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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1901

J. C. BANCROFT DAVIS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

PHILANDER CHASE KNOX, 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, 1901.

MUELLER *v.* NUGENT.

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

No. 257. Argued and submitted November 13, 1901. — Decided January 20, 1902.

Referees in bankruptcy exercise much of the judicial authority of the court of bankruptcy, and may enter orders to show cause subject to revision by the District Court.

Commitment until assets of a bankrupt are surrendered pursuant to order does not constitute imprisonment for debt.

The bankruptcy court has power to compel the surrender of money or other assets of the bankrupt in his possession, or that of some one for him, on petition and rule to show cause.

The filing of a petition in bankruptcy is a *caveat* to all the world, and in effect an attachment and injunction, and on adjudication and qualification of trustee, the bankrupt's property is placed in the custody of the bankruptcy court, and title becomes vested in the trustee.

The refusal to surrender property of the bankrupt does not in itself create an adverse claim at the time the petition is filed.

EDWARD B. NUGENT was adjudicated a bankrupt March 23, 1900, on the petition of the Wayne Knitting Mills and others, his creditors, filed in the District Court of the United States for the District of Kentucky, February 19, 1900, and the matter was referred to a referee. Arthur E. Mueller was appointed trustee of the bankrupt's estate, and on the seventh of April he obtained an order from the referee requiring the bankrupt to

show cause why he should not pay over the sum of $14,233.45, made up of two items of $4133.45 and $10,100. The response of the bankrupt was held insufficient; he was ordered to pay over; on failure to do so, was adjudged guilty of contempt, and the matter was reported to the court by the referee with a recommendation that he be committed. On the suggestion that approaching senile imbecility made the bankrupt an unfit subject of punishment the court discharged him, without prejudice to a renewal of the matter before the referee if subsequent developments rendered it proper.

April 13, 1900, the trustee filed his petition praying that an injunction might be issued against William T. Nugent, restraining him from disposing of the sum of $14,435.45, or any part thereof, belonging to the estate of the bankrupt, and for an order requiring him to pay the money to the trustee. This petition stated that William T. Nugent was in hiding. The referee granted the injunction and entered an order that said William T. Nugent show cause within five days from service thereof why he should not be required to pay over.

A copy of this order was served on William T. Nugent, October 8, 1900, and on October 13 he appeared in person and by counsel, and filed a response to the rule. In this respondent set forth that "neither the court or the referee in bankruptcy herein, has any jurisdiction either of this respondent or the matter involved, to make any order or to require this respondent to answer thereto, because he says that said records herein show, that, if respondent received said money or any part thereof, it was before the petition in bankruptcy was filed, and in that event neither the court or the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay, and he now hereby asks that this be taken as his response herein, and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein, has he received said $14,435.45 or any part thereof."

For further response he said that he had been indicted in the District Court for receiving said $14,435.45, after the filing of the petition, and with retaining the same, and aiding and

abetting in the retention thereof, both after the filing and the adjudication, for the purpose of defeating the bankrupt law, and that he ought not to be required to respond, and his response would tend to incriminate him.

The matter came on for hearing October 16, it being stipulated, without prejudice to the objection to the jurisdiction, that the depositions of Edward B. Nugent, and others named, (not including William T. Nugent,) theretofore taken in the cause, might be read. The referee summarized the evidence, as appears from his certificate, thus:

"The testimony shows, and I so find, that on the 9th day of February, 1900, the bankrupt, Edward B. Nugent, borrowed from George L. Erbach and Frank Hohmann, executors, the sum of $4500, and as security therefor executed a mortgage upon the house and lot of land owned by said Edward B. Nugent, in the city of Louisville; that after paying the taxes and expenses of procuring the loan there remained from said sum so borrowed the sum of $4133.45; that on said day the said balance of $4133.45 was delivered to said W. T. Nugent as the agent of the bankrupt, and the said amount has not been accounted for to the trustee in bankruptcy herein.

"I further certify that on the 19th day of February, 1900, before the hour of 2 o'clock P. M., being more than three hours before the petition praying for an adjudication of said Edward B. Nugent as bankrupt was filed in the clerk's office of said court, the stock of merchandise belonging to the bankrupt was sold to one Hermann Straus for the sum of $12,000, and on said 19th day of February, 1900, and before the hour of 2 o'clock P. M., the said $12,000 was paid to said bankrupt by said Hermann Straus, in the form of a check on the German Bank of Louisville, Ky.; that said bankrupt endorsed his name across the said check and delivered the same to said W. T. Nugent, his son, as his agent; that said W. T. Nugent received the cash upon said check on that day before the hour of 2 o'clock P. M., and paid therefrom the sum of $1900 for rental on the building where said stock was located and the expenses of making the sale, leaving the sum of $10,100, which then and there still remained in the hands of said W. T. Nugent as the agent of said bankrupt.

Statement of the Case.

"I further find that both of said balances, to wit, $4133.45 and $10,100, belonged to the said bankrupt and became and still are the property of Arthur E. Mueller, trustee in bankruptcy in this cause, and that said W. T. Nugent holds the same as agent or bailee only, and that he has not accounted for any part of said sums."

The referee entered an order on the same day, October 16, 1900, omitting preliminary recitals, as follows:

"And after hearing counsel, now therefore it is ordered and adjudged that the said response to the rule aforesaid be and the same is hereby held insufficient; and it appearing from the evidence in this cause that there came to the hands of W. T. Nugent $4133.45, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the city of Louisville, and that there also came to the hands of said W. T. Nugent the further sum of $10,100, being the net proceeds from the sale of the stock of merchandise sold to Herman Straus—the first of said sums having come to the hands of said W. T. Nugent as the agent of the bankrupt on February 9th, 1900, and the second sum, to wit, $10,100, having come to the hands of the said W. T. Nugent as the agent of the bankrupt on February 19th, 1900, before the hour of 2 o'clock P. M., on said day, and it further appearing that the petition of the Wayne Knitting Mills and others, praying that the said Edward B. Nugent may be adjudged a bankrupt, was filed in the office of the clerk of the above-styled court on February 19th, 1900, at 5 o'clock P. M., and it appearing that said W. T. Nugent has failed to pay over said sums, or any part thereof, to the trustee in bankruptcy herein, and that said sums are the property of the bankrupt, Edward B. Nugent, and belong to said trustee as part of said estate, it is ordered that said rule be and the same is hereby made absolute to the amount of said two sums aggregating the sum of $14,233.45.

"It is further ordered that said W. T. Nugent be and he is hereby required to pay to Arthur E. Mueller, trustee in bankruptcy in this cause, on or before 9:30 o'clock A. M. on October 17th, 1900, the said aggregate sum of $14,233.45."

Thereupon, October 17, William T. Nugent filed his petition

that the order of October 16 might be reviewed by the District Judge, and the referee made his certificate of the proceedings and the foregoing summary of the evidence, the depositions put in before him being returned therewith, concluding: "And the said question, to wit, the validity of the said order of October 16th, 1900, above set forth in full, is certified to the judge for his opinion thereon."

The referee also reported that William T. Nugent had failed to comply with the order in whole or in part; that he was in contempt of court; and recommended "that he be punished for contempt and committed to prison until he shall have paid to the said trustee the said sum of $14,233.45."

The record of the District Court shows that on the 1st day of November the cause came on to be heard on the petition of William T. Nugent for a review of the order of court entered by the referee requiring said Nugent to pay over, and the certification of the referee, and his recommendation that said Nugent be punished for contempt, and that the court being fully advised delivered a written opinion, which was ordered filed, whereupon William T. Nugent moved the court to postpone the entry of judgment until November 3, and it was so ordered.

The District Judge stated the facts at length; pointed out that the response was put upon two grounds, namely, that the court and referee were without jurisdiction, and that respondent had been indicted; held that as to the indictment, it was not an indictment for disobedience to the order, but under § 29 of the bankrupt act; that exculpation could not criminate; that he could have denied receiving or concealing the money, or paid it into court, but he had done neither; that he had the money and that it belonged to the estate; that the response really rested on the denial of jurisdiction; and that the referee had the power to order the money to be surrendered. The matter was summed up in these words:

"The respondent has the money in his hands as agent or bailee only. His possession is that of his principal. His principal was his father, up to a certain stage of these proceedings; but whether up to the filing of the petition, or up to the adjudication, we need not stop to inquire, as it is immaterial in this

case. At one or the other of those times his principal, by operation of law, was changed, and an officer of this court was substituted for his father. That change in no way lessened the duty of paying the money to the proper principal upon notice and demand. After the change, however, the money was potentially in the custody of the law in these proceedings, and subject to the orders of the court. The rule and its service constituted sufficient notice and demand. The order made was that the respondent should pay the money to the proper officer. Disobedience of that order is made punishable as a contempt by the express provisions of the act.

"The court, therefore, has jurisdiction of the person and of the subject matter. The rulings of the referee appear to be right, and are approved and confirmed, and his recommendation as to punishing the respondent for the contempt adjudged will be acted upon with appropriate vigor. . . .

"The judgment of the court, in the exercise of its statutory discretion, will be that the respondent, W. T. Nugent, for his contempt aforesaid, be imprisoned in the county jail until he shall deliver to Arthur E. Mueller, the trustee, said sum of $14,233.45, and the court will reserve the right to suspend or set aside this judgment and sentence upon the delivery and payment of the money as ordered." *Wayne Knitting Mills* v. *Nugent*, 104 Fed. Rep. 530.

On the third of November the respondent Nugent asked leave to file an amended response, stating that he had not made full response as to the entire facts because the referee had held he could not be examined as to transactions involved in the indictment, and denying that the $14,233.45, or any part thereof, was now in his possession or under his control, or was on October 8, 1900, and saying "that neither at the time of the filing of the petition in bankruptcy herein against E. B. Nugent, or at any time subsequent thereto, did he have in his hands any amount of money belonging to said Nugent which he held as his agent or bailee. He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee, or in any

trust capacity whatever, but was held adversely to said E. B. Nugent."

The District Court would not permit the proposed amendment to be filed, and entered this order:

"Came William T. Nugent, respondent herein, and tendered an amended response, and moved to file same, and the court not having postponed the imposing of the sentence for that purpose, and being of opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the court, filed herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.45, or otherwise satisfy the said trustee with respect thereto, and the court reserves the right and power to suspend or set aside the judgment and sentence upon the delivery, payment or satisfaction aforesaid."

Thereafter William T. Nugent filed a petition for review, under subdivision *b*, section 24, of the act, in the Circuit Court of Appeals, praying "that the orders, judgments, and sentence of the District Court be reviewed and revised in the matters of law, so as to adjudge that your petitioner be released and discharged," or "that he be permitted to further respond in said matter."

This petition alleged error in that the District Court held that the referee and the court had jurisdiction to proceed against petitioner in a summary way; that the court had jurisdiction on the proceedings and recommendations of the referee to punish petitioner for contempt; that the referee had power to grant the injunction against petitioner, or to proceed on rule to show cause; that the response was insufficient; that the facts were that the money belonged to the bankrupt's estate and was held by petitioner as the bankrupt's agent, and was not claimed adversely; that the amended response should not

be filed; that the petitioner was properly before the court; and that the contempt proceedings should not be dismissed and petitioner discharged.

The amended response was attached as an exhibit to this petition, although it had not been filed in the District Court or made part of the record there by certificate of exceptions or order of identification, and the petition also set up several matters and exhibits which apparently were not before the referee or the District Court in the proceeding. The trustee moved to expunge these various matters and exhibits.

To expedite the hearing this motion was reserved, and it was stipulated that "such affirmative allegations of said petition for review as properly should be denied be treated as controverted of record without prejudice to the hearing of said motion."

The Circuit Court of Appeals, December 13, 1900, filed a memorandum opinion, and entered judgment reversing the decree of the District Court, with directions to that court to vacate the order of the referee on respondent to show cause and his order adjudging respondent to be in contempt thereof, and that respondent be discharged from imprisonment. An extended opinion was subsequently filed. 105 Fed. Rep. 581.

The writ of certiorari was then granted by this court. 180 U. S. 640.

Mr. William W. Watts for Mueller. *Mr. John Richard Watts* was on his brief.

Mr. W. M. Smith for Nugent submitted on his brief, on which was also *Mr. Fred. Forcht, Jr.*

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

General order in bankruptcy XXVII (172 U. S. 662), provides: "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge, of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith

certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Respondent accordingly filed his petition for a review of the order of October 16. The referee thereupon certified to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon. He pursued in so doing Form No. 56 of the Forms in Bankruptcy. 172 U. S. 718. The question certified was "the validity of the said order of October 16, 1900, above set forth in full." At the same time the referee reported the disobedience of William T. Nugent and recommended that he be committed. No exception was taken before the referee or the District Court to the sufficiency of the trustee's application, or to the adequacy of the certificate, and the entire evidence was transmitted.

Subdivision *b* of section 24 of the act of July 1, 1898, c. 541, 30 Stat. 544, 553, provides: "The several Circuit Courts of Appeals shall have jurisdiction in equity, either interlocutory or final, to superintend or revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

The District Court affirmed the order of October 16, and ordered respondent to be committed for his failure to comply therewith, and thereupon respondent filed in the Circuit Court of Appeals his petition for review. The matters of law to be passed on by that court were the validity of the order of October 16, as affirmed by the District Court, and the correctness of the order of commitment. And these were to be determined on the record of the District Court.

The Circuit Court of Appeals had in prior cases recognized the general proposition that those courts are confined on petitions for review to matters of law arising on the record of the courts below, and may well have assumed that there was no necessity for a specific ruling on the motion to expunge the new matter accompanying the petition in this instance. *Cunningham* v. *German Insurance Bank*, 103 Fed. Rep. 932; *Courier-Journal Printing Co.* v. *Schaefer-Meyer Brewing Co.*, 101 Fed. Rep. 699. The record of the District Court in respect of the

order of October 16 was the record made before the referee, who had certified the question of the validity of the order at the request of respondent, and to the adequacy of whose certificate respondent had made no objection as heretofore said.

It is true that after the decision of the District Court was announced, and the final order was about to be entered, the entry of the order was suspended, on the application of the respondent, for two days, and that then the respondent undertook, by way of amendment, to set up a denial that he held the money as the bankrupt's agent, or bailee, and to assert that he held adversely to him. The District Court refused to allow the amendment to be made at that stage of the proceedings, and we do not understand that the Court of Appeals held that the District Court abused its discretion in so refusing.

At an earlier stage perhaps this ruling might have been controlled by the rules of equity practice adopted by this court, but that would not be so after hearing had been had, the decision of the court had been announced, and judgment was about to be entered.

The respondent had denied the jurisdiction on the ground that he had not received the money, or any part of it, after the petition in bankruptcy was filed. When the matter came on to be heard on the rule to pay over, respondent agreed that the enumerated depositions might be read, reserving his exceptions to the jurisdiction. He then carried the matter to the District Court, and after it was decided, sought to amend his response to the rule by asserting that whatever money belonging to the bankrupt came to his hands was not received as agent of but was held adversely to the bankrupt. He did not even then set forth what money he had received, and how and when it came to his hands, or the circumstances under which he claimed to hold it adversely, but put forward simply a conclusion of law. The District Court held it not admissible practice to permit such an amendment at that stage, that is, that the application came too late, after the case had been heard and determined and a written opinion had been delivered and filed; and the District Judge may have considered it a mere subterfuge in evasion of the effect of the decision, or that the proposed amendment was insufficient.

If the proposed amended response be treated as properly before us, we agree that the orders under consideration ought not to be disturbed because of this ruling made in the competent exercise of judicial discretion. And, moreover, respondent did not ask to plead over before the referee, but had the case certified to the judge as it stood.

Among the definitions set forth in section 1 of the bankruptcy act are these: "'Court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;" "'judge' shall mean a judge of a court of bankruptcy, not including the referee;" "'referee' shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead."

By section 2, courts of bankruptcy are vested with power to "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees."

Section 36 provides that "referees shall take the same oath of office as that prescribed for judges of United States courts."

Section 38, that referees shall have jurisdiction to "(4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

And section 39, that among other duties of referees, they

shall "(5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges."

Section 41 provides that "a person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ;" and that "*b* The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court."

General Order XII provides that after the order of reference reaches the referee, "all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

General Order XXIII is: "In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests."

And we repeat General Order XXVII: "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

No objection was made before the referee or the District Court, to the authority of the referee as such, to entertain these proceedings; to enter the order to show cause and thereby to bring in William T. Nugent; and to enter the order of Octo-

ber 16; and we do not find that the act or the general orders are to the contrary.

It is now said that the only power the referee has to direct the taking possession of property is given by subsection three of section 38*a*, providing that the referee may exercise the powers of the judge in that respect on a certificate of the clerk that the judge is absent or unable to act. But that provision seems to refer only to the seizure of property by the marshal or a receiver prior to adjudication and the qualification of the trustee as provided by section 2, section 3*e*, and section 69, and it is at all events inapplicable here.

We think the referee has the power to act in the first instance in matters such as this, when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases "much of the judicial authority of that court." *White* v. *Schloerb*, 178 U. S. 542. By petition for review the matter can be carried to the bankruptcy court and the entire record and findings laid before that tribunal as was done here.

And if the order of October 16 was in itself a lawful order, the power of the District Court to commit William T. Nugent until he surrendered the money to the trustee, or otherwise satisfied the trustee with respect thereto, was unquestionable under the express provisions of the bankruptcy act in that behalf, as well as the general jurisdiction of the court to enforce its orders in the collection of assets.

It is objected that the order of commitment was invalid because it did not run in the name of the United States. This objection was not made below; nor was this an attachment. It was an order to detain Nugent until he complied with an order made in a proceeding in equity under the bankrupt act. The objection is untenable. Nor was the commitment imprisonment for debt, as also contended. The order to pay over the money was not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt placed *in custodia legis* by the adjudication.

The real question was whether the order of October 16, as confirmed by the District Court, was a lawful order. It was to be determined as a mere question of law on the facts found

that the money belonged to the bankrupt's estate, and was then in Nugent's possession as the bankrupt's agent, he asserting no adverse claim. And the question of the validity of that order involved the validity of the order to show cause.

The proposition was that, as matter of law, where property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed.

In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a state court, as the case may be?

If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.

The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.

It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction, *Bank* v. *Sherman*, 101 U. S. 403; and on adjudication, title to the bankrupt's property became vested in the trustee, §§ 70, 21 *e*, with actual or constructive possession, and placed in the custody of the bankruptcy court.

There was no pretence that at the date of the filing of this petition in bankruptcy this money of the bankrupt, $4133.45 of which had been collected a few days, and $10,100, a few

hours, before, was held subject to any adverse claim, or that the right or title thereto had been passed over to another.

The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent.

But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review.

In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and the District Court.

The decisions of this court under the present law sustain the validity of the action we are considering.

In *Bardes* v. *Hawarden Bank*, 178 U. S. 524, the question related to the jurisdiction of the District Court over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of proceedings in bankruptcy. The court said: "Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where,

by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits." And it was held that Congress, by the second clause of section 23 of the bankruptcy act, had manifested its intention "that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant.'" The court was dealing there with a suit of the trustee against a third party to recover property fraudulently transferred to him by the bankrupt before the filing of the petition in bankruptcy, and which the third party claimed as his own.

In *White* v. *Schloerb*, 178 U. S. 542, where, after an adjudication in bankruptcy and reference of the case to a referee, and before the appointment of a trustee, the referee had taken possession of the bankrupt's stock of goods in a store, a writ of replevin of part of the goods was sued out by third persons against the bankrupt from a state court and executed by the sheriff forcibly entering the store and taking possession of the goods, it was held that the District Court of the United States, sitting in bankruptcy, had jurisdiction by summary proceedings to compel the return of the property seized.

In *Bryan* v. *Bernheimer*, 181 U. S. 188, Abraham, nine days before the filing of a petition in bankruptcy against him, made a general assignment to Davidson of all of his property for the benefit of his creditors. After the filing of the petition Davidson sold the property to Bernheimer. After the adjudication in bankruptcy and before the appointment of a trustee, the petitioning creditors applied to the court for an order to the marshal to take possession of the property, alleging that this was necessary for the interest of the bankrupt's creditors. The court ordered that the marshal take possession, and that notice be given to the purchaser to appear in ten days and propound his claim to the property, or failing to do so, be decreed to have no right in it. The purchaser came in and propounded his claim,

stating that he bought the property for cash in good faith of the assignee, and praying that the creditors be remitted to their claim against the assignee for the price, or that the price be ordered to be paid by the assignee into court and paid over to the purchaser, who thereupon offered to rescind the purchase and waive all further claim to the property. This court held that the summary proceeding was properly entertained; that the purchaser had no title in the property superior to the bankrupt's estate; and that the equities between him and the creditors might be determined by the District Court, bringing in the assignee if necessary. In that case it was observed that the remark in *Bardes* v. *Bank*, that the powers conferred on the courts of bankruptcy after the filing of a petition in bankruptcy, and in case it was necessary for the preservation of the property of the bankrupt to authorize receivers or the marshals to take charge of it until a trustee was appointed, "'can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant,' was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment." The court also said: "The general assignment, made by Abraham to Davidson, did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors." And further: "The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself."

In the case before us, William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself. If it was competent to deal with Davidson, the assignee in the case of *Bryan* v. *Bernheimer*, by summary proceeding, William T. Nugent could be dealt with in the same way.

The cases are indeed different, for Bernheimer, the purchaser, submitted himself to the jurisdiction of the bankruptcy court and the sale was after petition filed, but nevertheless, so far as the question of subjecting a mere volunteer in possession of as-

sets belonging to the bankrupt's estate to the control of that court by summary proceedings is concerned, the ruling in *Bernheimer's* case is in point.

We are of opinion that the order of October 16 was a lawful order. In arriving at that conclusion we have confined ourselves to the record of the District Court. If in the effort to escape the jurisdiction of the bankruptcy court, that record is not in a condition as favorable to respondent as the actual facts might have justified, he has only himself to thank for it; but, lest any injustice should be done, the judgment will be:

Decree of the Circuit Court of Appeals reversed; decree and order of the District Court affirmed; and cause remanded to the latter court with liberty to take such further proceedings as it may be advised.

LOUISVILLE TRUST COMPANY *v.* COMINGOR.

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

No. 309. Submitted April 29, 1901.—Decided January 27, 1902.

A general assignment for the benefit of creditors had been made under the statutes of Kentucky in that behalf and a suit involving the administration and settlement of the assigned estate was pending in the state Circuit Court, when a petition in bankruptcy was filed against the assignors, to which the assignee was made defendant, although no special relief was prayed for as against him, but an injunction was granted restraining all the defendants from taking any steps affecting the estate, and especially in the suit pending in the state court. The assignee had paid into court in that suit a considerable amount of money, which, on the trustee in bankruptcy becoming a party to the suit, had been paid over to him by order of the state court.

Rules were laid on the assignee by the referee in the bankruptcy proceedings to show cause why he should not pay over the sums of $3398.90 and of $3200, alleged to belong to the bankrupts' estate, in response to which the assignee showed as cause that he had paid the $3200 to counsel for services rendered to him as assignee, and had retained and expended the $3398.90 as his own commissions as such, all before the

Statement of the Case.

petition was filed, and he also, prior to the final order of the District Court, objected before the referee, and before the District Court, that he could not be proceeded against by summary process for want of jurisdiction. The rules were made absolute by the referee and the assignee ordered to pay over the two sums in question, and that action was affirmed by the District Court. *Held:* (1) That as to these sums the assignee asserted adverse claims existing at the time the petition was filed, which could not be disposed of on summary proceeding. (2) That the bare fact that the assignee was named as one of the defendants to the petition in bankruptcy did not make him a party to the bankruptcy proceedings for all purposes. (3) That in responding to the rules laid on him, the assignee did not voluntarily consent that he might be proceeded against in that manner, and that jurisdiction to do so could not be maintained.

DECEMBER 5, 1898, Simonson, Whiteson and Company, the firm consisting of three partners, made an assignment to Leonard Comingor for the benefit of their creditors, under the statutes of Kentucky in that behalf, and a few days thereafter Comingor brought suit involving the administration and settlement of the estate in the Circuit Court of Jefferson County.

The state statute provided, among other things, that the assignee should give bond with good security to be approved by the county judge, conditioned for the faithful discharge of his duties as assignee, and to be recorded in the county clerk's office; that the assignee should be at all times subject to the orders and supervision of the county court, or the judge thereof in vacation, except as thereinafter provided; for the final discharge of the assignee on due notice; and that the assignee or any creditor or creditors representing one fourth of the liabilities might bring suit in the Circuit Court for the settlement of the estate, whereupon the jurisdiction of the county court should cease, and the Circuit Court should have all the power and authority to administer and settle up the assigned estate conferred on the county court, in addition to its power and authority as a chancery court. Kentucky Statutes, 1899, p. 202, c. 7.

Certain creditors filed a petition in the Circuit Court of the United States for the District of Kentucky in bankruptcy, on February 14, 1899, against the firm, to which its members tendered a plea and answer. The ground on which the petition was based was that Simonson, Whiteson and Company had within four months of the filing of the petition made a general

assignment under the statutes of Kentucky for the benefit of creditors to Comingor. The court adjudicated them bankrupts, 92 Fed. Rep. 904, and one of them prosecuted an appeal to the Circuit Court of Appeals for the Sixth Circuit, which, July 5, 1899, reversed the judgment with directions to take further proceedings. 95 Fed. Rep. 948.

On September 20, 1899, adjudication was again awarded, and on a second appeal was affirmed February 12, 1900. 100 Fed. Rep. 426.

Comingor was made a defendant to the petition in bankruptcy as assignee, but no relief was prayed as against him, and he moved the court to dismiss the petition as to him for want of jurisdiction, and also, without waiving the motion, tendered an answer but the motion was not acted on, nor was his answer filed.

April 1, 1899, an injunction was granted against Simonson, Whiteson & Company, and Comingor, from taking any steps affecting the bankrupts' estate, and especially in the action in the Jefferson Circuit Court.

May 17, 1900, the case was referred to a referee, who, on May 28, without notice entered an order that Comingor file with him an itemized and detailed statement, showing his receipts and disbursements of the money and other assets belonging to the estates of Simonson, Whiteson and Company and its members. This Comingor did, the statement showing that he had received $92,865.77; that he had disbursed $19,876.73; that he had paid his counsel $3200; that he had drawn as commissioner, $3300; that he had paid over to the receiver of the state court $59,623.61; and that he had on hand $6766.53. This sum of $6766.53 was subsequently paid the trustee in bankruptcy.

June 20, 1900, the referee on his own motion entered an order appointing the Louisville Trust Company, receiver, and directing it to apply to the Jefferson Circuit Court for an order directing the receiver of that court to pay over the entire fund in court, in Comingor's action there; but providing that the Trust Company should not appear in the Jefferson Circuit Court as a party to that action, nor receive any less sum than

the whole fund in that court. Application was accordingly made by the Trust Company, but the Jefferson Circuit Court declined to entertain the motion to withdraw the funds, because the Trust Company was not a party to the action and had no standing in court, but the circuit judge suggested that when the Trust Company filed its petition asserting its claim to the fund, as provided by section 29 of the Code of Kentucky, the court would then be authorized to entertain such motions and make such orders in its behalf as might be necessary and proper.

The Trust Company appears to have been appointed trustee by the referee June 30, 1900, its bond as such trustee being then approved.

On the same day the referee entered an order that the Trust Company file a petition to be made a party to the suit in the Jefferson circuit court, and thereupon such petition was filed by it as trustee, stating among other things that the officers of the court had been paid in full and had no claims on the fund in court, and that the fund, to wit, $46,305.03, belonged to the creditors of the bankrupt concern and that nobody else had any interest therein, neither officers, attorneys nor anybody else, and praying that the court be directed to make the Trust Company a defendant, and that its petition be taken as an answer, and that the receiver of the said Circuit Court pay to petitioner the said sum of $46,305.03, and "for all further and proper relief." The Jefferson Circuit Court thereupon entered an order making the Trust Company a party defendant, and directing that it be allowed to withdraw from the fund in court the sum of $46,305.03.

June 20, the referee, on his own motion, entered an order requiring Comingor and his counsel to appear and show cause three days thereafter why they should not pay over to the receiver the amount of the commissions and fees.

June 23, Comingor responded as to the sum of $3398.90 that he had retained the same on account of his commissions as assignee before any bankruptcy proceedings were had, and that he relied on the fact that he would be entitled to more than that sum on the final settlement; that for services rendered to

the estate he believed this court would allow at least said amount; that he was a person of no means; and had used said money from time to time, relying on the fact that it belonged to him, and he had none of it left; and that he was unable to pay said money into court, as he had no money or property of any kind.

The referee held the response insufficient, and made the rule absolute. The order to show cause made on the attorneys does not appear to have been pursued, but June 28, 1900, another order was made on Comingor to show cause why he should not be required to pay to the receiver the sums of money paid to them, amounting to $3200 in all.

June 30, 1900, Comingor responded that he had paid the $3200 to his attorneys for services rendered him as his counsel while acting as the assignee before any proceedings in bankruptcy were taken. He further alleged that he had no money or means of any kind with which to pay, and referred to his former response and made it a part thereof, and insisted that he ought not to be compelled to pay the amount claimed.

The referee adjudged this response insufficient, and made the rule absolute.

Comingor then prayed for a review by the District Court in bankruptcy of the orders adjudging his responses insufficient, and ordering him to pay to the receiver the sums of $3398.90 and $3200 respectively.

The referee reported his findings to be that Comingor was entitled to no compensation whatever, and that he had no legal right to pay attorney's fees when no allowance had been made by the state court therefor, and that in contemplation of law he must be deemed to have the funds in his possession.

The District Judge referred the matter back to the referee July 16, 1900, to take testimony as to the character and value of Comingor's services and those of his counsel. The referee proceeded to do this, pending which, on November 10, Comingor tendered an amended response before the referee, setting forth that, as was shown by the pleadings, records and evidence in the case and the entire proceedings had, neither that court nor the referee in bankruptcy had any jurisdiction, either of the

respondent or the matter involved, to make any such orders or require respondent to answer thereto, because the records showed that all the transactions in reference to the two sums of money took place before the petition in bankruptcy was filed, and that neither that court nor the referee in bankruptcy could proceed against respondent as attempted by order or rule to pay over or by summary process. He prayed that the rule be discharged and the orders to pay be set aside. This amended response the referee declined to entertain, and it was again tendered in the District Court on the filing of the referee's report.

December 11, 1900, the referee reported the evidence and his conclusions thereon, that neither Comingor nor his attorneys had rendered any services of value to the estate, and that their services had in fact been injurious to the creditors, but that the fees paid to the attorneys were usual and reasonable according to the scale of compensation allowed for such services by the state court in Louisville.

The District Judge confirmed the report of the referee, and as to the objection of want of jurisdiction, held that it could not be entertained by the court for the reason that, by long acquiescence in that mode of procedure, respondent must be regarded as having consented thereto. Thereupon an order was entered dismissing the petition for review, and adjudging that Comingor pay to the Trust Company, as trustee, the said sums of $3398.90 and $3200, on or before February 16, 1901, to all of which Comingor excepted, and filed his petition for review in the Circuit Court of Appeals for the Sixth Circuit. That court entered an order staying proceedings in the District Court, and thereafter on hearing reversed the decree of the District Court affirming the orders of the referee requiring Comingor to pay to the trustee the sums aforesaid, with directions to set aside its order and decree, and the orders of the referee directing Comingor to pay the trustee in bankruptcy the moneys mentioned in said orders. 107 Fed. Rep. 898.

Certiorari from this court was then granted. 181 U. S. 620.

Mr. Augustus E. Willson for the Trust Company.

Mr. Alexander Pope Humphrey, *Mr. Morris A. Sachs*, *Mr. D. A. Sachs*, *Mr. J. G. Sachs* and *Mr. W. M. Smith* for Comingor.

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

The Circuit Court of Appeals was called on to review the orders of the referee as confirmed by the District Judge, by which Comingor was required to pay over the sums of $3398.90 and $3200, respectively, and the recommendation that he be dealt with for not complying therewith.

On the face of his responses, from first to last, it appeared that Comingor insisted that the $3200 had been paid by him to his counsel while they were acting for him, before the bankruptcy proceedings were commenced, for professional services rendered to him as assignee; and that he had retained and expended the $3398.90 as his commissions as assignee in reliance on the belief that he was entitled to that amount on final settlement. He thus asserted a claim to each of these sums adversely to the bankrupt, and as outstanding when the petition in bankruptcy was filed, and these claims were in fact passed upon by the referee and the District Judge as being adverse. This brought the controversy within the ruling in *Bardes* v. *Bank*, 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of the District Court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there.

The District Court held that Comingor had voluntarily accepted its jurisdiction, and that he had also consented that the court might proceed against him summarily. As the Circuit Court of Appeals said, speaking through Severens, J., "It was upon the ground of the petitioner's implied consent to the mode adopted that the District Judge justified it."

So far as this view rested on the contention that as Comin-

gor was joined with the bankrupts in the petition for adjudication, he therefore continued to be subject to the orders of the court without other process, we agree with the Circuit Court of Appeals that it cannot be sustained. As we understand the record, the petition in bankruptcy set up no cause of action and prayed no special relief against Comingor, and he was apparently made a defendant because adjudication would put an end to further action by him as assignee. Clearly, as the Circuit Court of Appeals points out, it would be inadmissible to permit creditors to deprive an assignee of his right to have his claims adjudicated by the proper court and in the customary mode of proceeding, by the device of making him a party to the petition for an adjudication and so attempting to bring him into the case for all purposes. Nor in this matter was any petition by the trustee, or by any other person, filed against Comingor to recover these sums, and the orders were entered by the referee on the record as it stood, so that there was no pretence whatever of a plenary suit in that court, in form or in substance.

The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If Comingor had been entitled to a trial by jury, he could not have obtained it as of right. The collection of the amounts found due would be enforcible not by execution but by commitment.

"We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defence of their rights." *Marshall* v. *Knox*, 16 Wall. 556; *Smith* v. *Mason*, 14 Wall. 419.

The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding.

We have just held in *Mueller* v. *Nugent*, *ante*, 1, that the District Court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed. And according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits. Jurisdiction as to the subject matter may be

limited in various ways, as to civil and criminal cases; cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on. In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.

We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered. He had been restrained from settling his accounts in the state court in the action pending there, and the District Court, instead of dissolving the injunction, declining jurisdiction, and leaving the litigation to the state court, either in due course, or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the Circuit Court of Appeals was right in its decree of reversal.

Decree affirmed.

Mr. Justice Harlan dissented.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* EUBANK.

ERROR TO THE CIRCUIT COURT OF SIMPSON COUNTY, STATE OF KENTUCKY.

No. 10. Argued November 8, 11, 1901.—Decided January 27, 1902.

Section 218 of the constitution of the State of Kentucky, reads as follows: "It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Railroad Commission, such common carrier, or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operation of this section," As construed by the courts of that State, and so far as it is made applicable to or affects interstate commerce, it is invalid.

THE railroad company has brought this case here by a writ of error to the circuit court of Simpson County, State of Kentucky, that being the highest court of the State in which a decision could be had, for the purpose of reviewing the judgment of that court in favor of the defendant in error (plaintiff below) based upon a violation of section 218 of the constitution of Kentucky. That section reads as follows:

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind,

under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

This action involves the question of the validity of the above section, as construed by the court below with reference to interstate commerce.

The plaintiff, T. R. Eubank, on June 9, 1899, duly filed in the clerk's office of the Simpson County circuit court a petition in which he alleged, in substance, that he was doing business in Franklin, in the State of Kentucky; that the defendant was a corporation chartered under the laws of that State as a common carrier, and that it owned and operated a line of railway for the transportation of freight and passengers from Nashville, Tennessee, running north through Franklin, Kentucky, and continuing on to Louisville, Kentucky, a distance of 185 miles, and that the distance from Franklin, Kentucky, to Louisville, Kentucky, over the defendant's line is 134 miles, and is included in and a part of the distance of 185 miles from Nashville to Louisville; that during the years 1897 and 1898 the defendant transported tobacco for the complainant from Franklin, Kentucky, to Louisville, Kentucky, at the rate of 25 cents per one hundred pounds, and that during all this time the plaintiff was shipping and did ship and transport tobacco from Nashville, Tennessee, to Louisville, Kentucky, over the same road at the sum of 12 cents for one hundred pounds, and the complainant averred in his peti-

tion that the company had no right to charge him a greater freight rate for the transportation of tobacco from Franklin, Kentucky, to Louisville, Kentucky, than 12 cents per one hundred pounds, and he therefore brought suit to recover back from the defendant the difference between that sum and the sum paid by him, viz., 13 cents per one hundred pounds, the amount carried being 145,245 pounds.

The defendant tendered special and general demurrers to this petition on the ground, among others, that it sought to make a law of the State of Kentucky applicable to a rate charged by defendant from Nashville, Tennessee, to Louisville, Kentucky, and that if the law were so construed it would become a regulation of interstate commerce and be invalid, because in conflict with and repugnant to subsection 3 of section 8 of article I of the Constitution of the United States, and also in violation of the interstate commerce act.

These demurrers were overruled by the court, and thereupon the defendant tendered its answer, setting up its defences in four separate paragraphs.

By paragraph 1 it substantially admitted the transportation of the tobacco at the rates stated in the plaintiff's petition. In the second paragraph it averred that its rate of 12 cents per one hundred pounds for the transportation of tobacco, from Nashville, Tennessee, to Louisville, Kentucky, was made under and in conformity with the act of Congress called the interstate commerce act, above referred to, and that in pursuance of the sixth section of that act the rate was printed, posted and kept open to public inspection and duly filed with the Interstate Commerce Commission, and that by virtue of that act it would have been unlawful for the defendant to have charged either more or less than the rate of 12 cents per one hundred pounds from Nashville, Tennessee, to Louisville, Kentucky. The defendant further averred that section 218 of the constitution of the State of Kentucky applied only to a railroad in that State, and had no application to that portion of any railroad that was without the State of Kentucky, and hence had no application to the railroad of the defendant between Nashville, Tennessee, and the state line between Tennessee and Ken-

tucky; and it was averred that the rates which the defendant might charge from Franklin, Kentucky, to Louisville, Kentucky, were not and could not become unlawful under the long and short haul laws of Kentucky by reason of any rates that might be charged by the defendant on traffic transported from Nashville, Tennessee, to Louisville, Kentucky, and that the long and short haul laws of Kentucky could apply only when both the long and short hauls were within Kentucky, and that the hauls from Nashville, Tennessee, to Louisville, Kentucky, were not within the jurisdiction of Kentucky.

Defendant further averred that at the times named in the petition it charged no rate on tobacco to Louisville, Kentucky, from any point in the State of Kentucky on the same line with Franklin and farther from Louisville, than Franklin, less than the rate of 25 cents per one hundred pounds charged by it from Franklin to Louisville. It was further averred that if the constitutional provision in question were so construed as to make this rate of 25 cents per one hundred pounds from Franklin, Kentucky, to Louisville, Kentucky, unlawful by reason of the less rate charged by it from Nashville, Tennessee, to Louisville, Kentucky, the result would be to regulate commerce among the States by the long and short haul laws of Kentucky and to compel the defendant to and it would raise its rates of 12 cents per one hundred pounds from Nashville, Tennessee, to Louisville, Kentucky, unless it could obtain the authority from the railroad commission of Kentucky to charge the less rate from Nashville, Tennessee, to Louisville, Kentucky; that thereby the long and short haul laws of Kentucky would regulate commerce among the States and would be in conflict with and repugnant to the interstate commerce act, and also subsection 3 of section 8, article I, Constitution of the United States, and would therefore be void; and there was contained in the paragraph the following averment, that "the defendant hereby sets up, pleads and relies on the right and privilege secured to it by the said act of Congress and by said provisions of the Constitution of the United States to have its interstate traffic and the commerce conducted among the States and between Kentucky and Tennessee regulated by the Constitution and the laws of the

United States and to be free from the regulation and interference of the constitution and laws of the State of Kentucky."

By paragraph 3 the defendant set up the statute of limitations of the State of Kentucky.

By paragraph 4, the defendant averred that its rate on tobacco from Franklin to Louisville during the times mentioned was much less than the defendant's standard tariff rates for that distance, and that the less rate resulted from and was necessitated by the fact of competition existing at Franklin, Kentucky, which arose from the fact that tobacco could be and was hauled by wagon from Franklin, Kentucky, to Bowling Green, Kentucky, and then shipped to Louisville on boats plying the Green and Barren and Ohio Rivers at extremely low rates of transportation, and on account of competition the defendant had to and did accept the rate of 25 cents per one hundred pounds; that, but for that competition, it would and could have charged a much higher rate, which higher rate would have been just and reasonable, and that the rate of 25 cents per one hundred pounds was just and reasonable in itself by reason of the competition.

It was further averred that Nashville, Tennessee, was situated on the Cumberland River, navigable by boats plying between Nashville and various points on the Ohio River, including Louisville, Kentucky, and that these boats transported tobacco from Nashville to Louisville at extremely low rates of transportation, and that by reason of this water competition Nashville enjoyed extremely low rates for the shipment of tobacco to Louisville and many other places, and if the defendant, at any of the times mentioned, had charged more for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, than 12 cents per one hundred pounds, it would not have secured the transportation of any of said tobacco from Nashville to Louisville, but the same would have been shipped from Nashville to Louisville, or some other tobacco market, at rates less than 12 cents per one hundred pounds, and thereby the defendant would have wholly lost the transportation of any tobacco from Nashville to Louisville, and that the defendant succeeded in obtaining, even at the low rate of 12 cents per one hundred

pounds, the transportation of only 12 hogsheads of tobacco from Nashville to Louisville during the time named in the petition. It was averred that the tobacco transported by the defendant from Nashville to Louisville was transported under the circumstances and conditions thus stated, and that none of the same could have been transported at any higher rate than 12 cents per one hundred pounds, and that at none of the times mentioned in the petition was the transportation of tobacco from Franklin to Louisville affected by the circumstances or conditions set forth regarding the transportation of tobacco from Nashville to Louisville, and that the competition at Nashville differed substantially from the competition at Franklin, in that it was far more effective and necessitated a much lower rate, and that in making the difference in rates between Franklin and Nashville the defendant simply recognized the substantial difference in the circumstances and conditions of the transportation from and to the two places.

It was also averred that it was to the advantage of the defendant to transport the tobacco that it might secure from Nashville to Louisville at the rate of 12 cents per one hundred pounds rather than lose such transportation altogether, as it would have done if it had attempted to charge more than the rate of 12 cents per one hundred pounds, but the fact that the defendant did transport tobacco from Nashville to Louisville at 12 cents per one hundred pounds did not increase the rate that it charged from Franklin to Louisville or make the rate from Franklin to Louisville any higher than it would otherwise have been, and that if it had refused to transport tobacco from Nashville to Louisville for any less rate than the rate charged from Franklin to Louisville, the Nashville shippers of tobacco could and would have shipped it to Louisville or other tobacco markets over routes which this defendant could not control and at rates not exceeding 12 cents per one hundred pounds, and that the defendant could and did engage in the transportation of tobacco from Nashville to Louisville at the rate of 12 cents per one hundred pounds without in anywise injuring Franklin or any person or interest at Franklin.

Other defences were set up not now material.

Opinion of the Court.

The plaintiff demurred to paragraphs 2, 3 and 4 of the defendant's answer, which demurrer was sustained by the court. The plaintiff then moved for judgment for the plaintiff upon the pleadings, which motion, under objection by the defendant, the court granted, and thereupon it was adjudged that the plaintiff recover of the defendant the sum of $188.81 and his costs.

Mr. Walker D. Hines for plaintiff in error. *Mr. H. W. Bruce* was on his brief.

Mr. H. W. Rives for defendant in error.

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

The writ of error in this case does not bring up for review any judgment of the Court of Appeals of the State of Kentucky, the highest court of that State. It appears that the circuit court of that State is the highest court in which a decision of the case could be had, presumably on account of the amount of the judgment. There was no opinion delivered by the judge holding the court in which the case was tried, and as the case did not go to the highest court of that State, we are without the benefit of any written opinion of the courts of Kentucky in regard to the question involved. We have already held, in the case of the *Louisville & Nashville Railroad Company* v. *Kentucky*, 183 U. S. 503, that the section of the Kentucky constitution above set forth, as applied to places, all of which are within the State, violates no provision of the Federal Constitution.

The effect of the decision by the state court now under review is to hold that the provision of section 218 of the state constitution is not confined to a case where the long and short hauls are both within the State of Kentucky, but that it extends to and embraces a long haul from a place outside of to one within the State, and a shorter haul between points on the same line and in the same direction, both of which are within the State, and the question is whether the provision of that

constitution as thus construed is or is not a violation of the commerce clause of the Constitution of the United States.

It would seem that the foundation upon which the validity of the constitutional provision is based is the theory that it operates solely upon the rate within the State, making that rate unlawful if it exceed the rate for the longer distance over the same line in the same direction, though, as in this case, the longer distance is from Nashville, Tennessee, to Louisville, Kentucky. The claim must be that the only effect of the provision is to regulate the rate between points within the State and that it has no direct effect upon nor does it in any degree regulate or affect the rate between points outside and those points which are within the State. The contention is that the State does not prescribe or regulate the rates outside of its borders; that the company may announce and enforce any rate it pleases regarding interstate commerce. It simply directs that between points within the State of Kentucky the charge shall not be greater for a shorter haul than for a longer haul, even though such longer haul may be between a point outside and one inside of the State; that this does not constitute an interference with or a regulation by the State of interstate commerce, and hence the provision is valid.

If this contention were correct, and the constitutional provision, as construed by the state court, did not by its enforcement regulate, or immediately and directly influence and affect the interstate commerce of defendant, either as to amount or rates, the provision in question would be valid. But is it correct? And is there no such immediate influence upon or regulation of the interstate commerce of the defendant?

By the demurrer and the motion for judgment on the pleadings it is admitted that the rates from all points on the defendant's road within the State of Kentucky to Louisville for the transportation of tobacco are not too high, but are in fact just and reasonable in themselves, and to that extent the general obligation of a carrier to make charges that are just and reasonable is fulfilled. There is also a rate for the transportation of tobacco from Nashville to Louisville of 12 cents per one hundred pounds, and that rate is arrived at because of the existence

of water competition between the two points which absolutely prevents the company from making a greater charge, for if it did it would get no business; and yet on account of the fact that trains are to be run in any event and expenses incurred by reason of the operation of the road, it pays the company to take the tobacco at the rate named, even though it is below what would otherwise be a fair and reasonable compensation for the transportation. It follows, therefore, and the fact is averred, that although under the circumstances it pays the company to transport the tobacco from Louisville at the rate of 12 cents per one hundred pounds, yet if it were confronted with the alternative of either giving up such transportation (which a charge of 25 cents per one hundred pounds would necessarily result in) or of reducing the charge from Franklin to Louisville to 12 cents per one hundred pounds for tobacco, it would be compelled to give up the transportation from Nashville rather than reduce the charge from Franklin to Louisville. If the State of Kentucky has the right to base its provision for the rate of a short haul within its own borders by comparison with the rate for a longer haul partly within and partly without its own borders, notwithstanding the direct effect of a limitation arrived at by such comparison may be the regulation or even the suppression of the interstate commerce of the carrier, then this provision is valid; otherwise, it would seem to be the reverse.

That the railroad commission is authorized upon application to permit the company to charge less for longer than for shorter distances, is immaterial. If the provision in question, if enforced, does directly affect interstate commerce, its invalidity is not cured by the fact that if the railroad commission should choose, it might permit the interstate charges to remain. In either case the interference is illegal.

The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the States in the carrying of tobacco. The necessary result of the provision under

the circumstances set up in the answer directly affects interstate rates, or in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. The fact is not altered by putting the proposition in another form, and saying that the constitutional provision only prevents the carrier from charging a greater sum for the shorter distance from Franklin to Louisville, both within the State, unless the consent of the railroad commission is obtained, because in either event the charge from Nashville to Louisville enters into and forms a part of the real subject matter of the provision, the greater sum for the shorter distance within the State being compared with the lesser sum for the longer distance without the State; and the prohibition is absolute unless the consent of the commission is obtained, from charging any more for the shorter distance within the State than for the longer distance partly within and partly without the State. And in this case, in order to maintain its state rate, it must fix its interstate rate at an amount which prohibits its doing interstate business.

We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident.

Although not exactly in point, yet the case of *Wabash, St. Louis &c. Railway* v. *Illinois*, 118 U. S. 557, is somewhat analogous in principle. In that case chapter 114 of the Revised Statutes of Illinois, section 126, came under consideration. That section enacted that if any railroad corporation should charge for the transportation of freight, etc., upon its railroad, for any distance within the State, the same or a greater amount of toll or compensation than is at the same time charged, col-

lected or received for the transportation in the same direction of any passenger, etc., over a greater distance of the same road, such charges should be deemed *prima facie* evidence of unjust discrimination prohibited by the act, and penalties were provided for its violation.

An action was brought to recover for a violation of the provisions of the act, and in the declaration it was alleged that the company had charged Elder & McKinney for transporting goods from Peoria in the State of Illinois to New York city at the rate of 15 cents per one hundred pounds, and on the same day the company charged Bailey & Swannell for transporting another carload of the same kind of goods from Gilman in the State of Illinois to the city of New York at the rate of 25 cents per one hundred pounds, although the carload transported for Elder & McKinney from Peoria was carried eighty-six miles further in the State of Illinois than the other carload of the same weight, and it was claimed that as the freight was of the same class in both instances and carried over the same route, except as to the difference of distance, a discrimination against Bailey & Swannell was made in the charges against them as compared with those given to Elder & McKinney, and hence suit was brought. Mr. Justice Miller delivered the opinion of this court, in which he expressed some doubt whether the statute of Illinois had been correctly construed by the court below, yet as that court had given an interpretation to it which made it apply to commerce among the States, although the contract was made within the State of Illinois and a part of its performance was within the same State, this court was held to be bound as to the construction given to the act by the state court. What that construction was is stated by the court itself. It said:

"We see no reason to depart from the conclusion reached in this case when it was here before. See *People* v. *W. St. L. & P. Railway Co.*, 104 Ill. 476. But to avoid misapprehension, we deem it desirable to state explicitly that we disclaim any idea that Illinois has authority to regulate commerce in any other State. We understand and simply hold that, in the absence of anything showing to the contrary, a single and entire contract to carry for a gross sum from Gilman, in this State,

to the city of New York, implies necessarily that that sum is charged proportionately for the carriage on every part of that distance; and that a single and entire contract to carry for a gross sum from Peoria, in this State, to the city of New York, implies the same thing; and that, therefore, when it is shown that there is charged for carriage upon the same line less from Peoria to New York (the greater distance) than from Gilman to New York (the less distance), and nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond the limits of this State, a *prima facie* case is made out of unjust discrimination under our statute occurring within this State. We hold that the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the state line proportionately with the balance of the line. The judgment is affirmed." *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 105 Ill. 236.

