches or watch cases; that your orator had built up at said town a very large business in the manufacture of watches and watch movements, and that said watches and watch movements, so made by your orator, had become known all over the world, and had been largely sold and used not only in this but in foreign countries.

" . . . That at and before said 11th day of April, A. D. 1868, your orator had adopted the word 'Elgin' as a trade mark for its said watches and watch movements; that said trade mark was marked upon the watches and watch movements

made by your orator, both upon those which entered into commerce in this country and those which were exported to and sold in foreign countries; that your orator's watches became known all over the world as Elgin watches, and their origin and source, as a product of your orator's manufacture, were distinguished from those of all other watches manufactured in any part of the world by said distinguishing word or trade mark, 'Elgin'; that from said 11th day of April, A. D. 1868, to the present time, your orator, both in the goods manufactured and sold by it in this country and those exported by it to and sold in foreign countries, has continued to use said trade mark upon its watches and watch movements, and is still using it, and that said trade mark has always served and still serves to distinguish your orator's product from that of all other manufacturers.

" . . . That at the time of its adoption of said trade mark no other person, firm or corporation engaged in the manufacture or sale of watches was using the word 'Elgin' as a trade mark or as a designation to designate its goods from those of other manufacturers, and that your orator had the legal right to appropriate and use the said word as its lawful trade mark for its watches and watch movements.

" . . . That the watches and watch movements made by your orator have achieved a very great reputation throughout the world, and that such reputation is of great commercial value to your orator in its business aforesaid."

It was further averred "that on the 19th day of July, A. D. 1892, under the act of Congress relating to the registration of trade marks, your orator caused said trade mark to be duly registered in the Patent Office of the United States according to law, as by the certificate of said registration, or a copy thereof, duly certified by the Commissioner of Patents, here in court to be produced, will more fully and at large appear."

The bill charged that defendants had infringed the rights of complainant by engraving or otherwise affixing the word "Elgin" to the watch cases made and sold by them; that such watch cases were adapted to receiving watch movements

of different construction from those made by complainant; that inferior watch movements were liable to be and often were encased in them, and that when so encased the entire watch, including both movement and case, appeared upon the market with the word "Elgin" upon it, thereby leading the public to believe that the watch as an entirety was made by complainant, and enabling parties wrongfully using complainant's trade mark to profit by the great reputation of complainant, to palm off other and inferior goods as goods made by complainant, to injure the reputation of complainant as a watchmaker, and to deprive it of a portion of the business and patronage which it would otherwise receive from the public, to the irreparable damage of complainant.

The prayer was for damages and for an injunction to restrain defendants "from directly or indirectly making or selling any watch case or watch cases marked with your orator's said trade mark, and from using your orator's said trade mark in any way upon watches or watch cases or in the defendants' printed advertisements, circulars, labels, or the boxes or packages in which their said watch cases are put or exposed for sale."

A demurrer having been overruled, defendants answered denying the legality of the registration of the alleged trade mark, and any attempt on their part to deceive the public or the doing of anything they did not have the legal right to do; and asserting that they had never manufactured or offered for sale watches or watch movements; that they manufactured at Elgin watch cases only; that complainant had never manufactured or sold watch cases with the word "Elgin" on them; that the business of the two companies was separate and distinct, and that whenever the defendant company had used the word "Elgin" it had usually, if not invariably, been done in connection with some other word, as "Elgin Giant," or "Elgin Commander," or "Elgin Tiger," or some other word in combination with the word "Elgin"; that defendant company had never used the word "Elgin" alone, or separately, as registered by complainant, upon goods exported to foreign nations or used in foreign commerce, but only in domestic commerce, and to inform the public of the place where watch cases of the defendant com-

Statement of the Case.

pany were manufactured; that such watches were sold upon a guarantee running for a number of years, so that it was necessary to indicate the name of the location where defendant company was carrying on its business, that purchasers might be able to find the company in case it became necessary to call upon it to make good its guarantees; "and that, owing to the distinct lines of business in which the complainant and the defendant company are engaged, no misunderstanding or confusion has arisen or can arise, as these defendants are informed and believe."

It was further alleged "that the word 'Elgin,' being a geographical name or word indicating the name of a prominent manufacturing city in which any manufacturer of watches, watch movements or watch cases is at liberty to locate and carry on his business, is not appropriable by any single manufacturing person, firm or corporation, but is open as of common right to the use of any person, firm or corporation carrying on business at the city of Elgin."

Replication was filed, proofs taken, and a hearing had. By leave of court complainant amended its bill, alleging that the watch cases so manufactured and marked by defendants in violation of complainant's rights were intended by defendants to be sold in foreign countries, and were in fact exported to and sold in foreign countries.

The Circuit Court decreed that the use of the word "Elgin," whether alone or in connection with other words, was a violation and infringement of complainant's exclusive rights in the premises, and that an injunction issue restraining the use of the word alone or in connection with other words or devices, upon watches, or watch cases, or packages containing watches or watch cases, going into commerce with foreign nations or with the Indian tribes, in such a way as to be liable to cause purchasers or others to mistake said watches or the watch movements encased in said watch cases for watches or watch movements manufactured by complainant. 89 Fed. Rep. 487. The case having been carried to the Court of Appeals, that court reversed the decree of the Circuit Court, and remanded the cause with instructions to dismiss the bill. 94 Fed. Rep. 667.

*Mr. Lysander Hill* for appellants. *Mr. George S. Prindle* was on his brief.

*Mr. Thomas A. Banning* for appellees. *Mr. Ephraim Banning* was on his brief.