In regard to this question, Mr. Justice Miller, in the course of his opinion, said:

"It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the State, and so much more to commerce in other States. The transportation, which is the subject-matter of the contract, being the point on which the decision of the case must rest, was it a transportation limited to the State of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the State of Illinois, and the city of New York in the State of New York?"

The court held it was the latter, and said, after examining the other cases (page 575):

"We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

In regard to the effect of the Illinois statute upon interstate commerce, it was further said:

"Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by the law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

"So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a carload, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company had received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to

prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York."

Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville and asks the defendant to carry it. It responds that it would like to carry it at the rate of twelve cents per one hundred pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than twelve cents, and that if it were to carry at the rate of twelve cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that State, which would entail a loss in the business between those points, which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than twelve cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the State? If it be, is not the law which accomplishes this result a direct interference by the State with interstate commerce? And if it do not lower its state rates and in consequence must raise its interstate rates, in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the State, of that commerce which ought to be free therefrom?

In *Hall* v. *De Cuir*, 95 U. S. 485, it was said: "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

The vice of the provision lies in the regulation of the rates between points wholly within the State, by the rates which obtain between points outside of and those which are within the State.

The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed, where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.

It has been urged that, assuming Congress to have the power to fix interstate rates, if that body should prescribe the interstate rate for the transportation of commodities (tobacco, for instance) from Nashville to Louisville, for a railroad carrier, that the State might then fix the local rates by that standard, and if so, why could it not do the same thing when the carrier itself fixes its interstate rate? In the case supposed, the rate is fixed and the interstate commerce regulated by the body which has the power to impose such rate on the carrier and to regulate its interstate commerce. The State might, in the case supposed, enact that the road should not charge more, or at a greater rate, for a short haul within the State than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it the State could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the State, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists.

It seems also to be thought that there is no regulation of com-

merce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its direct result regulates the interstate transportation of a single individual carrier, or company of carriers, violates the provision in question; that it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company.

It is also argued that if Congress should enact that an interstate rate shall be the sum of the local rates prescribed by the several States for the parts in the line within its borders, it could not correctly be maintained that such enactment would amount to an interference with the power of the State over local rates, and the mere fact that Congress accepted the local rates and made them the basis of an interstate rate could not be held to be an interference by Congress with local commerce, and if not, how can it be held an interference by the State when it recognizes existing interstate rates as a basis for its legislation concerning local rates? We think there is no analogy between the two cases.

In the case supposed, the States have fixed the local rates within their respective borders, and the action of Congress in fixing their sum as the rate for interstate commerce does not in any way regulate or interfere with the respective state rates already, or from time to time, adopted by the State. In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do, and on the other hand the State by such a statute regulates the local rate, but that it has the right to do.

Congress does not directly or indirectly interfere with local rates, by adopting their sum as the interstate rate.

In the case at bar the State claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to, an interference with, and a regulation of, commerce between the States, carried on, though it may be, by only a single company.

We are of opinion that as construed by the state court, and so far as it is made applicable to or affects interstate commerce, the two hundred and eighteenth section of the constitution of Kentucky is invalid, and the judgment of the circuit court of Simpson County, Kentucky, is therefore

Reversed, and the case remanded to that court for such further proceedings therein as shall not be inconsistent with this opinion; and it is so ordered.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE GRAY, dissenting.

I am unable to concur in the opinion and judgment in this case. We have just held that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes, based thereon, are not in conflict with the Constitution of the United States when applied to a case in which both the long and the short haul are wholly within the State. *Louisville & Nashville Railroad Company* v. *Commonwealth of Kentucky*, 183 U. S. 503. The constitutional section, briefly stated, forbids a carrier from charging more for a short than for a long haul within which the short haul is included. The prohibition is upon the short haul charge. There is no prohibition in respect to the long haul charge, no restriction of the power of the carrier over it, no regulation concerning it, no prescribing by whom or how or when it shall be made—all this is absolutely untouched by the section.

The proposition now advanced is that while the State may constitutionally prohibit a short haul charge in excess of a long

haul charge, it can do so only when both hauls are within the limits of the State. Nothing in the section makes such limitation. Nothing in the Federal Constitution, in terms at least, restricts the power of the State in this respect over its internal commerce. This question may arise under either of two conditions: one in which Congress has prescribed the interstate rate, and the other in which it has left the matter to be fixed by the carrier.

Considering the first of these conditions, suppose Congress in the exercise of its power over interstate commerce should enact that all interstate passengers be charged exactly four cents a mile, and the railroad company, while obeying that statute in its charges for carrying passengers from Nashville to Louisville, should from Franklin to Louisville charge five cents a mile, could it be pretended that the prohibition of the state constitution against charging more for a short haul than for a long haul was not operative because an interference with interstate commerce? Has the State no power to compel its corporations to give to parties traveling within its limits the same rates and privileges that Congress prescribes for interstate passengers? And can it not do so by simply prohibiting a greater charge for a long than a short haul? In other words, is it interfering with interstate commerce when the State, not prescribing the charges for interstate travel, simply requires that the passenger shall be charged no higher rates for local travel?

The form in which the state legislation is cast cannot be vital in determining the question of power. If an act, which in terms prescribes a rate per mile for local travel the same as has been prescribed by Congress for interstate travel, is within the power of the State, (and that it is cannot be doubted,) surely one accomplishing the same thing by simply forbidding the carrier to charge more for a short than for a long haul is likewise within its power. The State is merely using the standard fixed by Congress and enforcing that standard in respect to local rates. In *Miller's Executors* v. *Swann*, 150 U. S. 132, it was held that the construction of that part of the state statute which authorized the disposal of the state's lands in accordance

with the provisions of the public land laws of the United States involved no Federal question. The reference to the land laws of the United States was simply by way of selecting a standard.

But if a State may select as a standard the interstate rates prescribed by Congress and make its local rates the same, without interfering with interstate commerce, it would certainly seem that it could in like manner take the interstate rates which the carrier himself prescribes, and compel conformity of local rates thereto and still not be subject to the charge of interfering with interstate commerce. It is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the State respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words, action by the carrier in pursuit of its own financial interests overturns the constitution and statute of the State when like action by Congress in the exercise of its constitutional power does not.

It must be borne in mind that there is here no question of reasonableness of rates. It is true the carrier avers that the rate of 25 cents per 100 pounds from Franklin to Louisville was just and reasonable, but it also avers that it made that charge only by reason of water competition, whereas "but for that competition the defendant would and could have charged a much higher rate, which higher rate would have been just and reasonable." According to these allegations, while 25 cents was a just and reasonable rate, a much higher rate would also be just and reasonable; and it is nowhere alleged that a rate of 12 cents—that from Nashville to Louisville—would have been unreasonable as a rate between Franklin and Louisville. If invalid at all, it is not because it is no higher than the rate between Nashville and Louisville, but because it is in and of itself unreasonably low for the services rendered. As the amount of tobacco which the defendant shipped from Nashville to Louisville between February 23 and July 15 was only 12 hogsheads, weighing 20,910 pounds, and paying $25.09 freight, it is obvious that the loss of this entire amount of freight would not have worked a confiscation of the defendant's railroad property, if that be the test of reasonableness so far as

the power of the legislature over rates is concerned though, as to the true test of reasonableness see *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79.

The question may be looked at in another light. The railroad company avers that it made its rate of 12 cents from Nashville to Louisville in conformity with the act of Congress; that the said rate was duly printed, posted and kept open to public inspection, and that by virtue of the interstate commerce act it was unlawful for it to charge either more or less than the rate of 12 cents from Nashville to Louisville. Suppose the legislature of Kentucky, accepting that statement as correct, should pass an act in terms prohibiting this company from charging more than 12 cents from Franklin to Louisville, who would undertake to say that such act was unconstitutional without evidence that in and of itself the rate of 12 cents was unreasonable within some recognized definition of reasonableness? Does the act become *prima facie* unconstitutional because, instead of naming 12 cents, the legislature forbids the carrier from charging more than 12 cents which the carrier has fixed as its rate from Nashville to Louisville?

Again, Louisville is on the northern border of the State, and the route of defendant's railroad extends through the State and thence southward to Nashville. Every place on the line of the road within the limits of Kentucky makes therefore, a shorter haul to Louisville than the haul from Nashville, and is included in the latter. Under the reasoning of this opinion the State of Kentucky has no power to prescribe a rate from any point within the State of Kentucky to Louisville which shall be less than the rate which the company has fixed from Nashville to Louisville. Nor are we to suppose that competition between Nashville and Louisville is limited to the matter of the transportation of tobacco. It is a competition between water and railroad transportation, and naturally extends to all articles of freight as well as to passengers. By the reasoning of the opinion the State of Kentucky would be powerless to compel the Louisville and Nashville Company to charge a less than the competitive Nashville rate, no matter how reasonable, from any

point within its borders to Louisville. It does not seem to me that much is left of state control over local rates.

In the opinion of the court it is said :

" The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the States in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or, in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. . . . We fully recognize the rule that the effect of a state constitutional provision, or of any state legislation, upon interstate commerce must be direct and not merely incidental and unimportant ; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without that State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident."

The fallacy of this is that it makes transportation by the Louisville and Nashville Company essential to commerce between Nashville and Louisville. The burden of the complaint on the part of the company is that there is competition at Nashville for the transportation of tobacco to Louisville, and that it must make a low charge to get a share of that transportation ; not that the tobacco will not be transported, not that commerce will be interfered with, but that this company will lose some portion of that transportation. In other words, the power of the State of Kentucky over this corporation, which it has created, in respect to local rates, is denied in order that the corporation may obtain some portion of interstate transportation. I think we may well recall what was said only three weeks since by this court in the opinion in the case referred to of this same company against the Commonwealth of Kentucky :

"It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State. *N. Y. Lake Erie & Western Railroad* v. *Pennsylvania*, 158 U. S. 431, 439; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150."

Another matter is worthy of consideration. Suppose that Congress enacts that an interstate rate shall be the sum of the local rates prescribed by the several States for the parts of the through line within their borders. Will it be contended that this is an interference with the power of the State over local rates? Does the mere fact Congress accepts the local rates and makes them the basis of an interstate rate make it an interference by Congress with local commerce? And if that be not so, how on the other hand can it be held that a mere recognition by the State of existing interstate rates as a basis for its legislation concerning local rates is an interference with interstate commerce?

I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the legislature of Kentucky may see fit to enforce by simply saying that outside of the State it somewhere touches a competitive point and is forced to reduce its interstate rates by reason of the competition there existing. In other words, if in the present case there was in fact no water competition between Nashville and Louisville, or if there was no tobacco shipped from Nashville to Louisville, I take it no one would seriously contend that the railroad company, by affirming that there was, could upset the provisions of the Kentucky legislation. There would be a question of fact to be determined, even according to the theory that competition in interstate rates has anything to do with local rates, and that question of fact might be presented in actions like the present, actions for overcharges, actions in which the

parties would have the right to trial by jury. Suppose that one jury upon the testimony presented before it should find that there was water competition between Nashville and Louisville, and that there was tobacco shipped between the two places, and another jury upon the testimony introduced in a succeeding case exactly the contrary, is the legislation of Kentucky to be declared unconstitutional in one case and constitutional in the other?

It seems to me, in conclusion, that a state legislature has full power over local rates, subject only to the restriction that it cannot require a carrier to carry without reasonable compensation, and that when it legislates for local rates alone it may fix those rates by figures, or upon the basis of any standard which it sees fit to adopt, and the mere fact that it bases them upon some standard is not legislation regulating that standard—the local rates are alone the matter regulated. For these reasons I cannot concur in the opinion and judgment.

I am authorized to state that MR. JUSTICE GRAY agrees with this dissent.

UNITED STATES *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

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

No. 25. Argued April 18, 19, 1901.—Decided January 27, 1902.

This case is a continuation of *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, brought to quiet the title of the Government to lands within the limits of the forfeited grant to the Atlantic and Pacific Railroad Company. The questions in this case arise between the United States and parties holding title or claiming rights to lands by deed from or contract with the railroad company. The title of the company having been adjudged void, the acts of March 3, 1887, 24 Stat. 556; of February 12, 1896, 29 Stat. 6; of March 2, 1896, 29 Stat. 42, were passed for the pur-

Statement of the Case.

pose of upholding the titles of parties who, in good faith, had purchased lands from railroad companies which, though supposed to be part of their grants, proved not to be so. The first section of the act of March 2, 1896, reads: "But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." *Held:* 1. That the facts bring this case within the provisions of that section; and that the Circuit Court rightly confirmed the title to lands patented under it; 2. That the unpatented lands were so situated with reference to the constructed road of the Southern Pacific, as to be within the scope of its grant, and that the act was not intended to be limited to cases of purchases from the railroad company prior to its date; 3. That while the act was remedial, and to be liberally construed, yet to sustain the purchase in controversy in this case as one made in good faith, would ignore the plainest provisions of law in respect to *bona fide* purchasers, and would uphold almost any kind of speculative purchase.

THIS is a continuation of the case which was before this court and decided in 1897. 168 U. S. 1. It was brought to quiet the title of the Government to some seven hundred thousand acres of land within the limits of the forfeited grant to the Atlantic and Pacific Railroad Company, and claimed by the defendants under certain junior grants to the Southern Pacific Railroad Company. The decree in the Circuit Court quieted, as against the Southern Pacific Company, the title of the Government to all the lands. The other defendants asserted title or claimed rights to certain portions of the land by virtue of conveyances from or contracts with the Southern Pacific Company, and the decree provided: "Nor shall this decree in anywise affect any rights which the defendants, or any of them, other than the said Southern Pacific Railroad Company, now have or may hereafter acquire in, to or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes,' approved March 3, 1887."

This decree was affirmed by this court so far as the Southern Pacific Company as well as the trustees in its mortgage were concerned, the court saying, in reference to that portion of the decree just quoted (p. 65):

"Instead of leaving undetermined the matters in dispute between the United States and the defendants other than the Southern Pacific Railroad Company, the Circuit Court should have determined, by its final decree, what rights those defendants have by virtue of the above act of March 3, 1887, 24 Stat. 556, c. 376, in the lands of any of them now in dispute and claimed by the United States. The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that or any other act of Congress. The Government was entitled to a decree quieting its title to all the lands described in its pleadings, except those, if any, that are protected, in the hands of claimants, by acts of Congress. *United States* v. *Winona & St. Peter Railroad*, 165 U. S. 463; *Winona & St. Peter Railroad* v. *United States*, 165 U. S. 483. But as the Government has not appealed, the decree cannot be reversed for the error of the Circuit Court in not finally disposing of the issues between the United States and the individual defendants who claim under the Southern Pacific Railroad Company.

"The result is that the decree must be affirmed in all respects as to the Southern Pacific Railroad Company, as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the Government to proceed in the Circuit Court to a final decree as to those defendants, and it is so ordered."

On the return of the mandate to the Circuit Court the United States dismissed their bill against the defendants other than the railroad company and its mortgage trustee without prejudice as to all, except certain specified tracts, amounting in the aggregate to about 52,600 acres, of which amount 9284 were patented by the United States to the Southern Pacific, the patents bearing date March 29, 1876, April 4, 1879, December 27, 1883, and January 9, 1885, and 43,315 remained unpatented. In respect to these tracts the case proceeded to final hearing, which resulted in a decree in favor of the defendants, 88 Fed. Rep. 832, confirming their title to the lands patented, and adjudging them *bona fide* purchasers within the meaning of the act of Congress of March 3, 1887, of the lands not patented. From

this decree the United States appealed to the Court of Appeals for the Ninth Circuit, which affirmed the decree, 98 Fed. Rep. 45, and thereupon the United States brought the case here on appeal.

Mr. Joseph H. Call for appellants.

Mr. Maxwell Evarts and *Mr. M. D. Brainard* for appellees.

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

The questions now to be determined arise between the United States and parties holding title or claiming rights to lands by deed from or contract with the railroad company. The title of the company having been adjudged void, the defendants rely upon the acts of Congress of March 3, 1887, c. 376, 24 Stat. 556, and February 12, 1896, c. 18, 29 Stat. 6, and March 2, 1896, c. 39, 29 Stat. 42. These acts were passed for the purpose of upholding the titles of parties who in good faith had purchased from railroad companies lands, which though supposed to be part of their grants, proved not to be so. This legislation was fully considered in *United States* v. *Winona &c. Railroad Company*, 165 U. S. 463, and *Winona &c. Railroad Company* v. *United States*, 165 U. S. 483, and any further discussion of its scope is unnecessary. In respect to it we said:

"The act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has nevertheless purchased in good faith from the railroad company.

* * * * * * * *

"Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although

within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims." p. 481.

In the present case the deeds to the patented lands were executed by the company at different dates, commencing July 23, 1885, and ending July 19, 1892. These lands were apparently within the grant made to the Southern Pacific by the act of March 3, 1871, c. 122, 16 Stat. 573; that is, they were public lands in the statutory sense of the term along the line of the Southern Pacific as authorized by that act and within the place or indemnity limits of the grant. The road had been constructed, and the Land Department of the United States, the tribunal charged with the duty of administering the public lands, had decided that the company had earned the lands and had caused patents therefor to be issued to it. No third party claimed title; either the Government or the company was the owner. Under those circumstances the purchasers bought the lands; bought them in good faith; paid value for them.

These facts bring the case within the first section of the act of March 2, 1896, as heretofore construed by us: "But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Against this conclusion, it is contended that purchasers with notice that the Government questioned the company's title to these lands are not *bona fide* purchasers. And counsel say that "in the year 1886 every Department of the Government began to operate to protect the title of the United States to these lands, and in every public way gave notice to the world of the rights of the Government to them," enumerating the act of Congress of July 6, 1886, forfeiting the grant to the Atlantic and Pacific Company; various rulings of the Interior Department, from that on June 7, 1887, (*Gordon* v. *Southern Pacific R. R. Co.*, 5 Land Dec. 691,) to the date of the last deed, to the effect that the lands granted to the Atlantic and Pacific were not operated upon by the subsequent grants to the South-

ern Pacific, and were by the forfeiture act restored to the public domain; and the commencement of the several suits by the Government to establish its title to these lands and others similarly situated. Counsel also refer to *Winona &c. Railroad Co.* v. *United States*, *supra*, in which it was held that one cannot claim to be a purchaser in good faith from a railroad company if at the time he has notice of facts outside the records of the Land Department disclosing a prior right in some third party.

But we do not think a mere change in the opinions of the officers of the Government, as to the validity of the company's title, although made known to parties proposing to purchase from such company, is sufficient to take away from them the protection of good faith. A party may have notice of conflicting claims and still, in the exercise of an honest judgment as to the rightful owner, buy property and pay for it, and be acting in good faith. So far as suits are concerned, all the decisons of the courts had been up to the date of the last deed in favor of the title of the company. Thus the purchasers had not merely the action of the Land Department in issuing the patents, but all past decisions of the courts, justifying their conclusions. The conditions are not like those in *Winona &c. R. R. Co.* v. *United States*. That was a suit to cancel a certification of a tract of land made for the benefit of a railroad company and also a deed from it. The certification was wrongfully made, and the company in fact took no title. The purchaser sought protection under these statutes. Before any certification, or any pretence of right in the company, as well as at the time of the conveyance to its grantee, there was and had been for many years a party in actual possession of the land under a title *prima facie* regular and valid, and it was held that the grantee, charged with notice of that occupancy and that claim of title, could not be adjudged a *bona fide* purchaser from the railroad company within the meaning of the statute. "The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the Government were waived." Nothing of that kind appears here; no independent and out-

side facts are shown, no title in any third party—simply a change of opinion on the part of the officers of the Government as to the validity of the title of the Southern Pacific Company, and it would be harsh, indeed, if remedial statutes like these were shorn of their beneficent application by reason of the fact that the officials of the Government had changed their views of the law. We think the Circuit Court was right in confirming the title to the lands patented.

With reference to the unpatented lands, they, like the former, were so situated with respect to the constructed road of the Southern Pacific as to be apparently within the scope of its grant, and the same general comments are appropriate here as in reference to the patented land. The act of 1896 refers only to lands patented or certified, and the parties who contracted with the company for unpatented lands must rely for protection upon the act of 1887. Most of the transactions in respect to them were after the date of this act, and it is contended that it is not prospective in its operation and only purports to protect prior transactions.

The ruling of the Land Department has been to the contrary effect. In *Sethman* v. *Clise*, 17 Land Dec. 307, a purchase from the railroad company was made prior to the act of 1887, but after the act the purchaser conveyed to a transferee, and it was held that the latter was entitled to relief under the statute.

"The act directed the manner of making adjustments, and it was the evident intention of Congress, as expressed in the fifth section of the act, that when, in the adjustment of these grants, it was ascertained that land had been bought from the railroad companies for which they could convey no good title, such buyers or their transferees, if *bona fide*, should be allowed to purchase the tracts claimed by them. And it can make no difference, I think, whether a transferee, otherwise entitled to purchase, bought the land before or after the day of the approval of the act, if it was originally purchased in good faith from any said company." p. 312.

In *Andrus et al.* v. *Balch*, 22 Land Dec. 238, was presented the case of a purchase from the railroad company after the act of March 3, 1887, and it was held that that did not prevent the

operation of the act. The same proposition was reaffirmed in *Briley* v. *Beach et al.*, 22 Land Dec. 549; *Carlton Seaver et al.*, 23 Land Dec. 108; *Grandin et al.* v. *La Bar*, 25 Land Dec. 194; *Neilsen* v. *Central Pacific Railroad Company*, 26 Land Dec. 252. There has been no decision to the contrary. This uniform ruling and practice of the Land Department would, in case of doubt, be of great weight in determining the true construction of the act. *Knowlton* v. *Moore*, 178 U. S. 41, 56, 92; *Fairbank* v. *United States*, 181 U. S. 283–306.

But the act itself bears upon its face evidence that it was not intended to be limited to cases of purchases from the railroad company prior to its date. While the first section directs the Secretary of the Interior "to immediately adjust" the several land grants, section 3 provides "that if, in the adjustment of said grants, it shall appear that the homestead or preëmption entry of any *bona fide* settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws." This seems to imply an intent that all mistakes of the nature referred to which shall have occurred up to the very completion of the adjustment may be rectified. Section 4 makes provision for the issue of patents to certain purchasers from railroad companies, providing proof shall be made "within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted." While other sections may not be so specific, yet placing them alongside of those from which quotations have been made it is reasonable to hold that the act applies not merely to transactions had before its date, but to any had before the time of final adjustment. In this case the several grants to the Southern Pacific have not yet been finally adjusted. Further, it must be borne in mind that this is a remedial statute, and is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed, and the mere date of the transaction between the purchaser and the railroad company is not of itself vital in de-

termining whether there is or is not an equity in behalf of the purchaser. As said in Potter's Dwarris on Statutes, 231:

"A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule, a remedial statute ought to be construed liberally. Receiving an equitable, or rather a benignant interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes it has been said the construction made is contrary to the letter; which should be read—*ultra* the letter, and confined to ancient statutes."

See also the letter of Attorney General Garland to the Secretary of the Interior, in response to a question as to the true construction of this act. 6 Land Dec. 275.

"The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the Government, or by the railroads, have lost their rights or acquired equities. . . . The fifth section expressly refers to such lands as had been sold, which had not been conveyed 'to or for the use of such companies.' It is not required that the sale by the railroad companies shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith. That it was sold under a claim of the grant to another in good faith is the ground of his equity."

The remaining question arises on the ruling that one of the defendants, Jackson A. Graves, was a *bona fide* purchaser, and entitled to the protection of the fifth section of the act of March 3, 1887, and affects something like thirty-five thousand acres. These were purchased from the railroad company in 1885 by the Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, a corporation organized under the laws of Great Britain. This suit was commenced on May 17, 1890. On September 25, 1891, an amended bill of complaint was filed, in which the Fibre Company was made party defendant. Its answer was filed March 14, 1892. On January 27, 1893, it conveyed the lands to Graves, who thereafter caused himself to

be substituted for it as party defendant. Said section five, so far as is applicable, reads:

"SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns."

The Fibre Company was an alien, and therefore not within the terms of the section. Graves, it is true, was a citizen, and the ruling of the department has been that the right of purchase from the Government conferred by this section is not limited to the immediate purchaser from the company, but may be exercised by a subsequent grantee, who has the necessary qualifications, and that in such case it is immaterial what were the qualifications of such purchaser. See letter of Secretary Noble to the Commissioner of the General Land Office, (11 Land Dec. 229,) in which the Secretary said:

"It can make no difference, in my judgment, whether the applicant is the immediate purchaser from the company, or a purchaser one or more degrees removed. If he is a *bona fide* purchaser of the land and has the required qualifications as to citizenship he is within the intendment of the statute, and if he be not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers, may have been. If his immediate grantor was a foreigner, and his purchase was simply for the purpose of acquiring title from the Government for the benefit of the foreigner, he would not be a *bona fide* purchaser, and would not therefore come within the terms of the act." *Union Pacific Ry. Co.* v. *McKinley*, 14 Land Dec. 237; *Union Colony* v. *Fulmele*,

16 Land Dec. 273; *Sethman* v. *Clise*, 17 Land Dec. 307; *Ray* v. *Gross*, 27 Land Dec. 707.

Within the scope of these rulings Graves is entitled to the protection of the statute if he can be considered a *bona fida* purchaser. He bought *pendente lite*, and while he testified that he purchased in good faith and for value, that he was holding the lands under the conveyances, and had paid all legal taxes and assessments levied and assessed since the deeds, he further tesfied as follows:

"Q. 19. Did you buy these lands in good faith? A. Yes, expecting to make title to them.

"Q. 20. And do you hold them as said purchaser and as a citizen of the United States? A. I do.

"Q. 21. And as an innocent purchaser? A. Well——

"Q. 22. For value received? A. I hold them for a valuable consideration.

"Q. 23. Well, do you claim to be an innocent purchaser of said lands, under the act of Congress of March 3, 1887? A. I think I am protected under the act of Congress of 1887. I would like to understand this 'innocent.' What you mean by that? Of course I have notice of the defect—I have notice of the Congressional action taken, and of the pendency of this suit; had it when I bought. Outside of that I consider myself an innocent purchaser. Of course I had that notice of that suit. There is no use denying that. At the same time, I understand—I think I understand, the act of Congress of 1887, and I think I am protected under it."

Cross-examination:

"Q. 24. How much did you pay the Atlantic and Pacific Fibre Importing and Manufacturing Company for these lands? A. I have not paid them anything in coin. But I have agreements with them which are the equivalent of the coin.

"Q. 25. What is the nature of the agreements? A. I am to protect them in the title, that is, protect them in their original purchase money; make what I can out of it over and above that.

"Q. 26. And devote your legal services to that end? A. Yes. They have to have somebody on this end."

Now while the statute is, as we have stated, remedial and to be liberally construed in order to carry out the purpose of its enactment, yet to sustain this purchase as one made in good faith would ignore the plainest provisions of law in respect to *bona fide* purchasers and would uphold almost any kind of speculative purchase. Congress expressly limited the privileges granted by the act of 1887 to citizens of the United States or those who had declared their intention to become such. It excluded aliens, and in so doing acted in harmony with the general scope of public land legislation. True in the act of 1896 in respect to patented lands it recognized aliens as entitled to the benefits of a *bona fide* purchase, but the fact that in a later statute, and in respect to a different class of lands, it extended certain privileges, is no reason for ignoring the limitations contained in this act as applied to the lands covered by it.

While according to the construction of the Land Department the grantee of a purchaser from the railroad company is entitled to invoke the protection of this statute yet it is one who is himself a *bona fide* purchaser and not one whose "purchase was simply for the purpose of acquiring title from the Government for the benefit of the foreigner." It seems to us that the testimony plainly discloses a purely speculative transaction. Graves paid nothing. His agreement was, as he says, to protect the company in its title, or rather in its purchase money, and then he would make what he could over and above that. He was not buying with the purpose of owning the land but was simply engaged in an effort to secure to the original purchaser from the railroad company the money which it had invested in its purchase, advancing, it is true, in that effort, some money in the way of taxes and devoting his legal services to that end, and hoping to make a profitable speculation out of the matter.

Another matter worthy of notice as tending to show a community of interest with the Fibre Company is his testimony in respect to the matter of possession. When asked, "Q. Are you in possession of the same?" he replied, "A. Well, we are exercising possession; we are keeping other people off of them. Not farming them, but—yes, we are in possession."

We do not think that defendant Graves has shown that he

was a purchaser in good faith. As to him, the decree cannot be sustained.

The decree of the Court of Appeals will, therefore, be affirmed in all respects except as to the lands standing in the name of Jackson A. Graves. As to those lands it will be reversed, and the case remanded to the Circuit Court for the Southern District of California, for further proceedings in conformity with this opinion.

KING *v.* PORTLAND CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No 307. Argued November 18, 19, 1901.—Decided January 27, 1902.

Under the facts of this case, and the interpretation given of the charter of the city of Portland by the Supreme Court of the State of Oregon, this Court is of opinion that the plaintiffs in error have not been deprived of their property without due process of law.

THE case is stated in the opinion of the court.

Mr. Martin L. Pipes for plaintiffs in error. *Mr. Arthur P. Tifft* was on his brief.

Mr. Joel M. Long for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The object of this suit was to restrain the enforcement of certain street assessments levied upon the property of the plaintiffs in error, under the charter of the city of Portland, Oregon.

The question presented is whether the ordinances under which the assessments were made deprived plaintiffs in error of their property without due process of law, and thereby violated the Fourteenth Amendment of the Constitution of the United States.

The assessments were sustained by the trial court, and its

judgment was affirmed by the Supreme Court of the State, (63 Pac. Rep. 2,) and the case was then brought here by writ of error.

The charter of the city was passed by the legislature in 1898, (Special Session, 1898, p. 101,) and the provisions for improving streets are found in sections 126 to 161 inclusive. They were summarized by the Supreme Court of the State as follows:

"By section 127 the common council are authorized to improve streets. By section 128 the common council are not authorized to improve any streets until they pass a resolution of intention so to do, and describe the improvement, which resolution shall be posted for ten days, and published for ten days, and also posted on the street. All these notices shall state the fact of the passage of the resolution aforesaid, the character of the work proposed, and the time within which written objections or remonstrances may be made. Section 130 provides that if no remonstrance is filed by a majority of the property owners the common council shall be deemed to have acquired jurisdiction.

"Section 131 provides that the auditor shall immediately transmit this ordinance to the board of public works.

"Section 132 requires the city engineer to file with the board estimates and specifications. When these are filed they shall give notice that they will let the contract to bidders.

"Section 133 provides that proposals for doing the work shall conform as near as possible to estimates prepared by city engineer.

"Section 136 provides that the city auditor shall prepare an apportionment of the expenses of the street work.

"Section 137 provides that when the work is so far completed as to enable the board to determine the cost of the whole thereof, the city engineer shall file written acceptance of the work completed. Thereupon the board shall advertise in an official paper for six days, stating when and where any objection may be heard to the said improvement, and any person may at this time appear and object to the acceptance thereof. If no objections are filed, or if the objections are overruled and the street is accepted, the board shall report the same to the common council.

Opinion of the Court.

"By section 138 the auditor is required to prepare an assessment and report the same to the common council. Section 138 also provides how the cost shall be apportioned, viz.: Each lot or part thereof within the limits of the proposed street improvement abutting upon the street shall be liable for the full cost of making the improvement upon one-half of the street in front and abutting upon it, and also for the proportionate share of improving the intersections of two streets.

"Section 139 provides that when the probable cost of any improvement has been ascertained or determined, and the proportionate share thereof chargeable to each lot, the common council must declare the same by ordinance and direct the auditor to enter a statement in the docket of liens.

"Section 138 provides that regular lots are 50 feet by 100 feet; regular blocks are 200 feet square. It also particularly provides for irregular blocks and apportionment of the assessment upon unplatted tracts."

The main issues of fact were found against plaintiff in error by the trial court as follows:

"That the city engineer did make a report and estimate of the probable cost of the improvement mentioned in the complaint.

"That the common council did, before making said improvement, estimate the probable cost thereof, and give notice of the said probable cost.

"That in making the assessments upon the property of the plaintiff, set forth in the complaint, the common council did take into consideration whether the property of plaintiffs was benefited by said proposed improvements, and the amount of said benefits.

"That said common council did apportion the cost of making the said improvement according to the benefits to the said property from said improvement.

"That the property set forth in the complaint can be used in connection with the said elevated roadway, and it is accessible from said elevated roadway, and it is so situated that it is and can be benefited by said roadway.

"That the costs assessed against said property do not exceed

or equal the benefits that have accrued to said property by reason of said improvement.

"That plaintiffs, and each of them, did have notice of the amount of said assessment before the said assessments were made and before the same were entered in the docket of city liens and before said work was fully completed by said contractors, and said plaintiffs and each of them did have an opportunity to be heard to contest the fairness of said apportionment. And plaintiffs, and each of them, did have an opportunity to contest the question whether their said property was benefited and the amounts of the benefits, and also as to the amounts of the assessments.

"That said assessments were not made or entered on said city lien docket without any notice.

"That in making said assessments the common council did not act arbitrarily or unjustly, and that the common council did use and exercise discretion and judgment concerning said assessments and the amounts thereof.

"That in accepting said improvement the board of public works did not act arbitrarily or unjustly, and said board of public works, in accepting said improvement, did use and exercise their discretion and judgment concerning the same.

"That upon the giving of the notice of intention to make said improvement, and prior to the passage of the time and manner ordinance set out in plaintiffs' complaint, the common council considered the question of cost of said improvement in front of each of the lots within the limits of the proposed street improvement and abutting upon said street, and also the proportionate share of the cost of improving intersections of two of the streets bounding the blocks in which such lot is situated, and found that each of said lots abutting on said street, and each of said lots assessed for intersection of blocks, would be benefited by said improvement in an amount greater than the cost of said improvement as assessed against each of said lots."

Afterwards the court made an additional finding of fact in accordance with a stipulation "that the plaintiffs and each of them did not have any notice or knowledge of the amount of the assessments before the assessments were made, or before the

same were entered into the docket of city liens, or before said work was fully completed by said contractors, other than as stated in the complaint and the proceedings therein set forth."

That is, as we understand, except such notice as was given by the proceedings preceding the making of the assessment.

The findings of the court has narrowed our inquiry. That the improvement was a benefit to the abutting property must be accepted as true, and that the benefits were equal to the cost of the improvement. And, further, that the common council of the city apportioned the cost according to the benefits. Our inquiry, therefore, is confined to the validity of the rule of assessments prescribed by section 138, and to whether the plaintiffs in error were afforded an opportunity to contest the assessment.

Nor need we follow the details of counsel's arguments. The contentions of plaintiffs in error are made to depend upon the validity of the rule of assessment prescribed by the city charter, and upon what notice the charter requires to be given to property owners, and what opportunity such property owners are given to be heard upon the benefits to them of the contemplated improvement, the relation of benefits to costs and the apportionment of the assessment, and these several propositions in turn depend upon the opinion of the Supreme Court of the State.

The duty of defining the district to be improved is devolved by the charter of Portland upon the council of the city, to be exercised by passing a resolution of intention so to do, and giving notice thereof, which notice was required to "state the fact of the passage of the resolution aforesaid, its date, and, briefly, the character of the work or improvement proposed, and the time within which written objection or remonstrance may be made thereto."

A resolution of intention was passed in the case at bar, and notice thereof in accordance with the charter was posted in the places and by the officers required, and published as required and proof made thereof.

Passing upon the action of the council and the provisions of the charter, the Supreme Court of the State said:

"Now let us look at the law, and ascertain, if we can, whether it is legally sustainable upon principle. The common council is empowered by the legislature to fix and determine the taxing district. This it did by adopting the resolution of intention to make the improvement. Its action in this regard is legislative in character, and it was not requisite that the legislature should have provided for notice before the council was authorized to act. In prescribing the district it must be presumed, as would have been the case if the legislature had itself acted directly, that it took into consideration the exceptional benefits that would accrue to the property which it was intended should be charged with the burden, because it could inaugurate or make such an assessment upon no other basis. A notice in the present instance was required by the charter, and given, however, and, while it was for the purpose of acquiring jurisdiction, it gave the property holders an opportunity to appear and file objections to the improvement; and it was perfectly competent for them to raise both the objection that as a district the costs would be in excess of the exceptional benefits to the property involved, and that as it respects individual holders and between themselves the assessment would not be proportional to the relative benefits to be derived from the improvement. This is what, in fact, was done by the plaintiffs, as shown by the record, and upon this issue they were accorded a hearing. It is also possible for the common council to determine the matter with reasonable accuracy, as the probable cost and distributive share thereof among the holders was known to them, as was also the locality and situation of the property to be assessed."

The charter, therefore, gives a hearing on the question of benefits to the property owner before the formation of the district to be improved. And the trial court found that the common council before making the improvement estimated the probable cost thereof, and that it "considered the question of cost of said improvement in front of each of the lots within the limits of the proposed street improvement and abutting upon said street, and also the proportionate share of the cost of improving intersections of two of the streets bounding the blocks in which such lots are situated, and found that each of said lots

abutting on said street, and each of said lots assessed for intersection of blocks, would be benefited by said improvements in an amount greater than the cost of said improvement as assessed against each of said lots." And especially as to the property of plaintiffs in error, it was found that the council took into consideration whether that property was benefited by the improvements and the amount of the benefits, and that the cost assessed against the property did not exceed, or equal, the benefits which would accrue. Every requirement of due process of law, therefore, was satisfied as to plaintiffs in error.

What notice the charter of the city gives to property owners of the specific amount of the assessment against their property, and what opportunity to be heard thereon was afforded, the Supreme Court observed as follows:

"There are four several notices required along the way: First, of the proposed improvement; second, inviting proposals for doing the work; third, touching the acceptance of the work; fourth, ten days' notice of the entry of the assessment in the docket of city liens. Ample opportunity was thus afforded the owners to appear and interpose the constitutional objections, which is all that is sought to be done in this proceeding."

That is, as we understand, to object not only to the rule of assessment but to the amount of the assessment, for the court further said:

"The improvement consists of an elevated roadway, ranging from ten to fifteen feet in height throughout, except at one intersection, which was a fill, and it is apparent that the cost of the work was practically uniform throughout, and the assessment against the lots was, therefore, as nearly proportional according to benefits as could be devised. At least, it is not apparent that there is any substantial excess of costs above benefits, nor is there such a disproportionate distribution of the burden as to justify the court in declaring the assessment an arbitrary exaction by the legislature. It is beyond the power of human ingenuity to adopt any plan or mode of assessment that will operate to produce exact uniformity, and all that may be expected is a reasonable approximation to such a standard, and the rule adopted under the charter fulfills the condition as ap-

plied to the present controversy. There is no doubt that the property was benefited in excess of the costs and expenses."

But it is denied that the rule of the Portland charter constitutes an apportionment of the taxes, and it is said, quoting Cooley on Taxation, section 453:

"If such a regulation constitutes the apportionment of a tax, it must be supported, when properly ordered by or under the authority of the legislature; but it has been denied, on what seemed the most conclusive grounds, that this is permissible. It is not legitimate taxation, because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvements by any other property; and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot, those circumstances not at all contributing to make an improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing district whatever."

But if "accidental circumstances" may take from the rule the effect of apportionment, they do not prevent the application of the rule to cases where such circumstances do not exist. Where they exist they can be properly dealt with. Presumably the rule of the Portland charter was prescribed by the legislature in view of the conditions which existed in that city and in the expectation that the common council would so exercise its power and judgment in the creation of districts that the cost of the improvement ordered would be apportioned by the application of the rule prescribed. The expectation has been justified by the experience of the city. Under the rule of the charter, the opening and grading of the streets have been done for years, and the courts have been watchful against abuses—watchful to protect the rights of property owners. In *Oregon & California R. R. Co.* v. *Portland*, 25 Oregon, 229, the collection of an assessment was enjoined because it was imposed on

property which was not benefited by the improvement ordered. And in its opinion in the case at bar the Supreme Court said:

"But we are inclined to believe that the better doctrine, deducible from adjudged cases, including those of the Supreme Court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners."

From which we infer that the plan or method of assessment must have that result of itself. If that result is produced by a particular application of the plan or method, the latter will not be enforced, as was the case in *Oregon & California Railroad Company* v. *Portland*, *supra*.

Upon the claim of plaintiffs in error that they did not have "notice or knowledge of the amount of assessments before the assessments were made, or before the same were entered into the docket of city liens, or before said work was completed," we need not deal at length. The taxing district being formed upon a consideration of the utility of the work proposed and the benefits to property owners, and the cost of the work and its apportionment, the amount of the assessment then followed as a certain deduction, and the property owner having notice of all the proceedings and the right to contest them, it would seem useless to give him a further right to contest the assessment. But if notice and an opportunity to contest the assessment be necessary, the Supreme Court has interpreted the statute as giving such notice and opportunity. The court said:

"The manner of notice and the specific period of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement (see *Towns* v. *Klamath County*, 33 Oregon, 225; *Weed*

v. *Boston*, 172 Mass. 28), or the assessment is to be enforced by a suit to which he is to be made a party, *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701; *Walston* v. *Nevin*, 128 U. S. 578, or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined. *McMillen* v. *Anderson*, 95 U. S. 37. In such case he cannot be heard to complain that his property is being taken without due process of law. The case of *Paulsen* v. *Portland*, 149 U. S. 30, covers the question of the right to notice and a hearing quite fully, and it is significant that special reference is made to the ten days' notice required to be given under section 104 of the charter as it then stood, after the assessment had gone upon the docket of city liens and before collection can be proceeded with, which is almost the exact provision now contained in section 141. While the court at the time declined to decide that such a notice was sufficient, yet, if the cause had been dependent upon it alone, it is not altogether clear that it would have held it insufficient. So it was held by this court, in conformity with the prevailing rule, that if provision is made for notice to and hearing of each proprietor at some stage of the proceeding upon the question of what proportion of the tax shall be assessed upon his land, there is not a taking without due process of law. *Wilson* v. *Salem*, 24 Oregon, 504."

We are of the opinion, therefore, that, under the facts of this case and the interpretation given of the charter of Portland by the Supreme Court of the State, plaintiffs in error have not been deprived of their property without due process of law, and the judgment of the Supreme Court is

Affirmed.

McDONALD v. THOMPSON.

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

No. 95. Argued January 13, 14, 1902.—Decided February 3, 1902.

To a bill in equity by a receiver of a national bank to recover an assessment made by the Comptroller of the Currency to the amount of the par value of the shares formerly owned by one of the stockholders, defendant pleaded the statute of limitations. The statute provided that actions upon contracts in writing should be brought within five years, but that actions brought upon contracts not in writing or upon liabilities created by statute should be brought within four years. *Held:* That a bill to recover the assessment in question was not brought upon a contract in writing, but upon an implied contract not in writing, or upon a liability created by statute, and that the suit was barred.

THIS was a bill in equity originally filed May 20, 1898, in the Circuit Court for the District of Nebraska, by Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, (of whom the present appellant is the successor in office,) against David E. Thompson, to recover defendant's proportion of an assessment upon the stockholders of the bank to the amount of the par value of their shares. The bank failed on January 23, 1893, and a receiver was shortly thereafter appointed. On June 10, 1893, the Comptroller of the Currency ordered the assessment, which was made payable July 10, 1893.

The bill alleged Thompson to have been the owner of 210 shares of the capital stock, which he had acquired upon subscription to such stock and as a part of the original issue; that he, knowing the bank to be in a failing condition and practically insolvent, and in anticipation of its approaching failure, had sold and caused such stock to be transferred to certain irresponsible parties, and that such transfer was made with intent to defraud the bank, its depositors and creditors.

Defendant demurred upon the ground that it appeared by the bill that the cause of action was barred by the statute of

limitations. The demurrer was sustained, the bill amended, another demurrer interposed and sustained, and the bill dismissed. An appeal was taken to the Circuit Court of Appeals, which affirmed the judgment of the Circuit Court.

Mr. J. R. Webster for appellant. *Mr. John H. Ames* and *Mr. A. E. Harvey* filed a brief for same.

Mr. Halleck F. Rose for appellee.

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

This bill is founded upon Rev. Stat., § 5151, which declares that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares," etc. By section 5234 the Comptroller of the Currency is authorized to appoint a receiver of insolvent banks, who "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

The case turns upon the applicability of the state statute of limitations, which, so far as it is material, reads as follows:

"Sec. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued."

"Sec. 10. Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment.

"Sec. 11. Within four years, an action upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty."

As the cause of action in this case accrued on July 10, 1893, when the assessment was made payable, *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Marbury*, 145 U. S. 499; *Thompson* v. *German Insurance Company*, 76 Fed. Rep. 892; *Van Pelt* v.

Gardner, 54 Neb. 701, and the action was begun on May 20, 1898, more than four but less than five years thereafter, the case really turns upon the question whether the action is upon a "contract or promise in writing," or "upon a contract not in writing, express or implied," or "upon a liability created by statute." If the cause of action be upon a written contract, the action was brought in time. If upon a contract not in writing, or a statutory liability, the statute of limitations is a complete bar.

Used in this connection and as distinguished from a contract not in writing, express or implied, we think it entirely clear that section 10 contemplates an action between the immediate parties or their privies to a written contract, and that the only contract covered by that definition in this case is the one arising from the allegation of the bill that Thompson was the owner of 210 shares of the original capital stock, and "that he acquired the same upon subscription to such capital stock," and by a receipt of certificates for such shares. The only contract to be gathered from this allegation is one between the bank on the one hand and the defendant on the other, by which the latter agreed to take and pay for a certain number of shares, and the former agreed to issue certificates to him for the same. Had the action been brought upon this contract, as for instance by the bank to recover an unpaid assessment upon the original shares, the case would have fallen within section 10, and the suit might have been brought within five years.

But there was no contract in writing with the creditors or depositors of the bank, and none with the bank itself, to which the receiver could be said to be a privy, except to pay for the stock as originally issued. Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; but it was not a contract in writing within the meaning of the Nebraska act, since the writing—that is, the subscription—contained no reference whatever to the statutory obligation and no promise to respond beyond the amount of the subscription. In

none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association. *Carrol* v. *Green*, 92 U. S. 509, 512; *Terry* v. *Little*, 101 U. S. 216; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364; *Matteson* v. *Dent*, 176 U. S. 521; *Whitman* v. *Oxford National Bank*, 176 U. S. 559.

While section 10 does not use the words "express contract" but the words "contract or promise in writing," we think that, taken in connection with section 11, which is confined to contracts not in writing, express or implied, express contracts are primarily and principally intended by the earlier section. These are defined to be those contracts in which the terms of the agreement are fully and openly incorporated at the time the contract is entered into, while implied contracts are such as arise by legal inference and upon principles of reason and justice from certain facts, or where there is circumstantial evidence showing that the parties intended to make a contract. 2 Black. Com. 443. As contracts for subscription to stock contain no stipulation with reference to the rights of creditors and depositors, it is clear that such rights can only be asserted upon the theory that the subscriber impliedly bound himself to respond to any liability arising indirectly from his contract of subscription.

Whether the promise raised by the statute was an implied contract not in writing or a liability created by statute, it is immaterial to inquire. For the purposes of this case it may have been both. The statute was the origin of both of the right and the remedy, but the contract was the origin of the personal responsibility of the defendant. Did the statute make a distinction between them with reference to the time within which an action must be brought it might be necessary to make a more exact definition; but as the action must be brought in any case within four years, it is unnecessary to go farther than to declare what seems entirely clear to us, that it is not a contract in writing within the meaning of section 10 of the Nebraska act. *Hawkins* v. *Furnace Company*, 40 Ohio St. 507.

Plaintiff, however, insists that defendant's contract, here sought to be enforced, was not entered into between him and the bank, but between him and the creditors of the bank; that the order of the Comptroller of the Currency for the assessment of the shareholders did not create a cause of action or set the statute of limitations running, nor in any way affect the validity or duration of the right which belongs to the creditors to have this liability enforced; and that the action, not being upon the contract of subscription but upon the contract of the shareholder with the creditors of the bank, entered into by himself with the creditors through the agency of the officers of the bank, different considerations apply, and the statute of limitations does not operate as a bar so long as there are any outstanding claims against the bank.

In support of this proposition we are referred to section 2 of the act of June 30, 1876, c. 156, 19 Stat. 63, which declares: "That when any national banking association shall have gone into liquidation under the provisions of section 5220 of said [Revised] statutes, the individual liability of the shareholders provided by section 5151 of said statutes may be enforced by any creditor of said association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof," etc.; and we are cited to several cases holding that claims against shareholders under similar statutes do not become barred until the expiration of the time at which the claims against the corporation also became barred.

There are several answers to this position. Section 5220, to which the second section of the act of June 30, 1876, is supplementary, contemplates only a voluntary liquidation, providing, as it does, that "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." *Richmond* v. *Irons*, 121 U. S. 27, 47. Now, the Capital National Bank did not go into voluntary liquidation, but, as averred in the bill, "the Comptroller of the Currency of the United States became and was satisfied of the insolvency of the said Capital National Banking Association," and thereupon appointed a receiver. In other words, the proceedings

were taken under section 5234 as supplemented by section 1 of the act of June 30, 1876, authorizing the Comptroller of the Currency to appoint a receiver when the association had refused to pay its circulating notes and is in default, or he is otherwise satisfied of its insolvency.

But it is also sufficient to say of this that the action is not brought by the creditors under the second section of the act of June 30, 1876, but by the receiver under Rev. Stat. sec. 5234. In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run. *Scovill* v. *Thayer*, 105 U. S. 145; *Hawkins* v. *Glenn*, 131 U. S. 319. Upon the theory of the plaintiff, if the statute of limitations were pleaded, it would become necessary for the receiver to show that there were outstanding claims against the bank which were not barred by the statute, and therefore that the bill might be maintained. This would involve a departure from the whole theory of the bill in this case, which is based upon the allegation that the Comptroller of the Currency made an assessment upon the stockholders June 10, 1893, payable July 10, from which latter date plaintiff *claimed interest.* Defendant demurred to this upon the ground that the bill *set forth a cause of action* barred by the statute, and plaintiff went to a hearing upon this demurrer and was defeated. Obviously he cannot now set up a right to recover, if the creditors had brought a bill under another statute, to which no allusion is made in the bill in this case, and which provides for a wholly separate and independent remedy.

Plaintiff's final contention, that no cause of action arises until a demand has been made, is also fully met by the allegation of the bill that on June 10, 1893, the Comptroller of the Currency made an order in which he declared that he had made an assessment and requisition upon the shareholders, "and that he did thereby make demand upon each and every share of the capital stock of the said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders. Having made this allegation himself, we do not understand upon what theory the plaintiff now assumes that no demand was made.

Counsel for Parties.

In the view we take of the statute of limitations, we have not thought it worth while to consider the points made by the defendant that the action should have been at law and that the bill is defective for the want of proper parties.

There was no error in the decree of the court below, and it is therefore

Affirmed.

ILLINOIS *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

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

No. 28. Argued March 15, 1901.—Decided February 3, 1902.

This case was before this court in *Illinois Central Railroad Company* v. *Illinois*, 146 U. S. 387, and in that case the history of the litigation relating to the property involved is fully disclosed, and the court found that the structures made in the lake by the Railroad Company did not extend beyond the point of practical navigability; and upon the return of this cause to the Circuit Court, nothing was before that court except to inquire whether the structures erected by the Railroad Company extended into the lake beyond the point of practical navigability.

There was no error in holding that, in view of the manner in which commerce was conducted on the lake during the period of the investigation below, the structures erected by the Railroad Company did not extend into the water beyond the point of practical navigability.

The Circuit Court and the Circuit Court of Appeals having concurred in finding that the structures in question did not extend into the lake beyond the point of practical navigability, the decree below should not be disturbed, unless it was clearly in conflict with the evidence.

THE case is stated in the opinion of the court.

Mr. John H. Hamline for appellant. *Mr. Edward C. Akin*, *Mr. Frank H. Scott* and *Mr. Frank E. Lord* were on his brief.

Mr. John N. Jewett and *Mr. Benjamin F. Ayer* for appellees. *Mr. J. M. Dickinson* was on their brief.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case has been heretofore in this court. *Illinois Central Railroad Company* v. *Illinois*, 146 U. S. 387. The decree then under review was affirmed in all respects except one, and as to that one the cause was remanded for further investigation of the facts upon which it depended.

The case involved the asserted ownership by the Illinois Central Railroad Company of certain piers, docks and wharves constructed by it on the lake front of the city of Chicago, east of Michigan avenue.

The State contended that the structures in question were erected, without authority of law, on lands belonging to it, and that the decree now before us was erroneous in not so declaring.

The Railroad Company contended that the mandate of this court on the former appeal left open for consideration by the Circuit Court only one question, namely, whether those structures extended beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on Lake Michigan; and that that issue of fact having been found in its favor, the Circuit Court could not properly have passed any other decree than one confirming the company's title to such structures.

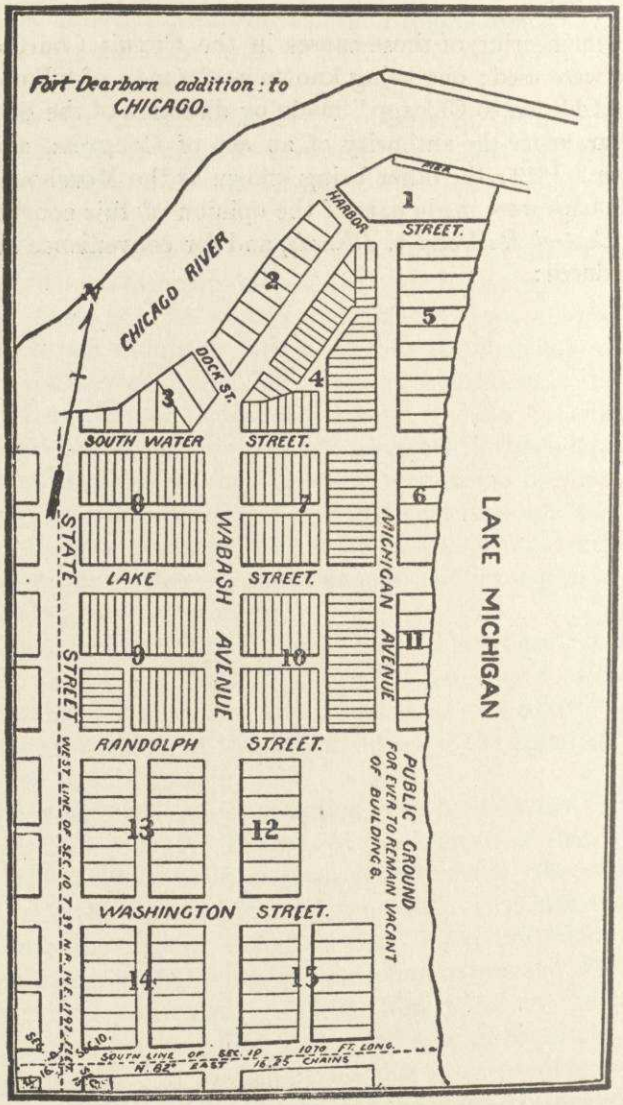
The history of the litigation relating to this property is fully disclosed in *Illinois Central Railroad Company* v. *Illinois*, above cited. But it will be appropriate and will contribute to a clear understanding of the present appeal if the essential facts be restated in this opinion.

In the year 1883 an information was filed in the Circuit Court of Cook County, Illinois, by the people of that State against the Illinois Central Railroad Company, the city of Chicago and the United States of America. That case was removed into the Circuit Court of the United States for the Northern District of Illinois, and a motion to remand it to the state court was overruled. 16 Fed. Rep. 881. In the same case the city of Chicago filed a cross-bill against the State and its co-defendants. At the same time there was pending in the Circuit Court of the United States for the same District an in-

formation in equity filed by the Government against the Illinois Central Railroad Company, the Michigan Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, the Baltimore and Ohio Railroad Company, and the city of Chicago.

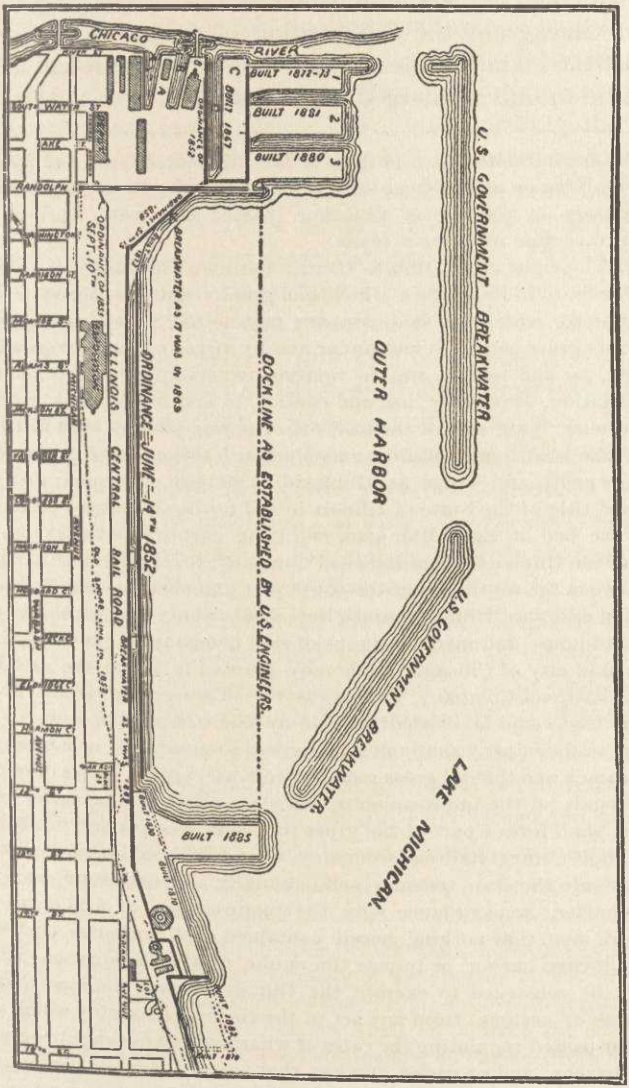
At the hearing of those causes in the Circuit Court certain maps were used; one being known as the map of "Fort Dearborn Addition to Chicago" made by direction of the Secretary of War, under the authority of an act of Congress, approved March 3, 1819; the other being known as the Morehouse Map. Both maps were made part of the opinion of this court in *Illinois Central Railroad* v. *Illinois*, and for convenience are here reproduced:

State of Illinois vs. *Illinois Central Railroad.*



State of Illinois vs. *Illinois Central Railroad.*

MOREHOUSE MAP.



The questions involved in the above suits are indicated by the following extract from the opinion of the Circuit Court at the original hearing: "The State, in the original suit, asks a decree establishing and confirming her title to the bed of Lake Michigan, and her sole and exclusive right to develop the harbor of Chicago by the construction of docks, wharves, etc., as against the claim by the railroad company that it had an absolute title to said submerged lands, described in the act of 1869,[1]

[1] "An act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago. Passed over veto, April 16, 1869." The third section of that act reads:

"§ 3. The right of the Illinois Central Railroad Company under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands, submerged or otherwise, lying east of the said line, running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south and near to the round-house and machine-shops of said company, in the South division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same; and that all gross receipts from use, profits, leases or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the state treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided, also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor: and provided, further, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now, or

and the right—subject to the paramount authority of the United States in respect to the regulation of commerce between the States—to fill the bed of the lake, for the purpose of its business, east of and adjoining the premises between the river and the north line of Randolph street, and also north of the south line of lot 21; and also the right, by constructing and maintaining wharves, docks, piers, etc., to improve the shore of the lake, for the purposes of its business, and for the promotion, generally, of commerce and navigation. The State, insisting that the company has, without right, erected, and proposes to continue to erect wharves, piers, etc., upon the domain of the State, asks that such unlawful structures be directed to be removed, and the company enjoined from constructing others. The city, by its cross bill, insists that since June 7th, 1839, when the map of Fort Dearborn addition was recorded, it has had the control and use for public purposes of that part of section 10 which lies east of Michigan avenue, and between Randolph street and fractional section 15; and that, as successor of the town of Chicago, it has had possession and control since June 13th, 1836, when the map of fractional section 15 addition was recorded, of the lands in that addition north of block 23. It asks a decree declaring that it is the owner in fee, and of the riparian rights thereunto appertaining, of all said lands, and has, under existing legislation, the exclusive right to develop the harbor of Chicago by the construction of docks, wharves and levees, and to dispose of the same, by lease or otherwise, as authorized by law; and that the railroad company be enjoined from interfering with its said rights and ownership. The relief sought by the United States is a decree declaring the ultimate title and property in the 'Public Ground' shown on the plat of the Fort Dearborn addition, south of Randolph street, and also in the open space shown on the plat of fractional section 15 addition, to be in the United

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which may hereafter be, on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation."

States, with the right of supervision and control over the harbor and navigable waters aforesaid; that the railroad companies and the city be enjoined from exercising any right, power or control over said grounds, or over the waters or shores of the lake; that the Illinois Central Railroad Company be restrained from making or constructing any piers, wharves or docks, and from driving piles, building walls or filling with earth or other materials in the said lake, or from using any made-ground, or any piers, wharves or other constructions made or built by or for it in or about the outer harbor, to the east of the 200-feet strip of its way-ground, or from taking or exacting any toll for such use; and that the Illinois Central Railroad Company be required to abate and remove all obstructions placed by it in said outer harbor, and to quit possession of all lands, waters and made-ground taken and held by it without right as aforesaid. The State, the city and the General Government all unite in contending that the Lake Front Act of 1869 is inoperative and void." 33 Fed. Rep. 730, 750.

A final decree was rendered in the Circuit Court on the 24th day of September, 1888. By that decree it was adjudged that the fee of certain streets, avenues and grounds was in the city of Chicago in trust for public use; and that the city of Chicago, as riparian owner of such grounds on the east or lake front of said city, between the north line of Randolph street and the north line of block twenty-three, each of the lines being produced to Lake Michigan, and in virtue of authority to that end conferred by its charter, had, among other powers, the power to establish, construct, erect and keep in repair on the lake front, east of such premises, within the lines given, and in such manner as would be consistent with law, public landing places, wharves, docks and levees, subject, however, in the execution of that power, to the authority of the State by legislation to prescribe the lines beyond which piers, docks, wharves and other structures, other than those erected by the General Government, might not be extended into the waters of the harbor that were navigable in fact, and to such supervision and control as the United States might rightly exercise in and over such harbor, and subject also to the enjoyment by the Illinois

Central Railroad Company of the rights then to be defined and described.

It was further adjudged:

"*That the Illinois Central Railroad Company* is the owner in fee of all the wharves, piers and other structures erected by it in the city of Chicago, *east of Michigan avenue, south of Chicago River, and north of the north line of Randolph street*, extended eastwardly as shown upon said Morehouse map, including the station grounds lying west of the slip C, the pier marked C, lying east of slip C, and represented upon the Morehouse map to have been built in 1867, *and piers* 1, 2 *and* 3, *lying east of pier C last mentioned, and represented upon said map to have been built as follows: Pier* 1 *in* 1872 *and* 1873, *pier* 2 *in* 1881, *and pier* 3 *in* 1880, *and is also entitled to the use, for the purposes of its business, of the slips marked on said Morehouse map.*

"That said company is likewise the owner in fee of all the wharves, piers and other works made and constructed by it in the city of Chicago, east of its main tracks, *between the north line of block* 23, *in fractional section* 15 *addition to Chicago, and the center line of Sixteenth street extended, including the pier or line of piling represented upon the said Morehouse map to have been built in* 1870, *and the station grounds lying west of the said pier and contiguous thereto; also of the wharf or pier projecting into the lake from the grounds last mentioned, and represented upon the said Morehouse map to have been built in* 1885; which said wharves, piers and other works so constructed *and so far as constructed* by the said Illinois Central Railroad Company, as aforesaid, are lawful structures and not encroachments upon the domain of the State of Illinois *or upon the public right of navigation*, or upon the property interests or estate of the said city of Chicago."

"And the court doth further find and declare, and it is hereby adjudged and decreed, that the third section of the act of the General Assembly of the State of Illinois, passed over the Governor's veto April 16th, 1869, entitled, 'An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern

frontage of the city of Chicago,' so far, at least, as it confirms 'the right of the Illinois Central Railroad Company under the grant from the State in its charter, . . . and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control in and to the lands, submerged or otherwise, lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue in fractional sections ten and fifteen,' is a valid and constitutional exercise of legislative power and legalizes as well what was done by said company prior to April 16th, 1869, in the way of filling in the lake and constructing wharves, piers, tracks, warehouses and other works between the Chicago River and the north line of Randolph street extended eastwardly, as its occupancy and use for way ground of the two said triangular pieces of ground immediately south of Randolph street; and that the subsequent act of the General Assembly of Illinois, passed April 15th, 1873, in so far as it sought by repealing the said act of April 16th, 1869, to revoke or annul said confirmatory clause of the last named act, was void under the Constitution both of Illinois and of the United States; but the court is of opinion, and so adjudges and decrees, that the said act of April 15th, 1873, repealing said act of April 16th, 1869, had the effect in law to withdraw from said railroad company the grant to it, its successors and assigns, by the third section of said act of April 15th (16th), 1869, of 'all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of one mile, and between the south line of the pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said company, in the south division of said city of Chicago;' and to reinvest the State with such right and title as it had in and to said premises prior to the passage of said act of April 16th, 1869; and said repealing act had the further effect to withdraw from said company the additional power conferred upon it by said act of April 16th, 1869, to improve the harbor of Chicago, and

to engage in the business of constructing and maintaining wharves, piers and docks for the benefit of commerce and navigation generally, and not in the prosecution of its business, as defined and limited by its original charter and the laws of the State, saving, however, to said company as unaffected by said repeal the right to hold and use as part of its way-ground or right of way, and not otherwise, the before-mentioned part of the submerged lands east of its breakwater between Monroe and Washington streets extended eastwardly, which was reclaimed from the lake in 1873, presumably upon the faith of the act of 1869, and is marked on the Morehouse map with the words 'built 1873.'

"It is further ordered, adjudged and decreed that the defendant, the Illinois Central Railroad Company, be, and it is hereby, perpetually enjoined and restrained from erecting structures in or filling with earth or other materials any portion of the bed of Lake Michigan *as it now exists and as shown on said Morehouse map east or in front of said fractional sections ten and fifteen*—that is, east or in front of the grounds *now occupied and used by it between Chicago River and the north line of Randolph street extended eastwardly*, or east or in front of the grounds *now occupied and used by it between the north line of Randolph and the center line of Sixteenth Street, each extended eastwardly*, except that said company *may complete the slip or basin already commenced* immediately north of Sixteenth street extended, with a wharf on each side of it not exceeding one hundred feet in width each, where vessels coming into such slip or basin may load and unload, and upon which tracks of the company may be laid; and it is considered and ordered by the court that the Illinois Central Railroad Company and the city of Chicago each pay one-half of the costs herein, and that execution issue therefor."

The railroad company not having obtained all it claimed, the cause was brought by it to this court, which affirmed the decree of the Circuit Court *except as modified in certain particulars*, to be presently indicated. *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 449, 464.

Referring to the third section of the act of the Illinois legis-

lature of 1869 this court said: "The section in question has two objects in view: one was to confirm certain alleged rights of the railroad company under the grant from the State in its charter and under and 'by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident' thereto, in and to the lands submerged or otherwise lying east of a line parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten and fifteen. The other object was to grant to the railway company submerged lands in the harbor. The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed, from its ownership of lands in sections ten and fifteen on the shore of the lake. Whether the piers or docks constructed by it, *after the passage of the act of* 1869, extended beyond the point of navigability in the waters of the lake, must be the subject of judicial inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined that such piers and docks do not extend beyond the point of *practical* navigability, the claim of the railroad company to their title and possession *will be confirmed;* but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the State and the facts established, may be authorized by law."

The modifications in the original decree of 1888 which this court directed to be made are distinctly shown by the following extract from our opinion:

"It follows from the views expressed, and it is so declared and adjudged, that the State of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of April 16th, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15th, 1873, repealing the same is valid and effective for the purpose of restoring to the State the same control, domin-

ion and ownership of said lands that it had prior to the passage of the act of April 16th, 1869.

"But the decree below, as it respects the pier commenced in 1872, and the piers completed in 1880 and 1881, marked 1, 2 and 3, near Chicago River, and the pier and docks between and in front of Twelfth and Sixteenth streets, is *modified* so as to direct the court below to order such investigation to be made as may enable it to determine whether those piers erected by the company, by virtue of its riparian proprietorship of lots formerly constituting part of section 10, extend into the lake *beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake;* and if it be determined upon such investigation that said piers, or any of them, do *not* extend beyond such point, *then* that the title and possession of the railroad company to such piers *shall be affirmed by the court;* but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, *then* the said court shall direct the said pier or piers, *to the excess ascertained*, to be abated and removed, or that other proceedings relating thereto be taken on the application of the State as may be authorized by law; and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock, constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets *extend beyond the point of navigability*, and *to affirm the title and possession of the company if they do not extend beyond such point*, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the State as may be authorized by law. *Except as modified in the particulars mentioned*, the decree in each of the three cases on appeal must be *affirmed*, with costs against the railroad company; *and it is so ordered.*" *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 449, 464.

The mandate of this court embodied the above extract from its opinion, and upon the return of the causes to the Circuit Court the parties took additional proof on the single matter so reserved for investigation.

Upon final hearing in the Circuit Court, May, 1896, a decree was entered by which it was found and adjudged "that the said piers and docks referred to in the aforesaid judgment and mandate of the Supreme Court and there described as piers marked 1, 2, and 3, near Chicago River, and the piers and docks constructed by the said railroad company in front of the shore between Twelfth and Sixteenth streets, all in the city of Chicago, in the State of Illinois, do not extend, nor does either of them extend, into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake. It is therefore ordered, adjudged and decreed that the title and possession of the said Illinois Central Railroad Company to the said piers, and each of them and every part thereof, be, and the same is hereby, affirmed."

That decree was affirmed by the Circuit Court of Appeals, 91 Fed. Rep. 955, and the case is here upon appeal by the State of Illinois. No appeal was taken by the United States or by the city of Chicago.

In view of these facts what matters are open for consideration on this appeal? This question was fully discussed at the bar. It is not in our opinion difficult of solution.

We have seen that by the original decree of the Circuit Court rendered September 24, 1888, the railroad company was adjudged to be the owner in fee of the particular structures in question, namely, the piers marked 1, 2 and 3 on the Morehouse map, as well the piers and docks between and in front of Twelfth and Sixteenth streets, and were entitled to use and control them in its business. This court held that view to be correct, *provided* the structures did *not* "extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake." If, upon investigation, it was found that the structures referred to did, in fact, extent beyond that point, then the Circuit Court was directed to make such decree as would effect their removal "to the excess ascertained;" and if the contrary was found to be the case, then a decree was to be entered recognizing the rights of the railroad company in respect of the structures in question to be such as were declared by the original decree of the Circuit Court.

As already shown, the Circuit Court found, upon full inquiry, that the structures did not extend beyond the point of practical navigability, having reference to the manner in which commerce was conducted on the lake; and in conformity with the mandate a decree was entered confirming the title of the railroad company.

In *Sibbald* v. *United States*, 12 Pet. 488, 492, this court said: "A final decree in chancery is as conclusive as a judgment at law. 1 Wheat. 355; 6 Wheat. 113, 116. Both are conclusive on the rights of the parties thereby adjudicated. No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes, 3 Wheat. 591; 3 Peters, 431; or to reinstate a cause dismissed by mistake; 12 Wheat. 10; from which it follows, that no change or modification can be made, which may substantially vary or affect it in any material thing. . . . Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. After a mandate, no rehearing will be granted, and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. 5 Cranch, 316; 7 Wheat. 58, 59; 10 Wheat. 443."

In *Roberts* v. *Cooper*, 20 How. 467, 481, the court said: "On the last trial, the Circuit Court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court

below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members. . . . We can now notice, therefore, only such errors as are alleged to have occurred in the decisions on questions which were peculiar to the second trial." To the same effect are numerous cases, some of which are cited in the margin.[1]

It is clear, under the adjudged cases, that upon the return of this cause to the Circuit Court, nothing was before that court except to inquire whether the structures erected by the railroad company, and specifically described in the opinion and mandate of this court, extended into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels was conducted on the lake. That matter, and nothing more, had been or could have been determined by the final decree of the Circuit Court, and therefore on this appeal we can only inquire as to the soundness or unsoundness of its conclusion upon the sole question reserved for investigation. We therefore do not stop to consider, as the appellant insists we should do, whether this court erred in any particular

[1] *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 355; *Browder* v. *McArthur*, 7 Wheat. 58; *Washington Bridge Co.* v. *Stewart*, 3 How. 413, 425; *Chaires* v. *United States*, 3 How. 611, 620; *Corning* v. *Troy Iron and Nail Factory*, 15 How. 451, 466; *Peck* v. *Sanderson*, 18 How. 42; *Whyte* v. *Gibbes*, 20 How. 541; *Ex parte Dubuque and Pacific Railroad*, 1 Wall. 69, 73; *Noonan* v. *Bradley*, 12 Wall. 121, 129; *Supervisors* v. *Kennicott*, 94 U. S. 498; *Stewart* v. *Salamon*, 97 U. S. 361; *Brooks* v. *Railroad Co.*, 102 U. S. 107; *Northern Pacific Railroad Co.* v. *Ellis*, 144 U. S. 458, 464; *Gaines* v. *Rugg*, 148 U. S. 228, 241; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 691; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *In re Sanford Fork and Tool Co.*, 160 U. S. 247.

in its opinion or judgment on the former appeal in respect of any matter then determined. Every matter embraced by the original decree of the Circuit Court and not left open by the decree of this court, was conclusively determined, as between the parties, by our former decree, and is not subject to reëxamination on this appeal.

We come, then, to consider the merits of the case as involved in the only question now before us, namely, whether the structures referred to extend beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake.

Judge Showalter in the Circuit Court found that the facts relating to the structures north of Randolph street and those between Twelfth and Sixteenth streets fully protected the railroad company under the rule prescribed by the mandate of this court. Referring to vessels of the largest class continuously used in lake navigation, he said: "Such vessels, when ladened, require from 16 to 20 feet of water in which to float. A vessel drawing more than 12 feet, as I find from the evidence in the case, would hardly reach the structure here in question in the ordinary stages of water, and in the lowest water vessels requiring more than 10 feet could not reach or land at these docks. Without being specific as to the exact depth of the water, I find that the two piers and docks between Twelfth and Sixteenth streets do not extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lakes, and I make the same finding as to the piers and docks north of Randolph street."

In the Circuit Court of Appeals, Judge Jenkins, speaking for the court, said: "The right [of the riparian owner] is a relative right, having relation, in the language of the Supreme Court in this cause, 'to the manner in which commerce in vessels is conducted on the lake.' To serve any useful purpose those piers must reach water of sufficient depth to float vessels when laden, and alongside of which vessels can be brought to be conveniently loaded or unloaded. A sufficient depth of water to float vessels such as navigate the waters of the lake is essential, and

it is a necessary incident of the riparian right that the pier shall penetrate the water to a distance from the shore necessary to reach water which shall float vessels, the largest as well as the smallest, that are engaged in the commerce of the lakes. *Atlee* v. *Packet Company*, 21 Wall. 389, 393; *Langdon* v. *Mayor of New York*, 93 N. Y. 151. . . . We must have regard to the object for which this right is conferred. It is to reach out to accommodate the vessels that plow the waters of the lake. It is in aid of the commerce of the lake, and that right for that purpose should be liberally interpreted and upheld."

After referring to the harbor line adopted by the United States Government at the request of the city of Chicago, the court proceeded: "Without undertaking to say to what extent these proceedings of the city of Chicago were authorized as between it and the people of the State of Illinois, it is sufficient to say that these things have been done without any adverse action on the part of the State of Illinois. If they have no other effect, they tend to strengthen, if support be needed, the general drift of all the evidence in the case, that the necessities of the commercial marine of the Great Lakes require substantially a depth of water of twenty feet to float the larger class of vessels, and indicate that that depth at the present time marks 'the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake.' It is conceded that the piers in question do not intrude into the waters of the lake to that extent, and that the depth of water can be obtained at them only by dredging. Conceding then, as we must, the right of the railroad company to reach that point of practical navigability, these structures were not and are not unlawful, and its rights to them must be sustained. The title to submerged lands resting in the State, are held in trust in aid of navigation. Courts have at all times been diligent to protect and enforce rights of navigation, in aiding and protecting whatever may tend to build up and encourage commerce upon the seas. It does not comport with our sense of duty in the protection of a mere naked legal right to submerged land, to deny a conceded riparian right—conceded because so declared by the ultimate tribunal—when that bare legal title is

held in trust for the very purpose to which these structures are devoted, namely, the accommodation of the commerce of the lake. To compel the abatement or removal of these structures to the extent demanded, or to any extent, in view of the establishment of the harbor line as indicated, would be to render them useless for the accommodation of the commerce of the lakes, and to practically deny to the appellee a substantial and valuable riparian right to which the Supreme Court has determined it is entitled."

The words of our mandate, "*practical* navigability, having reference to the manner in which commerce in vessels [on the lake] is conducted," admonished the Circuit Court that the question as to the extent to which the railroad company could rightfully continue to occupy the bed of the lake with piers, docks or wharves was not to be determined upon narrow, technical grounds, but upon grounds which, under all the circumstances, would be fair and reasonable as between the company and the public, having reference to the manner in which commerce was commonly or habitually conducted in vessels of various sizes.

It is said that in determining whether the piers and docks in question extended into the lake beyond the point of practical navigability, the Circuit Court could only take into view the size and capacity of vessels habitually employed on the lake at the commencement of this litigation or at the date of the original decree in the Circuit Court.

We are of opinion that nothing in our mandate or opinion compelled the Circuit Court to frame its decree upon that theory. That court was directed to ascertain whether the structures complained of extended beyond practical navigability, having reference to the manner in which commerce "*is* conducted on the lake." There was no intention to withhold the power to determine the particular matter reserved for investigation in the light of the situation as it was when that investigation was made. If this court had intended that that investigation should relate to the situation as it was when the litigation commenced, or when the original decree was rendered, it would have so declared. If, having reference to the manner in which commerce

in vessels was conducted at the time of the investigation below, the structures in question did not extend into the lake beyond the point of practical navigability, then the Circuit Court, in the execution of the mandate of this court, properly confirmed the title and possession of the railroad company as established by the original decree.

It appears from the evidence that in 1847 the largest vessel on the lake had capacity sufficient to carry 18,000 bushels of corn; that in 1860 some grain vessels carried as much as 20,000 bushels, having a draft of about twelve or twelve and a half feet. In 1869, some vessels had a draft of thirteen feet. Later, and during the period covered by the investigation, there were vessels on the lake carrying 100,000 bushels of corn, while others carried as much as 160,000 bushels, the latter drawing from sixteen to eighteen feet of water. The proof shows that the tendency for many years prior to the rendition of the decree was to increase the carrying capacity of vessels. That was particularly so in the case of metal steamers, some of which carried as much as 4000 or 5000 tons, while others varied in draft from ten to eighteen feet. There were, at the time of the investigation below, vessels regularly engaged in commerce on the lake whose draft was as much as twenty feet.

It is safe to say that according to the evidence in the cause a wharf or pier in the lake would not have adequately accommodated commerce, as carried on in many vessels on the lake, unless it had reached water not less than from fourteen to eighteen feet deep; and even such a structure could not have been used by the largest vessels on the lake. It was shown by soundings that the structures in question extended no farther into the lake than was necessary to accommodate a great number of vessels of moderate capacity. When the investigation below was entered upon, pursuant to our mandate, the depth of water in the channel of Chicago River over the La Salle and Washington street tunnels was about sixteen feet and eight inches—a greater depth than exists at the outer edge of the piers, docks, and wharves in question, except that at the mouth of the Chicago River, against the ends of some of the company's structures, there is a depth of from eighteen to twenty feet, obtained

by dredging. The average depth of water at the outer line of the structures in question does not exceed twelve or thirteen feet at the utmost, which is insufficient for the accommodation of a vast amount of commerce carried on in vessels on the lake. An examination of the evidence will disclose this fact beyond all serious controversy.

We are therefore of opinion that there was no error in holding that, in view of the manner in which commerce was conducted on the lake during the period of the investigation below, such structures did not extend into the water beyond the point of practical navigability. Regard being had to the weight of the proof, the same conclusion would be reached if we looked at the capacity of the vessels used on the lake at the time of the original decree in the Circuit Court.

Confirmation of these views will be found in the testimony of many witnesses whose opinions are entitled to respect. Captain Marshall of the Engineer Corps of the United States Army, having accurate knowledge of the harbor of Chicago and of its needs, was asked the question: "Having reference to the manner in which commerce in vessels is now conducted on the lakes at the port of Chicago, what, in your opinion, is the reasonable and necessary depth of water in a slip or dock for the accommodation of that commerce?" His answer was: "At present no vessel with a deeper draft than about sixteen feet can carry on commerce in the Chicago River, so that I should think that a foot deeper than that, seventeen feet, would be a proper depth to accommodate the largest as well as the smallest vessels that come to Chicago now." He was also asked: "If you were to construct a pier or wharf in the said outer harbor for the accommodation of vessels engaged in lake commerce, or were to advise in relation thereto, what would be the depth of water you would consider it necessary to reach in order that such pier or dock should be available for the uses intended?" He replied: "Seventeen feet at present, and ultimately they should construct their docks with twenty feet of water. Piling and bulkheads so as to stand dredging to twenty feet." Many other witnesses testified substantially to the same effect.

It does not follow from what has been said that the railroad company can, of right, further extend into the lake either the structures in question or new structures. While sustaining the title and possession of the railroad company in respect to piers and docks, *so far as then constructed*, the original decree of 1888 perpetually enjoined the railroad company from erecting structures in or filling with earth or other materials any portion of the bed of Lake Michigan as it then existed and was shown on the Morehouse map east or in front of the fractional sections ten and fifteen, that is, "east or in front of the grounds *now* [at the date of the original decree] occupied and used by it between Chicago River and the north line of Randolph street extended eastwardly, or east or in front of the grounds now [then] occupied and used by it between the north line of Randolph and the centre line of Sixteenth street, each extended eastwardly, except that said company may *complete the slip or basin* already commenced immediately north of Sixteenth street extended, with a wharf on each side not exceeding one hundred feet in width each, where vessels coming into such slip or basin may load or unload, and upon which tracks of the company may be laid." These restrictions imposed by the original decree were confirmed by the former decree of this court, leaving open only the question whether the structures complained of, and as then constructed and maintained, extended into the lake beyond the point of practical navigability. So that the railroad company cannot acquire by the present decision any authority to further extend its structures into the lake. It must stand upon the original decree of the Circuit Court in respect of its rights.

We may add that the Circuit Court and the Circuit Court of Appeals having concurred in finding that the structures in question did not extend into the lake beyond the point of practical navigability—which is largely, if not entirely, a question of fact—the decree should not be disturbed unless it was clearly in conflict with the evidence. *Compania La Flecha* v. *Brauer*, 168 U. S. 104, 123; *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Baker* v. *Cummings*, 169 U. S. 189, 198; *The Carib Prince*, 170 U. S. 655.

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For the reasons stated the decree of which the State complains must be affirmed and it is so ordered.

The CHIEF JUSTICE having been of counsel for the city of Chicago in the earliest stages of this litigation, took no part in the consideration or decision of this case.

BRAINARD *v.* BUCK.

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

No. 110. Argued January 15, 16, 1902.—Decided February 24, 1902.

The court below had power to authorize the amendment made to the bill.

It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous; and in this case, after examining the evidence, it seems to this court that the findings of the court below were justified by it: and that they established that a trust resulted in favor of Buck.

THE appellants seek a review in this court of the judgment of the Court of Appeals of the District of Columbia, in this case, affirming a judgment of the Supreme Court of the District enjoining the appellants from the further prosecution of an action of ejectment brought by them against appellee Coleman in the Supreme Court of the District, to recover a one fifth interest in a house and lot in the city of Washington, in the possession of Coleman as tenant of appellee, Leffert L. Buck, who claims to be the owner thereof. The appellees, Buck and Coleman, commenced this suit in April, 1898, and in their bill of complaint they alleged the bringing of the action of ejectment on or about July 26, 1897, by William H. Brainard, as one of the heirs of his brother, the late Charles F. Brainard, to recover an undivided one fifth interest in the real estate mentioned. The bill further alleged that the complainant Buck was the brother of one Cornelia A. Brainard, whose husband was Charles F. Brainard, both of whom lived in the city of Washington up to the time of the death of Charles on May 13, 1881, and the

widow thereafter continued to live in that city until her death on March 31, 1892. On June 12, 1872, Charles F. Brainard, the husband, made and executed his last will and testament, by which he devised and bequeathed to his wife all of his property of every kind and description for her own use and benefit. Afterwards and on July 18, 1879, there was conveyed to Charles F. Brainard by deed the premises in question. After the death of Charles F. Brainard and on March 31, 1882, his widow, by deed, duly conveyed her title to the premises to her brother, the complainant Buck. The bill then contained the following averments:

"8. The plaintiffs further show that the plaintiff, Leffert L. Buck, was the brother of the said Cornelia A. Brainard, and that her husband, the said Charles F. Brainard, was in his lifetime employed as a clerk in the Treasury Department; that he had little or no means of support outside of the salary which he received, and that the plaintiff, Leffert L. Buck, being willing to aid and assist his sister, and being solicited by her and her husband so to do, furnished and advanced the money to pay for the said property and premises first above described; that the said premises were purchased with money so advanced by the said plaintiff, L. L. Buck, in part directly to the said Brainard to pay for and on account of said property, and in part to the wife of the said Brainard, and in part in taking up and paying encumbrances which had been put upon said property for the purchase price thereof; that said money was so advanced and said property purchased for the sole and only purpose of giving to the said Cornelia A. Brainard, the sister of the said L. L. Buck, a home, and that it was so understood by the said Brainard at the time of said purchase; that the said property was conveyed to the said Brainard instead of to his wife for the reason that prior to said conveyance the said Brainard had executed his will, by which said will he had devised and bequeathed to his said wife all of his property of every kind, and it was understood and believed by the said Brainard and his wife that if she should survive him the property would descend to her, and that in event she should not survive him, her said husband, she would have a home on said property during her lifetime,

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and that during said period said Brainard should hold the title to said property as trustee for said plaintiff, Leffert L. Buck."

The bill then set forth the names of the surviving heirs at law of Charles F. Brainard, and averred that some of them had quitclaimed the property to the plaintiff Buck. It is also averred that from the time of the death of Charles F. Brainard his widow lived in the house, and that she conveyed the premises to Buck by deed on March 31, 1882, and that he believed that the legal title was in him until the commencement of the ejectment suit, when he was advised that the will of Charles F. Brainard did not convey the property to his sister for the reason that it was acquired by Brainard after the execution of the will, which did not operate to convey after-acquired property.

For relief, the bill asked that the plaintiffs in the action of ejectment might be perpetually enjoined from further prosecuting the same, and that it might be declared that the land in question was charged with a trust in favor of, and ought to be held for, the use and benefit of the plaintiff Buck, and that the defendants, or such of them as should appear to have the legal title to the lands, should be decreed to convey such legal title free and clear of all encumbrances done or suffered by them or any or either of them unto the plaintiff Buck.

The defendant William H. Brainard demurred to the bill on the ground, among others, that the promise set forth in the bill was not in writing or signed by the deceased, Charles F. Brainard, and was within the meaning of the statute for the prevention of frauds and perjuries; also that Buck had been guilty of gross and inexcusable laches in bringing his suit.

The demurrer was sustained with leave to the plaintiffs to amend. Pursuant to such leave the plaintiff served an amended bill, which was a full and complete bill, taking the place of the original, and restated all the facts set forth in the original bill, but left out the above quoted eighth paragraph. The complainants in the ninth, tenth, eleventh and twelfth paragraphs of the amended bill made the following averments:

"9. That from March 12, 1875, until June 3, 1880, the said plaintiff, Leffert L. Buck, sent to the said Charles F. Brainard, for investment as agent for him, the said Leffert L. Buck, vari-

ous sums of money—the particular amounts of which, and the dates at which they were received by said Charles F. Brainard, deceased, are stated in 'Exhibit D,' hereto annexed—and authorized the said Charles F. Brainard, as agent for him, the said Leffert L. Buck, to invest the same in real estate, bonds and securities in the city of Washington; that on or about the 18th day of July, 1879, the said Charles F. Brainard purchased the said property and premises hereinbefore described for the sum of $6350, and paid on said purchase price the sum of $2550 out of the moneys so sent to him for investment by the said plaintiff, Leffert L. Buck, as aforesaid; that upon said purchase the said Charles F. Brainard took the deed of said property to himself without the knowledge, consent or authority of said plaintiff so to do; that said deed is the same deed hereinbefore mentioned as 'Exhibit B;' that thereafter and on or about March 12, 1880, said Charles F. Brainard made a further payment of $1266.66 on said property out of said moneys so sent to him for investment by said plaintiff, Leffert L. Buck, as aforesaid; that on the 8th day of June, 1880, there still remained in the hands of said Charles F. Brainard out of the said moneys so received by him for investment as agent for the said plaintiff, Leffert L. Buck, the sum of $793.58, no part of which has ever been repaid to or received by said plaintiff; that on or about the 25th day of July, 1879, said Charles F. Brainard executed to John F. Waggaman and James A. Harban, trustees, a deed of trust on said property to secure payment of the balance of the purchase money then unpaid thereon; and that said deed of trust was executed without the knowledge, consent or authority of said plaintiff, Leffert L. Buck; that after the 8th day of June, 1880, and before his death, the said Charles F. Brainard made further payments on said property, not exceeding in amount the sum of $650, out of the said moneys so received by him from said plaintiff for investment as aforesaid, the particular dates of which payments plaintiffs are unable more definitely at this time to state, for the reason that the books and accounts of the Western Building Association, to which said payments were made, have been destroyed.

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"10. That after the death of the said Charles Brainard the plaintiff Leffert L. Buck was informed by his said sister, Cornelia A. Brainard, that she held the legal title to said property under the last will and testament of her said husband, which is the instrument hereinbefore mentioned as 'Exhibit A,' and that there remained unpaid upon said trust deed the sum of $1971.81; that thereupon, and on or about the 17th day of March, 1882, said plaintiff, Leffert L. Buck, paid the balance due upon said trust deed, which was thereupon discharged, to wit, the sum $1971.81; and thereafter, and on the 31st day of March, 1882, the said Cornelia A. Brainard conveyed the said property to him by the deed referred to as 'Exhibit C,' and the said plaintiff, Leffert L. Buck, thereupon and on that day entered into and has ever since remained in undisturbed possession of said premises.

"11. And the plaintiffs further show that all of the moneys that were paid for the purchase of said property, including the whole consideration thereof, were paid by the plaintiff Leffert L. Buck.

"12. And the plaintiffs further show that not until after the said action at law No. 41,274, which is the suit of said William H. Brainard against James Coleman, had been brought had the plaintiff Leffert L. Buck any information that the legal title to said premises did not pass to his sister, the said Cornelia A. Brainard, under the will of her said husband, Charles F. Brainard."

The defendants demurred to this amended bill on the same grounds stated in the demurrer to the original bill, and also on the ground that a new and different cause of action had been set up in the amended bill from the one in the original bill. The demurrer was overruled, and the defendants thereupon answered, in which among other things, they denied complainants' allegation as to the payments for the premises by Buck, and averred that the purchase money for the premises had been paid out of Charles F. Brainard's own funds in cash or by his notes secured by deed of trust, which notes were subsequently paid by Brainard.

Upon the trial there was a final decree in favor of the complainants, and the defendants were enjoined from prosecuting

the action at law, and they were directed to convey, quitclaim and release the real estate unto the complainant Buck, and in default of their doing so it was adjudged that the decree then given should operate and stand as such conveyance, quitclaim and release.

Mr. Leo Simmons and *Mr. Hugh T. Taggart* for appellants. *Mr. D. W. Baker* was on their brief.

Mr. E. V. Brookshire for appellees.

Mr. James Coleman filed a brief for Buck, appellee.

Mr. Nelson L. Robinson filed a brief for appellees.

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

The appellants insist that the Supreme Court of the District had no power to authorize the amendment which was made by the appellees to their original bill in this suit, because, as they assert, the cause of action set forth in the amendment is new, different and distinct from that set forth in the original bill, and that therefore the demurrer to the amended bill should have been sustained.

We fully agree with the courts below in holding that the allowance of the amendment was within the discretion of the court, and that the demurrer on the ground stated was properly overruled. The case comes within the principle of *Jones* v. *Van Doren*, 130 U. S. 684, 690. The purpose in both bills was the same, to establish a resulting trust in favor of the complainant Buck on account of the transactions set forth in the bills, and while the reasons are stated more fully in the amended bill and in some respects differently from those in the original bill, yet the purpose is the same, arising from the same transactions and based upon the same general rule of law applicable to resulting trusts.

Upon the merits of the case, the two courts below have come

to the same conclusion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been repeated and affirmed in the Court of Appeals, and we are now asked to review and reverse those findings upon the testimony contained in the record. It ought not to be done in this case. It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous. *The Carib Prince*, 170 U. S. 655, 658, and cases there cited. After examining the evidence in the case, we are not convinced that the findings of the court below were erroneous, but on the contrary it seems to us that they are justified by the evidence.

In regard to the evidence on the part of the complainants given on the trial, defendants assert it to be different from and inconsistent with the statements of fact contained in the amended bill, but a careful perusal of the whole evidence fails to convince us that there exists any such real and material inconsistency, but on the contrary the evidence substantially corroborates and justifies the averments of the amended bill.

The account book of the deceased Brainard was put in evidence, and some criticism has been made by counsel for the defendants in regard to the manner in which the deceased kept his accounts, as evidenced in that book, and some faint claim seems to have been made that the book showed that moneys had been sent by Brainard to Buck instead of the reverse, as claimed by Buck. This criticism arises on account of the position of the words "Dr." and "Cr." with regard to the statement of the account between the two people. However, a perusal of the accounts in the book, taken in connection with the statement of the account between the parties made by Brainard in his lifetime and in his handwriting and given to complainant Buck, shows beyond any controversy that the moneys were advanced by Buck to Brainard and not the reverse. There is really no contradiction of the evidence on the part of the complainants that it was the money of Buck, and his alone, which paid for the property in question.

From the evidence which was taken upon the trial and upon

which the trial court gave judgment in favor of the complainants, the Court of Appeals itself found the facts similar to the averments in the amended bill, and stated them as follows, 16 D. C. App. 595:

"Leffert L. Buck was a civil engineer and a bachelor. His residence was in the city of New York; but his professional engagements called him to different parts of the world. He testified that he went to Peru in 1875, and before leaving sent about $200 to Brainard for investment. He continued to send sums of money from time to time from 1877 to 1880, and during the latter year. Brainard invested from time to time in bonds which he sold for reinvestment.

"Brainard kept an account book, which has been preserved, and the entries therein of money received from Buck correspond with a statement rendered to the latter and produced by him in evidence.

"Buck testified that he suggested the joint purchase of the house and lot in controversy, which Brainard wrote him could be had for $6350. Brainard made the purchase at that price on July 18, 1879, making a cash payment thereon of $2550 with Buck's money, as the account book shows. The remainder was raised by mortgage. The account book, under the same date, shows the charge of the cost of recording the deed, and of insurance against Buck. The deed was made to Brainard.

"Buck testified that early in 1880, he learned that the deed was in the name of Brainard alone, and suggested to the latter to convey to him and he would pay the balance, and Brainard and wife could occupy the house as a home. Brainard was then in bad health. He did not wish to make the transfer then, saying that when he recovered he would be able to go on and pay the balance on the property, and would also be able to pay for Buck's half, and he thought that better than to go to the expense of making two transfers. He said that, in any event, the property would go to his wife with everything that he had in case of his death. He was sick and nervous, and Buck did not press the matter. Brainard died of Bright's disease, and was suffering therefrom at the time, though it was not then known.

"On March 12, 1880, he paid $1266.66 on the mortgage with Buck's money in his hands.

"Some time after that Brainard made a statement in writing of the cost of the property, showing the payments made with Buck's money, and stating therein that he proposed to convey to Buck a half interest in the property, and to give him his note for the excess paid over one half. He expected to be able to pay back to Buck this excess and also to finish paying for the property.

"Buck testified that he did not agree to this, but let matters run on because of Brainard's nervous condition, and because he expected the will of Brainard would vest the legal title in his sister. Brainard died without completing the payment for the property.

"Mrs. Brainard remained in possession, claiming under the will, but conveyed the title to Buck, who paid the last mortgage, amounting to nearly $2000. Mrs. Brainard made her home there until she died on March 31, 1892. Buck was frequently there, and contributed to her support. When she died he leased the property and has since collected the rents, kept the property in repair, and paid all the taxes.

"Without going into further details, it is sufficient to say that the evidence on behalf of Buck, corroborated on all the material points by the entries in the book of Brainard, shows clearly that the purchase of the property was made with his money in the hands of Brainard for investment; and that Brainard was his agent and trustee and not his debtor for money lent for the purpose. From these facts it is clear that a trust resulted in favor of Buck, which entitled him to a conveyance of the legal title. 2 Pom. Eq. sec. 1037."

We think the law in this respect was correctly stated by the court below.

The defendants also rely upon the defence of laches on the part of the complainants, in that they permitted so long a time to elapse after they knew that the title was in the name of Brainard.

We also agree with the court below that this defence is not sustained. When the knowledge came to the complainant

Buck that the title was in Brainard, Buck asked him to transfer it to the complainant, and stated that he (Buck) would pay the balance of the purchase money unpaid on the premises. This Brainard disliked to do, and wanted Buck to wait and see if he (Brainard) could not make payments, and thus keep the house for himself. During this time Brainard was ill, and, as it subsequently appeared, was then suffering from Bright's disease, although he did not then know the cause of his illness, and the complainant says that he acquiesced because he did not wish to worry Brainard, and so the matter ran on for a little while, and was terminated by the sudden death of Brainard without anything having been done.

This did not amount to any settlement, nor did it in any way bar the rights otherwise existing in favor of the complainant Buck. It was a mere hope expressed on the part of Brainard that he might thereafter be able to pay for the house and a passive acquiescence on the part of the complainant that such effort might be made. As is said, nothing was ever in fact done, and no real alteration was ever made in the position of the two parties.

We have then the conditions of the title taken to the property in the name of Brainard, unknown to the complainant at the time, and the money furnished by Buck to Brainard as his agent, and put into the purchase of the house and lot. Subsequently and a short time before the death of Brainard, Buck discovers the fact, and Brainard and his wife are then living on the premises. He knows that Brainard has made a will in favor of his wife, for he has been told by Brainard that upon his death everything was to go to her, and wants his sister to have a home, and is entirely satisfied in that way. He believed that the property would pass to the wife by the will in case of the death of Brainard. After Brainard's death, his widow (complainant's sister) remains in the house, and Buck contributes to her support while living there. She conveys the premises to him by deed, and he supposed that he thereby acquired full title to the premises, and paid the balance of the purchase money. After the death of his sister he takes possession of the property, and has continued in possession ever since, and it

was not until after the commencement of the action of ejectment that the complainant Buck had any knowledge that the legal title to the premises did not pass to his sister under the will of her husband, because it was acquired subsequently to that will. That action of ejectment was commenced in 1897, and this bill was filed April 15, 1898. These facts, we think, are sufficient to excuse all the delay that has been shown to exist in this case. It is covered by the principles laid down in *Ruckman* v. *Cory*, 129 U. S. 387, 389, and *Townsend* v. *Vanderwerker*, 160 U. S. 171, 185, 186.

Upon this subject we fully agree with what was said by Mr. Justice Shepard, in delivering the opinion in this case in the Court of Appeals, as follows:

"Buck entertained affection for and had perfect confidence in Brainard. He was anxious to secure a comfortable home for his sister. Brainard became seriously ill, and his condition was such that Buck would not aggravate it by importunity. Besides, he was assured that Brainard would devise the property to his sister. In fact, Brainard had made, and executed with due formality, a will leaving everything to his wife. This will was then, and until the institution of the action of ejectment, supposed to operate a conveyance of the property in question. Buck, so believing, took a conveyance from his sister, who was childless, and paid off the last encumbrance. He suffered her to occupy the house until her death. In the meantime, none of the heirs-at-law of Brainard made any claim to the property. Their apparent acquiescence tended to confirm Buck, who was in actual possession all of the time, in the belief that his title was perfect. There was nothing, therefore, to suggest the necessity or importance of resorting to a court of equity for the confirmation of that title, until the institution of the action of ejectment. When roused to action, he was diligent in taking it. This long, undisturbed possession, under a title supposed to be perfect, presents a stronger excuse for delay, also, than that held sufficient in *Ruckman* v. *Cory*, *supra*, wherein it was said: 'Nor has the plaintiff been guilty of any such laches as would close the doors of a court of equity against him. He was in the peaceful occupancy of the premises for some years prior to

any assertion of title upon the part of the defendant under the deed of 1872. If he had not been all the time in the possession of the premises, controlling them as if he were the absolute owner, the question of laches might be a more serious one than it is. The bringing of the action of ejectment was, so far as the record shows, the first notice he had of the necessity of legal proceedings for his protection against the legal title held by the defendant. As proceedings to that end were not unreasonably delayed, we do not perceive that laches can be imputed to him. Laches are rather to be imputed to the defendant, who, although claiming to have been the absolute owner of the lands since 1862, took no action against the plaintiff until the ejectment suit was instituted.'"