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

The Circuit Court of Appeals held that the bill must be dismissed for want of jurisdiction. The parties to the suit were all citizens of Illinois, and the court was of opinion that it could not be maintained under the act of March 3, 1881, c. 138, 21 Stat. 502.

In the *Trade Mark Cases*, 100 U. S. 82, this court held that the act of July 8, 1870, carried forward into sections 4937 to 4947 of the Revised Statutes, was void for want of constitutional authority, inasmuch as it was so framed that its provisions were applicable to all commerce, and could not be confined to that which was subject to the control of Congress. The cases involved certain indictments under the act of August 14, 1876, "to punish the counterfeiting of trade mark goods and the sale or dealing in of counterfeit trade mark goods;" and the opinion treated chiefly of the act of 1870 and the civil remedy which that act provided, because, as Mr. Justice Miller observed, "the criminal offences described in the act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trade marks which were registered under the provisions of the former act. If that act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it."

In its opinion the court, adhering to the settled rule to decide no more than is necessary to the case in hand, was careful to say that the question "whether the trade mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the

present case, we propose to leave undecided." And further: "In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade marks and of the duty of Congress to pass any laws necessary to carry treaties into effect."

The act of March 3, 1881, followed. By its first section it was provided that "owners of trade marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribe, which by treaty, convention or law, affords similar privileges to citizens of the United States, may obtain registration of such trade marks by complying with" certain specified requirements.

By the second section, the application prescribed by the first "must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration," "that such party has at the time a right to the use of the trade mark sought to be registered, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade mark is used in commerce with foreign nations or Indian tribes, as above indicated; . . ."

The third section provided that "no alleged trade mark shall be registered unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes as above mentioned or is within the provision of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade mark owned by another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trade mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers."

By the fourth section certificates of registration of trade marks were to be issued, copies of which, and of trade marks and declarations filed therewith, should be evidence "in any suit in which such trade marks shall be brought in controversy;" and by section five it was provided that the certificate of registry

should remain in force for thirty years from its date, and might be renewed for a like period. By the eleventh section nothing in the act was to be construed "to give cognizance to any court of the United States in an action or suit between citizens of the same State, unless the trade mark in controversy is used on goods intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe." The seventh section was as follows:

"That registration of a trade mark shall be *prima facie* evidence of ownership. Any person who shall reproduce, counterfeit, copy or colorably imitate any trade mark registered under this act and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages, for the wrongful use of said trade mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of such trade mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy."

Thus it is seen that under the act registration is *prima facie* evidence of ownership; that the certificate is evidence in any suit or action in which the registered trade mark is brought in controversy; that the act practically enables treaty stipulations to be carried out, and affords the basis for judicial redress for infringement in foreign countries, where such redress cannot ordinarily be had without registration, as well as in the courts of the United States, when jurisdiction would not otherwise exist. For it is the assertion of rights derived under the act which gives cognizance to courts of the United States when the controversy is between citizens of the same State, though the benefits of the act cannot be availed of if the alleged trade mark is not susceptible of exclusive ownership as such, and not, therefore, of registration.

Trade marks are not defined by the act, which assumes their

existence and ownership, and provides for a verified declaration by applicants for registration that they have the exclusive right to the particular trade mark sought to be registered.

The term has been in use from a very ea ly date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade mark, which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose.

And the general rule is thoroughly established that words that do not in and of themselves indicate anything in the nature of origin, manufacture or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade mark. *Canal Company* v. *Clark*, 13 Wall. 311; *Brown Chemical Company* v. *Meyer*, 139 U. S. 540; *Columbia Mill Company* v. *Alcorn*, 150 U. S. 460, and cases cited.

The word "Elgin" is and has been for very many years the name of a well known manufacturing city in Illinois. The factory and business of appellees were located at Elgin, and in describing their watch cases, as made there, it is not denied that they told the literal truth so far as that fact was concerned, and this they were entitled to do according to the general rule. Obviously to hold that appellant had obtained the exclusive right to use the name "Elgin" would be to disregard the doctrine characterized by Mr. Justice Strong, in *Canal Company* v. *Clark*, as sound doctrine, "that no one can apply the name of a district of country to a well known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation."

But it is contended that the name "Elgin" had acquired a

secondary signification in connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached.

In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those, and other, goods; and protection is accorded against unfair dealing, whether there be a technical trade mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.

If a plaintiff has the absolute right to the use of a particular word or words as a trade mark, then if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trade mark is not in itself a good trade mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537, 549; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Singer Man. Co.* v. *June Man. Co.*, 163 U. S. 169.

In *Singer Man. Company* v. *June Man. Company*, the Singer machines were covered by patents, whereby there was given to them a distinctive character and form, which caused them to be known as the Singer machines, as differing from the form and character of machines made by others. The word "Singer" was adopted by the Singer Company as designative of their

distinctive style of machines rather than as solely indicative of the origin of manufacture. That word constituted the generic description of the type and class of machines made by that company, and, on the expiration of the patent, the right to make the patented article and to use the generic name necessarily passed to the public. But nevertheless this court held that those who availed themselves of this public dedication to make the machines and use the generic designation did so on condition that the name should be so used as not to deprive others of their rights or to deceive the public. Mr. Justice White, delivering the opinion, said:

"It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a twofold significance, one generic and the other pointing to the origin of manufacture, and the name is availed of by another without clearly indicating that the machine, upon which the name is marked, is made by him, then the right to use the name because of its generic signification would imply a power to destroy any good will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another."