The last objection made by the appellants consists in an assertion that in no possible view of the evidence, even upon a proper bill, could Buck be properly held to be entitled as a matter of equitable right to more than a decree for an accounting, wherein he should be credited with advances of money made by him to Brainard in the latter's lifetime and invested by the latter in the property, and further credited with the sum paid by him after Brainard's death in the settlement of Brainard's debt to the building association secured by the deed of trust, (thus subrogating him to the rights of the association,) and charged with rents and other proper offsets and with an equitable lien on the property for the balance thus found to be due, if any.

Taking the facts as found by the courts below, this claim is not well founded. The moneys of the complainant Buck were used by his agent Brainard in the purchase of the premises and at the time of the death of the agent the whole purchase price had not been paid. After his death that balance was paid by Buck, who thus paid every dollar that has gone into the purchase price of the premises, and the substance of the whole evidence tends directly to show that while the funds were used by the agent with the assent of his principal, Buck, the taking of the title in Brainard's name was unknown to his principal. Buck's money, and Buck's money alone, has been paid for the whole premises, and there is neither equity nor justice in refus-

ing him the legal title to the property purchased with his own money.

The judgment should be

Affirmed.

CLEVELAND TRUST COMPANY *v.* LANDER.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 88. Argued January 10, 1902.—Decided February 24, 1902.

What the constitution of the State of Ohio requires or what the statutes of that State require as to taxation, must be left in this case to be decided by the Supreme Court of the State, and its decision is not open to review or objection here.

The manner of taxation in this case being legal under the statutes of the United States, its effect cannot be complained of in Federal tribunals.

THIS is a writ of error, to review the judgment of the Supreme Court of the State of Ohio, which sustained the ruling of the Court of Common Pleas of Cuyahoga County, dismissing upon the demurrer of the defendant in error the petition of the plaintiff in error praying for an order and decree restraining the collection of taxes levied upon the shares of the stockholders of plaintiff in error. 62 Ohio, 266.

The plaintiff (plaintiff in error was plaintiff in the court below) is a banking corporation with a capital stock of $500,000, divided into 5000 shares of $100 each, all of which are paid up, and for which certificates are outstanding and owned by a large number of persons, most of whom reside in Ohio.

The plaintiff made in due time return of its resources and liabilities, in accordance with section 2765 of the Revised Statutes of Ohio, to the auditor of the county, together with a full statement of the names and residences of the stockholders of the company, and with the number of shares held by each and the par value thereof, as required by the statute. The return included its real estate and one hundred and seventy-four bonds

of the United States of the denomination of $1000 each, "then and for a long time prior thereto owned by the plaintiff and in which the plaintiff had invested its capital stock." The plaintiff valued these bonds at the sum of $213,274.81, and in its return deducted that sum from the $500,000 par value of paid-in capital stock included among the liabilities of the plaintiff, leaving a balance of $286,725.19.

The county auditor refused to allow the deduction of the government bonds, and fixed the value of the shares of the capital stock at $338,700, exclusive of the assessed value of the real estate. No notice of this action was given plaintiff or its stockholders, nor did plaintiff or its stockholders know until the 11th of November, 1898, that said bonds had been included in fixing the valuation of the shares of the bank.

It is alleged in the petition that it is the custom of banks and banking institutions throughout the State of Ohio to deduct the value of government bonds from the paid-in capital stock returned, "although not so apparent upon the face of their returns to the several county auditors; that said bonds were by the banks and banking associations of this State so deducted in the return for 1897; that similar deductions of the United States government bonds are likewise made by unincorporated banks in the State of Ohio under and by virtue of the Revised Statutes of the State of Ohio, sec. 2759; that the auditor of Cuyahoga County and the county auditors elsewhere throughout the State, as this plaintiff is informed and believes, did not include United States government bonds so owned in fixing the total value for 1898 of the shares of the several incorporated banks of Ohio, as directed by section 2766 of the Revised Statutes of Ohio."

The county auditor entered the valuation of the property of plaintiff, including said government bonds, upon the tax duplicate of the county, and assessed taxes against the same at the rate of .02955 cents on each dollar's valuation of the shares, making an excess of taxation of $4283.71, and that that sum stands against said shareholders upon the tax duplicate in the hands of the defendant, "together with the remaining amount of taxes lawfully assessed against them upon the valuation so fixed by the county auditor."

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The plaintiff tendered the sum which it regarded as legally due, and alleged the grounds upon which it claimed equitable relief.

The error in the judgment of the Supreme Court of the State is assigned as follows:

"First. The court erred in affirming the judgment of the circuit court in sustaining the judgment of the Court of Common Pleas on the demurrer of the defendant to the petition of the plaintiff.

"Second. The court erred in holding and deciding that the Cleveland Trust Company was not entitled, in making its statement to the auditor of Cuyahoga County, Ohio, under section 2765 of the Revised Statutes of Ohio, to deduct, for the purpose of taxation, from its capital and surplus, the amount of the United States government bonds owned by it under and by virtue of section 3701 of the Revised Statutes of the United States, as claimed in the original petition of the plaintiff."

Mr. James Rudolph Garfield for plaintiff in error. *Mr. Harry A. Garfield* and *Mr. Frederic C. Howe* were on his brief.

Mr. P. H. Kaiser for defendant in error. *Mr. O. L. Neff* was on his brief.

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

The argument of the plaintiff in error claims a greater immunity from taxation for the shares of the Trust Company than section 5219 of the Revised Statutes of the United States gives to shares in national banks. That section permits the States to assess and tax the shares of shareholders in national banks, with the limitations only "that the taxation shall not be at any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State;" and that the shares of non-residents "shall be taxed in the city or town where the bank is located, and not elsewhere." The prayer of the petition

is also opposed by decisions of this court. In *Van Allen* v. *The Assessors*, 3 Wall. 573, the provision contained in section 5219 —then a part of the act of Congress of June 3, 1864—came up for consideration. There was a dispute as to the meaning of the statute, and its validity was also assailed. The court asserted a distinction between the property of the bank and corporation as such, and the property of the shareholders as such, and held that the tax authorized by the statute was a tax on the shares, the property of the shareholder, not a tax on the capital of a bank, the property of the corporation. The validity of the statute was sustained, and interpreting it the court said that it authorized the taxation of such shares, and shares were defined to be the whole interest of the holder without diminution on account of the kind of property which constituted the capital stock of the bank. Of the provisions of the act expressing this purpose and the right of the State to tax the court said nothing "could be made plainer or more direct and comprehensive." The case was subsequeutly affirmed. 4 Wall. 244; 4 Wall. 259; 121 U. S. 138.

The plaintiff concedes the distinction between the property of the corporation represented by its capital stock and the property of the shareholders represented by their shares, and bases an argument upon that distinction, and yet excludes from consideration, as immaterial to the questions at issue, the laws of Congress governing the taxation of the shares. The reasoning advanced is that under the laws and constitution of the State of Ohio the property of the trust company "must be and is subject to taxation;" and "that the sections of the statutes of the State of Ohio which provide the method for determining this tax value, so far as they apply to such trust company, simply prescribe a convenient method for arriving at the true value in money of the property of the corporation." And the deduction is made "that, in determining the value of such property for taxation, the trust company is entitled to deduct from its capital and surplus the value of the United States government bonds then owned by it." In other words, the contention is that the tax on the shares being equivalent to a tax on the property of the trust company, there must be deducted from

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the value of the shares that portion of the capital of the company invested in the United States bonds.

The answer to the contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (section 5219) by another (section 3701), between which there is no want of harmony. And what the constitution of the State of Ohio requires, or what the statutes of the State require as to taxation, must be left to be decided by the Supreme Court of the State, and whether that court has decided, logically or illogically, that a tax authorized by the laws of the United States on the shares of the company satisfies the constitution of the State as a tax on the corporation, is not open to our review or objection. The manner of taxation being legal under the statutes of the United States, its effect cannot be complained of in the Federal tribunals. We do not mean to be understood as implying that the plaintiff's view of the constitution of the State, or of the laws of the State, is correct. The inquiry is not necessary. Accepting such view as correct, plaintiff shows no right, under the Constitution or laws of the United States, which has been violated.

Judgment affirmed.

MR. JUSTICE HARLAN did not hear the argument and took no part in the decision.

VOIGT *v.* DETROIT CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 83. Argued December 6, 1901.—Decided February 24, 1902.

The Supreme Court of the State of Michigan having decided that the amount of taxes in a case like the present which may be assessed upon a district, or upon any given parcel of land therein cannot exceed the benefits, on a hearing given him the property owner could have shown

Statement of the Case.

that there was a violation of that rule, if it had been violated, and such violation would have relieved his land from the tax; but he was not entitled to a notice of every step in the proceedings.

THIS is a bill in equity brought by plaintiff in error in the circuit court for Wayne County, Michigan, to restrain the sale of his lands for an assessment levied by the city of Detroit, for the city improvements, on the ground that the law under which the assessment was imposed is repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the assessment, therefore, puts a cloud upon plaintiff's title. A demurrer was filed to the bill by defendants, which was sustained, and the bill dismissed. That action was affirmed by the Supreme Court of the State. 123 Mich. 547. A writ of error was then allowed by the Chief Justice of the State, and the case brought here.

The bill alleged that plaintiff was the owner of certain lots, (describing them,) which were a part of the subdivision of the "Voigt Park Farm," a plat of which had been made and recorded by plaintiff. Upon the plat was designated a street called "Second avenue," and to extend that street proceedings were instituted, which resulted in a verdict opening the same as a public necessity. Damages were awarded for the property taken to the amount of $73,732.68.

The verdict was confirmed by the court, and the judgment of confirmation was transmitted to the common council of the city, and was referred to the committee on street openings. The committee reported, recommending that $49,155.12 of the award be assessed on a local assessment district and the balance be paid by the city. A resolution was then adopted by the common council fixing and determining the assessment district, and including therein the property of plaintiff. The resolution recited "that it is hereby determined that the sum of $49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement which should be paid by the owners," of the property included in said assessment district; and it was further resolved that said amount be assessed and levied upon the several parcels of said property by the board of assessors of the city. It was also alleged that

plaintiff in error "had no notice of the intention of said common council to impose and have assessed upon a local assessment district a part of the damages awarded by the jury in said condemnation proceedings, and no notice to appear before said council or any committee thereof in relation to the matter of determining the limits of such district and the amount to be assessed thereon, and that he was given no opportunity to appear and be heard before said common council or any committee thereof with reference thereto."

An assessment roll was subsequently prepared, "being street assessment roll No. 111," and confirmed by the common council. By the assessment roll the sums assessed against the property of plaintiff aggregated the sum of $9957. The roll was placed in the hands of the defendant, Thomas M. Lucking, receiver of taxes of the city, for collection, and plaintiff notified of the assessment against his property, and payment of the amount assessed was demanded. And it is alleged that the receiver will, unless restrained, advertise and sell plaintiff's property for the amount assessed thereon.

The condemnation proceedings were instituted and conducted under the provisions of section 3406 of the Compiled Laws of the State of Michigan, and it is alleged that those provisions violate the Fourteenth Amendment of the Constitution of the United States, in that they deprive plaintiff of his property without due process of law, for the following reasons:

"I. Because said law does not provide for giving to the property owners interested any notice of the proceedings of the common council for the determination of the limits of the local assessment district, and the amount or proportion of the award of the jury to be assessed thereon, and does not provide for the giving to the property owners interested notice of any hearing by such common council as to the amount of land to be included in such assessment district and as to the amount or proportion of such award to be assessed thereon.

"II. Because said law does not fix the basis upon which or the standard by which the common council are to determine what is the just proportion of the compensation awarded by the jury to be assessed upon the assessment district.

"III. Because the said law does not require that the amount of the award of the jury which the common council may order to be assessed upon such assessment district shall not exceed the total amount of the benefits derived by the lands in said district from the improvement to pay the expense of which such award was made.

* * * * * * * *

"That the proceedings of said common council, hereinbefore set forth, in determining said assessment district and the amount to be assessed upon it are invalid for the reasons aforesaid, and for the further reason that it does not appear by the resolution fixing said district and determining the amount to be assessed thereon upon what basis or standard or by what method the council determined the proportion of the award to be assessed upon said district, or that the amount to be assessed did not exceed the total amount of benefits derived by the property to be assessed from the improvement."

Mr. Hinton E. Spalding for plaintiff in error. *Mr. Hoyt Post* was on his brief.

Mr. Charles D. Joslyn and *Mr. Timothy E. Tarsney* for defendants in error.

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

The proceedings in this case were had under the provisions of an act of the State of Michigan entitled "An act to authorize cities and villages to take private property for the use and benefit of the public, and to repeal act No. 26, Public Acts of 1882." This act is reproduced in the Compiled Laws of Michigan of 1897 as sections 3392 to 3415.

The particular provisions attacked are contained in section 3406 (section 15 of the original act), and are as follows:

"When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal is expired, or, if an appeal is taken, on the filing in the court be-

low of a certified copy of the order of the Supreme Court affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, board of trustees, or board of supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment, if any, of affirmance; and thereupon the proper and necessary proceedings, in due course, shall be taken for the collection of the sum or sums awarded by the jury. If the common council, or board of trustees, or board of supervisors believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city (or) village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive, and *prima facie* evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, vil-

lage or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for non-payment of the amount assessed and levied thereon, the city (or) village or county may become a purchaser at the sale."

Plaintiff in error makes two objections to the law:

"First. That it does not afford to the property owner notice and opportunity of hearing upon the questions of what lands, if any, are specially benefited by the improvement, and therefore to be included in the assessment district, and what is the amount of the special benefit, and therefore the maximum amount to be paid by the district.

"Second. That it does not require the amount imposed upon the district to be limited to the amount of special benefit."

The common council proceeded as required by the ordinance. They determined that a portion of the city was benefited by the improvement, created a district of the property benefited, determined also that $49,155.12 was a just proportion of the compensation awarded by the jury to be assessed upon the property owners of the district created, and directed the board of assessors to make the assessment. The assessment roll was subsequently made out and was ratified and confirmed by the council. The assessment against the property of plaintiff in error was nearly $10,000.

Passing on the ordinance, the Supreme Court said: "No provision is made for a notice to property owners of a time and place of hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon." But the court observed that such notices were not necessary to vindicate the statute from the charge of being unconstitutional, because "the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement, and the proper notice of this hearing was given." And further:

"When the proceeding has reached that stage where it becomes necessary to decide what proportion of the cost of the proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the owner of the land to be heard upon that question.

"There is no claim in the bill of complaint that his property is not benefited by the proposed improvement, in excess of the amount assessed, nor is there any claim that he was not allowed to be heard in relation to the amount which should be assessed against his property, thus avoiding the difficulties found in the cases cited by the counsel for complainant. We do not think it can be said that complainant's property is taken without due process of law. This statute has been construed in *Beecher* v. *Detroit*, 92 Mich. 268, and *Smith et al.* v. *Common Council*, 6 Detroit Legal News, 281, and the action taken by the common council thereunder upheld."

It was urged by plaintiff in error in the Supreme Court of the State, as it is now urged here, that—

"The act is bad because it does not fix any rule or standard by which the council are to determine the just proportion of the award of the jury to be assessed upon the district, nor limit the total assessment of the district to the amount of its benefits.

"The constitutional limit of the amount to be imposed upon the district is the total benefit to the district. The law might therefore permit the council, when, in their judgment, a portion of the city in the vicinity of the improvement is benefited thereby, to determine the amount of such benefit and to require a just proportion of the compensation awarded by the jury, not exceeding the total benefit, to be assessed upon such local district. This act contains no such limitation. The council are empowered, when they believe that a local district is benefited, to assess what in their judgment is a just proportion of the whole award upon the district, without requiring that proportion to be limited by the amount of benefit."

To the contention the Supreme Court of the State replied:

"We do not think this is a fair construction of the language of the statute. Before the council can create the district at all they must believe that a portion of the city in the vicinity of the proposed improvement will be benefited by such improvement, and then provide for an apportionment of the compensation awarded by the jury upon the property deemed to be benefited. 'The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real es-

tate in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement.' We think this language makes it clear that the amount of tax which may be assessed upon the district or upon any given parcel of land cannot exceed the benefit. Provision is then made for the assessment levy and collection of the tax."

The law, then, as we understand the decision of the Supreme Court of the State, provides for the formation of a district in the vicinity of the proposed improvement, the limits of the district to be determined by the benefits derived from that improvement, and further provides that the common council shall determine what proportion of the cost of the improvement ("compensation awarded by the jury") shall be assessed upon the owners of the real estate benefited. The language of the statute is: "The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement."

It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law. And such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. The Supreme Court of the State decided, as we have seen, "that the amount of the taxes which may be assessed upon the district or upon any given parcel of land cannot exceed the benefits." On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be, and the showing will take his land out of the district and relieve it from the tax.

The contentions of plaintiff in error seem to be based on the assumption that a property owner must have notice of every step of the proceedings. Such assumption is untenable. *Wey-*

Statement of the Case.

erhaueser v. *Minnesota*, 176 U. S. 550, and cases cited; *King* v. *City of Portland*, *ante*, 61.

Judgment affirmed.

MR. JUSTICE HARLAN did not hear the argument and took no part in the decision.

UNITED STATES *v.* BARLOW.
BARLOW *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 127, 128. Argued January 23, 1902.—Decided February 24, 1902.

Under the contract with the United States for the construction of a dry dock which is set forth and referred to in the statement of facts and in the opinion of the court, the decision of the engineer in charge of the work upon the quality of the sandstone employed by the constructor was final when properly exercised, but it could not be exercised in advance of the work, and forestall his judgment of stone furnished or about to be used, or the judgment of any other competent officer, or person, or persons who might be designated by the Navy Department.

The Court of Claims did not pass upon the issue raised as to the quality of the stone furnished, but accepted the decision of the engineer as final as matter of law. This court limits the recovery of claimants to the price of stone inspected and approved.

There was nothing in the contract or in the specifications which required the contractors to experiment with the water jet system; their obligation was to drive the piles in the construction of the dock to a sufficient depth, and it is not found that the depth when the Secretary of the Navy interfered was not sufficient.

The measure of damages adopted by the Court of Claims was correct.

THESE are cross appeals. The appellees in No. 127, appellants in No. 128, filed three separate petitions against the United States in the Court of Claims for extra work done and extra materials furnished under a contract with the United States. The petitions were consolidated and tried as one case. On some of the claims the decision was in favor of petitioners and on others in favor of the United States.

Statement of the Case.

The claimants entered into a contract with the United States for the construction of a dry dock at Puget Sound, in the State of Washington. The contract was in writing, and was very full. There are only a few of its provisions in controversy, and those only need be quoted:

"First. The constructors will . . . construct and complete, ready to receive vessels, a dry dock, to be located at the place shown on a plan accompanying this contract, at the naval station, Puget Sound, Washington; and will, at their own risk and expense, furnish and provide all labor, materials, tools, implements and appliances of every description—all of which shall be of the best kind and quality adapted for the work as described in the specifications—necessary or requisite in and about the construction of said dry dock and the caisson, pumping machinery, pumphouse, culverts, and all other accessories and appurtenances, in accordance with the aforesaid plans and specifications, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part; it being further mutually stipulated and agreed that the officer or officers, person or persons, thus designated shall and may, from time to time, during the progress of the work, inspect all material furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with spirit and intent of this contract and with the aforesaid plans and specifications, and to cause any inferior or unsafe work to be taken down, by and at the expense of the contractors; and that all such rejected material shall be at once removed from the station and replaced by material satisfactory to such inspector, and that all such inferior or unsafe work shall be replaced by satisfactory work, by and at the expense of the contractors. Such inspectors shall at all times during the progress of the work have full access thereto, and the contractors shall furnish them with full facilities for the inspection and superintendence of the same."

* * * * * * * *

"Seventh. The construction of the said dry dock and its ac-

cessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed and observed by the contractors, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change or modification in the aforesaid plans and specifications, such change or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractors shall receive, if any: Provided, That whenever the said changes increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be determined by a board of naval officers appointed for the purpose, and the contractors shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation they shall be entitled to receive in consequence of such change or changes: And provided also, That no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part: And provided further, That no change herein provided for shall in any manner affect the validity of this contract.

"Eighth. The aforesaid dry dock and its accessories and the appurtenances and each and every part thereof, shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning and spirit of the contract, plans and specifications, to the satisfaction of the party of the second part.

* * * * * * * *

"Fourteenth. It is expressly understood, covenanted and agreed by and between the parties to the contract, that if any doubts or disputes as to the meaning or requirements of any thing in the contract, or if any discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require, and the parties of the first part hereby bind themselves and their heirs and assigns, and their personal and legal representatives, to abide by his, the said Secretary's, decision in the premises."

The specifications referred to in the contract contain the following provision:

"The ashlar must be of granite or sandstone, of quality approved by the engineer. All stones must be hard, clean and free from seams and imperfections, and of good bed and build. They must be laid true on their natural beds, and without pinning."

The largest item in the contentions of the parties arises on that provision of the specifications.

The court found that a bid based on the use of sandstone was accepted, and that shortly after the inception of the work the claimants tendered to U. S. G. White, civil engineer in charge of the work, a sample of the sandstone which was proposed to be used in the ashlar of the dock, and offered at the

same time to exhibit to him the quarry from which the stone was taken. Early in the spring of 1893 the engineer visited the quarry, satisfied himself by certain inspections (which are detailed in the findings) of the quality of the stone, observed its satisfactory use elsewhere, and made numerous examinations with a glass magnifying six or eight diameters, looking to the detection of any mica or other substances in its composition, and found none, the texture appearing uniform and good under the glass, and he subsequently made a test to determine the percentage of absorption. As a result of this examination he approved the sandstone from the Tenino quarry, and informed the claimants that the same would be accepted for all work under the contract.

On May 4, 1893, the claimants (appellees), relying on the assurance of the engineer, entered into a contract "with the owners of the quarry to furnish them from said quarry all of the sandstone required for the work." By the contract (which is set out in full in the findings) the Tenino Stone Quarry Company covenanted to furnish and deliver "all of the sandstone required for the stone entrance of the United States dry dock, Puget Sound, Washington, according to drawings and schedules of courses, numbers and sizes furnished by the parties of the second part, and which form a part of this contract, for the sum of forty (40) cents per cubic foot, and all of the stone for the boiler and pump house trimmings for the sum of fifty-five (55) cents per cubic foot." And it was covenanted "that the stone shall be Tenino bluestone of good, even, regular texture, of quality approved and acceptable to the civil engineer, United States Navy, in charge of construction." Also that "payments of 90 per cent to be made monthly for all stone delivered the previous month upon acceptance, approval and estimate of the civil engineer, United States Navy, in charge of construction, and as soon as payment is received therefor from the Government by the parties of the second part, and the remaining ten per cent upon completion of the setting of the stonework and upon the approval and acceptance of the stone by the said civil engineer, United States Navy."

Afterwards the claimants entered into a contract with Albert

and Lewis Beaudette, stonecutters, to cut the stone. Subsequently 2377 cubic feet of stone arrived at the site of the dock, which amounted to $1545.05 at 65 cents per foot, and was included in the vouchers rendered by claimants in the month of June, 1893, to which the following certificates, signed by the engineer officially, were annexed:

"Having fully examined the labor and materials above charged, I certify that they are of good quality and in all respects in conformity with the written contract of date October 29, 1892."

"Received the above labor and materials in good order at Puget Sound Naval Station this first day of July, 1893."

The amount rendered by the claimants, which included the said sum $1545.05, was approved by the Commandant, John C. Morong, July 8, 1893. The Navy Department struck out the item for $1545.05 on account of a communication from the Tacoma Trades Council of the State of Washington, complaining of the quality of the stone. A report on the quality of the stone was called for from the Commandant, and the latter in turn called for a report from the engineer in charge. The engineer reported favorably on the quality of the stone, and attached to his report letters from the chief engineer of the Northern Pacific Railroad and others. The Commandant accepted the report as his own, and forwarded it to the Navy Department.

June 14, 1893, the claimants addressed a letter to the Department describing the qualities of the stone, and stated that the protest against it was prompted by a "spirit of boycotting."

On the 21st of August, 1893, the claimants sent a letter to the engineer in charge, including their bill for the sandstone, and reciting the circumstances which led to its selection, and insisted "on immediate payment for said stone and the Bureau's decision as to the remaining stone."

On the 31st day of August, 1893, the Chief of the Bureau of Yards and Docks announced by letter to the Commandant of the Puget Sound Naval Station that the Tenino stone would not be accepted as material for construction, and on the 8th of September, 1893, the engineer in charge notified the claimants of this decision.

Statement of the Case.

Upon being informed of this decision the claimants protested against the requirement, but offered stone from Sucia Island, and also from Dog Fish Point, which was accepted and used in the construction of the dock.

Upon their tendering such stone to the civil engineer in charge, he wrote them under date of March 29, 1894:

"MESSRS. BYRON BARLOW & Co.,

"Charleston, Washington.

"Gentlemen: The receipt of your favor of yesterday is acknowledged, and in reply would say that the stones referred to therein, having been approved by the Bureau, will be accepted by me, subject to inspection under such specifications as I may be furnished with by the Bureau.

"2. The specifications forming a part of your contract being of no effect under existing circumstances, I have asked for such specifications as will doubtless be furnished therewith before any stone will be delivered here.

"Very respectfully, U. S. G. WHITE,

"*Civil Engineer, U. S. Navy, in Charge of Construction.*"

Upon receiving the communication in regard to the quality of the Tenino stone the Navy Department, through the Bureau of Yards and Docks, instituted an examination into the qualities of the stone and its fitness, "with the result that said Navy Department, through the Chief of the Bureau of Yards and Docks, reached the conclusion that said Tenino sandstone was not fit and suitable for the purposes to which it was proposed to use said stone; that said stone did not fulfil the requirements of the contract and specifications as above recited; that it was not a hard stone, nor a clean stone, nor free from imperfections; that its absorbent qualities were too high; that its crushing strength was too low, and that it was in many essential particulars totally unfit and unsuitable and undesirable for the use in the ashlar of this dry dock; and thereupon, to wit, on the 29th day of August, 1894, the contractors were notified of this decision of the Bureau of Yards and Docks, and were required to furnish other and better sandstone. From this decision of the Chief of the Bureau of Yards and Docks the

claimants appealed to the Secretary of the Navy, who concurred in the opinion of the said Chief of the Bureau of Yards and Docks, and concurred in his order requiring a different and better sandstone. The tests and analyses of said Tenino sandstone were made from samples furnished to the Bureau of Yards and Docks by the contractors and by the Commandant of the Puget Sound station. The delay in arriving at the ultimate determination to require a better quality of sandstone, which was reached on the 24th of August, 1894, was partly caused by the fact that the claimants were in correspondence with the Secretary of the Navy in an endeavor to persuade him to accept said Tenino sandstone. The tests and analyses of said stone, as above recited, were made promptly."

And it was found by the court:

"The amount of Tenino sandstone quarried, cut and delivered was 2349 cubic feet, amounting, at 65 cents a cubic foot, to $1526.85.

"The claimants had also, before receiving notice of the rejection of the Tenino sandstone by the Bureau of Yards and Docks, caused to be quarried and cut, but not transported, 7280 cubic feet, amounting, at 65 cents a foot, less the cost of transportation, 10½ cents a foot, 54½ cents a foot, to $3967.60, making a total for stone actually quarried and cut, and part of which was delivered, of $5494.45. That sum, however, has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against the said claimants for said sum of money.

"The total amount expended by the claimants for furnishing, delivering and cutting the stone which actually went into the construction of said dry dock from Sucia Island and Dog Fish Point, as aforesaid, was $33,556.23.

"If they had been allowed to furnish Tenino stone they could have done so at a cost of $17,948.80. The additional cost, therefore, to the claimants of furnishing the stone which they did furnish, over and above what it would have cost them to furnish the Tenino stone, is the difference between the two sums last named, amounting to $15,607.43."

In the execution of the contract claimants made a mistake in

the cutting off of certain piling, which mistake could be corrected in two ways. One of the ways was accepted by the Navy Department and executed by the claimants as required, but claimants were also required to make some additions which "had no relation to the error which had been made in the original construction of the sheet piling, but would have been required irrespectively of any such error having been made. The additional cost to the contractors amounted to $59.30." Finding IX.

It was discovered during the progress of the work that the soil at the bottom of the dock was of a very tenacious and unyielding character, so as to be difficult of penetration for piles driven by the ordinary drop-hammer process, and was so reported by the contractors.

It was stated, on the 15th of February, 1894, that penetration was from 8 to 10 feet, and while the Bureau of Yards and Docks thought this might be satisfactory, yet the Bureau also thought that the piles should be driven, if possible, fifteen feet below the bottom of the excavation. There was no claim made by the contractors at that time that they could not reach a greater depth than theretofore reported. After some correspondence the Bureau telegraphed definite instructions to accept no piles driven to a less depth than fifteen feet. The contractors made no attempt to show that this could not be done, but employed experts to give an opinion, after tests upon the piles driven, that the Bureau was wrong. "In view of these facts, the Secretary of the Navy, on the 21st day of May, 1894, and upon the occasion of a visit to said dock by that official, verbally authorized and directed the contractors to sink the piles by a method known as the water-jet system; that is to say, by forcing water into the ground by means of a sink pipe operated by the hydraulic system, thus forming a hole into which the pile is set. The contractors objected to and protested against this method of driving the piles upon the ground that it destroyed and weakened the bottom of the pit, and subsequently a board of naval experts was convened for the purpose of reporting upon the advisability of sinking the piles by this system. The board reported adversely to this system, and recommended

that the piles be driven in accordance with the provisions of the contract and by the ordinary drop-hammer process, the piles to be driven to a minimum of 6 feet. The remaining 696 piles, which were driven after this report by the drop-hammer process, reached an average depth of 10 feet 4 inches."

The same board of naval experts, under the direction of the Secretary of the Navy, passed upon the expense caused the contractors by the use of the water-jet system, and recommended an allowance of $1156.76. The allowance was approved by the Secretary and a voucher drawn therefor; "but when the same came before the Auditor for the Navy Department for audit and before the Comptroller of the Treasury for payment, it was refused, upon the ground that the services required were not extra and additional, but that they were such as the contract contemplated, and upon the further ground that the Secretary of the Navy, under the specific requirements of section 7 of the original contract, had no power or authority to authorize or direct the incurring of this expense unless the cost of the same was first ascertained by a board of officers provided for that purpose before the expense was incurred, and reduced to writing, as required by the seventh clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, section 1063." Finding XI.

The reasonable value of the work set forth and described in the finding is $1156.76.

The foregoing statement of facts is applicable to the appeal of the United States. The findings applicable to the appeal of claimants (No. 128) are given in the opinion.

Mr. George Hines Gorman for the United States. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. George A. King for Barlow. *Mr. Rufus H. Thayer* was on his brief.

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

The principal claim of appellees and the largest item in the

judgment awarded them grows out of the rejection of the Tenino sandstone. That item was based upon the provision in the specifications which required it to be "of quality approved by the engineer." But that provision, it is contended by the United States, must be read and construed with those covenants of the contract which require (1) that all materials used in the dry dock shall be of the best kind, "subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part," which officer or persons may, "from time to time during the progress of the work, inspect all material furnished, . . . with full power to reject any material, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intention of this contract, and the aforesaid plan and specifications." And the United States also relies upon the covenants contained in the fourteenth subdivision of the contract set out in the statement of facts.

And we think these provisions are harmonious and determine the rights of the parties. We think, indeed, that the engineer in charge of the work was the appointee of the parties, and that his decision upon the quality of sandstone was final when properly exercised, but it could not be exercised in advance of the work and forestall his judgment of stone furnished or about to be used, or the judgment of any "other competent officer or person or persons" who might be designated by the Navy Department. To so hold would destroy the power reserved by the United States to appoint any competent person to inspect the work and material. The engineer was given power to judge, not a type of stone, but particular stones. It was such stones which were to be "hard, clean and free from seams and imperfections, and of good bed and build." Such was the power of the engineer in charge, but who should be the "engineer in charge" depended upon the appointment of the Navy Department; and the power of appointment was reserved to be exercised at any time. A useless right if one appointee could anticipate and control the judgment of his successor.

The influence which these considerations have in the inter-

pretation of the contract is not destroyed by answering that every stone from the Tenino quarry might have satisfied every requirement and have been approved by every and any person designated to inspect the work. This, indeed, might be so; but, on the other hand, not one stone might have passed the test. Besides, claimants are not in a position to urge that consideration. Every stone which might be tendered for inspection was subject to be rejected, but claimants seek to recover as for an acceptance. They rely not upon approval of stones, but upon the approval of the quarry, and they rest the quality of the quarry upon the general inspection of the engineer and certain instances of satisfactory use. In opposition stands the covenants of the contract already mentioned, and the test the Bureau of Yards and Docks made of samples of Tenino stone furnished by claimants. And there is no pretence that the test was unfairly made. It, at least, convinced the Bureau that the Tenino stone was not a hard stone, nor a clean stone, nor free from imperfections.

The Court of Claims did not pass upon the issue raised as to the quality of the stone. It accepted the decision of the engineer as being final as a matter of law. We cannot concur to the full extent of the decision, and must limit, therefore, the recovery of claimants to the price of stone inspected and approved. On this the finding is that "the amount of Tenino sandstone quarried, cut and delivered was 2349 cubic feet, amounting, at 65 cents a cubic foot, to $1526.85."

These views render it unnecessary to consider that provision of the contract which makes the decision of the Chief of the Bureau of Yards and Docks final, only subject to appeal to the Secretary of the Navy, of "any doubts or disputes as to the meaning or requirement of anything" in the contract.

2. The next item of importance is the expense to which the claimants were subjected in experimenting with the water-jet system. The court found that the experiment was ordered by the Secretary of the Navy against the protest of the claimants, and the board of inspectors found that the cost of the experiment to the claimants was $1156.76, and recommended the payment of that sum. This action was approved by the Secre-

tary, and vouchers drawn accordingly. It was refused when it came for audit and payment, because "under the specific requirements of section 7 of the original contract, [he] had no power or authority to authorize or direct the incurring of this expense unless the cost of the same was first ascertained by a board of officers provided for that purpose before the expense was incurred, and reduced to writing, as required by the seventh clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, section 1063."

There was certainly nothing in the contract or in the specifications which required the contractors to experiment with the water-jet system. There was nothing in the contract which required them to experiment with ineffectual or detrimental methods. Their obligation was to drive the piles in the construction of the dock to a sufficient depth, and it is not found that the depth attained, when the Secretary of the Navy interferred, was not sufficient. The Bureau of Yards and Docks conceived a greater depth to be necessary and that it could be attained. Some controversy arose, and there were reports to and correspondence with the Bureau of Yards and Docks, and finally the Bureau "telegraphed definite instructions" "to accept no piles driven to a less depth than 15 feet." In view of the facts the Secretary of the Navy, on the occasion of a visit to the dock, "verbally authorized and directed the contractors to sink the piles" by the water-jet system. The contractors protested and predicted failure. Failure occurred and the system was abandoned upon an adverse opinion of its utility given by a board of naval experts.

It is contended by the United States that the direction of the Secretary of the Navy was a change or modification of the contract within the meaning of the seventh subdivision of the contract, and that the Secretary had no power to direct or consent to such change more than the "humblest laborer employed upon the work," and besides, that no such change could be made except by an agreement in writing.

We have no doubt of the power of the Secretary of the Navy. His power is manifest from the contract and is given by law.

The duties of the bureaus of the Navy Department are performed under the control of the Secretary of the Navy. Their orders are considered as emanating from him and have "full force and effect as such." Section 420, Rev. Stat. And the act of 1891, which provided for the construction of the dry dock, authorized the Secretary of the Navy to have it constructed by contract. He especially stood for the United States in such contract, and was invested with its power, and was charged with the duty of seeing that the dock was adequately constructed.

It is further contended by the Government that the experiment with the water-jet system was a "change or modification" of the contract, and because not agreed to in writing by the parties that the expense incurred by the contractors in making the experiment cannot be recovered.

If both contracting parties were individuals, it would easily be seen that subdivision seven was inserted in the contract for their benefit, to be insisted upon or waived as to them might seem best. What precluded that freedom and useful power to the Government? If not precluded it certainly could have been exercised, and, as we have seen, through the Secretary of the Navy. If the power to insert the provision in the contract or to omit it was given, the power to dispense with it was also given, unless it was necessary to be inserted, and could not be dispensed with, on account of some injunction of the law. Such injunction, as we understand counsel, is claimed by virtue of section 3744 of the Revised Statutes, which requires the Secretary of the Navy to cause all contracts made by his Department to be reduced to writing and signed by the contracting parties with their names at the end thereof. It is certainly disputable if the requirement of the section applies to alterations, which may become necessary in the progress of work regularly conducted under contract. And this court has held that the requirements of the section did not preclude a recovery for property or services "as upon an implied contract for a *quantum meruit*." *Clark* v. *United States*, 95 U. S. 539. But we are not required to decide on this record the question suggested. We do not think that the order of the Secretary of

the Navy directing the experiment with the water-jet system was a "change or modification" of the contract within the sense of subdivision seven. It was an exercise of superintendence and unwarrantable superintendence. The experiment was forced upon the contractors. They were powerless to do anything but protest and yield. The interference with the work of driving the piles by the drop-hammer process was an improper interference, and brings the claim of the contractors within the rule in *Clark's* case, 6 Wall. 546; *Smoot's* case, 15 Wall. 47; the case of the *Amoskeag Company*, and within the ruling of *United States* v. *Smith*, 94 U. S. 214, where the other cases are cited and approved. By denominating the order of the Secretary as an improper interference, we mean in a legal sense. The facts show that he considered the order as a proper exercise of his authority, and beneficial to the United States. Nor did he intend to be oppressive to the contractors. He subsequently recognized their right to reimbursement for the expenses which they had incurred.

The measure of damages adopted by the Court of Claims, we think, was correct. The expense caused to the claimants by the suspension of the regular work was as definite and as directly assignable to the action of the Secretary as the expenditure in the experiment.

There was no error in allowing the sum of $59.30 for the extra work set forth in Finding IX.

The summary of our views upon the appeal of the United States is that the Court of Claims erred in allowing the following claims:

Tenino stone quarried and not delivered.....	$ 3,967 60
Difference in cost between Tenino stone and that which was furnished.....	15,607 43
	$19,575 03

The appeal of the claimants is based on the action of the Court of Claims in denying recovery for the extra work and materials described in Findings VIII and X.

Those findings are as follows:

"VIII. The plans for the foundations of the boilers and boiler house were submitted to the civil engineer in charge of the work and approved by him, and the work was then done on said foundations in accordance with the directions of said engineer. The foundations for the boiler house were completed and accepted by said engineer and included in his monthly estimate and paid for. The foundations for the boilers were made in accordance with the drawings so submitted to said engineer, and were completely laid at about the time the engineer first in charge of said work was detached therefrom. Subsequently another engineer was placed in charge of the work. In his opinion the foundations were imperfect and insecure because of defective construction on the part of the claimants, and he required that they be relaid. The claimants, protesting that it was not competent to require them to change the foundations after they had laid the same to the acceptance of the engineer in charge at the time of the original construction, relaid the same in accordance with the direction of the engineer thus subsequently in charge. The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract. It does not appear that the claimants appealed to the Chief of the Bureau before doing the work, or that it was ordered by him.

"The total additional cost of said work to the claimants was—

For the extra foundations for the boiler house...	$312 12
And for the extra foundations for the boilers....	384 56
Making a total of.....	$696 68"

"X. In refilling the dirt after the altars were in place no part of the filling was rammed or sluiced except the clay puddling. This was in accordance with the instructions of the engineer in charge of the work. The claimants discussed the matter with him, and he informed them that it was not required to be rammed or sluiced. He embraced the work done in that way in his monthly estimates, and the claimants received payment for a large portion of the work done in that way at

the contract rate of 'Filling and grading per cubic yard, 30 cents.' In the latter part of August, 1894, however, there was a change in the office of engineer in charge of the work for the United States. The new engineer then placed in charge required the claimants to ram or sluice all back fillings. The claimants protested, insisting that the contract did not require anything more than depositing the material and evenly grading the surface to correspond with the grade of the station. The new engineer, however, required all the work to be thoroughly sluiced with water, and all but a small part thoroughly rammed, and the claimants did the work in that way under protest.

"The additional cost to the claimants of doing this work, over and above what would have been required had they not been required to ram or sluice the same, would be ten cents a yard, making, for 37,227 yards, $3722.70. The engineer who ordered the work done in the manner stated referred the question of so requiring it, at the request of the claimants, to the Chief of the Bureau of Yards and Docks, and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it."

The claims were rightly disallowed. Some of the observations already made apply to them. The contract is very explicit in that all labor and materials "shall be of the best kind and quality adapted for the work," and subject not only to the approval of the civil engineer at a particular time, but subject to the approval of any engineer subsequently appointed, "with full power to reject any material or work, in whole or in part, which he or they (some other competent officer, or person or persons) may deem unsuitable for the purpose or purposes intended. . . . And to cause any inferior or unsafe work to be taken down by, and at the expense of the contractors, . . . and replaced by material satisfactory to such inspector . . . by and at the expense of the contractors."

In addition to these views we quote from the opinion of the Court of Claims as follows:

"As to the causes of action set forth in Findings VIII and X, the court is of the opinion that the claimants should have

submitted the requirements of the engineer in charge to the Chief of the Bureau before proceeding with the work. They were required to do so by the terms of the contract, and authority to compel them to do additional work was thereby reserved to the Chief of the Bureau."

Judgment is reduced to the sum of $5367.96, and for that amount

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

MR. JUSTICE HARLAN did not hear the argument, and took no part in the decision.

UNITED STATES *v.* EWING.

APPEAL FROM THE COURT OF CLAIMS.

No. 225. Argued November 12, 13, 1901.—Decided February 24, 1902.

Construing the act of March 3, 1883, c. 119, 22 Stat. 487, and the act of June 12, 1866, 14 Stat. 59, both relating to the salaries of postmasters, as their terms require, the judgment of the Court of Claims in this case is erroneous; but the charges of misconduct, maladministration and fraud against the officers of the Post Office Department, so freely scattered through the briefs of counsel for appellee, are entirely unwarranted by anything contained in the record.

THE Government appeals from a judgment of the Court of Claims awarding to the petitioner the sum of $1264.83, upon a readjustment of salary for his services as postmaster at Gadsden, in the State of Alabama, between July 1, 1866, and June 30, 1874. The original petition was filed in October, 1888, in consequence of the passage of the act of March 3, 1883, c. 119, 22 Stat. 487, which reads as follows:

"That the Postmaster General be, and he is hereby, authorized and directed to readjust the salaries of all postmasters and late postmasters of the third, fourth and fifth classes, under the

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classification provided for in the act of July first, eighteen hundred and sixty-four, whose salaries have not heretofore been readjusted under the terms of section eight of the act of June 12th, eighteen hundred and sixty-six, who made sworn returns of receipts and business for readjustment of salary to the Postmaster General, the First Assistant Postmaster General, or the Third Assistant Postmaster General, or who made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was ten per centum less than it would have been upon the basis of commissions under the act of eighteen hundred and fifty-four; such readjustments to be made in accordance with the mode presented in section 8 of the act of June 12th, eighteen hundred and sixty-six, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business, or quarterly returns were made: *Provided*, That every readjustment of salary under this act shall be upon a written application signed by the postmaster or late postmaster or legal representative entitled to said readjustment; and that each payment made shall be by warrant or check on the Treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the post office within whose delivery he resides, and which address shall be set forth in the application above provided for."

The petitioner claimed that by a readjustment of his salary under that act he was entitled to be paid a difference of $1264.83 between the salary actually paid him and the amount to which he was entitled by reason of such act.

By the act of June 22, 1854, 10 Stat. 298, Congress provided for the compensation of postmasters by allowing them commissions on the postage collected at their respective offices in each quarter of the year, and in due proportion for any period less than a quarter. The compensation awarded was as follows:

On any sum not exceeding $100, 60 per centum;

On any sum over and above $100, and not exceeding $400, 50 per centum;

On any sum over and above $400, and not exceeding $2400, 40 per centum;

On all sums over $2400, 15 per centum.

This method of compensation was changed by Congress by the passage of the act of July 1, 1864. 13 Stat. 335. By that act it was provided that the annual compensation of postmasters should be at a fixed salary in lieu of commissions, the postmasters to be divided into five classes, with compensation respectively as follows:

First class to receive not more than $4000, nor less than $3000;

Second class to receive less than $3000, and not less than $2000;

Third class to receive less than $2000, and not less than $1000;

Fourth class to receive less than $1000, and not less than $100;

Fifth class to receive less than $100.

The first section of the act then proceeds as follows:

"Whenever the compensation of postmasters of the several offices, (except the office of New York,) for the two consecutive years next preceding the first day of July, 1864, shall have amounted to an average annual sum not less than $3000, such offices shall be assigned to the first class; whenever it shall have amounted to less than $3000, but not less than $2000, such offices shall be assigned to the second class; whenever it shall have amounted to less than $2000, but not less than $1000, such offices shall be assigned to the third class; whenever it shall have amounted to less than $1000, but not less than $100, such offices shall be assigned to the fourth class; and whenever it shall have amounted to less than $100, such offices shall be assigned to the fifth class. To offices of the first, second and third classes shall be severally assigned salaries, in even hundreds of dollars, as nearly as practicable in amount the same as, but not exceeding, the average compensation of the postmasters thereof for the two years next preceding; and to offices of the fourth class shall be assigned severally salaries, in even tens of dollars, as nearly as practicable in amount the same as, but not exceeding, such average compensation for the two years next preceding; and to offices of the fifth class shall be severally assigned

salaries, in even dollars, as nearly as practicable in amount the same as, but not exceeding, such average compensation for the two years next preceding. Whenever returns showing the average of annual compensation of postmasters for the two years next preceding the first day of July, 1864, shall not have been received at the Post Office Department at the time of adjustment, the same may be estimated by the Postmaster General for the purpose of adjusting the salaries of postmasters herein provided for. And it shall be the duty of the Auditor of the Treasury for the Post Office Department, to obtain from postmasters their quarterly accounts with the vouchers necessary to a correct adjustment thereof, and to report to the Postmaster General all failures of postmasters to render such returns within a proper period after the close of each quarter.

"SEC. 2. *And be it further enacted*, That the Postmaster General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, on the basis of the preceding section, the salary assigned by him to any office; but any change made in such salary shall not take effect until the first day of the quarter next following such order, and all orders made assigning or changing salaries shall be made in writing and recorded in his journal, and notified to the Auditor for the Post Office Department."

Subsequently by section 8 of the act of June 12, 1866, 14 Stat. 59, 60, section 2 of the act of 1864 was amended by adding the following:

"*Provided*, That when the quarterly returns of any postmaster of the third, fourth or the fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of 1854, fixing compensation, then the Postmaster General shall review and readjust under the provisions of said section."

The Court of Claims finds that the petitioner was, as postmaster of Gadsden, Alabama, paid:

"For his services between July 1, 1866, and June 30, 1868, $73 per year, or for two years $146 00

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Amount brought forward,	$ 146 00
For his services between July 1, 1868, and June 30, 1870, at $220 per year, or for two years	440 00
For his services between July 1, 1870, and June 30, 1872, at $460 per year, or for two years	920 00
For his services between July 1, 1870, and June 30, 1874, at $540 per year, or for two years	1080 00
In addition thereto since said service for the two years between July 1, 1868, and June 30, 1870, $45.95 per year, amounting for the two years to	91 90
And for the two years between July 1, 1870, and June 30, 1872, $47.50 per year, amounting for the two years to	95 00
Amounting in all to	$2772 90

"During his first biennial term his adjusted salary was less than $100.

"During his second, third and fourth biennial terms his adjusted salary was more than $100 and less than $1000 per annum.

"III. He made application in writing to the Postmaster General for readjustment and payment of salary (under chapter 119 of the laws of 1883) for service as postmaster, in accordance with chapter 61 of the laws of 1854 and section 8 of chapter 114 of the laws of 1866. This he did prior to January 1, 1887. The Postmaster General thereupon stated plaintiff's account, as shown later in these findings. This statement shows that (if plaintiff be correct in his contention as to the law) his salary for the four biennial terms between July 1, 1866, and June 30, 1874, should have been $4037.73, whereas he has been paid in all for said terms but $2772.90; so (if he be correct) there is still due him as readjusted salary $1264.83."

The court also sets out certain correspondence between its clerk (under its direction) and the Postmaster General in regard

to papers in the Post Office Department, showing or tending to show what action, if any, had been taken by the Department on request of petitioner for readjustment of salary under the act of 1883. It does not clearly appear therefrom that Postmaster General Wanamaker, to whom the clerk addressed his communication, had readjusted the salary, but subsequently to the correspondence the Court of Claims finds, in its fifth finding, that on November 19, 1897, Postmaster General Gary certified and returned to the Court of Claims a readjustment of the petitioner's salary and documents relating to the action of the Post Office Department in this and similar cases, and the court in such fifth finding concludes thus:

"If the foregoing readjustment of Postmaster General Wanamaker is the readjustment prescribed and intended by the statutes therein referred to, there is no balance of salary remaining due the plaintiff. If the readjustment hereinafter set forth of Postmaster General Gary is the readjustment prescribed and intended by the said statutes, there remains due to the plaintiff the sum of $1264.83."

But the court, by its conclusion of law, finds that no legal readjustment of salary was made by Postmaster General Wanamaker, and that the readjustment made by Postmaster General Gary was valid under the statute, and therefore ordered judgment for $1264.83.

Mr. Assistant Attorney General Pradt for the United States.

Mr. Harvey Spalding for Ewing.

MR. JUSTICE PECKHAM, after stating the above facts, delivered the opinion of the court.

The question at issue between the parties is as to the proper construction of the act of Congress approved March 3, 1883, and which is set forth in the foregoing statement of facts. It is contended, on the part of the petitioner, that when application is made to the Postmaster General for a readjustment of salary between the period from 1864 to 1874 it is his duty,

under the statute of 1883, to compare the salary which the petitioner received in each biennial period with what he would have received in commissions on the receipts of his office, as shown by the sworn returns of the receipts and business of such office, under the statute of 1854 during the same term, and if on such comparison it should appear that the salary thus allowed was ten per centum, or more, less than such commissions, then to readjust the salary for the biennial term by allowing the petitioner the difference between the salary and the commission for that particular term. This has been done by the Court of Claims in its judgment in this case.

The Government, on the other hand, contends that to do so would be a plain violation of the statute, which provides that the readjustments shall be made in accordance with the mode prescribed in section 8 of the act of June 12, 1866, and that they shall date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made. In other words, the petitioner claims that upon a comparison of the actual salary paid him in a two-year period, with what he would have received for the same period upon the basis of commissions on the sum of the quarterly returns for that period, if the salary paid him were ten per cent less than the commissions, he was entitled to be paid the difference for that particular biennial term, whereas the Government contends that by virtue of the statute the readjustment is to date from the immediately succeeding quarter.

Going back to the statute of 1854, providing for compensation by commission, we find the act authorized the Postmaster General to allow the commissions to postmasters at the rates named therein and to be based on the postage collected at their respective offices in each quarter of the year. Then came the act of July 1, 1864, providing for payment to postmasters by salary, and classifying them according to the salary received. There were five classes thus made, and they were arranged at the commencement by reference to the compensation paid to the office for the two years next preceding July 1, 1864. The second section of the act provides for a review by the Postmaster General once in two years, and a readjustment of the sal-

aries on the basis of the preceding section, but any change made in the salary, the statute provided, should not take effect until the first of the quarter next following such order. In special cases, upon satisfactory representation, the Postmaster General might also review and readjust the salary assigned to any office as much oftener than once in two years as he might deem expedient.

Prior to this act of 1864 it will be seen that postmasters received their compensation by commission based upon each quarterly return of the amount of sales made at the particular office, but under the act of 1864, instead of compensation by commission, postmasters were to be paid under that act salaries for two years based upon the average amount of the receipts at their offices, as shown by their quarterly returns for the two years preceding the first day of July, 1864, as provided for in the act of June 22, 1854, and this salary was to be reviewed every two years.

Thus at the end of a biennial period the amount of receipts, as shown by the quarterly returns for the past two years, was taken, and upon that amount the salary for the coming two years was fixed, so that, assuming from 1864 to 1866 the amount of the quarterly receipts made a total of $2000, that sum would be fixed upon as the salary for the two years from 1866 to 1868. It was obviously an effort to make the compensation by salary equivalent to the compensation by commissions, and this was the way in which it was to be done. It is equally obvious that a failure to attain this result would frequently occur in the practical operation of the act. The amount of the compensation by salary from 1866 to 1868, for instance, fixed by a resort to the quarterly returns for the two years preceding, would, in rapidly growing communities, fail to reach the amount of compensation which the postmasters would have received had it been fixed by commissions for those years, 1866 to 1868.

The amount of the sales of stamps might have quadrupled in those years over the amount of such sales for the period from 1864 to 1866, and yet, as the compensation for the years from 1866 to 1868 was measured by the sales from 1864 to 1866, there was no relief to be had, and the postmaster in such case

would have received less salary than the amount of the compensation he would have received had he been paid by commissions on sales of stamps as under the act of 1854. Such being the obvious result of the act of 1864, the second section was amended in 1866, which amendment provided that when the salary allowed as fixed, pursuant to the provisions of the act of 1864, proved to be ten per centum less than it would have been on the basis of commissions, under the act of 1854, fixing the compensation, then in that event the Postmaster General was directed to review and readjust the salaries under the provisions of that act. And even then the readjustment would not take effect until the first day of the quarter next following the order for the same, as that is the condition of the act of 1864, which is not altered in that respect by the act of 1866. It has been held that under this statute of 1866 no action could be maintained in the Court of Claims until there had been a readjustment of the salary of the petitioner for the period for which he claimed to recover. *United States* v. *McLean*, 95 U. S. 750.

The quarterly returns mentioned in the act of 1866 do not refer to any one quarterly return during the biennial term. The question arose in *McLean* v. *Vilas*, 124 U. S. 86, when, referring to the amendment of 1866 to the act of 1864, the court, through Mr. Justice Miller, said: "What quarterly returns are here meant, as showing that the salary is ten per cent less than the commissions under the act of 1854? The argument of counsel is, that when one quarterly return shall show this condition of affairs, the Postmaster General, on the request of the postmaster, must make a readjustment, but such is not the language of the statute. The expression used is 'when the quarterly returns' shall show this, and inasmuch as the law had already established that readjustments must be made on the basis of the quarterly returns for two years, it is reasonable to suppose that that was the meaning of Congress in this proviso."

Under such a construction, the readjustment could not be had until eight quarterly returns of the biennial period had been made, so that it would appear therefrom that the salary allowed during that term was at least ten per centum less than

it would have been, if fixed on the basis of commissions under the act of 1854, in which case the Postmaster General was directed to review and readjust salaries under the provisions of said section, but the change was not to take effect until the first day of the quarter next following such order of the Postmaster General. Then comes the act of 1883, which also provides for a case for readjustment of salary where sworn returns of receipts and business have been made, or where quarterly returns, in conformity to the then existing regulations, have been made, showing that the salary allowed was ten per centum less than it would have been upon the basis of commissions under the act of 1854. In such case the Postmaster General was authorized and directed to readjust those salaries in accordance with the mode prescribed in section 8 of the act of June 12, 1866, already referred to.

The sworn quarterly returns referred to in the act of 1883 are those contained in the biennial period, and the act does not refer to one return alone, any more than did the act of 1866. Having stated the circumstances in which a readjustment could be had, the act of 1883 proceeded to state from what period such readjustment should take effect, and it stated that it was "to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made." This language is plain and unambiguous, and the court is bound by its terms. The readjustment cannot take effect in the same term for which the sworn returns were reviewed. It is postponed to the beginning of the next quarter.

It is said that as thus construed the statute leads in many cases to great injustice, and hence such construction should not be adopted. The difficulty is that any other construction violates the clear directions of the law, and although the result may be to withhold its benefits from some who might be regarded as otherwise entitled to it, yet we cannot for that reason alter its terms so as to include them, and thus ourselves enact instead of construing the law.

In *United States* v. *Verdier*, 164 U. S. 213, 219, it was held that the act of 1883 created an indebtedness voluntarily assumed

by the Government in regard to those who claimed under its provisions. It rested entirely with Congress to say who should have its benefits and how the same should be arrived at, and from what date the readjustment should take effect, and as Congress has plainly stated the date there is nothing for the court to do but follow the clear direction of the statute. If Congress had intended to provide for the readjustment taking effect at the commencement of a biennial term subsequent to that in which the quarterly returns were made upon which the compensation was fixed, we are at a loss to think of what language it could use which would more certainly and specifically prove that intention than does the language actually used in this statute.

The method of reviewing and readjusting the salaries of postmasters under the act of 1883 with reference to the acts of 1864 and 1866, pursued by the Post Office Department, by which the readjustments based upon the quarterly returns have been made prospectively for the next biennial term thereafter, was approved by Congress as a correct administration of the act of March 3, 1883, and the readjustments which had been made under that act and in that method by the Department, were ratified as a correct disposition of the claims which had been considered and disposed of, and Congress enacted that in considering all claims not yet readjusted the same method thus approved by it should be pursued, and it directed that any and every different method of readjustment of salaries during the period between 1864 and 1874 should be prohibited. 24 Stat. 256, 307, sec. 8; act approved August 4, 1886. When this act was passed the salary of the petitioner had not been readjusted.

While the declaration of Congress in the act of 1886, approving the construction which had been put upon the act of 1883 by the Post Office Department, and ratifying its method of reviewing and readjusting salaries under that act, could have no binding force upon the courts as to the proper construction of that act in cases of salaries already readjusted, yet its direction, "that in considering all claims not yet readjusted, the same method shall be pursued which is hereby approved; and any and every different method of readjustment of salaries of

such postmasters and late postmasters during the period between July 1, 1864, and July 1, 1874, than is herein approved, is hereby prohibited," is a valid legislative enactment and must be followed by the courts. The readjustment of the salary of petitioner has not been according to this direction.

Construing the acts of 1883 and 1886 as we think their terms require, the judgment of the Court of Claims is erroneous, and must be reversed and the case remanded to that court with instructions to enter a judgment in conformity to the directions of those statutes and the opinion of this court.

We feel called upon to say that the charges of misconduct, maladministration and fraud against the officers of the Post Office Department, so freely scattered through the pages of the briefs of counsel for appellee, are entirely unwarranted by anything contained in the record before us, and ought not to have been made.

Reversed.

MR. JUSTICE MCKENNA did not sit in this case and took no part in its decision.

LAKE BENTON FIRST NATIONAL BANK *v.* WATT.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 103. Submitted January 15, 1902.—Decided February 24, 1902.

The provision in Rev. Stat. § 5198, that "in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of debt, twice the amount of the interest thus paid," on the one hand causes a forfeiture of the entire interest to result from the taking, receiving, reserving or charging a rate greater than is allowed by law, and on the other subjects the creditor to pay twice the amount of the interest illegally exacted if, by persistence in wrongdoing, he subjects the debtor to the necessity of suing to recover.

BY this action, which was commenced in a court of the State of Minnesota, recovery was sought from the First National Bank

of Lake Benton, Minnesota, plaintiff in error here, of twice the amount of the entire interest which it was alleged had been paid to that bank by Watt, plaintiff below, who is the defendant in error on this record. The right to the relief was based on the averment that the bank had, in violation of the law of the United States, received from Watt usurious interest. The cause was tried to a jury and a verdict returned in favor of Watt. From an order denying a motion for a new trial an appeal was taken to the Supreme Court of the State of Minnesota, and that court affirmed the judgment. 76 Minn. 458. Upon the return of the record to the trial court, judgment was entered on the verdict of the jury. Another appeal was then taken and the judgment was affirmed. 79 Minn. 266. The case was then brought to this court by writ of error.

Mr. Frank B. Kellogg and *Mr. C. A. Severance* for plaintiff in error.

Mr. F. L. Janes for defendant in error.

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

The contention of the plaintiff in error is that the state court erroneously condemned it to pay twice the amount of the entire interest which it had collected because it had taken a usurious rate, whilst under the law of the United States, it is insisted, the recovery should have been not twice the amount of the entire interest, but only twice the sum by which the interest received exceeded the lawful rate. To dispose of this contention involves ascertaining the meaning of sections 5197 and 5198 of the Revised Statutes of the United States, which are as follows:

"Sec. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more, except that where by the laws of

any State a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the purchase, discount or sale or a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"SEC. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided, such action is commenced within two years from the time the usurious transaction occurred. (That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases.)"

The argument that the recovery should have been limited to twice the amount by which the usurious interest exceeded the legal rate is predicated on what is assumed to be the correct construction of the second sentence of section 5198 above quoted. The sentence relied on is as follows:

"In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice

the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

It is urged that the statute is penal in its character and must be strictly construed, therefore the sentence relied upon must be interpreted as relating solely to the usurious portion of the interest paid, and not to so much of the rate of interest as was lawful. Although it be conceded that the statute is penal in character, we do not consider, even under the strictest rule of construction, it is possible to give to it the meaning contended for without departing from its unambiguous letter, and thereby frustrating its obvious intent. The first sentence of the section provides that "the taking, receiving, reserving or charging a rate of interest greater than is allowed, . . . when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." This, without the slightest ambiguity, provides for the forfeiture, not of the amount by which the usurious has exceeded the lawful rate, but of the entire interest. When the statute then proceeds, in the very next sentence, to say "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back . . . twice the amount of the interest thus paid," it cannot in reason be held that the words, "the interest thus paid," refer to any other sum than the entire interest as provided in the previous sentence. To hold otherwise would be to decide that the statute forfeited the entire amount of interest whenever a usurious rate had been taken, received, reserved or charged, and yet limited the debtor's right to recover back only to twice the amount of the excess of the usurious over the legal rate. This would be to interpret the law as in one sentence imposing a forfeiture of the entire interest, whilst in the next sentence it rendered such forfeiture, in many cases, absolutely nugatory. That such would be the result becomes apparent when it is considered that whilst it is conceded that in case usurious interest is received the entire amount is forfeited, it is yet argued that in case suit is brought

to recover the forfeited usurious interest, the entire interest received cannot be awarded. The contention otherwise stated is this: The entire interest in the event usurious interest is received is forfeited at the election of the creditor, such election on his part, by which the forfeiture is escaped, being manifested by his insisting on retaining the money taken by him in violation of the statute. This, however, involves not only the conflict pointed out by the considerations just mentioned, but the further contradiction that the greater the violation of the statute the lesser the penalty which it imposes. The disregard of the text and the confusion as to the purpose of the law, which the argument involves, disappears if the statute be harmoniously enforced according to its letter and spirit. By both it is apparent that the statute on the one hand causes a forfeiture of the entire interest to result from the taking, receiving, reserving or charging a rate greater than is allowed by law, and on the other subjects the creditor to pay twice the amount of the entire interest illegally exacted if by persistence in wrongdoing he subjects the debtor to the necessity of suing to recover.

Whilst the question here presented has not been heretofore passed upon by this court, the Circuit Courts of the United States have had occasion frequently to consider it, and have uniformly construed the statute in accordance with its plain import as we have just expounded it. *Nat'l Bank of Madison* v. *Davis*, 8 Biss. 100; *Bank* v. *Moore*, 2 Bond, 174; *Crocker* v. *First Nat'l Bank*, 4 Dill. 358; *Hill* v. *Nat'l Bank of Barre*, 15 Fed. Rep. 433; *Louisville Trust Co.* v. *Kentucky Nat'l Bank*, 87 Fed. Rep. 143, 149; *S. C.*, 102 Fed. Rep. 442. The state courts of last resort have also, as a general rule, upheld the same construction. *Bomer* v. *Traders' National Bank*, 90 Texas, 443, and authorities there cited. True it is that in a few cases some state courts have hesitatingly taken an opposite view; but we think, for the reasons which we have given, the letter of the statute is too plain and its intention too manifest to justify such an interpretation.

Affirmed.

LEAGUE *v.* TEXAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 137. Argued and submitted January 29, 1902.—Decided February 24, 1902.

A State may adopt new remedies for the collection of taxes, and apply those remedies to taxes already delinquent, without any violation of the Federal Constitution.

That in the new remedy in the case at bar, as well as in the change from the old to the new, there was no violation of the constitution of the State of Texas, is settled for this court by the decisions of the highest court of that State.

Whether the title on this case which passed by the sale was conditioned or absolute, the State may waive the rights obtained by such sale and prescribe the terms upon which it will waive them.

A delinquent taxpayer who fails to discharge his obligation to the State, compelling it to go into court to enforce payment of the taxes due on his land, has no ground of complaint because he is charged with the ordinary fees and expenses of a law suit.

The Fourteenth Amendment contains no prohibition of retrospective legislation as such, and therefore, now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution.

On August 6, 1898, the State of Texas filed a petition in the district court of San Augustine County, Texas, averring that the defendant was justly indebted to the State of Texas and the county of San Augustine in the sum of $1305.87, on account of taxes, interest, penalties and costs due on certain described lands for the years 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1894, 1895 and 1896. The prayer was for a recovery of the taxes, interest, etc., and for a decree establishing and enforcing a lien upon the several tracts for the amounts found due upon each. An answer was filed and a trial had, which resulted, on September 9, 1889, in a finding that there was due the State the amount claimed for taxes, etc., a decree that the State recover the amount thereof from the defendant, and adjudging a lien upon the several tracts therefor, and directing a foreclosure and sale. On appeal to the Court of Civil Appeals

the decree was modified by striking out the taxes of 1884, all penalties and the personal judgment against the defendant, leaving the decree to stand as a finding of the amount due for taxes subsequent to the year 1884, interest and costs, and a foreclosure of a lien therefor upon the several tracts. This modification reduced the amount of the recovery to $1232.77, with interest at 6 per cent from September 9, 1899, the date of the decree in the district court. On error to the Supreme Court of the State the decree of the Court of Civil Appeals was affirmed, 93 Texas, 553; whereupon this writ of error was sued out.

Mr. F. Charles Hume for plaintiff in error submitted on his brief.

Mr. D. E. Simmons for defendant in error. *Mr. C. K. Bell* was on his brief.

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

In 1897 the legislature of Texas passed an act for the collection by judicial proceedings of delinquent taxes upon real estate. Texas, General Laws, 1897, c. 103, p. 132. The contention of the defendant, now plaintiff in error, is that prior thereto the collection of taxes was enforced by an administrative sale made by the collector of taxes after January 1 of the succeeding year; that the State's lien for taxes was merged in the estate passed or vested by that sale; that the status of the rights of the State or other purchaser was fixed by the sale and must depend upon the legality of the title acquired under the collector's deeds, and that any right of a purchaser at such sale, whether State or private individual, to revive or continue any lien for taxes must depend upon some statute existing at the time of the sale; and that hence this act of the legislature providing for the collection of delinquent taxes by judicial proceedings was a violation of the constitutional guarantee of due process in so far as it avoided the legal effect of the prior administrative sale and directed a further and judicial sale with the rights attending thereon.

There is no pretence that the taxes levied for these several years were invalid, or that the proceedings up to and including the collector's sale were irregular. On the contrary, the delinquent tax record in evidence, duly certified and filed, which by section 3 of the act is made *prima facie* evidence of the regularity of all prior proceedings and also that the amount of the tax against any real estate is a true and correct charge, showed taxes due as found by the court. It does not appear that the lands were assessed to the defendant or that he was the owner of them at the time of the early assessments. Indeed, he alleges in his answer that he acquired title about the year 1889, but does not allege that this title was from the State. Apparently he had purchased from some individual who claimed title. His argument assumes that the taxes had not been paid and that the lands had been sold by the collector to the State. The case, therefore, presented is one of a party, admitting that valid taxes have been duly levied on his property and have not been paid, who is contesting the manner in which the State shall collect them, and insisting that the only method which it can adopt for such collection is one which has hitherto proved ineffectual.

That a State may adopt new remedies for the collection of taxes and apply those remedies to taxes already delinquent, without any violation of the Federal Constitution, is not a matter of doubt. A delinquent taxpayer has no vested right in an existing mode of collecting taxes. There is no contract between him and the State that the latter will not vary the mode of collection. Indeed, generally speaking, a party has no vested right in a mere matter of remedy; that is subject to legislative change. And a new remedy may be resorted to unless in some of its special provisions a constitutional right of the debtor or obligor is infringed. "There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection." *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 570. That in the new remedy in the case at bar, as well as in the change from the old to the new, there was no violation of the constitution of the State of Texas, is for

us settled by the decisions of its highest court. *West River Bridge Co.* v. *Dix*, 6 How. 507; *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685.

Defendant further contends that interest, expenses and costs are included in the new remedy by judicial proceedings which were not provided for by the prior statutes in reference to collector's sales. The Court of Civil Appeals and the Supreme Court of the State dealt with this question in these ways. The latter, in its opinion, quoted the following averment from the sworn answer of the defendant:

"And for answer in this behalf, defendant denies all and singular the allegations of plaintiff's petition; and further answering, defendant shows that he purchased the lands described in plaintiff's petition and exhibits about the year 1889; that said lands have been sold by the collector of taxes of San Augustine County for 1884 taxes and for the taxes of subsequent years, and they have, in every instance, been bid in by the collector of taxes for the State of Texas, in obedience to the laws of the said State."

Upon this it observed that it had granted the writ of error upon a question of the validity of the charge for interest, and added:

"However, upon the point on which the writ was granted, we will say that the answer of the defendant sets up the sale of the lands for taxes and the purchase of them by the State, insisting that the State is bound by its purchase. No attack is made upon the sale nor upon any of the proceedings leading up to it, and it stands before the court, under the defendant's allegations, as a valid sale by which the title passed to the State. The State having acquired the title, had the power to waive its right, and in order to perfect the claim beyond all dispute, to foreclose its lien on the land as against the then claimant, and in doing so, had the authority to prescribe such terms as it deemed proper and just. The claimant of the lands being a party defendant, could have disclaimed any interest in them and might thus have escaped any cost for proceedings had after such disclaimer. The defendant chose not to pursue

this course, and he has no cause of complaint as the case stands before this court, because, by his own showing, he had no title to be affected by it, and depended solely upon the grace of the State for whatever he might get out of the lands."

The Court of Appeals said:

"The lands were forfeited to the State by the sale for the taxes of 1884, the forfeiture to become absolute in two years. The offer of the State is to waive this forfeiture and restore the land to the owner if he will only pay the taxes accruing since then and six per cent interest thereon, together with the costs which had been incurred in making the sale, and in making up the delinquent lists, and of the suit. The State has waived its right of forfeiture on condition that the taxes, with interest and costs, shall be enforced against the land. This it might do."

Whichever be the true view of the effect of the answer, (and, of course, so far as the two courts differ, we must accept the view expressed by the highest court of the State as controlling,) the same result will follow. Whether the title which passed by the sale was conditional or absolute, the State may waive the rights obtained by such sale and prescribe the terms upon which it will waive them. In the one view it waives the right to a forfeiture; in the other, the title acquired by the sale; and in either case the State may fix the conditions of its waiver.

The costs referred to are simply the ordinary expenses which attend proceedings of the character prescribed, to wit, compensation to the collector for preparing the delinquent list and certifying it to the commissioners; to the county attorney for conducting the suit; to the sheriff for selling the land, and to the district clerk for making the court records. There is no pretence that any separate charge is exorbitant or unreasonable. And if the State is compelled to resort to such proceedings for the collection of its taxes it may provide reasonable compensation for the officials charged with any duty in connection therewith, and incorporate the charges therefor as costs in the case. Liability for these costs and expenses can be avoided by payment of taxes, and a delinquent taxpayer, one who fails to discharge his obligations to the State, compelling it to go into court to enforce payment of the taxes due upon his land,

has no ground of complaint because he is charged with the ordinary fees and expenses of a law suit.

While the matter of interest stands upon a little different basis, yet, so far as the Federal Constitution is concerned, there is nothing to prevent its collection. The statute may be retroactive, but a statute of a State is not brought into conflict with the Federal Constitution by the mere fact that it is retroactive in its operation. In *Baltimore & Susquehanna Railroad Co.* v. *Nesbit*, 10 How. 395, 401, it was said:

"That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the States by the Federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. Thus, in the case of *Watson et al.* v. *Mercer*, 8 Pet. 110, the court say: 'It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws. Now, it has been solemnly settled by this court that the phrase *ex post facto* is not applicable to civil laws, but to penal and criminal laws.' For this position is cited the case of *Calder* v. *Bull*, already mentioned; of *Fletcher* v. *Peck*, 6 Cranch, 138; *Ogden* v. *Saunders*, 12 Wheat. 266, and *Satterlee* v. *Matthewson*, 2 Pet. 380."

This decision, it is true, was before the Fourteenth Amendment, and the restrictions placed by that amendment upon state action apply to retrospective as well as prospective legislation. But it contains no prohibition of retrospective legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution.

As the State may, in the first instance, enact that taxes shall bear interest from the time they become due, so, without con-

flicting with any provision of the Federal Constitution, it may in like manner provide that taxes which have become delinquent shall bear interest from the time the delinquency commenced. This is adding no novel or extraordinary penalty, for interest is the ordinary incident to the non-payment of obligations.

We see nothing else in the record calling for notice, and, finding no error, the judgment of the Supreme Court of Texas is

Affirmed.

HATFIELD *v.* KING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 221. Submitted November 11, 1901.—Decided February 24, 1902.

It is contended by appellants that the decree in the Circuit Court against them ought to be set aside because they have not had the hearing in that court to which they were entitled by law; that they were not served with process; that counsel unauthorized by them entered their appearance, and after having wrongfully entered their appearance failed to take the proper steps for the protection of their rights. It is also contended by other parties than the appellants, that there was no real controversy between the parties nominally opposed to each other, and that the litigation was in fact carried on under the direction and control of the plaintiff. *Held*, that questions of this kind may be examined, upon motion supported by affidavits, and that it is the duty of a court to make such inquiry.

Before any proceedings could rightfully be taken against the defendants, it was essential that they be brought into court by service of process, or that a lawful appearance be made in their behalf; and, in this case, it is quite clear that the counsel was not authorized to appear for Mrs. Browning.

It is fitting that this investigation should be had, in the first place, in the court where the wrong is charged to have been done, and before the judge who, if the charges are correct, has been imposed upon by counsel; and it may be wise that both examination and cross-examination be had in his presence.

On October 8, 1898, the appellee commenced this suit in the Circuit Court of the United States for the District of West

Statement of the Case.

Virginia to quiet his title to certain lands. In the bill he alleged that he was the owner in fee and in the actual possession of a large tract, known as the "Robert Morris 500,000 Acre Grant," which was granted by Virginia in 1795 to Robert Morris, of Philadelphia, and is situated partly in West Virginia, and partly in Kentucky and Virginia. He followed this general allegation with a detailed statement of his chain of title and of certain tax proceedings. After these averments, tending to show his own rights and title, he charged that Aly and Joseph Hatfield, father and son, had at different times obtained pretended titles to certain small tracts within the limits of his grant, stating how these titles were obtained and wherein he claimed they were invalid. He further averred that both the Hatfields were dead; that their only heirs were the two defendants, now appellants, the widow and daughter of Joseph Hatfield, who wrongfully claimed the tracts last mentioned and thereby cast a cloud upon the plaintiff's title. No process was issued, but on June 8, 1899, a demurrer was filed on behalf of the defendants, signed by one appearing as their attorney. This demurrer was overruled on May 16, 1900, and leave given to file answer. Thereupon, as the record states, the defendants declined to answer but elected to stand upon their demurrer, and on June 2, 1900, a decree was entered in favor of plaintiff, quieting his title to the lands claimed by the defendants. From this decree an appeal was prayed and allowed to this court, and the appeal papers were filed here on January 3, 1901.

The bill was so framed as to invite a consideration, in some aspects, of the question of forfeiture for non-payment of taxes, presented to this court in *King* v. *Mullins*, 171 U. S. 404.

At the beginning of this term one of the appellants, Nancy C. Browning, (erroneously, as she states, called Nancy C. Rutherford in the record,) moved for a rule against the attorney who had appeared for her, to show by what authority he had assumed to so appear and why he should not be attached and his name stricken from the roll of attorneys for falsely assuming to act as her attorney and imposing upon the circuit and this court a false, fictitious and manufactured case for the purpose of obtaining an opinion and judgment on a false statement

of facts, to her injury and the injury of others similarly situated but not parties to the suit or appeal. She also asked that the alleged final decree of the Circuit Court be declared null and void, and that this appeal and the cause be dismissed. At the same time other parties, claiming to be interested in the Robert Morris tract, appeared and represented that the entire proceedings had in this case were feigned and fictitious; that the litigation on both sides was controlled by the counsel for the plaintiff King, and asked an examination as to the truth of the charge so made. A substantially similar motion was made on behalf of the State of West Virginia. The counsel named in the record have answered, denying these charges and asserting the fullest integrity in the matter. Quite a number of affidavits have been filed and also some documentary evidence presented.

Mr. Holmes Conrad and *Mr. Edward C. Lyon* on behalf of interested parties, petitioners to dismiss the appeal.

Mr. Maynard F. Stiles opposing.

Mr. W. P. Hubbard, *Mr. C. W. Campbell* and *Mr. John H. Holt* filed a brief on behalf of intervenors.

Mr. Stuart Wood filed a brief on behalf of the State of West Virginia.

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

It is contended by the appellants that the decree in the Circuit Court against them ought to be set aside because they have not had the hearing in that court to which they were entitled by law; that they were not served with process; that counsel unauthorized by them entered their appearance, and after having wrongfully entered their appearance failed to take the proper steps for the protection of their rights.

It is also contended (though by other parties than the appellants) that there was no real controversy between the parties

nominally opposed to each other, and that the litigation was in fact carried on under the direction and control of the plaintiff. It is well settled that questions of this kind may be examined, upon motion, supported by affidavits, and that it is the duty of a court to make such inquiry, in order that it may not be imposed on by an apparent controversy to which there are really no adverse parties. *Shelton* v. *Tiffin*, 6 How. 163, 186; *Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 1 Black, 419, 426; *Wood Paper Company* v. *Heft*, 8 Wall. 333; *Tennessee &c. Rd. Co.* v. *Southern Tel. Co.*, 125 U. S. 695; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *California* v. *San Pablo &c. Railroad*, 149 U. S. 308.

In *Cleveland* v. *Chamberlain*, it was said, quoting from *Lord* v. *Veazie:* "Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court."

In *Shelton* v. *Tiffin*, the question was as to the validity of a judicial sale, and it appeared that one of the defendants in the proceedings had not been served with process; that an attorney had entered an appearance for him but had done so inadvertently and without authority, and it was said: "An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property."

If it be true, as claimed by some of the moving parties, that this is a collusive suit, that there is no real controversy between the plaintiff and defendants, that the plaintiff has been controlling the litigation on both sides with a view of obtaining an opinion on a matter of law in which he is interested, the transaction is one which, as stated, courts of justice have always

reprehended, and should be treated as a punishable contempt, and no decree entered under those circumstances should be permitted to stand.

So far as respects permitting the decree to stand, the same result would follow even though there were no collusion, if the appearance of counsel was, in fact, not authorized or ratified by the defendants; and to that matter alone shall we direct our attention.

Before any proceedings could rightfully be taken against the defendants it was essential that either they be brought into court by service of process or that a lawful appearance be made in their behalf. Confessedly they were not served with process, and they now deny the right of counsel to have entered an appearance for them. The evidence upon this, as well as kindred questions, is principally in *ex parte* affidavits. The appellants were respectively the widow and daughter of Joseph Hatfield, and claimed title to the various tracts by inheritance from him. It appears that in 1895 an action of ejectment was brought by King against several parties, these appellants among the number. Mrs. Hatfield was led to employ in that case the same counsel who entered her appearance in this. We do not stop to inquire into the circumstances which it is alleged attended that employment. She swears that it was simply for that action and a suit ancillary thereto brought to enjoin the cutting of timber; that she never employed him in any other matter, and knew nothing of the pendency of this suit until after the decree against her and the appeal to this court. She also swears that she never attempted to act for her daughter in preparing for the defence of any suit or action, or in making any arrangements for her. Mrs. Browning testifies that at the time of the ejectment suit she was the widow of John Rutherford; that on December 25, 1895, she married her present husband, Albert Browning; that she had no notice or knowledge of the present suit, and never directly or indirectly employed or authorized any one to appear for her therein, or in any other controversy or matter pertaining to said lands; and further, never authorized any person to employ said counsel or any other attorney to appear and represent her in this suit.

On the other hand, the counsel's affidavit is that he was employed by Mrs. Hatfield in the prior action, and supposed he was authorized by the scope of that employment to appear for her in this suit; that he had the title papers of both the appellants in his possession and had no suggestion of any revocation of his authority. He introduced a copy of a letter from Mrs. Hatfield, which supported his claim of employment, at least in the ejectment case. While he testifies to having met and conversed with Mrs. Hatfield, he does not state that he ever met Mrs. Browning or had any conversation or correspondence with her, although he does state in a general way that she sanctioned and ratified the action of her mother in employing him.

We do not deem it necessary to mention all the matters of evidence, but it seems to us quite clear that, whatever may have been his understanding of the matter, the counsel was not authorized to appear for Mrs. Browning. She had in fact never employed him in any litigation in respect to these lands or otherwise, nor had she authorized any one to employ him, and she had no notice of the pendency of this suit. As to Mrs. Hatfield, while she did at one time employ him in other litigation, she knew nothing of the pendency of this suit until after the decree and the appeal, and if the employment in the ejectment action was sufficiently broad to cover all future litigation of any kind in respect to the land, it would seem to have been so only in consequence of a contract which she says was made, and which, if made, would stamp the whole transaction with wrong.

We do not stop to inquire whether the course pursued by counsel was under the circumstances the best that could have been taken for the protection of the appellants' rights. They were entitled to notice of the pendency of the suit, to select such counsel as they chose and to be guided by his advice and judgment, even though that advice and judgment should prove to be erroneous.

We have refrained from spreading upon our records a detailed statement of the charges and countercharges made in the various motions and affidavits that have been filed, and have only referred to so much as seemed necessary for the

present disposition of the case. But our reticence in this respect must not be taken as expressive of a purpose to ignore them. The charges are serious ones, affecting the integrity of counsel, commended, by the fact of admission to the bar of the Circuit Court, to the confidence of the community. They involve the due administration of justice in that court and cannot be passed without notice and action. It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach be kept clean. We refrain from extended comment because, as heretofore stated, the testimony is mainly by *ex parte* affidavits, which are often, this case being no exception, quite unsatisfactory, and it is only through the sifting process of cross-examination that the real facts can be disclosed. When the truth is ascertained, if there be wrongs as charged, the language of judicial condemnation should be clear and emphatic, and a punishment inflicted such as the wrongs deserve; and if no wrong has been done the conduct of counsel will be cleared from suspicion. It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence.

The order, therefore, is that this case be remanded to the Circuit Court, with instructions to set aside the decree as well as the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require.

It is so ordered.

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

LYKINS *v.* McGRATH.

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

No. 90. Argued and submitted January 13, 1902.—Decided February 24, 1902.

It having been settled by *Lomax* v. *Pickering*, 173 U. S. 26, that when the consent of the Secretary of the Interior is necessary to give effect to a deed of public land, that approval may be retroactive, and take effect by way of relation as of the date of the deed, and it appearing from the fact of the approval by the Secretary in this case that the Indian grantor received full payment for his land, and was in no manner imposed upon in the conveyance, and as the plaintiffs have no equitable rights superior to those of the grantee in that deed: *Held*, that the title conveyed by the deed must be upheld.

UNDER and by virtue of the provisions of a treaty between the United States of America and the Kas-kas-kia, Peoria and other confederated tribes of Indians, concluded on the 30th day of May, 1854, proclaimed August 10, 1854, 10 Stat. 1083, and an act of Congress approved March 3, 1859, 11 Stat. 431, the southeast quarter of section No. fifteen (15), in township No. seventeen (17), south of range No. twenty-three (23) east, in the Territory, now State, of Kansas, and other lands, were on November 1, 1859, conveyed by the United States of America, by letters patent to Ma-cha-co-me-yah, or David Lykins, a member of the said Peoria tribe of Indians, being "Peoria Reserve No. 14." The patent contained the following provision: "That said tracts shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior, for the time being." On June 3, 1864, the patentee, David Lykins, conveyed the land to one Baptiste Peoria, by deed of that date, which deed was on March 10, 1865, presented to the Secretary of the Interior, and by him approved. Intermediate the making of the deed and the approval of the Secretary of the Interior, to wit, on August 14, 1864, the patentee died, leaving the two plaintiffs in error (plaintiffs below) as his sole

heirs. This action in ejectment was commenced by them on March 18, 1899, in the Circuit Court of the United States for the District of Kansas against the defendant, in possession and claiming title under the deed to Baptiste Peoria. A demurrer to an amended petition was sustained, and judgment entered in favor of the defendant, whereupon this writ of error was sued out.

Mr. William M. Springer for plaintiffs in error.

Mr. W. C. Perry, *Mr. Daniel B. Holmes* and *Mr. Frank M. Sheridan* submitted on their brief.

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

It is contended by the plaintiffs that the deed from David Lykins, not having been approved before his death, became thereby an absolute nullity; that title immediately vested in them, free from any claim of the grantee in the deed; that they never asked for the approval of the Secretary of the Interior; never consented that it should be given; never in any way ratified or assented to the deed of their ancestor, and that the Secretary was without any authority after the death of the patentee to approve the latter's deed.

The eleventh section of the act of 1859, superseding in this respect the treaty of 1854, contained a general provision in reference to restricted patents to Indians in Kansas, that the Secretary of the Interior should cause them to be issued "upon such conditions and limitations, and under such guards or restrictions as may be prescribed by said Secretary," and in pursuance of this section the restriction referred to was placed in this patent. That the consent of the Secretary was effective, though given after the execution of the deed, was determined in *Pickering* v. *Lomax*, 145 U. S. 310. In that case the patent to the Indian contained a stipulation, authorized by treaty, that the land should not be conveyed "to any person whatever, without the permission of the President of the United States." A

deed was made by the Indian holder of the title on August 3, 1858, which was approved by the President on January 21, 1871, nearly thirteen years thereafter, and it was held that the approval related back to the time of the execution of the deed, and made it valid as of that date. In other words, the antecedent approval of the President was not a condition of the validity of the deed. It was enough that he approved what had been done. It is true that it does not appear that the Indian grantor had died intermediate the making of the deed and the approval of the President, (and in this respect that case differs from the present,) but the grantee from the Indian had died during such interval, and only by way of relation could the action of the President be considered as making effective an otherwise void deed to a dead man. That case came before this court a second time, *Lomax* v. *Pickering*, 173 U. S. 26, 27, and in the opinion then filed the scope of the prior decision was thus stated: "The case was reversed by this court upon the ground that the approval subsequently given by the President to the conveyance was retroactive, and was equivalent to permission before execution and delivery."

It must, therefore, be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance.

But the applicability of the doctrine of relation is denied on the ground that the interests of new parties, to wit, the plaintiffs, have sprung into being intermediate the execution of the conveyance and the approval of the Secretary. But one of the purposes of the doctrine of relation is to cut off such interests, and to prevent a just and equitable title from being interrupted by claims which have no foundation in equity. The doctrine of relation may be only a legal fiction, but it is resorted to with the view of accomplishing justice. What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same as any holder of a fee simple title. The restriction was placed upon

his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein. When the Secretary approved the conveyance it was a determination that the purposes for which the restriction was imposed had been fully satisfied; that the consideration was ample; that the Indian grantor had received it, and that there were no unreasonable stipulations attending the transaction. All this being accomplished, justice requires that the conveyance should be upheld, and to that end the doctrine of relation attaches the approval to the conveyance and makes it operative as of the date of the latter.

Counsel for plaintiffs in error would liken this deed to a power of attorney—a mere authority to convey, which loses its vitality at the death of the grantor of the power. It seems to us more like a deed fully executed and placed in escrow, to be finally delivered on the performance of a condition. While ordinarily in case of an escrow title passes at the date of the second delivery, yet often, for the prevention of injustice, the deed will relate back to the first delivery so as to pass title at that time. "If the grantor being a feme sole should marry, or whether a feme sole or not should die or be attainted after the first and before the second delivery, and so become incapable of making a deed at the time of second delivery, the deed will be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity." *Prutsman* v. *Baker*, 30 Wis. 644, 649; *Vorheis* v. *Kitch*, 8 Phila. 554; *Harkreader* v. *Clayton*, 56 Miss. 383; *Black* v. *Hoyt*, 33 Ohio St. 203.

The plaintiffs have no equities superior to those of the purchaser. They are the heirs of the Indian grantor, and as such may rightfully claim to inherit and be secured in the possession of all that property to which he had at his death the full equitable title; but when, as is shown by the approval of the Secretary, he had received full payment of a stipulated price and that

price was ample, and he had been subjected to no imposition or wrong in making the conveyance, then their claims as heirs cannot be compared in equity with those of the one who had thus bought and paid full value. They certainly do not stand in the attitude of *bona fide* purchasers. "A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term '*bona fide* purchaser.' To enable the grantee to claim protection as a *bona fide* purchaser he must have parted with something possessing an actual value, capable of being estimated in money, or he must on the faith of the purchase have changed, to his detriment, some legal position that he before had occupied." Devlin on Deeds, sec. 813.

As, therefore, it has been settled by *Lomax* v. *Pickering*, *supra*, that approval by the Secretary may be retroactive and take effect by way of relation as of the date of the deed, and as it appears from the fact of the approval by the Secretary that the Indian grantor received full payment for his land and was in no manner imposed upon in the conveyance, and as these plaintiffs have no equitable rights superior to those of the grantee in that deed, it follows that the title conveyed by it must be upheld. The judgment of the Circuit Court is,

Affirmed.

MARANDE *v.* TEXAS & PACIFIC RAILWAY COMPANY.

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

No. 86. Argued January 8, 9, 1902.—Decided February 24, 1902.

This was an action to recover from the railway company the value of plaintiffs' cotton destroyed by fire while in the company's cars on its tracks near its terminal wharf. On the facts, *Held*: 1. That the obvious danger resulting from the use of locomotives about so easily ignitible a material as cotton was clear and the jury would have been reasonably justified in drawing the inference that it had caused the fire; 2. That the proof

Statement of the Case.

showed negligence in the care of the property; 3. That the jury would have had reasonable ground to infer negligence from the inadequacy of the fire apparatus, and from the want of instructions as to its use, or competent men to handle it.

THIS action was commenced to recover from the Texas and Pacific Railway Company the value of sixty-five bales of cotton destroyed by fire on the night of the 12th of November, 1894, whilst the cotton was in the cars of the railway company standing on its tracks in the rear of or in close proximity to a terminal wharf of the corporation situated opposite the upper portion of the city of New Orleans, on the west bank of the Mississippi River, at a point called Westwego. The cotton formed part of one hundred bales shipped from Greenville, Texas, on the 29th of October, 1894. An export bill of lading was given by the Sherman, Shreveport and Southern Railway Company, that company purporting to act not only on its own but also on behalf of the Texas and Pacific Railway, and of the Elder, Dempster & Co. steamship lines. The bill of lading provided for the carriage of the cotton from the point of shipment "to the port of New Orleans," and thence by the steamship line to Havre, France, and contained numerous conditions and exceptions, one of which exempted the carrier from all loss occasioned by fire. Responsibility of the railway company for the value of the cotton destroyed by fire, although at the time of its destruction it was in the possession of the railway under the bill of lading, was based on the assumption, first, that the fire was due to the negligence of the corporation; and, second, that the carriage of the cotton to the terminal wharf at Westwego, for transhipment there to the steamship line, was a deviation, and hence the railway company was not entitled to avail itself of the exception against loss by fire.

Upon issue joined, a trial was had in the Circuit Court. After the plaintiffs had introduced their testimony and rested their case, the defendant requested the court to take the case from the jury by giving a peremptory instruction in its favor. This was asked on the ground that there was no proof sufficient to go to the jury either as to the alleged negligence or the asserted deviation. The court granted the request, and exceptions were

duly saved by the plaintiffs. From the judgment entered on the verdict the plaintiffs prosecuted error to the Circuit Court of Appeals for the Second Circuit, and in that court the judgment was affirmed.

The case being one depending not solely on diverse citizenship, the defendant corporation being chartered by an act of Congress, the plaintiffs prosecuted error to this court.

Mr. Treadwell Cleveland for plaintiffs in error. *Mr. Frederick E. Mygatt* and *Mr. George Richards* were on his brief.

Mr. Rush Taggart for defendant in error. *Mr. Arthur H. Masten* was on his brief.

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

Questions involving the liability of the defendant for damage occasioned by the loss of other cotton by the fire which destroyed the cotton, the value of which is now sought to be recovered, have been previously decided by this court. *Texas & Pacific Railway Co.* v. *Clayton*, 173 U. S. 348; *Same* v. *Reiss et al.*, 183 U. S. 621; and *Same* v. *Callender*, 183 U. S. 632. Whilst in deciding these cases it was essential to refer to and in some respects consider the course of business at the terminal wharf at Westwego, the controversy which here arises for decision involves different considerations, and causes it to be necessary to more fully refer to the establishment of the wharf at Westwego and the course of business at that place prior to and at the time the fire occurred.

In the Circuit Court of Appeals there were a number of assignments of error; now, however, only four of such assignments are pressed: the first, the twelfth, the thirteenth and the fourteenth. As the first of these only complains generally that the Circuit Court of Appeals erred in affirming the judgment, and the fourteenth is a mere reiteration of the first, the only assignments which we are called upon to consider are the twelfth and the thirteenth. The one asserts that the case should have been allowed to go to the jury on the issue of de-

viation, the other that error was moreover committed in not permitting the plaintiff to go the jury on the general question of the loss of the cotton by the negligence of the defendant railway.

In order to pass upon the issues arising on these assignments, the evidence must be considered. In taking it into view, however, we shall do so only to the extent necessary to enable us to decide the question of law which arises, that is, was the evidence sufficient on the subject of negligence and deviation to go to the jury?

Approaching the city of New Orleans, on the opposite or right descending bank of the Mississippi River, the track of the Texas and Pacific Railroad terminated prior to 1873 at a point called Gouldsboro. There the company had a railway yard, roundhouse, and other structures. It there also had a terminal wharf with an incline, by means of which its cars could be transferred directly across the river by boat to a depot and yard belonging to the company situated at the foot of Thalia street, at about the center of the river front of the city of New Orleans. At the Thalia street depot freight for New Orleans was delivered, and that intended for further transit by way of export or otherwise was also delivered in carload lots over connecting tracks, or, where this could not be done, was hauled and delivered at the expense of the railway to the steamship or other carrier. Prior to 1873 the proof tended to show, at a point some six or eight miles above Gouldsboro, a spur track left the main track of the Texas and Pacific road, and extended for about half a mile in length to Westwego on the bank of the river. Before 1873, however, the proof showed that none of the inbound traffic was carried on at Westwego, though at that point probably some outbound freight, intended for the purposes of the railroad, may have been received at Westwego. Some time in 1873 the company constructed a grain elevator at Westwego, and built a terminal wharf at the same point. The proof gives no description of the elevator wharf, except that it was below the freight wharf and connected with it, but the freight wharf is fully described, there being no material variation in the testimony on the subject.

Opinion of the Court.

The wharf was built on the bank of the river. It was constructed on piles and stood above the water, the piling having placed on it beams and joists upon which planks were nailed, constituting a flooring which had very narrow spaces between the planks, as they were not tongued and grooved. The wharf was about 800 feet, stretching up and down the river front, and was somewhere between 350 to 400 feet in depth, that is, running back from the river front to where it rested against the bank. On this wharf were constructed two freight sheds, the one designated as No. 1 began some short distance above the lower end of the wharf, and extended up for a length of between 250 to 300 feet. At a short distance, above the upper end of this shed, the flooring on the wharf ceased, and there was an open space about 50 feet, extending up the wharf, and which was near about the width of the shed; in this place the piling had been driven and the joists and beams placed, but no flooring was laid. Beyond this open space there was built shed known as No. 2, of the same dimensions as the lower one. Both of these sheds were wooden structures raised on posts placed in the wharf, entirely open at each end and at each side. The roof commenced at about 20 feet above the flooring of the wharf, and was surmounted by a cupola running the entire length of each shed, which was covered with a lattice or wooden work like a wooden shutter. The number of the rows of posts in each shed is not made clear in the proof, but it tended to show that the posts were somewhere between 20 and 30 feet apart. About 8 to 10 feet in front of both of these sheds along the wharf was a railroad track, which entered the wharf from the lower end, and extended to and beyond the extreme upper end of shed No. 2. Between the outer rail of this track and the river front there was a space on the wharf of about 30 feet. Behind the sheds were two railroad tracks running the entire length, and extending above the upper end of No. 2 shed, somewhere between 50 and 100 feet.

Westwego was not within either the municipal limits of the city of New Orleans, or the limits of the port of New Orleans, as defined by statute. It was shown that the season of active cotton receipts in the city of New Orleans commences about

the first of September and ends about May of each year, and that the Westwego wharf was completed in time to enable the railway company to avail of its facilities for, if not the whole, at least a portion of the business of the cotton season of 1893 and 1894. After the construction of the wharf in the season in question the great bulk of cotton handled by the Texas and Pacific Railroad under export bills of lading was deflected from its main track at the Westwego spur track, carried to the terminal wharf, and there unloaded and transhipped. This the proof showed was the course of business also as to all export cotton in the following season of 1894 and 1895, up to the time of the fire, except, perhaps, as to small lots of cotton intended for export, where the number of bales would not justify the coming of a steamer to the wharf at Westwego, in which case the cotton was carried to Gouldsboro, transferred, and delivered. In arranging to carry export cotton the course of business was this: The Texas Pacific Railway would contract with steamship lines for the carrying of a given quantity of cotton at a stated price, and under these contracts would then, through either itself or through other carriers at various points of original shipment, issue through bills of lading, embracing both railroad and water carriage. The method pursued by the railway to bring about the formal delivery to the steamship lines of the export cotton at the Westwego wharf after its arrival is fully stated in the case of *Texas & Pacific Railway* v. *Clayton*, *supra*. It was shown that under the contracts made by the railway with the steamship companies there was always an understanding that the ships would not be obliged to suffer the expense of moving from their own docks, usually in the city of New Orleans, to the Westwego wharf, for the purpose of loading cotton, unless a sufficient amount, variously stated at from 1000 to 2500 bales, was on hand for delivery.

It appears that other railroads possessed terminal wharfs on the river, some of them being outside of the municipal and port limits, and that they were used as a depot for the shipment of through billed export cotton, under methods of business substantially similar to those at Westwego. The export cotton intended for transhipment at the Westwego wharf was

thus handled: On arriving in the vicinity, the cars were usually, in the night time, switched to the tracks running in the rear of the wharf beside the open sheds, and the cotton would then be unloaded and stored in the sheds, whence, when called for, it was delivered to the steamships. The track running the length of the wharf in front of the sheds was principally used for the bringing in of freight intended for shipment by water other than cotton. The cars containing it would be drawn or pushed by a locomotive along the track, and the freight would then be moved from the cars to the vessels.

During the cotton season of 1894 and 1895 (prior to November the 12th, 1894) labor troubles of a serious character occurred at the docks in the city of New Orleans. The disturbances, the proof tends to show, caused delay in the movement from the port of New Orleans of export cotton. Either because of this fact or because of an unusually large cotton crop, or an unexpectedly rapid movement of cotton to the seaboard by the Texas and Pacific lines, large quantities of export cotton accumulated in the sheds on the wharf at Westwego. The cotton, which was all compressed, was stored in the following manner: The bales were piled between 15 and 20 feet high throughout the whole space of the shed, but probably three, and certainly not more than four, narrow gangways being left in each shed, running from front to rear. There was no possible doubt from the evidence that no gangways were left running lengthwise of the sheds. There was also proof tending to show that these narrow gangways, as the cotton accumulated, were obstructed by bales of cotton standing endwise. The proof also tended to show that the accumulation of cotton became so great that on the river front of the sheds, in the open space towards the railroad track, cotton was also placed, approaching so close to the railroad track that as an engine moved along carrying or pushing cars containing freight intended for shipment there was not sufficient space between the cotton and the track to enable a person to stand with perfect safety. It appeared that around the open space between the upper end of the No. 1 and the lower end of the No. 2 shed cotton had been also piled. It was shown that most, if not all, of the cotton exposed as stated was

not covered with tarpaulins, and no other means were resorted to to protect it from the danger of fire arising from the operation of the locomotives in the rear and front of the sheds and among the cotton on the wharf.