In *Reddaway* v. *Banham*, App. Cas. 1896, p. 199, much relied on by appellant's counsel, Reddaway was a manufacturer of belting from camel hair, which belting he had called "camel hair belting" for many years, so that it had become known in the trade as belting of his manufacture. Banham, long after, made belting from the same material, which he sold and advertised as Arabian belting, but subsequently he, or a company he had formed, began to call it "camel hair belting." Reddaway and Reddaway's company brought an action for injunction, which was tried before Collins, J., (now Lord Justice Collins), and a special jury. The jury answered certain questions to the effect that "camel hair belting" meant belting made by plaintiffs as distinguished from belting made by other manufacturers; that the words did not mean belting of a particular kind without reference to any particular maker; that the defendants so

described their belting as to be likely to mislead purchasers and to lead them to buy defendants' belting as and for plaintiffs' belting; and that defendants endeavored to pass off their goods as and for plaintiffs' goods, so as to be likely to deceive purchasers. On the findings of the jury, Collins, J., entered a decree for plaintiffs, and granted an injunction restraining defendants "from continuing to use the words 'camel hair' in such a manner as to deceive purchasers into the belief that they are purchasing belting of the plaintiffs' manufacture, and from thereby passing off their belting as and for the belting of the plaintiffs' manufacture." The case having gone to the Court of Appeals, the decree was reversed, and judgment entered for defendants, (Q. B. Div. 1895, p. 286,) and plaintiffs thereupon prosecuted an appeal to the House of Lords, which reversed the Court of Appeals, and reinstated the decision of Collins, J., with a slight modification. The case was held to fall within the principle, as put by the Lord Chancellor, "that nobody has any right to represent his goods as the goods of somebody else."

Lord Herschel, referring to *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, said:

"The name 'Glenfield' had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. Where the name of a place precedes the name of an article sold, it *prima facie* means that this is its place of production or manufacture. It is descriptive, as it strikes me, in just the same sense as 'camel hair' is descriptive of the material of which the plaintiff's belting is made. Lord Westbury pointed out that the term 'Glenfield' had acquired in the trade a secondary signification different from its primary one, that in connection with the word starch it had come to mean starch which was the manufacture of the plaintiff."

And Lord Herschel further said that he demurred to the view —

"That the defendants in this case were telling the simple truth when they sold their belting as camel hair belting. I think the fallacy lies in overlooking the fact that a word may

acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true."

These and like cases do not sustain the proposition that words which in their primary signification give notice of a general fact, and may be used for that purpose by every one, can lawfully be withdrawn from common use in that sense; but they illustrate the adequacy of the protection from imposition and fraud in respect of a secondary signification afforded by the courts.

In the instance of a lawfully registered trade mark, the fact of its use by another creates a cause of action. In the instance of the use in bad faith of a sign not in itself susceptible of being a valid trade mark but so employed as to have acquired a secondary meaning, the whole matter lies *in pais.*

It is to be observed, however, that the question we are considering is not whether this record makes out a case of false representation, or perfidious dealing, or unfair competition, but whether appellant had the exclusive right to use the word "Elgin" as against all the world. Was it a lawfully registered trade mark? If the absolute right to the word as a trade mark belonged to appellant, then the Circuit Court had jurisdiction under the statute to award relief for infringement; but if it were not a lawfully registered trade mark, then the Circuit Court of Appeals correctly held that jurisdiction could not be maintained.

And since while the secondary signification attributed to its use of the word might entitle appellant to relief, the fact that primarily it simply described the place of manufacture, and that appellees had the right to use it in that sense, though not the right to use it, without explanation or qualification, if such use would be an instrument of fraud, we are of opinion that the general rule applied, and that this geographical name could not be employed as a trade mark and its exclusive use vested in appellant, and that it was not properly entitled to be registered as such.

In view of this conclusion, and of the fact that the question

of the constitutionality of the act of Congress was not passed on by the court below, we have refrained from any discussion of that subject.

The Circuit Court of Appeals was right, and its decree is

*Affirmed.*

## DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 10. WATSON *v.* RHODE ISLAND. Error to the Supreme Court of the State of Rhode Island. Argued for the plaintiff in error October 9, 1900. Decided October 15, 1900. *Per Curiam.* Judgment affirmed, with costs, on the authority of *Murphy* v. *Massachusetts*, 177 U. S. 155; *Caldwell* v. *Texas*, 137 U. S. 692. *Mr. David A. Gourick* for plaintiff in error. No counsel appeared for defendant in error.

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No. 41. GOULD *v.* HUGHES. On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. Argued October 10 and 11, 1900. Decided October 22, 1900. Decree affirmed, with costs, by a divided court, and cause remanded to the District Court of the United States for the Eastern District of Pennsylvania. *Mr. Henry R. Edmunds* and *Mr. Eugene P. Carver* for petitioners. *Mr. Horace L. Cheyney* and *Mr. John F. Lewis* for respondents.

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No. 55. ARCHER *v.* BALTIMORE BUILDING AND LOAN ASSOCIATION. Appeal from the Circuit Court of the United States for the District of West Virginia. Argued and submitted October 30, 1900. Decided November 5, 1900. *Per Curiam.* Decree affirmed, with costs, on the authority of *Forsythe* v. *Hammond*, 166 U. S. 517; *Central Trust Company* v. *Seasongood*, 130 U. S. 491; *Remington Paper Company* v. *Watson*, 173 U. S. 451; *Maxwell* v. *Dow*, 176 U. S. 581, and cases cited. *Mr. V. B. Archer* for appellants. *Mr. William Hepburn Russell*, *Mr. William Beverly Winslow* and *Mr. Fielder C. Slingluff* for appellees.

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No. 57. DAY *v.* CONLEY & MCTAGUE, KEEPERS OF THE STATE PRISON OF THE STATE OF MONTANA. Appeal from the Circuit

Court of the United States for the State of Montana. Argued and submitted October 31, 1900. Decided November 5, 1900. *Per Curiam.* Final order affirmed, with costs, on the authority of *Markuson* v. *Boucher*, 175 U. S. 184; *Brown* v. *New Jersey*, 175 U. S. 172–175; *Tinsley* v. *Anderson*, 171 U. S. 101; *In re Eckart*, 166 U. S. 481; *Bergemann* v. *Backer*, 157 U. S. 655; *In re Wilson*, 140 U. S. 575; and see *State* v. *Brantley*, 20 Montana, 173; *State* v. *Clancy*, 20 Montana, 498. *Mr. Chapin Brown* and *Mr. James W. Forbis* for appellant. *Mr. C. B. Nolan* for appellees.

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No. 233. Daugherty *v.* Hood. Error to the Circuit Court of the United States for the District of Nebraska. Motions to dismiss or affirm submitted October 29, 1900. Decided November 5, 1900. *Per Curiam.* Writ of error dismissed for the want of jurisdiction on the authority of *Colvin* v. *Jacksonville*, 158 U. S. 456; *Robinson* v. *Caldwell*, 165 U. S. 359. *Mr. C. S. Montgomery* for motions to dismiss or affirm. *Mr. Joel W. West* opposing.

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No. 61. McGilvray *v.* Knott. Error to the Supreme Court of the State of California. Argued November 1 and 2, 1900. Decided November 12, 1900. *Per Curiam.* Judgment affirmed, with costs, on the authority of *Whitcomb* v. *Smithson*, 175 U. S. 635. *Mr. Jackson H. Ralston* and *Mr. C. H. Wilson* for the plaintiff in error. No counsel appeared for the defendant in error.

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No. 75. Stevens *v.* State of Ohio. Appeal from the Circuit Court of the United States for the Northern District of Ohio. Submitted November 7, 1900. Decided November 12, 1900. *Per Curiam.* Final order affirmed, with costs, on the authority of *Pepke* v. *Cronan*, 155 U. S. 100; *New York* v. *Eno*, 155 U. S. 89, and cases cited; *Baker* v. *Grice*, 169 U. S. 284. *Mr. J. Bernard Handlan* for appellant. *Mr. Addison C. Lewis* for appellee.

Decisions announced without Opinions.

No. 124. HART *v.* STATE OF UTAH. Error to the Supreme Court of the State of Utah. Motions to dismiss or affirm. Submitted November 5, 1900. Decided November 12, 1900. *Per Curiam.* Writ of error dismissed for the want of jurisdiction on the authority of *Long* v. *Converse*, 91 U. S. 105; *Ludeling* v. *Chaffe*, 143 U. S. 301; *In re Converse*, 137 U. S. 624. *Mr. Alexander C. Bishop* for motions to dismiss or affirm. *Mr. Orlando W. Powers* opposing.

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No. 107. BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY *v.* MAYOR AND CITY COUNCIL OF OCEAN CITY. Error to the Court of Appeals of the State of Maryland. Argued November 14, 1900. Decided November 19, 1900. *Per Curiam.* Writ of error dismissed for the want of jurisdiction on the authority of *Lehigh Water Company* v. *Easton*, 121 U. S. 388; *Central Land Company* v. *Laidley*, 159 U. S. 103; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Louisville and Nashville Railroad Company* v. *Louisville*, 166 U. S. 709; *Ansbro* v. *United States*, 159 U. S. 695; *Powell* v. *Brunswick County*, 150 U. S. 433. *Mr. Nicholas P. Bond* for the plaintiff in error. *Mr. James E. Ellegood* for the defendants in error.

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No. 111. SCHUYLER NATIONAL BANK *v.* GADSDEN. Error to the Supreme Court of the State of Nebraska. Argued November 15, 1900. Decided November 19, 1900. *Per Curiam.* Writ of error dismissed for the want of jurisdiction on the authority of *Rutherford* v. *Fisher*, 4 Dall. 22; *Winn* v. *Jackson*, 12 Wheat. 135; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Johnson* v. *Keith*, 117 U. S. 199. *Mr. C. J. Phelps* for the plaintiffs in error. *George* and *Mattie N. Thrush*, two of the defendants in error, filed a brief *in propria persona.*

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No. 53. CALIFORNIA REDWOOD COMPANY *v.* JOHNSON, and No. 54. SAME *v.* MAHAN. Appeals from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted Octo-

ber 30, 1900. Decided December 10, 1900. *Per Curiam.* Decrees affirmed, with costs, on the authority of *Hawley* v. *Diller*, 178 U. S. 476, and causes remanded to the Circuit Court of the United States for the Northern District of California. *Mr. Charles Page* for the appellants. *Mr. Barclay Henley* for the appellees.

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No. 98. NIVER *v.* FIELDS. Error to the Circuit Court of the United States for the District of South Carolina. Submitted November 13, 1900. Decided December 17, 1900. *Per Curiam.* Judgment affirmed, with costs, on the authority of *Malony* v. *Adsit*, 175 U. S. 281. *Mr. Leroy F. Youmans* and *Mr. W. S. Monteith* for the plaintiff in error. *Mr. Attorney General*, *Mr. Solicitor General* and *Mr. Robert A. Howard* for the defendant in error.

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## *Decisions on Petitions for Writs of Certiorari.*

No. 293. REED, ADMINISTRATOR, *v.* STANLEY, TRUSTEE. Ninth Circuit. Denied October 15, 1900. (The Chief Justice took no part in the consideration and disposition of this application.) *Mr. A. B. Browne* and *Mr. Alex. Britton* for petitioners. *Mr. Thomas H. Hubbard*, *Mr. E. S. Pillsbury* and *Mr. Wm. A. Maury* opposing.