Westwego was remote from any town or village having a police force or a fire department. The wharf exclusively belonged to the railway company, and was under its control; property on it, therefore, had the benefit of no police protection except that afforded by the company, and in case of fire had nothing to rely upon except the men and appliances which the company furnished. The fire appliances were as follows: There was a tank near the grain elevator standing at such a height as to afford adequate pressure. This tank was supplied by a pump drawing its water from the river. From the tank a pipe ran to the wharf and passed under the floor of each of the sheds. In each shed there were three hydrants or water pipes, in the middle of the shed—about equidistant; they were by the side of the posts, and stood six feet above the floor. On each of the six posts by which the hydrants stood and connected to them there was a platform six or more feet above the floor, on which was placed a hundred feet of coiled hose. A witness testified that some months or more before the fire he had seen hose stretched along the front posts of the shed resting on pieces nailed to such posts, but there was other testimony tending to give rise to the reasonable inference that no such hose was there at the time of the fire. The testimony on this subject, however, had no relation to the hose coiled on the platforms on or around the posts where the hydrants were situated. This is conclusively the case, since the witness who testified as to hose being stretched as above stated spoke only of the front, and said he had not observed the hydrants and their condition, and knew nothing of them. We say this in passing, because in the argument for the defendant in error it is suggested that the testimony of the witness in question related to the hose at the hydrants, and was all the testimony on the subject in the record, overlooking the clear and cumulative testimony that the hose, at the hydrants, was connected with them and coiled on a platform on or around the posts about six feet above the floor. The evidence left it

uncertain exactly where the valve was placed which opened the connection with the water. The proof tended to show that the valve was either under the floor with an opening to reach it, or just above it, at the base of the hydrant pipe. As the three hydrant pipes in each shed stood beside the posts, and the gangways running from front to rear, although very narrow, were shown not to be obstructed by the posts, it was therefore inferable from the proof that the posts where the hydrant pipes stood had cotton piled around them. Indeed, this inference was sustained by direct evidence tending to show that the posts near which the hydrants stood had cotton piled around them from twelve to fifteen feet high, and there was also proof tending to show that in some instances the cotton so piled had fallen over on the hose on the platform, and the bale which did so had to be removed.

There was testimony tending to show that along the front and rear of the sheds there were barrels containing water with buckets hanging near. It was shown without contradiction that there were no chemical fire engines, although there was testimony tending to show that what were designated as chemical fire buckets had been bought at about the time the wharf was built, and there was conflict in the testimony as to whether these buckets were on hand for use at the time of the fire. The evidence tended to show that no general directions as to handling or the use of the hose in case of fire had been given, that no fire drill had ever taken place, nor had the men in charge of the wharf been ever instructed in any way as to the use of the apparatus which has just been described.

The wharf in the day time was under the direct authority of an employé designated as chief clerk; in the night time it was in the charge of one regular employé of the company and three watchmen, who were the members of a special private police force in the city of New Orleans, the railway company contracting with the head of the special police organization for the services of the three men at the wharf, and a like number of men were on watch during the day time. In other words, in the night time the wharf was in charge of but four men, one a regular employé of the company, and three special policemen

employed as just stated, and their duty extended over the whole surface of the wharf and sheds, as well as under the wharf.

A short while prior to November 12, growing out of supposed danger resulting from fear of election disturbances, the force at the wharf was increased by a few men, whose duty it was to patrol the space under the wharf and prevent persons from entering by boats or otherwise. This force, prior to the fire, had been reduced to the number previously stated.

It was shown that at a wharf in the city of New Orleans belonging to a steamship company where cotton had accumulated, the force of watchmen employed was largely in excess of the number at Westwego, and that at a terminal wharf of another railroad, where there was about half the quantity of cotton which was on the wharf at Westwego at the time of the fire, there were twenty-five watchmen employed instead of four, the number at Westwego; that there were Babcock fire extinguishers, hose placed on reels ready for use, and that this hose was used almost daily for the purpose of washing down the wharves, and to enable the men in control to be familiar with its use in case of emergency.

By about the middle of October, 1894, the accumulation of cotton at the wharf of Westwego had been so great that the proof showed that the railroad officials had become solicitous on the subject, and deemed that they were in great risk of fire. It was also shown that about that date a destructive fire had occurred in a wharf where cotton was stored in the city of New Orleans, presumed to be the result of the labor disturbances, and that at Westwego, during the daytime, within a period not remote from the general conflagration which ensued, subsequently, the longshoremen working there had discovered a fire smouldering in a bale of compressed cotton which was in the tiers, and that it had been extinguished by throwing down the cotton and removing the bale; and that this fact had been reported to the officers of the company. Prior to Monday, the 12th of November, 1894, cars loaded with cotton were being brought in in the night time in the rear of the sheds, and for days prior to that date vessels had been loading in front of

both of the sheds, some with cotton and some with other products. On the 12th of November two steamers were at the wharf; one about abreast of the lower end of No. 1 shed, and the other opposite the upper or No. 2 shed; that for the purpose of bringing in the cargo taken by these ships, a locomotive was operating among the cotton on the wharf in front of the shed, and was passing back and forth on the track, pushing cars containing the freight to be loaded. Although there was some proof indicating that on that particular day the locomotive which entered from the lower end of the wharf proceeded up the track abreast of No. 2 shed, we assume, for the purposes of this opinion only, that it was shown that the locomotive was pushing so many cars ahead of her that she did not get abreast of the No. 2 shed. There was no proof that the locomotive, in operating along the front of the wharf, was emitting sparks from her smokestack or dropping cinders from her fire-box.

There was evidence as to the direction of the wind on the 12th of November. The parties asserting that opposing inferences were to be deduced therefrom, but without undertaking to consider this controversy, we assume only for the purpose of this opinion, that the result of this proof as to the direction of the wind tended alone to show that if a spark had been emitted from the locomotive operating on the front of the wharf, as above stated, the wind would have carried it away from the No. 2 shed, where the fire subsequently broke out, as we shall hereafter state.

On Monday, the 12th of November, 1894, the accumulation of cotton was so great that there were stored in the sheds and on the wharf in the manner which we have indicated, about 20,000 bales of compressed cotton, and there were in cars, standing on tracks in the vicinity of the wharf and sheds, about 8000 bales more, awaiting storage room. The cotton sued for was among the latter. On the evening of the date above mentioned, shortly after the day force had ceased work and the four night watchmen had come on duty, the cotton was discovered to be on fire. The flames spread rapidly, and a disastrous conflagration followed, with the result that most of the

cotton in the sheds and the sheds themselves, as well as cotton in the cars in the vicinity, among which was that sued for, was destroyed. What took place at the time of the discovery of the fire was testified to by only one witness, one of the night watchmen, Robeau, who was one of the three special officers of the private police agency. His statement of what occurred may be thus summarized: His place of duty was at the upper or No. 2 shed, and his business was to pass around and through the shed, and at designated intervals register his presence upon a watchman's clock. After sending a telephone message to indicate his presence at his post, and whilst he was on the river side of shed No. 2, at the lower end, he heard a cry of fire. Running immediately to a gangway, he crossed to the rear or wood side of the shed. Not seeing the fire, he ran up the rear side and across by a gangway to the river front, thence running along the river front of the shed he turned into another gangway and hastened towards the rear of the shed. In going through there he discovered Valle (the one of the four watchmen, who was the regular employé of the railroad company) standing on top of the piled cotton, about fifteen feet from the floor. Robeau joined Valle, who had the nozzle of a hose in his hand, from which no water was being thrown. From the place where the two stood on the piled cotton they saw a fire burning near the floor in the direction of the upper end of the shed. As they stood upon the pile of cotton they were above the hydrant pipe running up by the post, and about six feet above the platform around or upon the post, upon which was coiled the hundred feet of hose connected with the hydrant. From where they stood both the hydrant pipe and the platform with the coiled hose on it were hidden from their view by the piled cotton. Valle, holding the nozzle of the hose in his hand, from which no water was flowing, called upon Robeau to get down between the piles of cotton and open the water valve. Robeau squeezed himself through the space between the cotton piled around the post to the floor, felt about for the valve, perceived water on the floor, declared the valve to be open, and rejoined Valle. They both dragged at the hose, but no water flowed. The burning cotton flamed up, Valle called upon Ro-

beau to get down on the platform around the post and uncoil or untangle the hose. He refused on account of the intensity of the fire, and both became alarmed and ran away. The destruction of the property ensued.

As the only witness who testified concerning the outbreak of the fire, the alarm, and the efforts to extinguish it, was Robeau, and as therefore his testimony is of the utmost importance in determining whether the case should have been allowed to go to the jury, we excerpt in the margin [1] the portions of his testimony which are material.

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[1] Q. Now go on and state what occurred. A. After we had done telephoning, and saw everything was all right, we came to the office—I mean to the office of the shed No. 1—to take my lamp, and I went to my beat, and I met the one that was there, and I said "How is it?" He told me "All right." I took off my coat and put my lamp away. Then I came to make my rounds as usual, to see if everything was right, where my key was. About five or six minutes I was standing there, or seven minutes; I can't tell exactly. I saw the private watchman pass. In about a minute or two I heard "Fire! Fire!"

By the COURT:

Q. You heard the cry of fire? A. The crying of "Fire! Fire!" I run to the woods side to see if I could see anybody, but I could not see anybody, and then I run to the river side, and then I run to the fire and I passed through the shed to go to the woods side and I saw Valle with hose in his hand, and he says, "Go down and open the valve."

Q. What did you do? A. I went to open the valve. I could only go sideways. I couldn't hardly stand; and I found the valve wide open. Then I came back and tried to help Mr. Valle with the hose in his hand. Everything was in flames. I couldn't do anything. I tried all my might to have the water, but we could not have any water. The hose was too heavy; we couldn't do anything at all; and he says to me, "Robeau, go down and untangle the hose." I says, "I won't go down where the flame is." I kept up; that is the only thing I could do. I went to the other end of my beat, and took my coat and ran away.

Q. Where did you first see the light of the flame that night? A. I was about 70 feet from the light.

Q. When you saw Valle did you first see the light of the flame? A. I saw Valle first.

* * * * * * * *

Q. And when you first saw Valle, where was he? A. On top of the cotton.

Q. Whereabouts? A. About 12 or 15 feet high on top of the cotton.

By the COURT:

Q. Whereabouts on the wharf? A. At the woods side.

Such being the proof, was it sufficient to go to the jury? is the question then for decision. In answering this question, as we have said at the outset, we shall be called to pass upon, not

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By Mr. CLEVELAND:

Q. You were on the woods side? A. Yes, sir.

Q. Where was Valle? A. He was on the cotton.

Q. Whereabouts, with relation to the center of the shed? A. The fire?

Q. No; where was Valle? A. He was about the center of the shed, but the upper end; because the fire was about 70 or 75 feet below the upper end.

Q. When you first saw Valle what was he doing? A. He had the hose in his hand.

Q. What was he doing with it? A. He couldn't do nothing. When I went down there he told me to go down and open the valve; and so I went, and it was wide open.

Q. When you were down there trying this faucet, and found that it was wide open, did you see any water coming out? A. No, not a drop. We couldn't have any water.

Q. You did not see any water when you were opening the valve? A. Yes; saw the pouring.

Q. Leaking, you mean? A. Yes.

Q. When you clambered up with Valle, and he had the hose in his hand, what part of the hose did he have in his hand? A. The pipe.

Q. Was there any water coming out? A. No, sir.

Q. What was he doing when you got up on that pile of cotton? A. Tried to have water, but he could not have none.

Q. Was Valle on the hose? A. Yes, and I was too; but everything was in flames; we couldn't do nothing at all.

Q. You say he said to you, "Go down and untangle that hose?" A. Yes, sir.

Q. How do you mean go down? Where was the hose? A. The hose was pretty near where the fire was, against the post.

Q. Against the post? A. Yes, sir.

Q. Was it on the platform? A. On the floor.

Q. On the floor of the platform? A. Yes.

Q. On the posts? How high up from the floor of the dock? A. The hose?

Q. Yes. A. The hose was about six feet high.

Q. What did you do when you got up with Valle? A. Tried to pull out the hose to have the water to extinguish the fire, but we could not. Everything was in flames.

Q. When did you first see the flames that night? Before you got up to Valle? A. When I got on top I saw the flames.

Q. How many bales of cotton were on fire then, as you recollect it? A. About three or four bales.

the preponderance of the evidence, but whether it was adequate to go to the jury; and this involves not a decision as to the facts, but the determination of a proposition of law.

Q. No water came out of the hose? A. No, sir.

Q. How long were you there pulling that hose, trying to untangle it? A. Maybe two or three seconds, because we tried the best we could.

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Q. Describe to the jury this fire? Where was it? Was it on the top of the cotton or at the bottom? A. At the bottom of the floor.

Q. How near did you come to the flames that night, when you were nearest to them? A. About fifteen paces.

Q. In your judgment, if you had had a sufficient stream of water— A. We could easy put it out.

Q. Wait. In your judgment, if the water had come out of the hose that night—a full stream of water—such as the hose was able to carry, could you have extinguished the flames? A. Yes, sir; myself alone.

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Cross-examination by Mr. TAGGART:

* * * * * * * *

Q. Where were you on the wharf when you first heard this cry of fire? A. I was about 30 feet under the shed, at the lower end.

Q. Towards No. 1 shed? A. Yes.

Q. On the river side? A. On the river side.

Q. That is out near the tug that was there? A. About 30 or 40 feet. I can't say exactly.

Q. Were you under the shed? A. Under the shed.

Q. Which way did you go when you heard the cry of fire? A. My idea first was to go to the woods side to see if I could see anybody.

Q. Were you at a gangway? A. Yes, sir.

Q. You went through that gangway then to the woods side? A. Yes, sir.

Q. And you saw nothing? A. I saw nothing. Then I run to the river side.

Q. Did you come back through the same gangway? A. No, sir.

Q. You went up along the woods then? A. I went to the upper end of my beat after I heard the noise, "Fire! Fire!"

Q. Did you go clear up to the upper end? A. Yes, sir.

Q. And you did not see any fire up there? A. No.

Q. Then where did you go? A. I went to the woods again. I went through the gangway, and I saw Valle.

Q. This hose he had in his hand, you say, did you? A. He had what?

Q. He had the hose pipe in his hand, did he? A. Yes, he had the pipe in his hand.

Q. How far was the hydrant from where he was? A. About 10 feet; but where he was he could not see the hydrant.

In *Washington Gas Light Company* v. *Lansden*, 172 U. S. 534, the question of the liability of the gas company for certain acts of its general manager, in respect to procuring the publi-

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Q. He could not see the hydrant? A. He was on top of the cotton. He could not see me when I went down neither.

Q. What did you do when you went there? A. I went there and I saw the valve was wide open.

Q. The what? A. The valve of the pipe.

Q. And was there water in the hose? A. Kind of water; yes, in the hose.

Q. It had pushed out in the hose, had it? A. Yes, swelled up.

Q. How far had it pushed out and swelled up in the hose? A. I didn't look. As soon as I saw it open I went to Valle to help him.

Q. What did you do to help him? A. We tried to pull the hose free, and we couldn't do anything.

Q. The pressure of water had kinked the hose? A. Yes, the hose was so tangled that we couldn't do anything. At the same time the blaze was going; and Valle says to me, "Go down and have it untangled." And I said, "No, I won't go, go yourself if you want to."

Q. And you run away then, did you? A. Yes, I did. I tried to save my skin.

Q. This cotton was blazing? A. Yes, very high.

Q. Blazing right up? A. Yes.

Q. Blazing way up? Yes.

Q. How high was it blazing when you got there? A. About 6 feet from the floor—about.

Q. How high was the pile of cotton? A. The cotton was piled about 15 feet high.

Q. Was it blazing along the side of that pile of cotton? A. Yes, spread out.

Q. Spread out along the ends of the bales, was it? A. Yes.

Q. Where was this kink in the hose—down below Valle? A. Where the platform was?

Q. Yes. A. About 6 feet under.

Q. You say the valve, when you tried it, was wide open? A. Yes, sir.

Q. How far out in this hose had the water pushed out from the pipe? A. I don't know that.

Q. Did you take hold of the hose to see? A. With all my might, all the strength I had.

Q. And the pressure of water was so heavy that you could not straighten it out? A. We couldn't budge it.

Q. Do you know who opened that valve? A. I don't know.

Q. Do you know how high the fire was when that valve was opened? A. Yes.

Q. How high was it when the valve was opened—when it was first opened?

cation of a libel, was presented for determination. In the course of the opinion, after observing that in the case no specific authority was pretended to have been given to the general manager on the subject, the court said (p. 545):

The COURT: He found it open.

The WITNESS: I found it open when I got there.

Q. You don't know who opened it? A. No, I don't know who opened it.

Q. How long were you there with Valle when you discovered this fire? A. I never took my watch for that. I did the best I could.

Q. About how long were you there? A. Maybe two or three seconds; I don't know.

Q. And then where did you go? A. I went up stairs to help him.

Q. You went up on the cotton? A. On the cotton.

Q. How long were you there with him? A. Maybe one or two seconds.

Q. Then where did you go? A. I said I tried to save myself.

Q. In saving yourself, where did you go? A. I went to the lower end of my beat and took my overcoat and ran away. I didn't stay any more.

* * * * * * * *

Q. Now, how long was it before the fire was spread all over the No. 2 shed? A. About ten minutes.

Q. And about two seconds after you got there you had to run away on account of the fire, didn't you? A. Yes.

Q. Do you know where the fire started? A. Right in the center of the shed; I mean up the shed, about 40 or 50 feet this side.

Q. About 40 or 50 feet south of the upper end of No. 2 shed? A. I can't say exactly. About 70 feet, maybe. I don't know.

Q. About that far from the upper end of No. 2 shed? A. Yes, sir.

Q. And in the center of the shed, wasn't it? A. Yes, sir.

Q. And near the bottom of a pile of cotton, wasn't it? A. What?

Q. Was it near the bottom of the pile that it was burning? A. At the floor, I told you, where it started.

Q. Was there a whole pile of cotton on fire? A. When I got there I saw the light of the fire.

Q. Where did you see the light from? Where were you when you saw the light of the fire? A. Didn't I tell you that?

Q. No, you have not. A. Didn't I tell you I was about 70 feet from the light of the fire?

Q. Was it in a gangway that the fire was? A. Yes, sir.

Q. Were you at the end of the gangway when you saw the light? A. I was on the platform outside.

Q. And did you see the light down the gangway? A. Yes, sir.

Q. How much of a fire was there then, when you saw that? A. I couldn't tell you.

Q. You did not see the fire? A. Yes; when I came to climb up on the cotton, Valle says to me: "Go down and open the valve."

"We are then limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide."

The court then reviewed the evidence on this branch of the case, and concluded as follows (p. 548):

"We are of opinion that the court erred in submitting to the

Q. I didn't ask that. I asked how much of a fire there was? A. I don't know.

Q. You did not see the fire? A. I saw the light of the fire.

Q. How much light was there: was it a big light? A. How much light was there?

Q. Yes; how much light did you see? A. I can't say exactly how much light I saw.

Q. Did you see it over the piles of cotton? A. No, sir; we couldn't see it.

Q. You could not see it over the piles of cotton? A. Because I passed there, about 15 paces from the places in the gangway.

Q. When? A. To come to Valle.

Q. And you did not see it in the other gangway, then, did you? A. No, of course not.

Q. You say this blaze was about 6 feet high when you got there? A. 6 or 7 feet high, yes.

Q. And how many bales of cotton was it covering? A. I don't know. I saw the light of the fire.

Q. I know, but when you got there?

The COURT: When you got there to Valle?

A. Three or four bales.

Q. Had it burned the covering off the bales? A. They were spread out.

Q. How wide was the fire; how wide was the blaze? A. About 15 or 20 feet I should say.

Q. Was it on the end of a solid bale of cotton? Was the pile of cotton solid there that it was burning against? Do you understand that? A. What do you mean?

Q. Was this cotton piled? A. Yes, like that.

Q. And was it burning 15 feet high? A. Yes, spreading.

Q. Spreading rapidly? A. Yes.

Q. How long was it from the time you heard Valle cry "fire" until you got to Valle? A. Maybe half a minute. I don't believe it was.

jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it."

In *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, the following facts appeared: The action was brought by Patton to recover damages for injuries sustained while in the employ of the railway company as a fireman. On a second trial a verdict was directed for the defendant, upon which judgment was rendered, and the Court of Appeals affirmed such judgment.

Answering the contention of the plaintiff in error that the trial court erred in directing a verdict and in failing to leave the question of negligence to the jury, the court said (p. 659):

"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 opposition to it. *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 32; *Griggs* v. *Huston*, 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."

We come, then, to an analysis of the evidence for the purpose of ascertaining whether it was correctly decided that it afforded no reasonable ground upon which a jury, in the exercise of its

functions, could have inferred that the destruction of the cotton by fire was occasioned by the negligence of the defendant. In doing so we shall, of course, be mindful, as was said in *Patton* v. *Texas and Pacific Railway Company*, *supra*, that as both courts below have held that the evidence had not the tendency stated, their decision is entitled to great respect—a respect, however, which cannot relieve us from the duty of securing the plaintiffs in the enjoyment of their constitutional right to trial by jury if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as a matter of law by the court.

All the reasonable tendencies of the proof, if any, to show negligence, must arise from three propositions, which we shall proceed to consider in their order.

First. The manner in which the cotton was stored and the operation of the locomotives in and about the same so as to subject the cotton to danger of fire and to cause the prompt detection of a fire to be so difficult as to render it practically impossible in time to prevent a conflagration.

That the storage of such a great mass of cotton in the open sheds and on the wharf, with only a few narrow gangways from front to rear, with no passageways between the tiers running lengthwise of the sheds, so as to enable the cotton to be inspected and to be accessible upon an alarm of fire, with substantially no tarpaulins or other covering, and the operation of the locomotives in and around the open sheds and in front of the wharf among the cotton so situated at least afforded sufficient proof to go to the jury, we think is too clear for discussion. This was not controverted by either the trial court or the Circuit Court of Appeals, but the proposition which those courts felt constrained to uphold was, that as the proof did not in their opinion furnish any reasonable ground from which it could be inferred that the acts above enumerated had actually tended to produce the fire, therefore, even although there was negligence in the matters suggested, they furnished no reasonable ground upon which the jury could have given a verdict for the plaintiffs. This reasoning proceeded upon three assumptions, *a*, because the proof did not show that the locomotive

operating along the front of the wharf, on the morning of the 12th of November, had traversed the track opposite to or in the immediate vicinity of the place in No. 2 shed, where the fire occurred; *b*, because there was no proof that the locomotive was emitting sparks or dropping fire from its firebox, and if there had been, because the proof as to the direction of the wind showed that such sparks, if emitted, would have been blown away from the direction of the upper part of No. 2 shed where the fire broke out; and, *c*, because the fire was immediately discovered on its outbreak.

But each of these propositions either rests on premises of fact where no proof whatever existed or disregarded what the jury would have had the right to conclude was the reasonable tendency of the proof as made. There was no question that the proof showed, leaving aside the movement of the engine on the wharf on the morning of the 12th of November, that other locomotives had been moving in the rear of the wharf and in its vicinity probably on the night of the 11th, and certainly on the 10th, and previously; and the proof also unquestionably showed that for days prior to the breaking out of the fire, except it may be Sunday, vessels had been loading at the wharf in front of the No. 2 shed, and the tendency of the proof was to show that the cargo which they took was carried on the wharf in front of the shed by locomotives. To hold then that there was no proof tending to show that the conflagration was the result of the movement of locomotives about and among the piles of exposed cotton, was simply to say such must have been the case because the proof did not tend to show that the fire could have been caused by the locomotive which was on the wharf on the morning of the 12th. This, however, was only to find, in the absence of all proof as to any other origin of the fire, that it would have been unreasonable for the jury to deduce the conclusion that the fire was the result of other and previous proximity of the locomotives to the cotton. The obvious danger resulting from the use of the locomotives, as described, in and about so easily ignitible a material as cotton, particularly when stored and unprotected as this was, is to our mind so clear that we think the least that can be said is, when

the origin of the fire was otherwise unexplained, that the jury would have been reasonably justified in drawing the inference that the use of the locomotives caused the fire. And the general course of legislation, both in England and this country, demonstrates the soundness of this conclusion. *St. Louis & San Francisco Railroad* v. *Matthews*, 165 U. S. 1. The only possible ground by which this can be met is the assumption that because there was no proof tending to show the operation of a locomotive in the rear of the sheds or on the front of No. 2 shed, for a considerable period of time before the fire, therefore sparks from the locomotive could not have caused the fire, because if they had the conflagration would have broken out sooner. But this assumes that compressed cotton, piled up as this was, if ignited by sparks, would necessarily at once break out into flame, and disregards the right to have the judgment of the jury as to whether the fibre of such cotton, when so situated, on being touched by a spark, might not have smouldered for a considerable time, until such headway had been gained as to cause the fire to break into flame. In other words, there being two inferences to be drawn from the testimony, one of a sudden outbreak of the fire and the other of a long continued smouldering, it was the province of the jury to pass upon the question. And this disposes of the assumption that the fire was discovered immediately on its breaking out. Such assumption, however, was a mere unreasonable inference from the facts in favor of the defendant and against the plaintiff, and rested on the predicate that there was nothing in the proof which would have justified a jury, although the cotton was compressed and piled up, in inferring that the fire might have smouldered for a considerable time before bursting into flame. It was certainly open to the plaintiff to direct the attention of the jury to the obvious natural law that any fibrous material, like cotton, when tightly compressed and piled, as was the cotton in question, if ignited by a spark, may smoulder for an uncertain period. The only proof on the subject of the discovery of the fire is that to which we have referred, giving an account of the alarm of fire by Valle. The mere fact, however, that he gave an alarm of fire when he discovered it does not sup-

port the inference that the fire had not been burning for a considerable period before he knew of it. Indeed, when the state of the fire, as described by the witness Robeau when he first saw it, is taken into consideration, and the natural tendency of a tightly compressed fibre to smoulder is borne in mind, the jury might have reasonably inferred, we think, from the condition of the fire when first seen by Robeau and the rapid and extensive conflagration which almost immediately resulted, that the discovery marked, not the time when the ignition of the cotton took place, but the breaking out of the cotton into a flame as a consequence of its prior burning. This also disposes of the view that although the cotton was negligently stored by leaving no gangways through the length of it, by which it could be inspected and the presence of fire be promptly detected, the proof did not tend to justify a recovery because the fire was discovered in the mass of cotton just as soon as it would have been if proper precautions had been taken in its storage. The description of the state of the fire, we think, afforded ground for a jury to otherwise find, for the only proof on the subject was, that in order to discover the fire, the watchmen had to climb up on the pile of cotton, and that it was not possible, from the gangway, to have seen the fire, as it would have been if suitable openings length wise had been left.

Second. That the proof showed negligence in the care of the property inasmuch as the number of watchmen who were engaged were greatly inadequate for the service, and therefore the jury would have been reasonably justified in finding that the destruction of the cotton was occasioned thereby.

Here also we think it was evident that the presence of only four watchmen to care for so vast an accumulation of cotton stored and exposed to the risks it was subjected to was sufficient to go the jury on the question of negligence. Both the courts below with reference to this ground substantially concluded, as they did as to the former one, that even although the number of watchmen was insufficient, nevertheless as the inadequate number of watchmen discovered the fire as soon as it broke out, a greater number of watchmen could have done no more,

therefore the inference of negligence contributing to the loss was as a matter of law unwarranted. This, however, but rested on the assumption that the fire was immediately discovered. On the contrary, as we have said, not only the reasonable inference that cotton stored and piled like that here in question, when ignited, would smoulder, but the actual facts as to the conflagration in hand, we think, were sufficient to go to the jury so as to enable the jury to conclude whether, if an adequate force of watchmen had been on hand, the fire might have been sooner detected and the property saved from destruction. But the larger number of watchmen would have been efficient, not only in detecting the fire, but for the purpose, in such an emergency, of handling the cotton in order that the fire might be gotten at and extinguished. That an adequate force might have so done was reasonable to infer, especially in view of the proof that in the daylight, when a larger body of men were at work, smouldering cotton was discovered in one of the lower bales, and by removing the others and getting at the ignited bale in a tier, a conflagration was prevented.

Third. That the jury would have had reasonable ground to infer negligence from the inadequacy of the fire apparatus and from the want of instructions as to its use or competent men to handle it.

This proposition, we think, is also well founded. The argument to the contrary is, that as it was shown that if the apparatus which was there had been properly worked, the fire would have been extinguished; therefore there was no negligence in respect to such appliances. The proof was construed to be that when Robeau heard the alarm of fire and rushed to the point where Valle stood, upon the cotton, and was ordered by Valle to go down and open the valve, he found the valve open, because Valle had previously opened it. But we have searched the record in vain for any direct proof that Valle had opened the valve before Robeau's arrival. *Non constat*, therefore, that the valve had not been left open negligently some time previously, as it was hid from view by the cotton, and if the open valve therefore caused the tangling of the hose or

rendered it so that it could not be moved, the negligence in respect to the care of the hose would be that of the company. If it be that one inference from the testimony would have justified the conclusion that Valle had opened the valve, as such inference was not necessarily to be drawn, then it was the function of the jury and not of the court to draw the proper inference.

But this, it is argued, is of no consequence since, it is asserted, the proof showed that the cause of the destruction of the cotton was not the imperfect nature of the appliances, but an error of judgment in the use of them by the employés in the emergency of the moment. The proof, it is insisted, left no room for any other inference than that Valle on the discovery of the fire had rushed to the spot, thrown the hose down from the platform, got down among the cotton and opened the valve, or had left the hose on the platform without unwinding it, and that the pressure of water had either so kinked or tangled the hose when thrown down or rendered it so difficult to move it, if left coiled on the platform, that the water would not flow, and the failure to extinguish the fire resulted. But all the elements contained in these propositions involve mere inferences from the evidence which it was the province of the jury to make. The only testimony in the case showing the actual condition of the hose at the time of the discovery of the fire was that of Robeau. That testimony showed that the cotton was piled up around the post where the hydrant was situated, above the platform on which the hose was coiled, to such an extent that neither the hydrant nor the hose could be seen from the gangway or from the top of the pile of cotton, that to get at the hose, if it was on the platform, required either reaching to or getting on the platform about six feet below, between the cotton, and to reach the valve necessitated squeezing down between the cotton to the floor. Under these circumstances and the difficulties which they necessarily created we think the proof was such as would have reasonably justified the jury in concluding that the negligent acts of stowing the cotton high up around the hose and the hydrant and the valve connected with it created a condition so conducing to error of judgment and misdirected efforts as to

render the railway company responsible therefor. And this conclusion is greatly fortified when the uncontradicted proof is considered that no general rules for the use of the fire apparatus had ever been promulgated, that no systematic inspection thereof had been made, that no fire drill or instructions as to the use of the apparatus was had or given, and that the too few watchmen were left in case of an emergency to use an apparatus which, even if it were intrinsically adequate, was surrounded by the act of the company with such conditions that its favorable and efficient use was rendered practically impossible.

This leaves for consideration only the question whether the case should have been allowed to go to the jury on the question of deviation. As the result of the conclusions to which we have come on the question of negligence is that a new trial must be granted, it follows that on the new trial the whole case will be open. Being so open, we cannot say that testimony may not be introduced at the new trial which may modify the aspect of this question as exhibited in the record now before us. Conducive, however, to the result that there may be an end to this litigation, we content ourselves on this branch of the case at this time with saying that we think the proof in this record fully justified the action of the trial court in respect to the question of deviation.

The judgments must be reversed and the cause remanded to the Circuit Court of the United States for the Southern District of New York with directions to set aside the verdict and grant a new trial, and it is so ordered.

MINNESOTA *v.* NORTHERN SECURITIES COMPANY.

ORIGINAL.

No. 10. Original. Argued January 27, 1902.—Decided February 24, 1902.

Whether a bill in equity, filed in the name of a State, seeking to prevent by injunction a corporation organized under the laws of another State, with power to acquire and hold shares of the capital stock of any other corporation, from obtaining and exercising ownership and control of two or more competing railroad companies of the State, so as to evade and defeat its laws and policy forbidding the consolidation of such railroads when parallel and competing, is a controversy of which this court has jurisdiction.

The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it; and the established practice of courts of equity to dismiss the plaintiffs' bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings, or suggested by counsel.

The bill discloses that the parties to be affected by the decision of this controversy are—directly the State of Minnesota, the Great Northern Railway Company, and the Northern Pacific Railway Company, corporations of that State, and the Northern Securities Company, a corporation of the State of New Jersey—and, indirectly, the stockholders and bondholders of those corporations, and of the numerous railway companies whose lines are alleged to be owned, managed or controlled by the Great Northern and Northern Pacific Railway Companies; and it is obvious that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties; and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in this case, when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend.

On the 7th day of January, 1902, came the State of Minnesota, by Wallace B. Douglas, its Attorney General, and moved the court for leave to file a bill of complaint against the Northern Securities Company, a corporation of the State of New

Jersey. Thereupon the court directed that notice of such application should be given to the defendant, and set the motion for argument on January 27, 1902, when it was duly heard.

The bill proposed to be filed was in the following terms:

To the Judges of the Supreme Court of the United States of America:

Your oratrix, the State of Minnesota, complainant, by Wallace B. Douglas, Attorney General thereof, brings this its bill of complaint against the Northern Securities Company, a corporation organized under and by virtue of the laws of the State of New Jersey, and alleges:

I.

That by an act of Congress, entitled "An act for the admission of Minnesota into the Union," approved May 11, A. D. 1858, the said State of Minnesota was admitted into the Union upon an equal footing with the original States.

II.

That said Northern Securities Company is a corporation organized as hereinafter alleged, under and by virtue of the laws of the State of New Jersey, and is a citizen of the State of New Jersey.

III.

A.

That by an act of the Congress of the United States, of March 12, 1860, extending to the State of Minnesota the swamp lands grant theretofore made to the State of Arkansas, and by various subsequent acts, the Congress of the United States donated to the State of Minnesota from the public domain large quantities of lands situated within the State of Minnesota, and of the value of several millions of dollars. That the State of Minnesota now has left and undisposed of more than three million acres of said lands, of the value of more than fifteen million dollars, much of which said land is located in the territory traversed by the railroads of the Great Northern and Northern Pacific Railway Companies, as hereinafter alleged. That the value of said land, and the salability thereof, depends

in very large measure upon having free, uninterrupted and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway Companies.

That many of said lands are vacant and unsettled and located in regions not at present reached by railway lines, and depend for settlement upon the construction of lines in the future; that it has heretofore been the practice of said Great Northern and Northern Pacific Railway Companies, respectively, to extend spur lines into territory adjacent to each of said roads, as well as into new territory, for the purpose of developing such territory, as well as to obtain traffic therefrom; that such new lines have been built in the past very largely by reason of the rivalry heretofore existing between said companies, for existing, as well as new business; that under the consolidation and unity of control hereinafter set forth, such rivalry will cease, and many of the lands now owned by the State of Minnesota will not be reached by railroads for years to come, if at all, owing to such combination and consolidation removing all rivalry and competition between said companies; that the settlement and occupation of said lands will add very much to their value, and such occupation will depend entirely upon the accessibility of railway lines and transportation facilities for marketing the products raised thereon; that if said lands are sold and become occupied, they will add very largely to the taxable value of the property of the State, and that said lands cannot be sold or the income of the State increased thereby without the construction of railroad lines to, or adjacent to, the same.

B.

That the State of Minnesota is now and for many years past has been the owner of, and continuously maintained, an educational institution for the benefit of its citizens, known as the University of Minnesota; also a large number of hospitals for the insane, within its territorial limits; also five normal schools for the education of teachers within the State; also a state training school for boys and girls; also several state schools for the education, care and maintenance of the deaf, dumb,

blind and feeble-minded; also a state school for indigent and homeless children; also a state penitentiary and reformatory.

That for many years past the State of Minnesota has continuously maintained and supported each of said institutions, and in the care, maintenance and management thereof has been compelled to and in the future, of necessity, will annually purchase large quantities of supplies for said institutions, including provisions, clothing and fuel, a great portion of which the State of Minnesota is compelled to ship over the different lines of railway owned and operated by the Northern Pacific Railway Company and the Great Northern Railway Company.

That the State of Minnesota is compelled to expend annually more than seven hundred thousand dollars in the operation and maintenance of said public institutions, most of which sum is raised by general taxation upon the lands and other property of the citizens of the State of Minnesota, and situated therein. That the amount of taxes which said State of Minnesota can collect, and the successful maintenance of its said public institutions, as well as the performance of its governmental functions and affairs, depends largely upon the value of the real and personal property situated within its territorial limits, and the general prosperity and business success of its citizens. That the value of said real and personal property of the citizens of the State of Minnesota, as well as their business success and general prosperity, depend very largely upon maintaining in said State free, open and unrestricted competition between the railway lines of said Great Northern and Northern Pacific Railway Companies respectively within said State.

C.

That it has been the settled policy and practice of the State of Minnesota since its organization as a Territory to develop the resources of the State by encouraging railroad building therein, and in furtherance of this policy the Territory of Minnesota, by an act thereof, under the date of May 22, 1857, granted to the Minnesota and Pacific Railroad Company a charter, and in consideration of the construction and maintenance of a line of railway in Minnesota, by said company, said Territory do-

nated to it out of its public domain about seven hundred thousand acres of land. That said Minnesota and Pacific Railroad Company thereafter became insolvent, and all its property was placed in the hands of a receiver; that such proceeding were thereafter had that all the property of the last named company, including said land, was duly sold and conveyed to the St. Paul, Minneapolis and Manitoba Railway Company, hereinafter mentioned.

That the State of Minnesota, by an act of its legislature, and in consideration of the construction and maintenance of a line of railway by the Great Northern Railway Company, hereinafter referred to, between St. Cloud and Hinckley, a distance of eighty-four miles, donated and conveyed to said last named company upwards of four hundred thousand acres of land then owned by and situated in the State of Minnesota, which said land was then worth more than one million dollars. That in carrying out said policy, and in aid of the building of railways within the State of Minnesota, there has been granted out of the public domain within the limits of the State of Minnesota upwards of 10,500,000 acres of land, nearly all of which has been granted to said Great Northern and Northern Pacific Railway Companies, and the subsidiary companies owned and controlled by them.

D.

That by an act of the legislature of the State of Minnesota, approved March 3, 1881, entitled "An act granting swamp lands to aid in the construction of the main line of the road of the Little Falls and Dakota Railway Company," and which now is a part of the Northern Pacific Railway Company system, hereinafter referred to, the State of Minnesota donated to said Little Falls and Dakota Railway Company two hundred and forty-three thousand five hundred and ninety-one (243,591) acres of land situated in and then belonging to said State, in consideration of the construction and maintenance by said last named railway company of a line of railway extending from Little Falls to Morris, in the State of Minnesota.

IV.

Your oratrix further alleges that immense quantities of wheat

and other products are shipped annually from East Grand Forks, Crookston, Moorhead, Fergus Falls and other competitive points within the State of Minnesota, and all on the lines of railway of the said Great Northern and Northern Pacific Railway Companies, hereinafter referred to, to the cities of Duluth, St. Paul and Minneapolis, within the State of Minnesota. That nearly all of the shipment of such products made from the above named initial points are consigned to various citizens at either the city of Duluth, St. Paul or Minneapolis over one or the other of said lines of railroad last above named. That enormous quantities of merchandise have been and will continue to be shipped annually over said lines of railway, between the cities of St. Paul and Minneapolis and various other cities and villages along said lines of railway situated within the State of Minnesota, and which are purchased and used entirely by the people of said State. That the competition in both freight and passenger traffic to and from said places has always been sharp and active between said railway companies, and has secured to the residents of said cities, as well as the State of Minnesota, and to the State of Minnesota itself, much lower rates for both freight and passengers than would otherwise have been obtained, or than will or can be obtained in case the consolidation or unity of control and management of said Great Northern and Northern Pacific Railway Companies, hereinafter alleged, is not enjoined as herein prayed.

V.

That the Great Northern Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, to wit, under an act duly passed by the Territory of Minnesota, entitled "An act to incorporate the Minneapolis and St. Cloud Railroad Company," approved March first, A. D. 1856, and various subsequent acts of the State of Minnesota amendatory thereof and supplemental thereto, respectively entitled as follows:

"An act to amend an act entitled 'An act to incorporate the Minneapolis and St. Cloud Railroad Company,' passed March 1, 1856." Approved February 23, 1864.

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"An act of the legislature of the State of Minnesota entitled 'An act granting swamp lands to aid the Minneapolis and St. Cloud Railroad Company in building branches to connect with the Lake Superior and Mississippi Railroad and the Winona and St. Peter, or any other railroad in southern Minnesota.'" Approved February 11, 1865.

"An act to amend an act entitled 'An act to incoporate the Minneapolis and St. Cloud Railroad Company,' approved March 1, 1856, and to repeal certain portions of an act amending the charter of said company, passed February 23, 1864." Approved February 28, 1865.

"An act to amend an act entitled 'An act granting swamp lands to aid the Minneapolis and St. Cloud Railroad Company in building branches to connect with the Lake Superior and Mississippi Railroad and Winona and St. Peter Railroad, or any other railroad in Southern Minnesota.'" Approved March 5, 1869.

"An act to amend the charter of the Minneapolis and St. Cloud Railroad Company." Approved March 6, 1869.

"An act to amend the charter of the Minneapolis and St. Cloud Railroad Company." Approved March 2, 1870.

"An act to extend the time for the construction and completion of the branch of the Minneapolis and St. Cloud Railroad Company." Approved March 11, 1879.

"An act to amend an act entitled 'An act granting swamp lands to aid the Minneapolis and St. Cloud Railroad Company in building branches to connect with the Lake Superior and Mississippi Railroad and the Winona and St. Peter Railroad, or any other railroad in southern Minnesota,' approved February 11, in the year of our Lord one thousand eight hundred and sixty-five, as amended." Approved March 10, 1885.

That on the 16th day of September, 1889, the corporate name of said company was duly changed to the Great Northern Railway Company. That during the year 1889 said railway company caused to be constructed a line of railway extending from St. Cloud, Minnesota, to Hinckley, Minnesota, which line was immediately conveyed to the St. Paul, Minneapolis and Manitoba Railway Company, a corporation duly organized and exist-

ing under and by virtue of the laws of the State of Minnesota, hereinafter referred to as the Manitoba Company. That said Manitoba Company, prior to the first day of February, 1890, had built, purchased and put in operation various lines of railway within the State of Minnesota, as well as in the States of North Dakota, Montana, Idaho and Washington, connecting by rail the cities of St. Paul and Minneapolis, within the State of Minnesota, and various other cities and villages within said State, with each other, and with Puget Sound, on the Pacific Ocean; which said railways are hereinafter more particularly described.

That on the first day of February, 1890, said Manitoba Railway Company leased to the said Great Northern Railway Company, for a period of nine hundred and ninety-nine years, all of the lines of railway, including the rolling stock then owned and controlled by said Manitoba Company; that ever since said last named date said Great Northern Railway Company has continued to and now does control, operate and maintain each and all of said lines as one complete railroad system. That said lines of railway so constructed by said Manitoba Company and now so controlled, operated and maintained by said Great Northern Railway Company under said lease, are described as follows:

A line of railway extending from St. Paul, Minnesota, via Minneapolis, Elk River, St. Cloud, Sauk Center, Fergus Falls, Glyndon, Crookston to the northern boundary line of the State of Minnesota at St. Vincent.

Another line of railway extending from Minneapolis, Minnesota, along the western bank of the Mississippi River to St. Cloud, Minnesota.

Another line of railway extending from St. Cloud easterly to Hinckley, Minnesota.

Another line of railway extending from Elk River, Minnesota, northward to Malaco, Minnesota, on the line of the St. Cloud and Hinckley Branch, last above referred to.

Another line of railway extending from Minneapolis, Minnesota, to Breckenridge, Minnesota.

Another line extending from Sauk Center, Minnesota, to Park Rapids, Minnesota.

Another line of railway extending from Hutchinson Junction to Hutchinson, Minnesota.

Another line of railway extending from Benson, Minnesota, thence in a westerly direction to the western boundary line of the State; thence to Watertown, South Dakota.

Another line of railway extending from Evansville, Minnesota, westerly to the state boundary line, thence to Ellendale, North Dakota.

Another line of railway extending from Moorhead, Minnesota, westerly to the state boundary line; thence to Wahpeton, North Dakota.

Another line of railway extending from Moorhead, Minnesota, to Crookston, Minnesota.

Another line of railway extending from Barnesville, Minnesota, to Moorhead, Minnesota.

Another line of railway extending from Carman, Minnesota, to Foster, Minnesota.

Another line of railway extending from Crookston, Minnesota, to Red Lake Falls and Thief River Falls, Minnesota.

All of the foregoing lines being situated in the State of Minnesota, except as hereinafter otherwise expressly stated.

That said Great Northern Railway Company now either owns or controls, and operates and maintains, by virtue of said lease, a line or system of railways connecting with said lines above referred to, and extending from the western boundary line of the State of Minnesota through the States of North Dakota, Montana, Idaho and Washington, to Puget Sound on the Pacific Coast. The said railway lines covered by said lease, or owned by said Great Northern Railway Company, aggregate a total of about four thousand five hundred miles.

That many of said railroads above described being located within the State of Minnesota, were built by subsidiary companies or corporations, and said Great Northern Railway Company now owns all of the capital stock of such corporations in addition and as supplemental to said lease; and in addition thereto said Great Northern Railway Company owns all of the capital stock of the Eastern Railway Company of Minnesota, a corporation organized under the laws of the State of Minne-

sota, and which owns and operates a railway line extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota; and from Duluth, Minnesota, to Bemidji, Minnesota; and by virtue of such ownership of stock said Great Northern Railway Company dictates the policy of said railway company and controls the lines of railway and properties of said Eastern Railway Company, and operates the same as a part of the Great Northern system of railway.

That said Great Northern Railway Company also owns all of the capital stock of the Willmar and Sioux Falls Railroad Company, a corporation owning a railroad extending from Willmar, Minnesota, to Yankton, South Dakota, and by virtue of such ownership of stock dictates the policy of and owns and controls the railway line and property of said Willmar and Sioux Falls Railroad Company.

That all of the railways and railway lines hereinbefore described are operated and controlled by and form a complete system under the name of said Great Northern Railway Company.

That the charter of said Great Northern Railway Company provides as follows: "That all of the affairs and business of said company shall be conducted by or under the direction of a board of directors, and they are authorized, for the purposes specified in this act, to make and establish regulations and by-laws, and to do all things necessary to be done and not inconsistent with the Constitution and laws of the United States, or the laws of this Territory, or this act."

Your oratrix further alleges that the board of directors of said Great Northern Railway Company, at the time of the organization of the Northern Securities Company, hereinafter referred to, to wit, on or about the 13th day of November, 1901, was and now is composed of the following named persons, to wit: James J. Hill, James N. Hill, Samuel Hill, William P. Clough, Edward Sawyer, M. D. Grover, Jacob H. Schiff and Henry W. Cannon; and at said date the managing or executive officers of said corporation were and now are as follows: President, James J. Hill; Vice President, William P. Clough; Secretary and Assistant Treasurer, E. T. Nichols. That on

said last named date said Great Northern Railway Company had issued, and there was then outstanding, a total of one hundred and twenty-five million dollars, par value, of the capital stock of said corporation, and your oratrix is informed and believes, and upon information and belief alleges, that said James J. Hill was on said last named date the owner of or in possession and control of, or had subject to his direction and disposition, more than a majority of said capital stock so outstanding.

VI.

That the Northern Pacific Railway Company was formerly a corporation organized and existing under and by virtue of an act of the Congress of the United States, entitled, "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the northern route," approved July 2, 1864; and a joint resolution of Congress extending the time for the completion of said railroad until July 1, 1868; and a joint resolution granting the consent of Congress provided for in section ten of said act, incorporating the Northern Pacific Railroad Company, approved March 1, 1869; the joint resolution of Congress granting the right of way for the construction of a railroad from Portland, Oregon, to a point west of the Cascade Mountains in Washington Territory, approved April 1, 1869; the joint resolution of Congress authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes, approved May 31, 1870. And complainant asks leave to refer to and have each of said acts and resolutions considered as though fully herein set forth.

That under and in pursuance of the said several acts and joint resolutions of Congress, the Northern Pacific Railroad Company constructed and put into operation, prior to January 1, 1890, all of its main line of road, extending from Ashland, in the State of Wisconsin, westward across the States of Minnesota, North Dakota, Montana and Idaho, and in the State of Washington to Walla Walla Junction; also all that other part of its main line of railroad extending from Portland,

Oregon, to Tacoma, Washington; also the whole of its Cascade Branch, extending from Pasco Junction, in the State of Washington, to Tacoma, in the State of Washington.

That said Northern Pacific Railroad Company had also, prior to said first day of January, 1880, acquired and then owned all of the capital stock of the following named railroad companies and corporations, to wit, the St. Paul and Northern Pacific Railroad Company, a corporation organized under the laws of the State of Minnesota, and which then owned a railroad extending from St. Paul, Minnesota, to Brainerd, Minnesota; and from Little Falls, Minnesota, to Staples, Minnesota; also of the Duluth and Manitoba Railroad Company, a corporation organized under the laws of the State of Minnesota, and which then owned a line of railroad extending from Winnipeg Junction, Minnesota, via Red Lake Falls, Minnesota, to the western boundary line of said State, and thence to Grand Forks, North Dakota; and thence to the international boundary line between the state of North Dakota and Canada; also of the Duluth, Crookston and Northern Railroad Company, a corporation organized under the laws of the State of Minnesota, and which then owned a railroad extending from Fertile Junction, Minnesota, through Crookston to Carthage Junction, Minnesota; also of the Little Falls and Dakota Railroad Company, a corporation organized under the laws of the State of Minnesota, and which then owned a railroad extending from Little Falls, Minnesota, to Morris, Minnesota; also of the Northern Pacific, Fergus Falls and Black Hills Railroad Company, a corporation organized under the laws of the State of Minnesota, and which owned a line of railroad extending from Wadena, Minnesota, thence westerly to the western boundary line of the State; and thence to North Dakota points; also all of the capital stock of various railroad corporations or companies organized in the States of North Dakota, South Dakota, Montana and Washington, which owned and operated various railway lines in said States respectively. The said railway lines built by said companies within the State of Minnesota, as well as those built outside of the State of Minnesota, and the capital stock of the corporations so building said lines, and

owned by said Northern Pacific Railroad Company, as hereinbefore alleged, were operated, managed and controlled by said Northern Pacific Railroad Company as a system of railway or railways extending from and between various points in the State of Minnesota, more specifically hereinafter referred to, through said State and thence to the Pacific Coast; and aggregate about four thousand five hundred miles of railway.

VII.

That the Northern Pacific Railway Company is now and for upwards of five years last past has been a corporation organized under and by virtue of the laws of the State of Wisconsin; said corporation being organized during the year 1895. That thereafter and prior to the time said Northern Pacific Railway Company became possessed of and the owner of the railway lines and property formerly owned and operated by said Northern Pacific Railroad Company, said Northern Pacific Railway Company filed with the Secretary of State of the State of Minnesota, in accordance with the terms and provisions of the laws of said State of Minnesota, a duly authenticated and certified copy of its articles of incorporation, and thereupon said Northern Pacific Railway Company became a corporation of and within the State of Minnesota, and subject to all of the laws, regulations and provisions of said State of Minnesota relating to railway or railroad corporations, including those acts or parts of acts hereinafter specifically pleaded or referred to.