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No. 188. SAUNDERS *v.* PECK. Seventh Circuit. Denied October 15, 1900. *Mr. W. A. Foster* for petitioner. *Mr. A. M. Pence* opposing.

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No. 285. WOODWORTH *v.* NUTE. First Circuit. Denied October 15, 1900. *Mr. Frederic Dodge* for petitioner. *Mr. Eugene P. Carver* and *Mr. E. E. Blodgett* opposing.

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No. 292. MASTERS, CLAIMANT, *v.* SARGENT. First Circuit. Denied October 15, 1900. *Mr. Frederic Cunningham* and *Mr. Lewis S. Dabney* for petitioner. *Mr. Eugene P. Carver* opposing.

Decisions announced without Opinions.

No. 294. MORRIS *v.* NEW YORK AND WEST CHESTER WATER COMPANY. Second Circuit. Denied October 15, 1900. *Mr. Charles E. Coddington* for petitioners. *Mr. Allan McCulloh* opposing.

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No. 295. WILSON *v.* DUNSETH. Seventh Circuit. Denied October 15, 1900. *Mr. Bluford Wilson* and *Mr. Philip Barton Warren* for petitioners. *Mr. Burke Vancil* opposing.

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No. 300. STEAMSHIP "STYRIA" *v.* MORGAN; No. 301. STEAMSHIP "STYRIA" *v.* PARSONS; No. 302. STEAMSHIP "STYRIA" *v.* MALCOLMSON, and No. 303. STEAMSHIP "STYRIA" *v.* MUNROE. Second Circuit. Granted October 15, 1900. *Mr. J. Parker Kirlin* for petitioner. *Mr. Charles C. Burlingham*, *Mr. M. H. Regensburger*, *Mr. John M. Bowers*, *Mr. L. G. Reed* and *Mr. W. J. Curtis* opposing.

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No. 309. JEWETT *v.* UNITED STATES. First Circuit. Denied October 15, 1900. *Mr. M. F. Dickinson, Jr.*, and *Mr. Hollis R. Bailey* for petitioner. *Mr. Solicitor General Richards* opposing.

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No. 345. UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK *v.* ROSS, ADMINISTRATOR. Fifth Circuit. Denied October 15, 1900. *Mr. Charles E. Patterson* and *Mr. George Clark* for petitioner. *Mr. Waller S. Baker* opposing.

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No. 382. TOMPKINS *v.* PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA. Fourth Circuit. Denied October 15, 1900. *Mr. F. B. Enslow* for petitioner.

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No. 319. FUNK *v.* UNITED STATES. Court of Appeals of District of Columbia. Denied October 22, 1900. *Mr. D. W.*

*Baker* and *Mr. Alex. Wolf* for petitioner. *Mr. Solicitor General Richards* opposing.

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No. 342. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* DINGLEY, ADMINISTRATOR. Ninth Circuit. Granted October 22, 1900. *Mr. Edward Lyman Short*, *Mr. Frederic D. McKenney*, *Mr. John B. Allen* and *Mr. Julien T. Davies* for petitioner.

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No. 390. DINSMORE *v.* SOUTHERN EXPRESS COMPANY. Fifth Circuit. Granted October 22, 1900. *Mr. Frank H. Miller* for petitioners. *Mr. J. M. Terrell* and *Mr Fleming G. du Bignon* opposing.

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Nos. 432, 433, 434 and 435. GRAND ISLAND AND WYOMING CENTRAL RAILROAD COMPANY *v.* SWEENEY. Denied October 22, 1900. *Mr. Charles F. Manderson* and *Mr. N. K. Griggs* for petitioners. *Mr. Charles W. Brown* opposing.

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No. 446. CARBORUNDUM COMPANY *v.* ELECTRIC SMELTING AND ALUMINUM COMPANY. Third Circuit. Denied October 22, 1900. *Mr. George H. Christy*, *Mr. Thomas W. Bakewell* and *Mr. Francis Lynde Stetson* for petitioner. *Mr. Charles M. Vorce* opposing.

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No. 444. BURT *v.* GOTZIAN & Co. Eighth Circuit. Denied October 29, 1900. *Mr. U. M. Rose* and *Mr. G. B. Rose* for petitioner.

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No. 451. ATLAS GLASS COMPANY *v.* SIMONDS MANUFACTURING COMPANY. Third Circuit. Denied October 29, 1900. *Mr. William L. Pierce* for petitioner. *Mr. James I. Kay* and *Mr. J. N. Cooke* opposing.

Decisions announced without Opinions.

No. 454. FIDELITY AND DEPOSIT COMPANY OF MARYLAND *v.* COURTNEY, RECEIVER. Sixth Circuit. Granted October 29, 1900. *Mr. St. John Boyle* and *Mr. Edward J. McDermott* for petitioner.

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No. 431. ELLIOTT *v.* ANDERSON. Fourth Circuit. Granted November 12, 1900. *Mr. J. C. Pritchard* and *Mr. Charles A. Moore* for petitioners. *Mr. Charles Seymour* opposing.

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No. 474. MORGAN *v.* AUSTO-AMERICANA STEAMSHIP COMPANY; No. 475. PARSONS *v.* SAME; No. 476. MALCOLMSON *v.* SAME; and No. 477. MUNROE *v.* SAME. Second Circuit. Ordered that petition for cross-writs of certiorari herein be filed in Nos. 300, 301, 302 and 303, and petition granted November 12, 1900. *Mr. Harrington Putnam*, *Mr. John M. Bowers*, *Mr. William J. Curtis* and *Mr. M. H. Regensburger* for petitioners.