That under the charter or articles of incorporation of said Northern Pacific Railway Company the powers of said company are delegated to and exercised by a board of fifteen directors; that during the month of April, 1901, the following-named persons constituted and now are the members of the board of directors of said last named company: James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, H. McK. Twombly, Brayton Ives, D. Willis James, John S. Kennedy, Daniel S. Lamont, Charles S. Mellen, Samuel Rea, William Rockefeller, Charles Steele, James Stillman and Eben B. Thomas. That on the 13th day of November, 1901, J. Pierpont Morgan, with certain other persons to your oratrix unknown, but who

were acting with said Morgan, owned and had in their possession, or held under and subject to their control and disposition, upwards of eighty-five per cent of the total capital stock of said Northern Pacific Railway Company then outstanding. That the total amount of capital stock of said Northern Pacific Railway Company then issued and outstanding amounts to one hundred and fifty-five millions of dollars, par value, seventy-five millions of dollars of which was preferred stock, subject to retirement as provided by the articles of incorporation and agreement under which the same was issued.

That during the year 1893 the said Northern Pacific Railroad Company became insolvent, and all of the property of said last named company, of whatever kind or character, was duly placed in the hands of receivers appointed for that purpose by the Circuit Court of the United States for the Eastern District of Wisconsin; and thereafter, in proceedings ancillary thereto, by the various Circuit Courts of the United States in whose jurisdictions said property was located. That after said Northern Pacific Railway Company had filed its said articles of incorporation in the State of Minnesota and had become subject to its laws, and during the year 1896, said Northern Pacific Railway Company duly purchased and became the owner of the entire railroad properties and railway lines, including the right of way, rolling stock and capital stock, formerly owned by said Northern Pacific Railroad Company; and immediately thereafter entered into the possession thereof; and at all times since has continuously owned and operated each and all of the said lines of railway so situated within the State of Minnesota, and which connect the cities of St. Paul and Minneapolis and Duluth, and various other villages and cities within the State of Minnesota, and connect with the lines of railway outside of said State of Minnesota.

That during the year 1899 said Northern Pacific Railway Company purchased, and ever since has owned and operated, a line of railway extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota; that said last named line parallels and is a competing line of railway for both freight and passenger traffic with the line of railway between said

Minneapolis and St. Paul and Duluth, hereinbefore described, and which is owned by said Eastern Railway Company of Minnesota, but operated, controlled and managed by said Great Northern Railway Company as a part of the system of said last named company, as hereinbefore alleged.

That the lines of railway now owned and operated by said Great Northern Railway Company within the State of Minnesota are parallel and competing lines for freight and passenger traffic with the lines of railway now owned, operated and controlled by said Northern Pacific Railway Company within the State of Minnesota, between the following points in said State, to wit: The cities of St. Paul and Minneapolis and the city of Duluth, Minnesota, and the various cities and villages between said points; also between the cities of St. Paul and Minneapolis and Crookston, Minnesota, by way of Fergus Falls and the various cities and villages between said points; also between the cities of St. Paul and Minneapolis and Crookston by way of Breckenridge, and the towns and cities between said points; and also between the cities of Duluth and Crookston, and the cities and villages between said points, as well as the country adjacent to the lines of railway between each and all of said cities; and the said lines of railway owned, operated and controlled by said Great Northern Railway Company, and also the lines of railway owned, operated and controlled by said Northern Pacific Railway Company which connect with the said lines of railway owned, operated and controlled by each of said companies respectively within the State of Minnesota, are parallel and competing lines through the States of North Dakota, Montana, Idaho and Washington to Puget Sound on the Pacific Coast for passenger and freight traffic. That during all of the time aforesaid each and all of said lines of railway were maintained and operated by said respective companies as common carriers of freight and passengers within the State of Minnesota; and that said companies are now, and for upwards of eleven years last past have been, the only railway companies owning or operating lines of railway crossing the State of Minnesota and connecting the Pacific Ocean by rail with points in Minnesota; also the only lines of railway traversing east and west

the northern tier of States of the United States lying west of the Mississippi River, and connecting such territory and territory tributary thereto by rail with the Pacific Ocean; and, with one exception, the only lines of railway crossing the north half of the State of Minnesota in any direction.

VIII.

That the Chicago, Burlington and Quincy Railway Company is and, for many years last past has been, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois; and, as such, until the disposition of its capital stock as hereinafter alleged, owned, operated and controlled an extensive system of railway lines extending from the city of Chicago, in the State of Illinois, in a westerly direction to the city of Denver, in the State of Colorado; and also in a westerly and northwesterly direction from said city of Chicago, to the city of Billings, in the State of Montana; which last named point is a junction and competitive point for freight and passenger traffic with the said Northern Pacific Railway Company; and also from said city of Chicago to the cities of St. Paul and Minneapolis, in the State of Minnesota; and in addition to said main lines, owned, operated and controlled a large number of connecting and tributary lines, extending to various cities and towns in the States of Illinois, Iowa, Missouri, Wisconsin, Minnesota, Nebraska, Kansas, Wyoming and Montana. That the total mileage of said railway company is approximately seven thousand four hundred miles. That during the year 1901 the said Great Northern Railway Company and said Northern Pacific Railway Company jointly purchased ninety-eight per cent of the total capital stock of said Chicago, Burlington and Quincy Railway Company, aggregating approximately one hundred and seven millions of dollars, par value, and now own the same; and issued in payment therefor the joint bonds of said Great Northern and Northern Pacific Railway Companies, payable in twenty years from the date thereof, and bearing interest at the rate of four per cent per annum, payable semi-annually. That said Great Northern and Northern Pacific Railway Companies issued and delivered in exchange for each

one hundred dollars in amount of said Chicago, Burlington and Quincy Railway Company stock two hundred dollars in amount of the said bonds.

That under and by virtue of the purchase of said stock the joint ownership and control of the said Chicago, Burlington and Quincy Railway Company is vested in and ever since has been exercised by the said Great Northern and Northern Pacific Railway Companies.

IX.

That the defendant Northern Securities Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. That said corporation was organized on the 13th day of November, A. D. 1901, with its principal office for the transaction of its business located at the city of Hoboken, county of Hudson and State of New Jersey, and is a citizen of the State of New Jersey.

That the articles of incorporation of said Northern Securities Company are as follows:

CERTIFICATE OF INCORPORATION
OF
NORTHERN SECURITIES COMPANY.

STATE OF NEW JERSEY, *ss:*

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the legislature of the State of New Jersey, entitled "An act concerning corporations (Revision of 1896), and the acts amendatory thereof and supplementary thereto," do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the State of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be the registered office of the corporation.

Third. The objects for which the corporation is formed are:

(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owners of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

(4) To aid in any manner any corporation or association of which any bonds, or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State.

Fourth. The total authorized capital stock of the corporation is four hundred million dollars ($400,000,000), divided into four

million (4,000,000) shares of the par value of one hundred dollars ($100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

Fifth. The names and post-office addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business) are as follows:

Name and post office address.	*Number of shares.*
George F. Baker, Jr., 258 Madison avenue, New York, New York.	100
Abram M. Hyatt, 214 Allen avenue, Allenhurst, New Jersey.	100
Richard Trimble, 53 East Twenty-fifth street, New York, New York.	100

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time by the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose terms shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one third of their number for the unexpired por-

tion of the term of the directors of the second class, and one third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the State of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

As authorized by the act of the legislature of the State of New Jersey passed March 22, 1901, amending the seventeenth section of the act concerning corporations (Revision of 1896), any action which theretofore required the consent of the holders of two thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employé of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws, or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of

board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice presidents, one or more assistant treasurers, and one or more assistant secretaries; and, to the extent provided in the by-laws, the persons so appointed respectively shall have and may exercise all the powers of the president, of the treasurer, and of the secretary, respectively.

The board of directors shall have power from time to time to fix and to determine and to vary the amount of the working capital of the corporation; to determine whether any, and if any, what part of any accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and the payment of dividends; and to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the corporation, to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors from time to time shall determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute of the State of New Jersey, or authorized by the board of directors or by a resolution of the stockholders.

The board of directors may make by-laws, and, from time to time, may alter, amend or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting, or at any special

meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof, we have hereunto set our hands and seals, the twelfth day of November, 1901.

GEORGE F. BAKER, JR. (L. S.)
ABRAM M. HYATT. (L. S.)
RICHARD TRIMBLE. (L. S.)

Signed, sealed and delivered in presence of—
GEORGE HOLMES.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss:*
MANHATTAN,

Be it remembered, that on this twelfth day of November, 1901, before the undersigned, personally appeared George F. Baker, Junior, Abram M. Hyatt, Richard Trimble, who, I am satisfied, are the persons named in and who executed the foregoing certificate, and I, having first made known to them, and to each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed. GEORGE HOLMES,

Master in Chancery of New Jersey.

Endorsed: "Received in the Hudson Co., N. J., Clerk's office, Nov. 13, A. D. 1901, and recorded in Clerk's Record, No. ——, on page ——. Maurice J. Stack, Clerk. Filed Nov. 13, 1901, George Wurts, Secretary of State."

That said Northern Securities Company was incorporated at the instigation and request, and under the direction of James J. Hill and William P. Clough, and certain other stockholders of said Great Northern Railway Company to your oratrix unknown, who were coöperating with said James J. Hill and William P. Clough, and who, with said Hill and Clough, owned and controlled, or have the disposition and management, as hereinafter alleged, of a very large majority of the capital stock of said Great Northern Railway Company; and J. Pierpont Morgan and certain other stockholders of said Northern Pacific Railway Company, to your oratrix unknown, who were coöperating with said Morgan, and who, with said Morgan,

owned and controlled, or have the disposition and management of, a very large majority of the capital stock of said Northern Pacific Railway Company. That said Northern Securities Company was formed by George F. Baker, Jr., and Richard Trimble, of the city of New York and State of New York, and Abram Hyatt, of Allenhurst, in the State of New Jersey, who adopted the said articles of incorporation. That said three last named parties had no interest in said corporation other than the formation of the same for and at the request of said James J. Hill, William P. Clough, J. Pierpont Morgan, and their several associate stockholders of said Great Northern Railway Company and said Northern Pacific Railway Company, as above alleged, acting in concert with said parties.

That said James J. Hill, William P. Clough and J. Pierpont Morgan, who, with their associates, did on said 13th day of November, 1901, and prior thereto, own and control a large majority of the capital stock of both said Great Northern Railway Company and said Northern Pacific Railway Company, were prior to, and at the time of, the organization of said Northern Securities Company, almost continually in conference with each other and with a large number of other stockholders of said Great Northern Railway Company and said Northern Pacific Railway Company, but whose names are to your oratrix unknown, considering such organization and the scheme and agreement herein referred to, and the means and manner by which the laws of Minnesota, hereinafter referred to, could be most successfully evaded or avoided, all of which facts were well known to the organizers of said Northern Securities Company, including the parties executing the said articles of incorporation. That said Northern Securities Company was organized solely for the purpose of carrying out and accomplishing the designs, agreement and plans of said James J. Hill and J. Pierpont Morgan and their said associate stockholders, as herein set forth, and to effect a consolidation of the property, railway lines, corporate powers and franchises of said Great Northern and Northern Pacific Railway Companies, respectively, through said defendant the Northern Securities Company.

That prior to the organization of said Northern Securities Company the said owners and holders of a large majority of the capital stock of said Great Northern Railway Company, as well as the owners and holders of a large majority of the capital stock of said Northern Pacific Railway Company, as a part of the scheme or plan herein alleged, as well as a part of the plan and purpose of the organization of said Northern Securities Company, entered into a mutual agreement or arrangement, the exact terms of which are unknown to your oratrix, but which is in substance as follows:

The said owners of a large majority of the capital stock of said Great Northern Railway Company and said Northern Pacific Railway Company mutually agreed with each other and certain persons who thereafter became the officers and directors of said Northern Securities Company, to transfer or cause to be transferred to said Northern Securities Company in exchange for the capital stock of said last named company substantially all of the capital stock of said Great Northern Railway Company and said Northern Pacific Railway Company, respectively; the said capital stock of the Great Northern Railway Company to be transferred to and exchanged for the capital stock of the said Northern Securities Company on the basis of one share of the capital stock of the Great Northern Railway Company for one and 80–100 shares of the capital stock of said Northern Securities Company, and one share of the common stock of said Northern Pacific Railway Company for one and 15–100 shares of the capital stock of said Northern Securities Company. The $75,000,000 of the preferred stock of said Northern Pacific Railway Company to be retired in accordance with the provisions of the articles of incorporation of said Northern Pacific Railway Company, and the conditions and agreements under which the same was issued; said retirement to take place on the 1st day of January, 1902. The funds for retiring said preferred stock to be raised by the issuance by said Northern Pacific Railway Company of its negotiable bonds, bearing date November 15, 1901, of the aggregate amount of seventy-five million dollars, payable January 1, 1907, in gold coin of the United States, with interest thereon at the rate of

four per cent per annum, payable semi-annually in like gold coin, from and after January 1, 1902. The said bonds, however, to be convertible at the option of either the holders thereof, or said railway company, into shares of the common stock of said Northern Pacific Railway Company at the rate of one share of stock for each one hundred dollars of the principal sum of such bonds, and the said common stock, when so taken in exchange for such bonds, to be converted into stock of said Northern Securities Company upon the basis of one share for each one and 15–100 shares of stock of said Northern Securities Company.

That said preferred stock could only be retired by resolution of the board of directors of said Northern Pacific Railway Company; that a very large majority of said preferred stock was owned by certain individuals who were opposed to the agreement and plan herein referred to relative to turning over the management and control of said Northern Pacific Railway Company to said Northern Securities Company, and the holding of its stock by said Northern Securities Company; that the owners of said preferred stock so opposed to said agreement and plan were also owners of sufficient of the common stock of said Northern Pacific Railway Company to give them a small majority of the total capital stock of said Northern Pacific Railway Company; thus making it necessary, in order to carry out the plan and agreement herein set forth and to vest the management and control of said Northern Pacific Railway Company in said Northern Securities Company in the manner and for the purposes herein alleged, to retire said preferred stock; all of which was well known to the board of directors of said Northern Pacific Railway Company and to said J. Pierpont Morgan and his associate stockholders of said Northern Pacific Railway Company, as well as said Northern Securities Company.

That on or about the 13th day of November, 1901, the board of directors of said Northern Pacific Railway Company took such official action as was necessary to retire said preferred stock upon the basis and in accordance with the plan and agreement herein set forth; and thereafter said preferred stock was retired by the issuance of convertible bonds to the amount and

in the manner herein alleged. That immediately after the retirement of said preferred stock, said Northern Pacific Railway Company, acting through its board of directors and executive officers, exercised its right and option of declaring said bonds to be convertible into the shares of the common stock of said Northern Pacific Railway Company, and thereupon the same were so converted and the common stock of said Northern Pacific Railway Company issued in exchange therefor, upon the basis and for the purposes herein alleged. That in order to prevent the persons who owned said preferred stock, and who were opposed to the carrying out of the plan and agreement herein referred to, from acquiring a like control of the common stock, it was provided that the $75,000,000 of common stock into which the said bonds were convertible could only be subscribed for and taken by holders of the then outstanding $80,000,000 of the common capital stock of said Northern Pacific Railway Company; each share of said common stock then outstanding entitling the owner and holder thereof to take an additional seventy-five eightieths of a share of said $75,000,000 additional common stock. That the retirement of said preferred stock and the conversion of the said bonds into common stock of said Northern Pacific Railway Company, and the exchange of said common stock for stock of said Northern Securities Company, as herein alleged, were each and all a part of the agreement, plan and scheme of said J. Pierpont Morgan and his said associate stockholders of said Northern Pacific Railway Company who then and there owned and controlled a large majority of the then outstanding common stock of said Northern Pacific Railway Company, under and by which the complete management and control of said Northern Pacific Railway Company was to be, and was thereafter, turned over to and vested in said Northern Securities Company in order that said Northern Pacific Railway Company, its property and franchises, might be in effect consolidated with the property and franchises of said Great Northern Railway Company, as herein alleged. That said James J. Hill and his associate stockholders of said Great Northern Railway Company had full knowledge of and assisted in retiring said preferred stock for the purposes and

objects herein alleged. That as a part of said agreement and plan entered into between said James J. Hill and his associate stockholders and said J. Pierpont Morgan and his associate stockholders, each and all of whom were then, and are now, acting in concert for the purpose of evading and violating the laws of the State of Minnesota, in the manner, for the purposes, and with the object and design herein set forth, and in furtherance of said purposes and design, and to avoid the effect of any litigation which might be instituted to defeat the consummation of the agreement, plan and scheme herein referred to of vesting the complete management and control of the railway lines, properties and franchises of said Great Northern and Northern Pacific Railway Companies in said defendant Northern Securities Company, said parties further undertook and agreed with each other and the persons who thereafter became the officers and directors of the defendant Northern Securities Company that pending the delivery and transfer of a majority of the capital stock of said Great Northern Railway Company to said Northern Securities Company, the same should be held by or under the control of some person or corporation to your oratrix unknown; and that pending such delivery it was mutually agreed between said Hill and his associate stockholders and said Morgan and his associate stockholders and the persons who thereafter became the directors and officers of the defendant, as well as the person or corporation so temporarily holding said stock that the same should be held during said period for the purposes above set forth in trust for the use and benefit of the defendant, the Northern Securities Company; and that during such time the parties holding said stock should attend and vote the same at all meetings of the stockholders of said Great Northern Railway Company, in the interests of the defendant, and as directed by the board of directors of said Northern Securities Company or the executive committee thereof, or in unison with the stock of said railway companies, actually assigned to and held by the defendant. That said Northern Securities Company has not purchased and does not intend to purchase the stock of either of said railway companies, except by issuing its stock in exchange for and in lieu of the stock of said railway companies

on the basis and in the manner and for the purposes herein alleged.

That for the unlawful purposes aforesaid the said Northern Securities Company, by circular letter heretofore issued to the public, has offered and is still offering to issue and exchange for the capital stock of the said Great Northern and Northern Pacific Railway Companies, capital stock of said Northern Securities Company to the amount of one hundred and eighty dollars par value thereof for each share of capital stock of said Great Northern Railway Company, and to the amount of one hundred and fifteen dollars par value thereof for each share of stock of said Northern Pacific Railway Company. And that the said Northern Securities Company is about to receive, on the basis aforesaid, and will, unless enjoined therefrom, receive, hold and hereafter control all the capital stock of said Great Northern and Northern Pacific Railway Companies.

X.

That the organization of said Northern Securities Company in the manner hereinbefore alleged, and the making of said agreement or arrangement hereinbefore referred to, are each and all a part of a scheme or plan on the part of said James J. Hill and his said associate stockholders of the Great Northern Railway Company, and J. Pierpont Morgan and his said associate holders of the stock of said Northern Pacific Railway Company, under and by which the said two last named railway companies are to be in effect consolidated, and the complete management and control of the business affairs of said corporations respectively placed in one body and under the direction and control of one man or one board of directors, through and by means of said defendant. That pursuant to said plan, agreement and arrangement, and in consummation thereof, and for the purpose of placing the complete management and control of said Great Northern Railway Company and said Northern Pacific Railway Company under one management, and for the purpose of establishing, in effect, a consolidation of said railway companies, together with said railway lines and properties, in and through said defendant, the said J. Pierpont Morgan

and his associate stockholders have actually assigned and delivered to said Northern Securities Company upwards of eighty-five per cent of the total capital stock of said Northern Pacific Railway Company; and your oratrix alleges, on information and belief, that said James J. Hill, and his associate stockholders of said Great Northern Railway Company have also actually assigned and delivered to said Northern Securities Company upwards of eighty-five per cent of the said capital stock of said Great Northern Railway Company. That the sole purpose, object and effect of the transfer of said stock by said James J. Hill and his said associates and the said J. Pierpont Morgan and his said associates to said Northern Securities Company was and is to transfer to and vest in said defendant Northern Securities Company the complete management and control of the respective lines of railway and railway properties of each of said railway companies within and without the State of Minnesota, and to place the complete management and control of the same, and the power to dictate the policy of each of said corporations, as well as the power and authority to fix rates and charges for the transportation of both freight and passengers within the State of Minnesota, as well as without said State, in the hands of and under the control of one party or board of directors, and thereby create, foster and perpetuate a monopoly in railway traffic in the State of Minnesota.

That the purpose, object and effect of the incorporation of the defendant and the receipt by it of a controlling amount of the capital stock of the said Northern Pacific and Great Northern Railway Companies, as well as each act of the officers and board of directors thereof, in entering into, adopting or executing the agreement or plan herein set forth, including the issuance and exchange of the capital stock of the Northern Securities Company for the stock of the said Northern Pacific and Great Northern Railway Companies on the basis hereinbefore set forth, was and is to place the said railway companies and the property and franchises thereof under a single management, and enable a single party or body of men acting as the board of directors of the said Northern Securities Company, or such executive committee as they may designate, to fix all rates and

charges for the transportation of passengers and freight over any and all the lines of railway of each of said companies within the State of Minnesota; to determine what trains shall be operated over each or any of the lines of railway of each of said railway companies, and to remove all competition in freight or passenger traffic over said parallel and competing lines, and prevent the building of lines into new territory as well as into the territory now reached by only one of said lines of railway; that the purpose of said agreement and of the parties thereto was the creation of a trust or the formation of a combination by which a monopoly of railway traffic in northern Minnesota and elsewhere will be perfected; that the defendant company was organized for, and is to be used as a medium through and by which this unlawful agreement, purpose and object can, and, if not enjoined, will be accomplished; that this agreement and the consummation thereof is in restraint of trade, tends to create a monopoly in railway traffic and is against public policy, and void.

That holders of a large majority of the capital stock of both said Great Northern and Northern Pacific Railway Companies had knowledge of, consented to, and assisted in carrying out the agreement, arrangement and scheme herein set forth by which a large majority of the capital stock of each of said railway companies was to be exchanged for the capital stock of said Northern Securities Company upon the basis and for the purposes herein set forth; and the said stockholders of said Great Northern and Northern Pacific Railway Companies so consenting to, taking part and assisting in the formation of said Northern Securities Company, and the perfecting of the agreement and scheme herein set forth, constitute all of the stockholders of said Northern Securities Company; and the board of directors and executive officers of said Northern Securities Company hereinafter named have been selected from and elected by such stockholders of said Great Northern and Northern Pacific Railway Companies.

That under the articles of association of said Northern Securities Company, its corporate powers and entire business management is vested in a board of directors consisting of

such number as shall be fixed from time to time, by the by-laws of said corporation, and the board of directors itself is authorized to make such by-laws as it deems best, and from time to time to alter, amend or repeal any by-laws. That the board of directors of said company thereby has power to determine its own number, and to adopt rules and regulations for its own conduct and the conduct of the affairs of said corporation. The articles of association further provide that said board of directors may appoint an executive committee in the manner provided by the by-laws of the company, which committee shall exercise all the powers and duties of said board of directors.

That on or about the 14th day of November, A. D. 1901, the following named persons were elected as and now constitute the board of directors of said Northern Securities Company, to wit: For the term of one year, James J. Hill, George F. Baker, Daniel S. Lamont, James Stillman and N. Terhune; for the term of two years, Samuel Thorne, Charles E. Perkins, Jacob H. Schiff and William P. Clough; for the term of three years, John S. Kennedy, D. Willis James, E. T. Nichols, Robert Bacon and E. H. Harriman. That on the 15th day of November, A. D. 1901, said board of directors met and elected the following executive officers of said company, to wit: President, James J. Hill; First Vice President, John S. Kennedy; Second Vice President, George F. Baker; Third Vice President, D. Willis James; Fourth Vice President, William P. Clough; Secretary and Treasurer, E. T. Nichols.

Complainant further alleges that said James J. Hill and said William P. Clough were, on said last named date, the President and Vice President respectively of said Great Northern Railway Company; and both were members of the board of directors of said last named company. That said E. T. Nichols was, on said date and now is, the Secretary and Assistant Treasurer of said Great Northern Railway Company. That said James J. Hill and his associates either own or have in their possession or under their control, a large majority of the capital stock of said Great Northern Railway Company. That said James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, D. Willis James, John S. Kennedy, D. S. Lamont and James Stillman were, on

said 14th day of November, 1901, and now are members of the board of directors of said Northern Pacific Railway Company, and constitute a majority of the board of directors of said named company.

That said James J. Hill and his associate directors and officers of said Northern Securities Company own and control a majority of the capital stock of said last named company; that during the month of December, 1901, said Northern Securities Company, through its directors and executive officers, began dictating the policy and management of said Northern Pacific as well as said Great Northern Railway Company, and ever since has been and now is directing and managing the business and property of both said Great Northern and Northern Pacific Railway Companies, and determining and enforcing freight and passenger rates on many of the lines of railway of said companies in the State of Minnesota, together with the manner and means of handling the freight and passenger business of said companies on such lines of railway, and will continue so to do unless enjoined as herein prayed.

That said Northern Securities Company has no authorized agent or representative within the State of Minnesota on whom a summons or other process in any legal proceeding may be served.

That the massing and concentration of said railway properties and the control and management thereof in the defendant company in the manner hereinbefore outlined, tends to and does create a monopoly in railway traffic in the State of Minnesota, and tends to and does deprive the State of Minnesota and the citizens thereof of the privilege of competition in fixing charges and rates of transportation for a large amount of freight transported annually over the lines of railway of each of said railway companies, between stations upon the lines of railway of both said companies within the State of Minnesota.

That it has ever been a part of the settled and public policy of the State of Minnesota to prohibit therein, in any way, the consolidation in any manner of competing and parallel lines of railway; and to this end the legislature of the State of Minnesota did, in the year 1874, pass the following enactment, which

ever since has remained and now is a part of the statute law of the State of Minnesota, known as chapter 29 of the General Laws of 1874, to wit:

"SEC. 1. No railroad corporation, or the lessees, purchaser or managers of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues.

"SEC. 2. This act shall take effect and be in force from and after its passage. Approved March 9, 1874."

That in the year 1881 the legislature of the State of Minnesota passed the following enactment, which ever since has remained and now is a part of the statute law of the said State and known as chapter 94 of the General Laws of 1881, to wit:

"SEC. 3. No railroad corporation shall consolidate with, lease or purchase, or in any way become the owner of or control any other railroad corporation or stock, franchises, rights or property thereof, which owns or controls a parallel or competing line.

"SEC. 4. This act shall take effect and be in force from and after its passage. Approved March 3, 1881."

That said Northern Securities Company is a railroad corporation within the meaning of the laws of the State of Minnesota; and the purpose, object and design of the said organizers and promoters of said Northern Securities Company, both in the organization thereof and in the making and carrying out of the said plans, agreement and designs hereinbefore referred to, was and is to violate the said legislative enactments of the State of Minnesota, and to evade and escape the provisions thereof; and it is the purpose, intent and design of said corporation, its stockholders, directors, executive committee, officers, agents and representatives, to violate the said legislative enactments,

and to evade and escape the terms and provisions thereof, and to effect a consolidation of said railway corporations and properties as herein alleged. That each and all the said acts are violations and evasions of the said laws and the settled public policy of the State of Minnesota, and unless said parties are enjoined will cause the State of Minnesota irreparable injury.

That for many years last past it has been a part of the settled policy of the State of New Jersey to permit the consolidation of only such lines of railroad as are or can be connected so as to form continuous lines of railroad, and not to permit the consolidation of parallel or competing lines; and to that end, in the year 1885, the legislature of the State of New Jersey enacted a law which permits the consolidation of such lines as shall or may form connecting or continuous lines of railroads.

Your oratrix is informed and believes, and upon information and belief alleges, that defendant is not the owner of any property or stock or securities of any corporation, except as above set forth, and is not engaged in any business whatever except such as is incidental to the ownership of such stock and the general management and control of said Great Northern and Northern Pacific Railway Companies and the railway lines and properties thereof.

Your oratrix further alleges that if the defendant is permitted to control and manage the affairs of said Great Northern and Northern Pacific Railway Companies, in a manner hereinbefore alleged or otherwise, all competition between them will forever cease, and a monopoly in railway traffic in Minnesota be created, to the great and permanent and irreparable damage and injury to the State of Minnesota and to the people thereof, and in violation of its laws.

That your oratrix has and can have no other adequate remedy or relief by action at law except as herein prayed for in equity.

To the end, therefore, that the defendant, the Northern Securities Company may, if it can, show cause why your oratrix should not have the relief herein prayed for, and that it may be compelled to answer all and singular the premises, and all matters and things herein stated, as fully and particularly as if they were here again repeated, and said company thereunto in-

terrogated, and that the defendant may be required to answer without oath, its answer under oath being hereby expressly waived; and that the defendants may, by the decree of this court, be perpetually enjoined and restrained:

First. From voting at any meeting of the stockholders of either said Great Northern or Northern Pacific Railway Company any of the capital stock of either of said companies by any means or in any manner whatsoever, and from attending, by reason of such ownership, possession or control of stock, either through its officers or by proxy, or in any other manner, any meeting of the stockholders of either of said companies.

Second. That the defendant, its stockholders, officers, directors, or the executive committee thereof, its attorneys, representatives, agents or servants, and each of them, be enjoined and restrained from, in any way, aiding, advising, directing, interfering with or in any way taking part, directly or indirectly, in any manner whatsoever, in the management, control or operation of any of the lines of railway of either of said companies, or in the management or control of the affairs of either of said companies.

Third. That the said defendant, its officers, attorneys, representatives, agents or servants, including its board of directors, or any of its members as such, be enjoined and restrained from exercising any of the powers or performing any of the duties, or in any manner acting as a representative, officer, member of the board of directors or employé, of either said Great Northern or Northern Pacific Railway Company, or in any way exercising any management, direction or control over the same.

Fourth. That said defendant, its stockholders, directors and other officers, representatives and agents, be enjoined and restrained from doing any and all acts and making any arrangements or combinations by contract or otherwise having for their object, effect or result the consolidation or establishment of a joint management or control in any manner whatsoever of the said Great Northern and Northern Pacific Railway Companies, their lines of railway or properties.

Fifth. That the said defendant be enjoined from either directly or indirectly holding, owning or controlling any of the stock of

either of said companies at one and the same time for any of the purposes or objects alleged in said bill, or otherwise.

Sixth. That in case it shall appear upon the hearing that the defendant owns or controls, or is acting in concert with the owners of, a majority of the capital stock of either of said railway companies, and owns or controls a minority of the stock of the other of said companies, then that the defendant, its officers, directors, agents, or representatives, be enjoined and restrained from receiving, acquiring or controlling any additional capital stock of such other railway company.

Seventh. And your oratrix further prays the leave of this court to amend this, its bill of complaint, if amendment thereto shall become necessary, including the right to bring in other parties defendant for the purpose of giving force and effect to any decree that may be made by the court herein.

And that complainant be granted such other and further or different relief as the nature of this case may require, and as shall be agreeable to equity and good conscience.

Mr. W. B. Douglas and *Mr. M. D. Munn* for complainant. *Mr. George P. Wilson* was on their brief.

Mr. William D. Guthrie and *Mr. John W. Griggs* for defendant. *Mr. John G. Johnson* was on their brief.

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

Whether a bill in equity filed in this court, in the name of a State, which seeks to prevent by injunction a corporation organized under the laws of another State, with power to acquire and hold shares of the capital stock of any other corporation, from obtaining and exercising ownership and control of two or more competing railroad companies of the complainant State, so as to evade and defeat its laws and policy forbidding the consolidation of such railroads when parallel and competing, presents the case of a controversy of a civil nature whereof this court has jurisdiction under the Constitution and laws of the

United States, and whether the bill in the present case is of that description, or whether it is the case of a suit brought by a State to enforce its penal statutes, and hence within the principle of the decision in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, are questions which have been ably discussed by counsel.

But it is not necessary for us to consider and answer those questions, for, in view of the nature of the facts presented and the remedies prayed for in the bill proposed to be filed, we think that the suit is defective for want of essential parties whose rights would be vitally affected by the relief sought therein.

The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Plds. sec. 72.

The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel. *Shields* v. *Barrow*, 17 How. 130; *Hipp* v. *Babin*, 19 How. 271, 278; *Parker* v. *Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black, 545.

In the case of *Shields* v. *Barrow*, 17 How. 130, the question was fully discussed, and it was shown, upon a review of the previous cases, that there are three classes of parties to a bill in equity.

They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. The court in respect to the act of Congress of February 28, 1839, 5 Stat. 321, and to the forty-seventh rule in equity practice, said (p. 140):

"The first section of that statute enacts: That when in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties, who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit.

"This act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it reaches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron* v. *McRoberts*, 3 Wheat. 591; *Osborn* v. *The Bank of the United States*,

9 Wheat. 738, and *Harding* v. *Handy*, 11 Wheat. 132. For this court had already there decided that the non-joinder of a party who could not be served with process would not defeat the jurisdiction. The act says it shall be lawful for the court to entertain jurisdiction; but as is observed by this court, in *Mallow* v. *Hinde*, 12 Wheat. 193, 198, when speaking of a case where an indepensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.' So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the forty-seventh rule is only a declaration, for the government of practitioners and courts, of the effect of this act of Congress, and of the previous decisions of this court, on the subject of that rule. *Hogan* v. *Walker*, 14 How. 36.

"It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights."

California v. *Southern Pacific Co.*, 157 U. S. 229, was a case in several particulars like the present one. There a bill was filed in this court by the State of California against the Southern Pacific Company, a corporation of the State of Kentucky, claiming title and jurisdiction by the State over certain large tracts of land lying upon the shores of the bay of San Francisco and over the harbor waters of said bay, including San Antonio Creek, and averring that the Southern Pacific Company claimed adversely to the State, and was engaged in placing structures in and upon said tracts of land, thereby obstructing navigation in the bay and adjoining waters. The bill prayed

for a decree quieting the title of the State and enjoining the defendant company from maintaining the structures that it had placed upon said tracts and the adjacent waters. The defendant company answered the bill, denying the ownership of the complainant in the premises in dispute, and setting forth its own title derived from the town of Oakland, as to the whole of the water front of that town, through one Carpentier, as grantee of said town by ordinance and deed of conveyance, and claiming that by subsequent mesne conveyances the said title and property had become vested, as to a part thereof, in the Central Pacific Railroad Company, and, as to another part, in the South Pacific Coast Railway Company, and in the defendant company as lessee. It further was claimed that certain ordinances and deeds of the town of Oakland operated as a grant by the city of Oakland and the State of California of the land to the Oakland Water Front Company, as grantee or alienee of Carpentier. The case was duly put at issue, and a commissioner was appointed to take testimony therein and to return the same to the court.

When the case came on for hearing it was held by this court that the city of Oakland and the Oakland Water Front Company were so situated in respect to the litigation that the court ought not to proceed in their absence. In reaching this conclusion the court reviewed the cases, including the cases above cited and others.

Upon the contention that the city of Oakland and the Oakland Water Front Company might be made parties defendant, and the court thus enabled to proceed with the case, the court held that this could not be done, because this court could not exercise original jurisdiction in a suit between a State on the one hand and a citizen of another State and citizens of the complainant State on the other. Accordingly, the bill was dismissed for want of parties who should be joined, but could not be without ousting our jurisdiction.

We shall, therefore, proceed to examine the substance of the bill proposed to be filed, in order to see whether it discloses a case in which a decree could be granted which would do final and complete justice between the nominal parties without

vitally affecting other persons not before the court. As already stated, a conclusion reached that the suit cannot be entertained for want of necessary and essential parties, will not imply any expression of opinion beyond that question.

As the bill is set forth in full in the preceding statement, it will not be necessary to here repeat its allegations. They may be summarized as follows:

The complainant is the State of Minnesota; the defendant is the Northern Securities Company, a corporation of the State of New Jersey.

It is part of the policy of the State of Minnesota, as declared in its public statutes, to prohibit therein the consolidation in any manner of competing and parallel lines of railway. The statutes specially recited in the bill are the act of March 9, 1874, the first section whereof is in the following terms: "No railroad corporation, or the lessees, purchaser or managers of any railroad company, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues;" and the act of March 3, 1881, of which the third section is as follows: "No railroad company shall consolidate with, lease, or purchase, or in any way become the owner of or control any other railroad corporation or stock, franchises, rights or property thereof, which owns or controls a parallel or competing line."

The Great Northern Railway Company is a corporation organized and existing under an act duly passed by the Territory of Minnesota and under various subsequent acts of the State of Minnesota, and owns and controls, as lessee, several important lines of railroad, some only within and others extending beyond the State of Minnesota, and which are maintained by the Great Northern Railway Company as one complete system. The

board of directors of the Great Northern Railway Company, at the time of the organization of the Northern Securities Company, to wit, on or about November 13, 1901, was and now is composed of the following-named persons, to wit: James J. Hill, James N. Hill, Samuel Hill, William P. Clough, Edward Sawyer, Jacob H. Schiff and Henry W. Cannon. That on said last mentioned date the Great Northern Railway Company had issued and there was then outstanding a total of one hundred and twenty-five million dollars, par value, of the capital stock of said corporation, of which, it is alleged, that said James J. Hill was on said last mentioned date the owner of or had subject to his direction and disposition, more than a majority of said capital stock so outstanding.

The Northern Pacific Railway Company was organized under the laws of the State of Wisconsin of the year 1895, and afterwards, by filing a certified copy of its articles of incorporation, became a corporation of the State of Minnesota and subject to the laws of that State relating to railroad corporations. In the year 1896 the Northern Pacific Railway Company duly purchased and became the owner of the entire railroad properties and lines formerly owned by the Northern Pacific Railroad Company, and at all times since has continuously owned and operated each and all of said lines of railway situated within the State of Minnesota, and which connect the cities of St. Paul and Minneapolis and Duluth, and connect with the lines of railways outside the State of Minnesota. During the year 1899 the said Northern Pacific Railway Company purchased, and ever since has owned and operated a line of railway extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota. Said last mentioned line parallels and is a competing line of railway for both freight and passenger traffic with the line of railway between said Minneapolis and St. Paul and Duluth, owned by the Eastern Railway Company of Minnesota, but which is operated, controlled and managed by said Great Northern Railway Company, as a part of the system of that company. The lines of railway now owned and operated by said Great Northern Railway Company within the State of Minnesota are parallel and competing lines for freight and passenger traffic

with the lines of railway now owned, operated and controlled by said Northern Pacific Railway Company within the State of Minnesota; and also said lines of railway owned, operated and controlled by said Great Northern Railway Company, and also the lines of railway owned, operated and controlled by said Northern Pacific Railway Company, which connect with the lines of railway owned, operated and controlled by each of said companies respectively within the State of Minnesota, are parallel and competing lines through the States of North Dakota, Montana, Idaho and Washington to Puget Sound on the Pacific Coast, for passenger and freight traffic. That said companies are the only railway companies owning or operating lines of railway crossing the State of Minnesota and connecting the Pacific Ocean by rail with points in Minnesota.

That the Chicago, Burlington and Quincy Railway Company, a corporation of the State of Illinois, has, for many years last past, owned, operated and controlled an extensive system of railway lines, connecting the city of Chicago with the city of Denver, in the State of Colorado, and with the city of Billings, in the State of Montana, which last named point is a junction and competitive point for freight and passenger traffic with said Northern Pacific Railway Company, etc. That during the year 1901 the said Great Northern Railway Company and said Northern Pacific Railway Company jointly purchased ninety-eight per cent of the total capital stock of said Chicago, Burlington and Quincy Railway Company, aggregating approximately one hundred and seven million of dollars, par value, and now own the same, and issued in payment therefor the joint bonds of said Great Northern and Northern Pacific Railway Companies, payable in twenty years from the date thereof, and bearing interest at the rate of four per cent per annum, payable semi-annually. That the said Great Northern and Northern Pacific Railway Companies issued and delivered in exchange for each one hundred dollars in amount of said Chicago, Burlington and Quincy Railway Company stock two hundred dollars in amount of the said bonds; and that under and by virtue of the purchase of the said stock the joint ownership and control of the said Chicago, Burlington and Quincy Railway Company are vested in,

and ever since have been exercised by, the said Great Northern and Northern Pacific Railway Companies. During April, 1901, and ever since, the following named persons constituted and now are the members of the board of directors of the Northern Pacific Railway Company: James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, H. McK. Twombly, Brayton Ives, D. Willis James, John S. Kennedy, Daniel S. Lamont, Charles S. Mellen, Samuel Rea, William Rockefeller, Charles Steele, James Stillman and Eben B. Thomas. On November 13, 1901, J. Pierpont Morgan, with certain other unknown persons, but who were acting with said Morgan, owned and had in their possession, or held and had subject to their control and disposition, upwards of eighty-five per cent of the total capital stock of said Northern Pacific Railway Company. The Northern Securities Company was organized on November 13, 1901, with its principal office at Hoboken, in the State of New Jersey, and the objects for which the corporation was formed, as stated in the articles of incorporation, are to acquire and hold, as investments, the bonds, securities and capital stock of any other corporation or corporations of the State of New Jersey, or of any other State, Territory or country, and while owner of said stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon; and it is declared that the corporation shall have power to conduct its business in other States and in foreign countries, to have one or more offices out of the State, and to purchase, hold and convey real and personal property out of the State.

It is alleged that the Northern Securities Company was incorporated at the instigation and request of James J. Hill, William P. Clough, and certain unknown stockholders of said Great Northern Railway Company, who, with said Hill and Clough, owned or controlled, or have the disposition and management of, a large majority of the capital stock of said Great Northern Railway Company, and with the coöperation of J. Pierpont Morgan and certain other unknown stockholders of said Northern Pacific Railway Company, who, with said Morgan, owned and controlled, or have the disposition and man-

agement, of, a large majority of the capital stock of said Northern Pacific Railway Company.

On November 14, 1901, James J. Hill, George F. Baker, Daniel S. Lamont, James Stillman, N. Terhune, Samuel Thorne, Charles L. Perkins, Jacob H. Schiff, William P. Clough, John S. Kennedy, Willis James, E. T. Nichols, Robert Bacon and E. H. Harriman were elected directors of the Northern Securities Company, and said directors on November 15, 1901, elected James J. Hill to be president, and John S. Kennedy, George F. Baker, Willis James and William P. Clough to be vice presidents, and E. T. Nichols, to be secretary and treasurer, of said company. It is alleged that the holders of a large majority of the capital stock of both said Great Northern and Northern Pacific Railway Companies had knowledge of and assisted in the formation of the said Northern Securities Company, and that such stockholders, so consenting and assisting, constitute all of the stockholders of said Northern Securities Company.

The bill charges that the purpose of the formation of the Northern Securities Company was to place the management and control of the Great Northern Railway Company and of the Northern Pacific Railway Company under one management, and to thus, in effect, establish a consolidation of said railway companies, and defeat and evade the statutes and policy of the State of Minnesota forbidding consolidation of parallel and competing lines of railway.

The relief prayed by the bill is that the defendant company be perpetually enjoined and restrained from voting, at any meeting of either said Great Northern and Northern Pacific Railway Company, any of the capital stock of either of said companies by any means or in any manner whatsoever, and from attending, by reason of such ownership, possession or control of stock, either through its officers or by proxy, or in any other manner, any meeting of the stockholders of either of said companies, and from, in any way, aiding, advising, directing, interfering with or in any way taking part, directly or indirectly, in any manner whatsoever, in the management, control, or operation of any of the lines of railway of either of said companies; and that said defendant, its officers, attorneys, repre-

sentatives, agents, or servants, including its board of directors, or any of its members as such, be enjoined and restrained from exercising any of the powers or performing any of the duties, or in any manner acting as a representative, officer, member of the board of directors or employé, of either said Great Northern or Northern Pacific Railway Company, or in any way exercising any management, direction or control over the same; and that said defendant, its stockholders, directors and other officers, representatives and agents, be enjoined and restrained from doing any and all acts and making any arrangements or combinations, by contract or otherwise, having for their object, effect or result the consolidation or establishment of a joint management or control in any manner whatsoever of the said Great Northern and Northern Pacific Railway Companies, their lines of railway or properties; and that said defendant be enjoined from either directly or indirectly holding, owning or controlling any of the stock of either of said companies at one and the same time for any of the purposes or objects alleged in the bill, or otherwise, and that in case it shall appear upon the hearing that the defendant owns or controls, or is acting in concert with the owners of, a majority of the capital stock of either of said railway companies, and owns or controls a minority of the stock of the other of said companies, then that the defendant, its officers, directors, agents or representatives, be enjoined and restrained from receiving, acquiring or controlling any additional capital stock of such other railway company; and further for leave to amend the bill of complaint, if amendment thereto shall become necessary, including the right to bring in other parties defendant for the purpose of giving force and effect to any decree that may be made by the court herein.

More briefly stated, the case presented by the charges and prayers of the bill is that the State of Minnesota is apprehensive that a majority of the stockholders respectively of the Great Northern Railway Company and of the Northern Pacific Railway Company have combined and made an arrangement, through the organization of a corporation of the State of New Jersey, whereby such a consolidation, or what is alleged to amount to the same thing, a joint control and man-

agement of the Great Northern and Northern Pacific Railway Companies, shall be effected as will operate to defeat and overrule the policy of the State in prohibiting the consolidation of parallel and competing lines of railway, and therefore appeals to a court of equity to prevent by injunction the operation and effect of such a combination and arrangement.

But at once, as we have seen, the court is put upon inquiry whether the parties and persons to be affected by such an injunction are before it.

The narrative of the bill unquestionably discloses that the parties to be affected by a decision of the controversy are, directly, the State of Minnesota, the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that State, and the Northern Securities Company, a corporation of the State of New Jersey, and, indirectly, the stockholders and bondholders of those corporations, and of the numerous railway companies whose lines are alleged to be owned, managed or controlled by the Great Northern and Northern Pacific Railway Companies.

Can such a controversy be determined with due regard to the interests of all concerned, by a suit solely between the State of Minnesota and the Northern Securities Company? It is, indeed, alleged that all of the stockholders of the Northern Securities Company are stockholders in the two railroad companies, and, therefore, it may be said that the latter stockholders are sufficiently represented in the litigation by the Northern Securities Company; but it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company. It is obvious, therefore, that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company. They have a right to be represented, in the controversy, by the companies whose stock they hold, and their rights ought not to be affected without a hearing, even if

it were conceded that a majority of the stock in such companies, held by a few persons, had assisted in forming some sort of an illegal arrangement. Moreover, it must not be overlooked that it is not the private interests of stockholders that are to be alone considered. The directors of the Great Northern and Northern Pacific Railway Companies are appointed to represent and protect not merely the private and pecuniary interests of the stockholders, but the rights of the public at large, which is deeply concerned in the proper and advantageous management of these public highways. It is not sufficient to say that the Attorney General, or the Governor, or even the Legislature of the State, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a State, when it voluntarily becomes a complainant in a court of equity, cannot claim to represent both sides of the controversy. Not only have the stockholders, be they few or many, a right to be heard, through the officers and directors whom they have legally selected to represent them, but the general interests of the public, which might be deeply affected by the decree of the court, are entitled to be heard; and that, when the State is the complainant, and in a case like the present, can only be effected by the presence of the railroad companies as parties defendant.

Upon investigation it might turn out that the allegations of the bill are well founded, and that the State is entitled to relief; or it might turn out that there is no intention or design on the part of the railroad companies to form any combination in disregard of the policy of the State, but that what is proposed is consistent with that policy and advantageous to the communities affected. But, in making such investigation, a court of equity must insist that both sides of the controversy shall be adequately represented and fully heard.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are be-

yond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States.

As then, the Great Northern and the Northern Pacific Railway Companies are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed, and as our constitutional jurisdiction would not extend to the case if those companies were made parties defendant, the motion for leave to file the proposed bill must be and is

Denied.

UNITED STATES *v.* ST. LOUIS & MISSISSIPPI VALLEY TRANSPORTATION COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 89. Argued January 10, 13, 1902.—Decided February 24, 1902.

After the findings of fact, conclusions of law, and judgment in this case were filed, two successive motions for a new trial were made on behalf of defendant; whereupon the former findings were withdrawn, and new and amended findings and opinion filed. *Held*, that as these amendments were made at defendant's request, the existing conclusions of law and judgment were not thereby disturbed.

The evidence adduced shows that the facts found were sufficient to warrant the court below in holding that the collision in the Mississippi River at New Orleans, whereby the Transportation Company lost a vessel, was the result of the negligence of the officers in command of the United States vessels.

There was also culpable negligence in the United States officers in anchoring in an unusual and improper position.

Upon the findings made the Transportation Company was not chargeable with contributory negligence.

On October 17, 1894, the St. Louis and Mississippi Valley Transportation Company filed in the Court of Claims a suit by way of petition against the United States, in pursuance of the provisions of the act of August 3, 1894, alleging that said company was a corporation of the State of Missouri, and the owner

of the towboat Future City, her barges in tow and freight earnings; that owing to a collision on May 5, 1888, in the Mississippi River, between said steam towboat and barges and war vessels of the United States, several of the barges, with their cargoes and contents, were sunk and wholly lost, and the freight earnings of such barges for the voyage in progress were lost, or not earned and paid to the claimant; and that said collision and the loss and injury resulting therefrom were solely and directly the result of negligence on the part of those in charge of the said vessels of war; and claimed damages in the sum of $24,308.

The United States appeared in said Court of Claims by its Attorney General, and filed an answer traversing and denying the allegations of the claimant's petition. The case was so proceeded in that on March 21, 1898, the court found for the claimant, and adjudged and decreed that the St. Louis and Mississippi Valley Transportation Company should have and recover of and from the United States the sum of $19,808.85.

On March 21, 1898, the court filed findings of fact and conclusion of law. Subsequently, to wit, on May 14, 1900, the court filed an order withdrawing its former findings of fact in this case, and filed amended findings in lieu thereof.

On May 21, 1900, an appeal was prayed for and allowed to this court.

Mr. George Hines Gorman for appellant. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. James H. Hayden for appellee. *Joseph H. McCammon* was on his brief.

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

After the findings of fact, conclusions of law and judgment were filed by the Court of Claims on March 21, 1898, two successive motions for a new trial were made on behalf of the defendant. The result of these motions was that on May 14,

1900, the court filed an order withdrawing its former findings of fact, and filed new and amended findings and opinion; and it is now contended that by such action in amending its findings of fact and modifying its opinion the court must be deemed to have set aside its judgment. But as the amendments of the findings were made at the request of the defendant in connection with the motions for a new trial, we think that the existing conclusions of law and judgment were not thereby disturbed. Obviously the changes or modifications in the findings, at the instance of the defendant, were intended by the court to enable the case of the defendant to be most advantageously presented for review by the court below on the motions for a new trial, and by this court on appeal. The motions for a new trial having been overruled, the judgment rendered on March 21, 1898, remained as the judgment of the Court of Claims, and that is the judgment from which the defendant appealed, and which is now before us for review. By taking such appeal, the defendant must be deemed to have admitted the existence and finality of the judgment. Nor is it perceived that the defendant has any reason to complain that the findings, on which the conclusions of law and the judgment were based, were amended at its instance. So far as the amendments were at all material, they were, in some instances, favorable to the case of the defendant, and, at all events, must be regarded as a proper exercise of authority by the trial court in making its findings conform to the truth, while its record had not passed out of its control by the allowance of an appeal.