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No. 375. CREW-LEVICK COMPANY *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY (LIMITED) OF LIVERPOOL. Third Circuit. Denied November 19, 1900. *Mr. Theodore F. Jenkins* and *Mr. Thomas R. Elcock* for petitioner. *Mr. Wilhelmus Mynderse* and *Mr. Joseph C. Fraley* opposing.

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No. 457. FARMERS LOAN & TRUST COMPANY, TRUSTEE, *v.* PENN PLATE GLASS COMPANY. Third Circuit. Granted November 19, 1900. *Mr. Herbert B. Turner*, *Mr. John G. Johnson* and *Mr. John S. Ferguson* for petitioner. *Mr. Bernard Carter* opposing.

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No. 458. BENEDICT *v.* CITY OF NEW YORK. Second Circuit. Denied November 19, 1900. *Mr. Richard L. Sweezy* for petitioner. *Mr. George L. Sterling* opposing.

Decisions announced without Opinions.

No. 459. McSherry Manufacturing Company *v.* Dowagiac Manufacturing Company. Sixth Circuit. Denied November 19, 1900. *Mr. Charles M. Peck* for petitioners. *Mr. Fred L. Chappell* opposing.

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No. 479. Richards *v.* Michigan Central Railroad Company. Seventh Circuit. Denied November 19, 1900. *Mr. John C. Chaney* and *Mr. Alphonso Hart* for petitioner. *Mr. George S. Payson* opposing.

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No. 482. Worden & Co. *v.* California Fig Syrup Company. Ninth Circuit. Granted November 19, 1900. *Mr. John H. Miller*, *Mr. W. W. Dudley* and *Mr. L. T. Michener* for petitioners. *Mr. Warren Olney* opposing.

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No. 473. Provident Savings Life Assurance Society of New York *v.* Hadley. First Circuit. Denied December 10, 1900. *Mr. Robert M. Morse* for petitioner. *Mr. Alfred Hemenway* and *Mr. Arthur J. Selfridge* opposing.

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No. 481. First National Bank of Houston *v.* Ewing. Fifth Circuit. Denied December 10, 1900. *Mr. M. F. Mott* and *Mr. L. B. Moody* for petitioner. *Mr. Presley K. Ewing* and *Mr. Henry F. Ring* opposing.

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No. 500. Hagan *v.* Scottish Union and National Insurance Company. Third Circuit. Granted December 17, 1900. *Mr. Horace L. Cheyney* and *Mr. John F. Lewis* for petitioner.

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No. 462. Chipps, and McKenzie, Receiver, *v.* Lindeberg. Ninth Circuit. Denied December 24, 1900. *Mr. C. K. Davis*, *Mr. Frank B. Kellogg*, *Mr. C. A. Severance*, *Mr. M. S. Gunn*,

Decisions announced without Opinions.

*Mr. John B. Clayberg* and *Mr. T. J. Geary* for petitioners. *Mr. William A. Manry*, *Mr. E. S. Pillsbury*, *Mr. J. C. Campbell*, *Mr. W. H. Metson*, *Mr. K. M. Jackson*, *Mr. Charles Page* and *Mr. E. J. McCutcheon* opposing.

# INDEX.

13. A recovery can be had *in personam* for a maritime tort, when the relation existing between the owner and the master and crew of the vessel, at the time of the negligent collision, was that of master and servant. *Ib.*

*See* JURISDICTION, A, 1.

## CASES AFFIRMED AND FOLLOWED.

1. These cases were argued with *Saxlehner* v. *Eisner & Mendelson Co.*, *ante*, 40. The answer in them was substantially the same as in that case, and the same record of proofs was used. *Held* that an injunction should issue against all the defendants, but as the Siegel-Cooper Company acted in good faith, it should not be required to account for gains and profits. *Saxlehner* v. *Siegel-Cooper Co.;* v. *Gries;* and v. *Marquet*, 42.
2. Defendant was prosecuted for selling bitter waters under the name of "Hunyadi Lajos." *Held*, That although the proof of laches on the part of the plaintiff was not as complete as in the former case the same result must follow, and that the bill must be dismissed as to the word "Hunyadi" and sustained as to the infringement of the bottles and labels. *Saxlehner* v. *Nielsen*, 43.
3. *New York State* v. *Barber* (*No. 1*), followed. *N. Y. State* v. *Barber* (*No. 2*), 287.
4. Following the decision and the concurring opinion in *Stearns* v. *Minnesota*, *ante*, 233, the court holds that the act of the legislature of Minnesota relied upon was void. *Duluth & Iron Range Railroad* v. *St. Louis County*, 302.
5. This case having been argued with No. 12, *ante*, 415, at the same time and by the same counsel, the decision of the court in that case is followed in this. *Chicago, Milwaukee & St. Paul Railway Co.* v. *Bosworth*, 442.
6. This case having been argued with No. 12, *ante*, 415, at the same time, and by the same counsel, the decision of the court in that case is followed in this. *Rau* v. *Bosworth*, 443.
7. This case having been argued with No. 12, *ante*, 415, at the same time, and by the same counsel, the decision of the court in that case is followed in this. *Bosworth* v. *Carr, Ryder & Engler Co.*, 444.

*See* CRIMINAL LAW.
JURISDICTION, B, 3.

## CERTIORARI.

*See* MILITARY TRIBUNALS.

## CIGARETTES.

1. Tobacco being a legitimate article of commerce, the court cannot take judicial notice of the fact that it is more noxious in the form of cigarettes than in any other. It is, however, to the same extent as intoxicating liquors, within the police power of the State. *Austin* v. *Tennessee*, 343.

CITIZENSHIP.



CONSTITUTIONAL LAW.

## DAMAGES.

and Affiliated Bands of Indians were by the United States located within the boundaries of the lands hereinbefore described;" that they "now number not more than one thousand and sixty persons;" and that the location of the Wichitas and Affiliated Bands within said boundaries was "for the purpose of affording them permanent settlement therein," adjudged that the lands in dispute had been acquired and were held by the United States in trust for the purpose of settling Indians thereon, and that whenever that purpose was abandoned as to the whole or any part thereof, then all the lands not so devoted to Indian settlement should be held in trust by the United States for the Choctaw and Chickasaw Indians exclusively. It was also adjudged that the members of the Wichita and Affiliated Bands, not exceeding one thousand and sixty, were equitably entitled to one hundred and sixty acres of land each out of the lands in dispute, and that the same should be set apart to them by the United States, due regard being had to any improvements made thereon by them respectively for their permanent settlement. It was further adjudged that the Choctaw and Chickasaw Nations were in law and equity entitled to and were the owners of such of the lands ceded to the United States by the Wichita and Affiliated Bands as remained, after satisfying the provisions for the Wichitas and Affiliated Bands, and that in the event of the sale thereof by the United States, the Indian plaintiffs should be entitled to and receive the proceeds of such sale. This judgment being brought here on appeal, this court, in its opinion, carefully reviewed all the legislation, and all the Indian treaties on the subject, and, as a result, held that for the reasons given the decree must be reversed with directions to dismiss the petition of the Choctaw and Chickasaw Nations, and to make a decree in behalf of the Wichita and Affiliated Bands of Indians fixing the amount of compensation to be made to them on account of such lands in the Wichita Reservation as are not needed in order to meet the requirements of the act of Congress of March 2, 1895, c. 188, and for such further proceedings as may be consistent with law and with this opinion. *United States* v. *Choctaw Nation and Chickasaw Nation*, 494.

## INJUNCTION.

In July, 1895, Harold F. Hadden and James E. S. Hadden brought an action in the New York Supreme Court for the city and county of New York, against the Natchaug Silk Company, Michael F. Dooley, personally and as receiver of the First National Bank of Willimantic, John A. Pangburn, and others, including William I. Buttling, sheriff of Kings County. The complaint alleged certain fraudulent and collusive proceedings between the Natchaug Silk Company, Dooley, receiver of the First National Bank of Willimantic, and John A. Pangburn, and, under a prayer of the bill, an injunction *pendente lite* was granted restraining the sheriff of Kings County from selling property of the silk company in his possession as sheriff upon executions against said company in favor of John A. Pangburn or Dooley, as receiver, and restraining Pangburn and Dooley from further proceedings at law against the

property of the silk company in the State of New York. The action was removed to the Circuit Court of the United States for the Southern District of New York, and repeated motions to dissolve the temporary injunction were there made and denied, and the order of the Circuit Court denying the motions was, on appeal, affirmed by the Circuit Court of Appeals. Subsequently, the taking of testimony in the case having been closed, the defendants Dooley and Pangburn made another motion, upon the plenary proofs, to dissolve the injunction, and this motion was granted, after hearing, by Circuit Judge Lacombe, on November 27, 1896. The case came to final hearing in the Circuit Court, and resulted in the decree dismissing the bill on January 27, 1898. Upon appeal by the complainants the Circuit Court of Appeals reversed the decree in part and affirmed it in part. From this decree of the Circuit Court of Appeals the complainants appealed to this court, on the ground that the decree should have adjudged to the complainants priority of lien on all the goods in dispute; and the defendants appealed on the ground that the Circuit Court of Appeals erred in reversing the decree of the Circuit Court. The facts, as stated in the opinion of Circuit Judge Shipman, were substantially these: On April 23, 1895, the Natchaug Silk Company, a Connecticut corporation, owed the First National Bank of Willimantic, a national banking association located in Connecticut, over $300,000, and was entirely insolvent. In consequence of this indebtedness the bank suspended, and Michael F. Dooley was appointed its receiver on April 26, 1895, by the Comptroller of the Currency. On April 23, 1895, J. D. Chaffee, as president and general manager of the silk company, in consideration of and to reduce this indebtedness, sold to the bank 107 cases of manufactured silk, the value of which cannot be accurately ascertained, but which is said to be about $20,000. They were then, or had been, shipped to New York, where they were subsequently taken by Dooley into his possession, and removed to Brooklyn. On May 8, 1895, he, as receiver, attached the goods by attachment, which was subsequently dissolved. On May 30, 1895, he sold and assigned to Pangburn, who is a resident of the State of New York, notes of the silk company, not paid by this transfer, amounting to about $67,000, for the nominal consideration of $200, which sale Dooley made by virtue of an order of the Circuit Court of the Southern District of New York, with the approval of the Comptroller of the Currency, for the purpose of enabling a suit to be brought in the State of New York, by a resident of that State, in his own name, against the silk company, a foreign corporation. Pangburn did bring suit on said notes against the silk company on June 1, 1895, in the proper state court, and obtained an order of attachment, a judgment for the full amount thereof, and an execution which was levied by the sheriff of Kings County upon these cases of silk. The sale was stopped by this injunction order. On June 6, 1895, the complainants, who are creditors of the silk company, brought suit against it in a court of the State of New York, and obtained an order of attachment, under which the sheriff of Kings County levied an attachment upon the same silk. On June 6, 1895, the complainants, who are creditors of the silk com-

## PATENT FOR INVENTION.

1. An examination of the history of the appellant's claim shows that in order to get his patent he was compelled to accept one with a narrower claim than that contained in his original application; and it is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office, or disclosed by prior devices. *Hubbell* v. *United States*, 77.
2. This court concurs with the court below in holding that the cartridges made and used by the United States were not within the description contained in the appellant's claim. *Ib.*

## PLEADING.

*See* CONSTITUTIONAL LAW, 3.

## PRACTICE.

1. The petition for a rehearing in this case is denied. *Hubbell* v. *Hubbell* (No. 198, October Term, 1897), 86.
2. The defendant in the court below moved to dismiss this case on the ground that the contract in relation to the property in question was with Griffith alone, and, that motion being denied, proceeded to offer evidence. *Held* that he could not assign the refusal to dismiss as error. *Sigafus* v. *Porter*, 116.
3. The briefs filed in this case are in plain violation of the amendment to Rule 31, adopted at the last term, and printed in a note to this case. *Wisconsin, Minnesota &c. Railroad* v. *Jacobson*, 287.
4. Where both courts below have concurred in a finding of fact, it will, in this court, be accepted as conclusive, unless it affirmatively appears that the lower courts obviously erred. *Workman* v. *New York City, &c.*, 552.

## PUBLIC LAND.

1. The fourth subdivision of section 13 of the act establishing the Court of Private Land Claims, which provides that "no claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority," applies to this case, and the claimant has no right to ask that court to pass upon its claim. *Las Animas Land Grant Co.* v. *United States*, 201.

## RECEIVER.

1. An action against a receiver of a state corporation is not a case arising under the Constitution and laws of the United States simply by reason of the fact that such receiver was appointed by a court of the United States. *Gableman* v. *Peoria, Decatur & Evansville Railway Co.*, 335.
2. A receiver appointed by a Federal court may be sued in that court as well as in the state court, but if in the state court, he is not entitled to remove the cause on the sole ground of his appointment by the Federal court. *Ib.*

RAILROAD.

1. This case involves deciding whether the defendants in error are liable for the damage occasioned to certain property, resulting from a fire which occurred on October 28, 1894, in a railroad yard at East St. Louis, Illinois. At the time of the fire Bosworth was operating the railway as receiver. The decision depends largely, if not entirely, on facts, which are stated at great length by the court, both in the statement of the case, and in its opinion. These papers are most carefully prepared. While both deal with facts, those facts are stated with clearness, with fullness, with completeness, and with unusual care. They leave nothing untouched. Without treating them with the same fullness, the reporter feels himself unable to prepare a headnote which could convey an adequate and just account of the opinion and decision of the court. Under these circumstances he deems it best not to attempt an impossibility, but to respectfully ask the readers of this headnote to regard the opinion of the court in this case as incorporated into it. *Huntting Elevator Co.* v. *Bosworth, Receiver*, 415.
2. The plaintiff, an employé of the railway company, was injured while at work for it. With reference to his contention that the trial court erred in directing a verdict for the defendant, and in failing to leave the question of negligence to the jury, this court, after stating the facts, said: (1) That while in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish, that the employer has been guilty of negligence; (2) that in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence, but the evidence must point to the fact that he was; and where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion; (3) that while the employer is bound to provide a safe place and safe machinery in which and with which the employé is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employé, it is also true that there is no guaranty by the employer that the place and machinery shall be absolutely safe. He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. *Patton* v. *Texas & Pacific Railway Co.*, 658.
3. The rule in respect to machinery, which is the same as that in respect to place, was accurately stated by Mr. Justice Lamar for this court in *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554, 570. *Ib.*

## RES JUDICATA.

*See* LIS PENDENS.

## STATUTES.

### A. OF THE UNITED STATES.

*See* ADMIRALTY, 1; CRIMINAL LAW; CUSTOMS DUTIES, 1, 2, 3; INDIAN, 2; JURISDICTION A, 1, 2, 3; MILITARY TRIBUNALS, 1, 2; PUBLIC LAND; TAXATION, 1.

### B. OF STATES AND TERRITORIES.

*Georgia.* *See* CONSTITUTIONAL LAW, 9; TAXATION, 2.

*Kentucky.* *See* CONSTITUTIONAL LAW, 19.

*Louisiana.* *See* CONSTITUTIONAL LAW, 4; NEW ORLEANS DRAINAGE.

*New York.* *See* INSURANCE (LIFE).

*Ohio.* *See* CONSTITUTIONAL LAW, 20, 21.

## SURETY.

A surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee; or, in other words, the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise. *Joyce* v. *Auten*, 591.

## TAXATION.

1. The constitution of Minnesota of 1858, still in force, provided that all taxes should be as nearly equal as may be, and that the property taxed should be equalized and uniform throughout the State. It made provision for certain defined exemptions, and provided for uniform and equal taxation throughout the State. Before that time, namely, on September 28, 1850, Congress had granted to the several states, Minnesota included, the swamp and overflowed lands within each; and other grants were subsequently made, as stated in the opinion of the court, subject to be taxed only as the land should be sold. There were also statutes passed in regard to the taxation of land granted to the Lake Superior and Pacific Railroad Company, which are set forth in the opinion of the court. In 1896 an act was passed, repealing all former laws exempting from taxation, and providing for the taxation of the lands granted to railroads as other lands were assessed and taxed. *Held*, that in this legislation a valid contract was created, providing for the taxation of all railroad property (lands included) on the basis of a per cent of the gross earnings, which contract was impaired by the legislation of 1896, withdrawing the lands from the arrangement, and directing their taxation according to their actual cash value; that as to the St. Paul & Duluth Railroad Company a contract was made and only Congress can inquire into the manner in which the State exe-