The material facts found by the Court of Claims were as follows: The Future City and the barges comprising her tow were all staunch, sound and seaworthy, and were fully and adequately manned, officered and equipped, and the Future City was ample, powerful and able to handle her tow under any and all circumstances arising in the navigation of the Mississippi River. On Mya 7, 1888, the Future City with her tow was descending the river and approaching the port of New Orleans, with the intention of making a landing, and while so descending the river the Future City followed the proper and customary course of navigation for descending towboats with tows. A towboat

with a tow bound for the port of New Orleans, and pursuing the proper and customary course for such vessels, cannot make out and see vessels and other objects lying in that portion of the river below a point of land at Celeste street and between the western shore and the middle of the stream, because that point and the buildings standing upon it, and the shipping moored along its banks, intervene and completely shut off the view in that direction.

Upon rounding the point of land at Celeste street the Future City for the first time sighted five United States vessels, to wit, the Atlanta, Galena, Ossipee, Yantic and Richmond, lying at anchor below the said point of land and between the western bank of the river and the middle of the stream. The Future City could not have made out and discovered the United States vessels before, because the said point of land intervened and, with the buildings upon it and the shipping moored along its banks, completely shut off the view in the direction of the portion of the river where those vessels lay at anchor. As soon as she sighted and discovered the United States vessels lying at anchor in her usual and proper course, the Future City backed under a full head, working full stroke, with all the power she had, thus adopting the only course feasible and proper in the circumstances, or in anywise calculated to prevent her from colliding with the United States vessels. On account of the insufficiency of time and space after she discovered the United States vessels, and notwithstanding that she made every possible effort to keep clear of the United States vessels, and, in order that her tow might extend out into the river as short a distance as its length would permit, backed her stern as close to the New Orleans shore as it was in anywise possible without coming into collision with the shipping moored therealong, and notwithstanding that she was skillfully and properly handled and managed by her officers and crew, the Future City was unable, on account of the short distance intervening, either to check her headway or to straighten up, and still being in a flanking position, she and her tow were carried by her headway and the current of the river, and barge 73, the leading barge of her tow on the port side, came into collision with the Atlanta,

striking against the ram of that vessel broadside on with great force. As a result of this collision barge 73 was cut down, and sank, with all her cargo.

Thereafter, notwithstanding that the Future City continued to pursue the only course feasible and proper in the circumstances and in anywise calculated to avoid further collisions with other of the United States vessels, and continued to back with all her power, and notwithstanding that she was skillfully managed and handled by her officers and crew, yet her stern having been swung slightly down stream by the collision of barge 73 with the Atlanta, she was unable to check her headway or straighten up, and was carried by her headway and the currents of the river, and barge 68, the leading barge on the starboard side, collided with the Galena, and was sunk with all her cargo. Notwithstanding that the Future City was skillfully and properly handled, and that she and her officers and crew did their utmost to control her remaining barges and to prevent further collisions between them and the United States vessels, barge 50 broke loose and was carried by the current, and came into collision with the Richmond, and thereby sustained great damage and the loss of part of its cargo.

The United States vessels, as they lay at anchor on May 7, 1888, were ranged in an irregular line along the western bank of the river, which is the city side, their distances from said bank varying from 500 to 700 feet. The Atlanta was anchored highest up stream, and was about 150 feet below the Richard street ferry, and the entire fleet extended down the river for the distance of about one mile—the Richmond lying off and about opposite the barge landing. At Celeste street the shore extends into the river to a sharp point, and the river bends from that point to the north. Just below, the width of the stream is about 1800 feet. The location of the Atlanta, 600 feet, or a little less, from the New Orleans shore, put that vessel in the track of tows entering the harbor from above. It was in the pathway of a tow of even less length than the plaintiff's, at that particular place engaged in flanking down to the landing. The upper vessel was at the entrance to the harbor, and the fleet was located in the way of all vessels descending and seek-

ing to land in the neighborhood of the barge landing. When the United States vessels were first sighted or discovered by the Future City the Atlanta was distant from her about 150 yards.

The positions occupied by the United States vessels were directly in the track of towboats with tows descending the Mississippi River bound for the port of New Orleans, and pursuing their proper and customary course of navigation, and were thus directly in the track the course of which the Future City and her tow were pursuing when she first sighted and discovered them. The positions thus occupied by the United States vessels were improper and unusual, by reason of their being higher up stream, too short a distance below the point of land at Celeste street, not at the bank, but nearer to the New Orleans or western shore in the river, than the proper, usual and customary anchorage grounds for such or other vessels, or than vessels had ever before been known to occupy while at anchor. By reason of their being anchored so high up the river such short distances below the point of land at Celeste street and so close to the New Orleans shore, and by reason of their swinging at anchor, they rendered the navigation of the river by towboats with tows, pursuing their usual and customary course, hazardous and extremely dangerous. On May 7, 1888, and prior thereto, there was an abundance of good and suitable anchorage ground lower down the river and nearer its eastern or Algiers shore, where it was usual, customary and proper for vessels to lie at anchor while at the port of New Orleans, and where the United States vessels could have lain at anchor in perfect safety and without rendering the navigation of the river at the port of New Orleans either hazardous or dangerous for any vessels pursuing their usual, proper and customary courses. Good holding ground for vessels like the men-of-war to safely anchor at all times existed within twenty feet of the Algiers shore. The United States vessels came to anchor in their said positions on or about May 5, 1888, while the Future City, with her tow, was descending the Mississippi River on her voyage from St. Louis, and none of her officers or crew had notice or knowledge of their presence at New Orleans, or of their whereabouts, or of the manner in which they were anchored, until

they were sighted and discovered after the Future City had rounded the point of land at Celeste street. There is a clear and well-defined custom at New Orleans respecting the course and practice of tows to land. Descending tows come close to the shore on the city side of the river. If they did not pursue this course descending tows would come down in the current so far out that the motive power could not back the tow to land. One of the reasons for coming in close to the shore is to catch the slack near vessels moored to the shore.

Under the laws of the State of Louisiana there existed, at the time of this occurrence, a board of five harbor masters, who were charged with the duty of "regulating and stationing all vessels in the stream of the river Mississippi, within the limits of the port of New Orleans, and at the levees thereof." Among the rules and regulations adopted by the board, and at that time in force, was one prescribing that "the harbor masters have authority by law to regulate, moor and station all seagoing or coasting vessels at the levee, and to remove them from time to time to make room for others, and of the degree of accommodation which one vessel shall afford another the harbor master is constituted sole judge;" and another which provides that "all vessels arriving at this port shall notify the harbor master of the district or leave word at the central office, where the place of landing will be designated; otherwise they will be removed at the expense of the vessel;" and another which declares that "masters of vessels failing to comply with the rules will be held responsible for all damages in consequence, besides laying themselves liable under the law."

Upon the arrival of these United States vessels in May it does not appear that the harbor master was notified of the fact, nor was word left at the central office that the vessels had arrived. The harbor master exercised no personal supervision over the matter of the anchorage of the fleet, and was without knowledge of the places taken in the river by the said war vessels.

The Court of Claims further found, in its twenty-second finding, that "the said collisions were the result of negligence on the part of the officers in command of the United States ves-

sels in bringing them to anchor in improper and unusual positions, and in causing them to be anchored on swinging chains, as aforesaid."

A lengthy discussion is made in the briefs of the respective counsel as to the nature of this finding. Is it a finding of the ultimate fact in the case, or is it merely a conclusion of law based on the facts previously found?

It is said, on the one hand, that, by the express terms of the act of Congress authorizing this suit to be brought, no judgment shall be rendered against the Government unless it shall affirmatively appear, from the evidence adduced, that such collision was the result of negligence on the part of the officers in command of said vessels of war, and that the Court of Claims, having affirmatively found that the collisions were the result of negligence on the part of the officers in command of the United States vessels, such finding is a conclusion of fact, which conclusively disposes of the case, and which, so far as the right to recover is concerned, leaves no question of law to be passed upon by this court. On the other hand, it is claimed that negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence, and that, hence, this court can determine, from the facts otherwise found, whether the collision was the result of negligence on the part of the officers in command of the vessels.

We do think it necessary to weigh this question in a very delicate balance, as we are of opinion that, even if the Government's contention in that particular is sound, yet the evidence adduced, as it appears in the facts found, was sufficient to warrant the court below in holding that it affirmatively appeared that the collision was the result of the negligence of the officers in command of the vessels.

Undoubtedly, by entering the port of New Orleans, intending to anchor and remain there, in total disregard of the usages and regulations of the port, the officers in command of the vessels were negligent. Ports like those of New Orleans and New York, which are frequented not merely by seagoing vessels, but by numerous vessels and barges engaged in commerce, or

rivers which enter and form part of the harbors, require regulations suited to the local exigencies.

"An ordinance of the city of Charleston, prescribing where a vessel may lie in the harbor, how long she may remain there, what light she must show at night, and making other similar regulations, is not in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States. It is therefore valid, and a vessel at anchor is bound to show such a light as is required by the local regulations." *Owners of James Gray* v. *Ship John Fraser*, 21 How. 184; *The Vanderbilt*, 6 Wall. 225.

There was also culpable negligence in anchoring in an unusual and improper position.

"It is negligence for a vessel to moor so near the entrance to a harbor that shipping, entering in stress of weather, is liable to become embarrassed by its presence; and where the usual difficulties of navigation make the entrance to a harbor a dangerous undertaking, it is especially reprehensible for a vessel to moor in a situation tending to increase these difficulties."

"Where a vessel is at anchor in a proper place, and is observant of the precaution required by law, it is not liable for damages sustained by a vessel in motion colliding with it, but where it anchors in an unlawful position, or fails to observe the statutory requirements and such other precautions as good seamanship would suggest, it must suffer the consequences attending a violation of the law." Spencer on Marine Collisions, secs. 99, 106.

"A vessel ought not to be moored, and lie in the channel or entrance to a port, except in cases of necessity; or, if anchored there from necessity, she ought not remain there longer than the necessity continues. If she does and a collision takes place with a vessel entering the harbor, she will be considered in default." *The Scioto*, 2 Ware, 360.

The treatment of the question of negligence on the part of those in command of the Government's vessels was so full and satisfactory by the court below that we think it sufficient to refer to its opinion, reported in 33 C. Cl. 251.

The dissent on the part of Peele, J., did not arise out of any

view that the United States officers had not been negligent, but was based on the opinion of the dissenting justice that negligence on the part of the plaintiff had contributed to the accident.

Adverting to that aspect of the case, we think that, upon the findings made, which of course control us, the plaintiff was not chargeable with contributory negligence. The findings show that the Future City entered the harbor and manœuvered for landing, in the manner customary for vessels of her class; that she had no reason to expect to find vessels at anchor, where none had ever been known to anchor before, on the city side of the river and close under the point at Celeste street, and that her management, when she encountered the exigency, was skillful and proper.

The Court of Claims further found that the damages caused to the plaintiff, as a result of the collisions, amounted to the sum of $19,808.85.

It is contended on behalf of the Government, that, even if the collision was the result of negligence on the part of the officers in command of said vessels of war, and even if, on the facts found, the plaintiff was properly exonerated from the charge of contributory negligence, yet that the judgment of the court below was erroneous in including the loss and damages caused to barge 68.

This contention is based on an alleged difference between the findings of fact filed on March 21, 1898, and those filed on May 14, 1900, whereby, it is claimed, that the facts that were found in the first finding, and upon which the liability of the Government for barge 68 was based, were eliminated, and hence there was no foundation left for the judgment in that respect. This record does not disclose to us the first finding, and, of course, we can only consider the findings as amended and filed on May 14, 1900. But, even conceding that the discrepancies pointed out exist, yet we think that the findings actually and finally made furnish sufficient support for the judgment in the particular complained of. Finding sixteen is explicit, that, "notwithstanding the Future City, after the collision with the Atlanta, continued to pursue the only course feasible and proper

in the circumstances, and in anywise calculated to avoid further collisions with other of the United States vessels, and continued to back with all her power, and notwithstanding that she was skillfully and properly handled and managed by her officers and crew, yet her stern having been swung slightly down stream by the collision of barge 73 with the Atlanta, she was unable to check her headway or straighten up, and was carried by her headway and the currents of the river, and went down toward the Galena, which was lying about 400 feet astern of the Atlanta and closer to the New Orleans shore than the latter. In the collision between barge 68 and the Galena the lines and fastenings of the said tow and the rigging of the Future City were parted or greatly damaged, and her tow was broken up and the lead barge (68), the barge on the starboard side, struck the Galena and was sunk, with all cargo aboard, and the barge and her freight earnings became a total loss."

Inasmuch as the court found that everything that was possible to avert further collisions after the collision with the Atlanta was done by the Future City, it, in effect and indeed in terms, found that the loss of the three barges occasioned by collision with the Atlanta, the Galena and the Richmond, were occasioned by negligence of the officers in command of the said United States vessels, in bringing them to anchor in improper and unusual positions and in causing them to be anchored on swinging chains.

The judgment of the Court of Claims is

Affirmed.

STUDEBAKER *v.* PERRY.

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

No. 122. Argued January 17, 20, 1902.—Decided February 24, 1902.

The single question for the determination of the court in this case is, whether the Comptroller of the Currency, acting under the national banking laws, can validly make more than one assessment upon the shareholders of an insolvent national banking association, and it is held that he can, the language of the statutes on that subject being plain and free from doubt.

On November 9, 1899, in the Circuit Court of the United States for the Northern District of Illinois, John Perry, as receiver of the National Bank of Kansas City, brought an action against Clement Studebaker, to recover an assessment made by the Comptroller of the Currency on stock held by the defendant in said bank.

The declaration set forth the incorporation of the National Bank of Kansas City; the ownership by the defendant of 189 shares of its capital stock of the par value of $100 each; the insolvency of the bank; an assessment by the Comptroller of the Currency on February 11, 1896, of sixteen per cent on the stock; the payment by the defendant of said assessment; a finding by the Comptroller of the Currency on February 25, 1899, that the first assessment was insufficient and the necessity of an additional assessment of seven per cent; the levy of said second assessment; the direction by the Comptroller to the receiver to collect it, and the refusal of the defendant to pay.

A demurrer was filed raising the question of the sufficiency in law of the declaration. The demurrer was overruled, and the defendant electing to stand by his demurrer, judgment was rendered for the amount of the second assessment upon the stock owned by the defendant. A writ of error was allowed, and the cause was taken to the Circuit Court of Appeals of the Seventh Circuit, where the judgment of the Circuit Court was affirmed.

102 Fed. Rep. 947. The case was then brought to this court by a writ of error duly allowed.

Mr. Hugh C. Ward for plaintiff in error.

Mr. George W. Ward and *Mr. Francis F. Oldham* for defendant in error. *Mr. Walter W. Ross* and *Mr. M. J. Kirkman* were on their brief.

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

The single question for our determination is whether the Comptroller of the Currency, acting under the national banking laws, can validly make more than one assessment upon the shareholders of an insolvent national banking association.

It is not denied by the plaintiff in error that the first assessment, which he voluntarily paid, was insufficient to pay the debts and liabilities of the bank, but his contention is that the Comptroller of the Currency exhausted his power to levy assessments upon the shareholders of stock in an insolvent national bank by a single exercise of that power. He advances two arguments in support of his contention: First, that the individual liability of national bank shareholders is contractual, and that hence only one assessment and suit to enforce the same is authorized by law; and, second, that by a course of practice for many years the Comptrollers of the Currency, charged with the execution of the laws, construed them to authorize but one assessment, and that such construction is now conclusive upon the courts.

Those portions of the statutes which are involved in this controversy are found in section 5151 of the Revised Statutes of the United States, in the following terms:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount in-

vested in such shares, except that shareholders of any banking association now existing under state laws, having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares. . . . "

And in section 5234 in the following terms:

"On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

And section 5236, as follows:

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

The proposition of the plaintiff in error, as expressed in the

brief of his counsel, is "that section 5234 simply authorizes the Comptroller to enforce the individual liability of shareholders in a national bank, if necessary to pay the debts of such bank; that the Comptroller is therefore plainly authorized to decide as to the necessity of enforcing such liability and as to the time when the same is to be enforced, and fix the amount to be collected; that there is to be a decision by the Comptroller as to these matters, and then a demand or requisition by him, followed by one suit, at law or in equity, as circumstances require; that it is this decision, which is termed an assessment; that the Comptroller is nowhere expressly authorized to enforce such liability by several decisions and suits; that he is simply authorized to enforce the individual liability of national bank stockholders according to law; and that there can be but one decision by the Comptroller as to the time, necessity and extent of enforcing this liability, and, therefore, but one assessment, as the statute certainly does not authorize an assessment which could not be enforced by suit."

It is further urged, in behalf of the plaintiff in error, that as the liability of a shareholder of an insolvent national bank for all contracts, debts and engagements of such association to the extent of the amount of his stock therein, at the par value thereof, in addition to the amount invested in such shares, is contractual in its nature, it therefore follows that the general rule that the plaintiff cannot split up a single and entire cause of action and make it the subject of different suits applies.

We do not deem it necessary in the case before us to enter at length into the discussion suggested. It is sufficient that, by entering into the relation of a shareholder in a national banking association, the plaintiff in error subjected himself to the obligation created by the statute, and the only question is whether the Comptroller of the Currency has power to make and to enforce by a suit at law more than one assessment upon the shareholders of an insolvent national bank, if necessary to pay the debts thereof. The general purpose of the statute undoubtedly was to confer upon the creditors of the bank a right to resort to the individual liability of the shareholders to the extent, if necessary, of the amount of their stock therein, and it

would be a singular construction of law that would empower the Comptroller, by making an inadequate assessment, to relieve the shareholders, upon paying such assessment, from their entire liability.

The logic of the plaintiff in error requires him to convince us that his voluntary payment of one assessment, made when the Comptroller was imperfectly acquainted with the amount of the bank's indebtedness, amounts to a satisfaction *in toto* of his obligation. Such may be the true construction of the statute; but, defeating, as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only be made by a court when compelled by the necessary meaning of the language. The inconvenience that would be occasioned by the meaning proposed are so great and obvious as to lead us to expect to find that a reasonable construction of the law does not require us to adopt it.

If it be the duty of the Comptroller to give the creditors of an insolvent national bank the remedy providing for the individual liability of the shareholders, and if the law be that he can do so by one assessment only, then he must, no matter what the condition of the bank may appear to be, make an assessment upon the shareholders up to the entire amount of their liability. In many instances, the value of the bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up, and then be returned without interest, would certainly be a hardship upon the shareholders. If, to avoid that hardship, the Comptroller should postpone the assessment until he could fully inform himself of the condition of the bank's affairs, in the time that might thus elapse, some of the stockholders might become insolvent or remove their property from the reach of legal proceedings, and thus a loss be thrown upon the creditors.

There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences.

In *Kennedy* v. *Gibson*, 8 Wall. 498, 505, some aspects of the question were considered. Mr. Justice Swayne said:

"The receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

"The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution and the case may stand over for the further action of the court, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount to be collected shall be formally ascertained. This would greatly protract the final settlement and might be attended by large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the result in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious

policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying the demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered."

These observations clearly imply that the Comptroller, in the exercise of his discretion, may levy successive assessments as they may appear to be necessary. If the power can be exercised only once no reason is apparent why equity should have jurisdiction for the collection of an assessment less than one hundred per cent. If the stockholders' liability is fixed once for all by the first assessment of the Comptroller, the legal remedy for the collection of a ten per cent assessment is as full, adequate and complete as it is for the collection of the one hundred per cent assessment. The reason why, when the assessment is for the one hundred per cent, the proceedings must be at law, and when for a less amount it may be in equity, is obvious. When the full amount is assessed there can be but one suit against each stockholder. He is suable for his full liability at once, and there is no reason for equitable jurisdiction. If a partial assessment is made, there may be other assessments, when the receiver has liberty to sue at law for even a partial assessment, though equity has concurrent jurisdiction to prevent a multiplicity of suits.

Casey v. *Galli*, 94 U. S. 673, was the case of a suit at law by the receiver of a national banking association to enforce the individual liability of a shareholder. It was there contended that the defendant was bound to contribute ratably, and that the proper amount could be ascertained only in equity; that the defendant was bound to contribute ratably a large sum; that this sum was not stated in the declaration, and hence what would be ratable and proper did not appear; that the obligation of the defendant was to pay into the hands of the Comptroller of the Currency a ratable portion of the debts of the association proved before him, and that the declaration did not show that any debts had been so proved; and that the declaration demanded a larger sum than the defendant is required by

the statute to pay, and also an additional sum by way of interest. But it was held by this court that "in regard to the first three of these objections it is sufficient to say that *Kennedy* v. *Gibson*, 8 Wall. 498, is conclusive against them. It is there said that the amount to be paid rests in the judgment and discretion of the Comptroller; that his determination cannot be controverted by the stockholders in suits against them, and that, when the order is to collect the full amount of the par of the stock, the suit must be at law. It is unnecessary to reproduce the reasoning of the court in support of these propositions. The sum to be paid being liquidated, and due and payable when the Comptroller's order was made, it follows that the amount bears interest from the date of the order."

In *United States* v. *Knox*, 102 U. S. 422, an attempt was made to enforce a deficiency, caused by the insolvency of some of the shareholders of an insolvent national bank, against solvent shareholders, but it was held that the liability of the shareholders was several, and was not affected by the failure of any other shareholder to pay the amount assessed against him, and it was said by this court that "although assessments made by the Comptroller, under the circumstances of the first assessment in this case, and all other assessments, *successive or otherwise*, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders."

Germanica National Bank v. *Case*, 131 U. S. (Appendix, 144), was a case where the Comptroller had levied an assessment for an amount on each shareholder, not sufficient to justify an appeal from the Circuit Court of the United States, and where a motion to dismiss the appeal was made in this court, but the motion was denied, Chief Justice Waite saying, "If the decree asked and obtained in this cause had been confined to an order for the payment of the seventy per cent upon the amount of the stock held by the appellants respectively, which the Comptroller of the Currency has already instructed the receiver to collect, the objection taken by the appellee to our jurisdiction might have been good; but the decree as given goes further, and after providing for the seventy per cent, adjudges that each of the appellants shall be liable to further contribution as stock-

holders until a sufficient sum is realized to pay the debts of the bank, and that the bill be retained until it shall be certain that no further contribution will be required. This fixes the liability of each of these appellants to contribute in this suit to the extent of the nominal amount of his stock if necessary, and as the bill alleges that at least twenty-five per cent more will be required, it is apparent 'that the matter in dispute' is not alone the amount already decreed, but a sum in addition that may amount to thirty per cent of the stock, and is now expected to reach twenty-five per cent. Their liability generally as stockholders to make contribution has been finally established. That can never again be contested in this suit except under this appeal. For the purposes of jurisdiction, we may consider that as in dispute which would be settled by the decree if it had not been appealed from." The right of the Comptroller to levy a further assessment was thereby plainly implied.

Bushnell v. *Leland*, 164 U. S. 684, was a late case, in which the power of the Comptroller to determine the necessity and amount of an assessment upon the shareholders was challenged on constitutional grounds, but it was held, in the language of Mr. Justice White: "All these alleged errors may be reduced to the simple contention that under the national banking law the Comptroller of the Currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank; and that the lodgment of authority in the Comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power, in violation of the Constitution. All of these contentions have long since been settled, and are not open to further discussion. *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673; *United States* v. *Knox*, 102 U. S. 422."

The precise question raised in the present case has several times been argued and determined in the lower Federal courts. In *Aldrich* v. *Yates*, 95 Fed. Rep. 78, the question was thus

stated and answered by District Judge Evans in the Circuit Court for the District of Kentucky: "The question, then, remains, has the Comptroller of the Currency the power to make a second assessment in any event? The ultimate liability of the shareholder in such cases is for the full amount of the par value of the stock, under the statutory conditions, if by the Comptroller they are found to exist. A mistake of that officer in making an estimate of the amount of a needed assessment cannot be held to release the shareholder from the full statutory liability. A mistake of such a character would be natural, if not inevitable, in many instances, in view of the uncertain value of assets; and the indisposition, in the first instance, to make an assessment unnecessarily large, may well excuse its not being done, when there is certainly no statutory provision, prohibiting, in terms or by necessary implication, further assessments, if the necessity exists. In practice, second assessments have frequently been made. The court is of opinion that such a course is within the power of the Comptroller, in the exercise of his duty to see that the liability of the stockholder is sufficiently enforced to pay the debts of the bank, and that practice has been recognized as proper by the Supreme Court. *United States* v. *Knox*, 102 U. S. 422."

In *Aldrich* v. *Campbell*, 97 Fed. Rep. 663, it was held by the Circuit Court of Appeals for the Ninth Circuit, that the action of the Comptroller of the Currency in ordering an assessment against the stockholders of an insolvent national bank, whether a first assessment or one subsequently made, is a determination of the necessity for such assessment, which is conclusive on the stockholders, and cannot be questioned by them in any litigation which may ensue, either at law or in equity.

In *Deweese* v. *Smith*, 97 Fed. Rep. 309, it was held by the Circuit Court that a judgment against a shareholder of an insolvent national bank on a first assessment was a bar to a second suit brought to recover a later assessment, but this judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit, in *Deweese* v. *Smith*, 106 Fed. Rep. 438. And, as already stated, the Circuit Court of Appeals for the Seventh Circuit held in the case now before us that it was discretionary

with the Comptroller to make one or more assessments, *Studebaker* v. *Perry*, 102 Fed. Rep. 947, Woods, Circuit Judge, saying:

"The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts 'to the extent of the amount of their stock therein,' and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the Comptroller the receiver is authorized to enforce the shareholders' liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design."

The cases cited by the plaintiff in error wherein courts of high authority have held that, where some particular act involving judicial discretion is to be performed by an executive officer, the power is exhausted by its single exercise, are not applicable to cases like the present, where the law merely provides that the shareholder shall pay what may be necessary to meet the debts and obligations of the bank. How much that is may not be ascertained at once, but as it is important that the settlement shall progress without delay, it is a reasonable construction of the statute that, while it is just and for his benefit that the stockholder be called on for no more than seems to be necessary, so it is just to the creditor that further calls may be made when necessary. This is a case where the power to assess belongs exclusively to the Comptroller, and the power to enforce the assessment belongs to the courts, and the construction contended for on behalf of the plaintiff in error confuses the remedy provided for by this statute of the United States with the ordinary remedy for the enforcement of statutory liability of stockholders by the courts.

It is finally argued on behalf of the plaintiff in error that the doctrine of contemporaneous and practical construction put upon a statute by executive officers is applicable. It is said that former Comptrollers of the Currency held, in several instances, that the power to assess under the national banking law was exhausted by a single exercise; that subsequent

Comptrollers ought not to have departed from that construction; and it is urged that this court should, by its decision in this case, set aside the construction at present prevailing and restore the former one.

The doctrine invoked is a useful one, but its application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance. The rule is well expressed in Cooley on Constitutional Limitations, sec. 69, 5th ed.:

"If the question involved is really one of doubt the force of their (officers') judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind. Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law and not allow intrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmaker."

That the language of the statute under consideration is plain and its construction free from doubt are sufficiently shown by the decisions of the courts heretofore cited; and it would be absurd to claim that the plaintiff in error bought his stock in a national banking association with a right to rely on the contingency that the Comptroller might inadvertently or mistakenly make an insufficient assessment should the bank become insolvent.

The judgment of the Circuit Court of Appeals is

Affirmed.

TERLINDEN *v.* AMES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 475. Argued January 6, 7, 1902.—Decided February 24, 1902.

Extradition proceedings before a committing magistrate thereto duly authorized, where jurisdiction exists, and there is competent legal evidence tending to establish the criminality alleged, cannot be interfered with by *habeas corpus*.

In this case the writ of *habeas corpus* was issued before the examination by the commissioner was entered upon, and the inquiry was confined to the question of his jurisdiction. He had jurisdiction if there was a treaty between this and the demanding country, and the commission of extraditable offences was charged.

Offences were charged to have been committed "contrary to the laws of Prussia," and although the violated laws were prescribed by imperial authority, they were nevertheless the laws of Prussia and were being administered as such by the Royal Prussian Circuit Court before which the charges were pending.

As the German Government has officially recognized, and continues to recognize, the treaty between the United States and the Kingdom of Prussia of June 16, 1852, as still in force, and not terminated because of impossibility of performance, and the Executive Department of this Government has accepted that view and proceeded accordingly, it is not for our courts to question the correctness of the conclusions of the German Government as to the effect of the adoption of the Constitution of the German Empire.

The question whether power remains in a foreign State to carry out its treaty obligations is in its nature political, and it is not within the province of the courts to interfere with the conclusions of the political department in that regard.

AUGUST 15, A. D. 1901, Dr. Walther Wever, Imperial German Consul at Chicago, filed his complaint before Mark A. Foote, Esq., a commissioner of the United States in and for the Northern District of Illinois, and specially authorized to issue warrants for the apprehension of fugitives from justice of foreign governments, stating that he was "the duly accredited official agent and representative of the German Empire at Chi-

cago and also the Kingdom of Prussia, forming a part of said German Empire," and charging that one Gerhard Terlinden, alias Theodor Graefe, a subject of the Kingdom of Prussia, did, within the first six months of the year 1901, "commit within the jurisdiction of the said Kingdom of Prussia various crimes of forgery and counterfeiting and the utterance of forged papers," in that as a director of the Gerhard Terlinden Stock Company, organized and doing business in said kingdom, said Terlinden forged and counterfeited certain certificates of the stock of said company amounting to about a million and a half of marks, and put out, uttered and disposed of the same to Robert Suermont of the city of Aachen, Prussia; the Amsterdamsche Bank, Netherlands; the Disconto Gesellschaft, a corporation doing business in Berlin, Prussia; and other persons and corporations, with felonious intent to cheat and defraud them respectively. The complaint further charged that Terlinden was at the time of committing said crimes a resident of the city of Duisburg and a citizen of said Kingdom of Prussia; that he was a fugitive from said kingdom; that on or about the first day of July, 1901, he fled into the jurisdiction of the United States of America for the purpose of seeking an asylum therein; that he was now said to be concealed within the Northern District of Illinois or in the Eastern District of Wisconsin; and that the crimes with which he was charged were crimes embraced within the treaty of extradition between the United States and the Kingdom of Prussia, concluded on the 16th day of June, 1852, and ratified May 30, 1853.

It was therefore prayed that a warrant be issued for the apprehension and commitment of Terlinden "in order that the evidence of his criminality may be inquired into, and the said Gerhard Terlinden, alias Theodor Graefe, may be extradited and delivered up to the justice of the said Kingdom of Prussia, in accordance with the stipulations of said treaty and the acts of Congress passed in pursuance thereof."

The complaint was duly verified and the commissioner issued his warrant, which was placed in the hands of John C. Ames, United States marshal in and for the Northern District of Illinois, and Terlinden was apprehended and held to be dealt with according to law.

Statement of the Case.

Subsequently and on September 25, 1901, Dr. Wever, in his capacity aforesaid made another complaint before the commissioner, charging (1) the forging of a large number of stock certificates of the Gerhard Terlinden Stock Company; (2) uttering said stock certificates, well knowing them to be forged; (3) forging and counterfeiting the steel stamp of the Royal Prussian revenue office at Duisburg, Prussia; (4) imprinting said forged steel stamp upon the forged certificates of stock so as to make it appear that the tax required by the Prussian revenue law had been paid on said certificates issued by the company in said kingdom, and thus to give said forged certificates the appearance of genuineness; (5) uttering forged certificates of stock with said forged stamp thereon; (6) forging the acceptance of one Heinrich Schulte to a certain draft for nine thousand five hundred and eighty-two marks and thirty-five pfennings, and uttering the same; (7) forging the acceptance of one Wilhelm Seven to two certain drafts for the sums of twenty-six thousand two hundred and fifty marks and of twenty-five thousand nine hundred and twelve marks and forty-five pfennings, respectively, and uttering the same; or causing all these things to be done; "contrary to the laws of the Kingdom of Prussia."

It was stated that these several crimes were fully shown by the testimony of a number of witnesses heard before the examining judge of the Landgericht at Duisburg in the Kingdom of Prussia, "a court of competent jurisdiction in which the matter of the penal investigation instituted against the said Gerhard Terlinden, alias Theodor Graefe, is now pending, in order that he may answer for said several crimes;" and with the complaint were submitted copies of the depositions of the witnesses, together with a copy of the warrant of arrest issued by that court against Terlinden, "and of the provisions of the penal code of the German Empire applicable to said several crimes and providing punishment therefor," all of which were duly authenticated; and also a verified English translation thereof. This second complaint also showed that the crimes charged were committed within the jurisdiction of the Kingdom of Prussia; and that Terlinden was at the time of committing the same, a subject of that kingdom; and the commissioner in

accordance with the prayer of the complaint issued another warrant, which was served on Terlinden the following day, he being discharged from arrest on the first warrant. On the 17th of October, before any evidence was taken before the commissioner, Terlinden presented to the District Court of the United States for the Northern District of Illinois his petition praying for a writ of *habeas corpus* on the following grounds:

"1. No treaty or convention for the extradition of fugitives from justice exists between the United States and the German Empire.

"2. That the treaty or convention for the extradition of fugitives from justice concluded between the United States and the Kingdom of Prussia on the 16th day of June, 1852, and ratified May 30, A. D. 1853, was terminated by the creation of the German Empire and the adoption of the Constitution of said Empire in A. D. 1871, and that no treaty or convention for the extradition of fugatives from justice has been concluded between the United States, on the one part, and the Kingdom of Prussia or the German Empire, on the other, since said time.

"3. Said complaint does not charge an extraditable offence under the provisions of the treaty of 1852, concluded between the United States and Prussia and other German States, were said treaty still in force and of binding effect.

"4. Your petitioner is not guilty of any extraditable offence under the provisions of said treaty of 1852, were said treaty still in force and of binding effect.

"5. All proceedings had or attempted to be had before said commissioner under said complaint and warrant are illegal, void and without authority in law because said commissioner did not have jurisdiction over the person of this petitioner."

The writ of *habeas corpus* was issued and the marshal for the Northern District of Illinois filed his return October 21, setting forth that he "arrested said petitioner within said district on the 26th day of September, 1901, upon a warrant duly issued by Mark A. Foote, a United States commissioner specially appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extradition and to issue warrants therefor, which

said warrant was duly issued by said commissioner upon a complaint duly made by Walther Wever, Imperial German Consul at Chicago as representative of the Kingdom of Prussia, charging said Gerhard Terlinden, who, it appears, falsely assumed in this country the name of Theodor Graefe, with having, as a subject of the Kingdom of Prussia and within the jurisdiction of the said kingdom, committed the crimes of forgery, counterfeiting and the utterance of forged instruments, and with being a fugitive from justice of said Kingdom of Prussia. . . ."

The matter was brought on for hearing October 21, and after arguments of counsel the court gave leave to present briefs and adjourned the hearing to October 28. On that day the relator filed with the clerk of the court a traverse, reciting that with the complaint of September 26 there were filed "copies of the original testimony and translations of the same contained in the depositions taken before certain court officials in the Empire of Germany, relative to the alleged offences with which said complaint charges your petitioner; that said complaint refers to said depositions so filed in words following, to wit:" [Then setting forth the passages of the complaint to the effect that Dr. Wever therewith submitted "to the commissioner and files with this complaint a copy of all depositions of witnesses taken in said matter, together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the penal code of the German Empire applicable to said several crimes and providing punishment therefor."]

The traverse then continued:

"That the provisions of the Criminal Code of the German Empire applicable to the facts and circumstances of this case as shown by the evidence hereto annexed are sections 240, 47, 49 first paragraph; section 360 fourth and fifth paragraphs; section 275 and section 56 of the Code of Criminal Procedure, also section 234 of the Civil Code, a correct translation of which sections are hereto annexed and marked Exhibit 'B' and made a part hereof.

"That said depositions so filed do not show or tend to show that your petitioner is guilty of any extraditable offence; that

a copy of said deposition so referred to in said complaint and heretofore filed with said commissioner is hereto attached marked Exhibit 'A' and made a part of this traverse.

"Wherefore your petitioner prays that the return of the United States marshal herein be dismissed and your petitioner discharged."

Copies of depositions were attached to the alleged traverse; but no copy of the warrant of arrest issued by the court at Duisburg, or of the provisions of the penal code attached to the complaint.

An affidavit accompanied the traverse to the effect that affiant as an expert had made the annexed translations of certain sections and parts of sections of the German criminal and civil codes.

October 29, to which day the hearing of the cause had been continued, Terlinden presented a petition for a writ of certiorari to bring before the court "for its consideration the depositions, provisions of the German Criminal Code and copy of the original warrant issued by said German court heretofore referred to."

This application was denied by the District Court, October 31, and the court ordered "that the question of whether since the formation of the German Empire the extradition treaty concluded between the Government of the United States and the Kingdom of Prussia in 1852 is still in force or abrogated by the Constitution of the German Empire, be submitted to the court on briefs to be filed," and continued the hearing. It was also ordered "that said relator be remanded to the custody of the marshal, and that the motion to stay all further proceedings before the United States commissioner be and the same hereby is denied."

Thereafter, on November 5, the District Court entered an order finding that the petitioner was lawfully restrained of his liberty, directing the petition to be dismissed, and remanding petitioner, from which an appeal was taken to this court. Errors were assigned, in substance, that the court erred in declining to hold that no treaty exists between the United States and the Kingdom of Prussia or the German Empire; in assum-

ing the existence of such treaty; in denying the right to introduce evidence for the purpose of showing that no extraditable offence had been committed; in denying the application for a certiorari; in holding that the record showed the commission of an extraditable offence.

Mr. Albert W. May and *Mr. A. C. Umbreit* for appellant. *Mr. Joseph B. Doe* was on their brief.

Mr. William Vocke for appellee. *Mr. William Mannhardt* was on his brief.

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

The treaty of June 16, 1852, between the United States and the Kingdom of Prussia, and other States of the Germanic Confederation included in or which might accede to that convention, provided that the parties thereto should upon requisition "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or assault with intent to commit murder, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other." 10 Stat. 964, 966.

Pursuant to § 5270[1] of the Revised Statutes, (and the acts

[1] Sec. 5270. Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard

from which that section was brought forward,) complaint was duly made before a commissioner appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extradition and to issue warrants therefor, charging Terlinden with having as a subject of the Kingdom of Prussia, and within the jurisdiction of that Kingdom, committed the crimes of forgery, counterfeiting and the utterance of forged instruments, and with being a fugitive from the justice of said kingdom.

The complaint charged with much particularity, among other things, the forging and uttering of forged stock certificates of the Gerhard Terlinden Stock Company; the forging of the revenue stamp of the German Government employed by the Royal Prussian Revenue Office; and the forging and uttering of several enumerated acceptances.

Attached to the complaint and referred to therein were duly authenticated[1] copies of certain depositions taken before the examining judge of the court at Duisburg, Prussia, in which an investigation against Terlinden, that he might answer for said several crimes, was pending, together with a copy of the war-

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and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

[1] SEC. 5271. In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section.

rant for the arrest of Terlinden issued by that court, and of the provisions of the penal code of the German Empire applicable to the crimes in question and providing punishment therefor.

The commissioner issued his warrant and Terlinden was apprehended, whereupon and before the commissioner had entered upon the hearing, Terlinden petitioned and obtained from the District Court the writ of *habeas corpus* under consideration.

The settled rule is that the writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*. *Ornelas* v. *Ruiz*, 161 U. S. 502, 508, and cases cited; *Bryant* v. *United States*, 167 U. S. 104.

The statute in respect of extradition gives no right of review to be exercised by any court or judicial officer, and what cannot be done directly cannot be done indirectly through the writ of *habeas corpus*. The court issuing the writ may, however, "inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion." Blatchford, J., *In re Stupp*, 12 Blatch. 501; *Ornelas* v. *Ruiz*, 161 U. S. 508.

By section 754 of the Revised Statutes it is provided that the complaint in *habeas corpus* shall set forth "the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known;" and by section 755 that the writ shall be awarded "unless it appears from the petition itself that the party is not entitled thereto."

Opinion of the Court.

On the face of the complaint extraditable offences were charged to have been committed, and if petitioner desired to assert, as he now does in argument, that it appeared from the depositions taken before and the warrant of arrest issued by the court at Duisburg and the provisions of the criminal code that such was not the fact, they should have been set out. *Craemer* v. *Washington*, 168 U. S. 124, 128.

And this clearly must be so where, as in this case, the writ is issued and petitioner undertakes to traverse the return. The return was that Terlinden was arrested and held by virtue of warrants of arrest and of commitment issued by the commissioner, under the extradition acts, against Terlinden as a fugitive from the justice of Prussia, and charged with the commission of crimes embraced by the treaty of extradition with that kingdom; and copies of the warrants were attached as part thereof. The alleged traverse referred to the complaint and annexed copies of the depositions filed with it, but did not annex a copy of the warrant of arrest issued by the court at Duisburg, or of the provisions of the penal code made part of the complaint; and also annexed certain sections and paragraphs of the Criminal Code of the German Empire, and of the Code of Criminal Procedure, and of the Civil Code, as applicable to "the facts and circumstances of the case," and then alleged that the depositions did not show or tend to show guilt of an extraditable offence.

This was manifestly insufficient. Petitioner could not select a portion of the documents accompanying the complaint and ask the court to sustain his conclusion of law thereon. Nor could he subsequently supply the inadequacy of the traverse by a certiorari, which could do no more, if it could be, in any view, properly issued at that stage of the proceedings, than bring up what he should have furnished in the first instance.

Generally speaking, " whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the

preliminary examination unless palpably erroneous in law." *Ornelas* v. *Ruiz*, 161 U. S. 502, 509.

Necessarily this is so, for where jurisdiction depends on the merits, the decision is not open to collateral attack involving a retrial, although if on the whole record the findings are contradicted, the inquiry as to lack of jurisdiction may be entertained.

In this case the writ of *habeas corpus* was issued before the examination by the commissioner had been entered upon, and his jurisdiction was the only question raised. If he had jurisdiction, the District Court could not interfere, and he had jurisdiction if there was a treaty and the commission of extraditable offences was charged.

But it is said that the offences complained of were not extraditable because their commission was averred to be "contrary to the laws of Prussia," whereas the criminal laws asserted to have been violated were those of the German Empire, and Prussia had no criminal laws dealing with such offences. Hence it is argued that the commissioner had no jurisdiction, because if an extradition treaty existed it was with Prussia, and not with the German Empire; and if any crime was committed, it was against the German Empire and not Prussia.

It is true that by Article 2 of the Constitution of the German Empire it was provided that: "Within this territory the Empire shall have the right of legislation according to the provisions of this constitution, and the laws of the Empire shall take precedence of those of each individual state."

And by Article 4: "The following matters shall be under the supervision of the Empire and its legislation: . . . 13. General legislation regarding the law of obligations, criminal law, commercial law, and the law of exchange; likewise judicial proceedings."

Counsel for petitioner states in his brief that on January 1, 1872, the German Imperial Code went into effect, embracing provisions as to the crime of forgery "contained in sections 267, 268, 146 and 149, the very sections quoted in the depositions filed with the amended complaint." Counsel for respondent agrees with this except that he includes sections or para-

graphs 147 and 270. All these are given below as furnished by counsel for respondent.[1] And see Drage's Criminal Code of

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[1]267. Whoever with unlawful intent forges or counterfeits a domestic or foreign public instrument or such a private instrument as may be of importance for the purpose of proving rights or legal relations, and makes use of the same for the purpose of deception, is punishable with imprisonment for forgery of instruments.

268. Forgery of an instrument made by any one with the intent of obtaining for himself or another a pecuniary gain, or to inflict injury upon another, is punishable as follows:

1. When the instrument is a private instrument, with imprisonment in the penitentiary up to five years, besides which a fine not exceeding three thousand marks may be imposed.

2. When the instrument is a public instrument, with imprisonment in the penitentiary for a term not exceeding ten years, besides which a fine of from one hundred and fifty to six thousand marks may be imposed.

In case of mitigating circumstances imprisonment in the common jail will take place, which, in the case of forgery of a private instrument, shall be not less than one week, and in the case of forgery of a public instrument, not less than three months.

In addition to the imprisonment, a fine not exceeding three thousand marks may be imposed.

146. Whoever counterfeits inland or foreign coin or paper money for the purpose of using such counterfeited money as genuine or otherwise to put it in circulation; or who, with like intent, gives to genuine money, by alteration made upon the same, the appearance of higher value, or gives to invalidated money the appearance of money still current, shall be punished with imprisonment in the penitentiary for not less than two years. Police surveillance is also admissible. In the case of mitigating circumstances imprisonment in the common jail may be provided.

147. The same penalty extends to all persons who circulate the money counterfeited or altered by them with the above mentioned intent, and also to such persons who obtain counterfeited or altered money and either utter the same or bring the same from abroad with the intent of circulating the same.

149. Certificates of indebtedness made payable to the holder, bank notes, stock certificates or preliminary certificates or receipts taking their place, as well as coupons and dividends or renewal certificates thereto belonging, which may be issued by the Empire, the North German Confederation, a state of the Confederation, or a foreign state, or by any other community, corporation, company or private person authorized to issue such papers, are deemed equivalent to paper money.

270. It is treated as equivalent to forgery of an instrument in case anybody makes use of any forged or altered document, knowing the same to be forged or altered, with intent to deceive.

the German Empire, 227, 266. The traverse set up that there were filed with the complaint "a copy of all depositions taken in said matter, together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the Penal Code of the German Empire applicable to said several crimes, and providing punishment therefor." The traverse did not set forth the warrant of arrest or the provisions of the code referred to, and merely attached certain other provisions which it was averred were applicable. The presumptions were against petitioner, apart from which, accepting the admissions of counsel, extraditable offences were charged, if the laws quoted applied, as we think cannot be denied. We are unable to perceive that these laws were not the laws of Prussia, although prescribed by imperial authority, and the record discloses that they were being administered as such, in Prussia, by the Royal Prussian Circuit Court at Duisburg. The inquiry into the source of the laws of the demanding government is not material, and the objection is untenable.

It is obvious that the District Court could not remove the case from the commissioner by virtue of the writ of *habeas corpus*, and that the court rightly declined to hear evidence, to grant the certiorari, or to interfere with the progress of the case.

This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Opinion of the Court.

Undoubtedly treaties may be terminated by the absorption of Powers into other Nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other States of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other States, including the Kingdom of Würtemburg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse Cassel, Nassau and the free city of Frankfort, by Prussia.

The North German Union was then created under the praesidium of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this Government. Messages and Documents, Dep. of State, 1867–8, Part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on the other

part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation." 15 Stat. 615. This recognized the treaty as still in force, and brought the Republics of Lubeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Würtemburg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that " His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, His Majesty the King of Würtemburg, His Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual States, and it was vested with the power of general legislation in respect of crimes.

Article 11 read " The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries, accredit ambassadors, and receive them. . . . So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required

for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated States, and even that it was called a confederated Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practiced by the German Government, the Imperial Foreign Office transmitted to our chargé at Berlin a memorial on the subject, in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the confederated German States, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

"In so far as by laws and treaties of the Empire relating to

the extradition of criminals, provisions which bind all the States of the union have not been made, those States are not hindered from independently regulating extradition by agreements with foreign States, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual States of the union with various foreign States, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Würtemburg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, Das Staatsrecht des Deutschen Reiches, (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German states, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the Executive Department of our Government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular States of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of Treaties and Conventions between the United States and other Powers, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It cannot be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of *In re Thomas*, 12 Blatch. 370, in which the continuance of the extradition treaty with Bavaria was called in question, and Mr. Justice Blatchford, then District Judge, said:

"It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several States composing the confederation called the German Empire, and foreign countries, were annulled, or to be considered as abrogated.

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive

or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent's Com. 174. In the present case the mandate issued by the Government of the United States shows that the convention in question is regarded as in force both by the United States and by the German Empire, represented by its envoys, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority representing the German Empire and also representing Bavaria."

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

Treaties of extradition are executory in their character, and fall within the rule laid down by Chief Justice Marshall in *Foster* v. *Neilson*, 2 Pet. 253, 314, thus: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department."

In *Doe* v. *Braden*, 16 How. 635, 656, where it was contended that so much of the treaty of February 22, 1819, ceding Florida to the United States, as annulled a certain land grant, was void for want of power in the King of Spain to ratify such a provision, it was held that whether or not the King of Spain had power, according to the Constitution of Spain, to annul the grant, was a political and not a judicial question, and was decided when the treaty was made and ratified.

Mr. Chief Justice Taney said: "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, un-

less they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the Government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered."

Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.

In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision. 1 Moore on Extradition, 21; *United States* v. *Rauscher*, 119 U. S. 407.

The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. *Holmes* v. *Jennison*, 14 Pet. 540, 569. Its exercise pertains to public policy and governmental administration, is devolved on the Executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.

If it be assumed in the case before us, and the papers presented on the motion for a stay advise us that such is the fact, that the commissioner, on hearing, deemed the evidence sufficient to sustain the charges, and certified his findings and the testimony to the Secretary of State, and a warrant for the surrender of Terlinden on the proper requisition was duly issued, it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded, had terminated by reason of the adoption of the constitution of the German Empire, not-

withstanding the judgment of both governments to the contrary.

The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus.*

The District Court was right, and its final order is

Affirmed.

MR. JUSTICE HARLAN did not hear the argument and took no part in the decision of the case

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HUGULEY MANUFACTURING COMPANY *v.* GALETON COTTON MILLS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 94. Argued January 15, 1902.—Decided February 24, 1902.

By the act of March 3, 1891, the judgments and decrees of the Circuit Courts of Appeals are made final in all cases in which the jurisdiction of the Circuit Court as originally invoked, is dependent entirely on diversity of citizenship.

If after the jurisdiction has attached on that ground, issues are raised and decided, bringing the case within either of the classes defined in section five of the act, the case may be brought directly to this court, although it may be carried to the Circuit Court of Appeals, in which event the final judgment of that court cannot be reviewed in this court as of right.

If the jurisdiction of the Circuit Court rests solely on the ground that the suit arose under the Constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then if carried to the Circuit Court of Appeals, the decision of that court would not be made final by the statute.

The use of the words " or otherwise " in the statute, when it provides that cases in which the decrees or judgments of the Circuit Court of Appeals

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are made final, may be brought here by "certiorari or otherwise," adds nothing to the power of this court, to so direct, as any order or writ in that behalf must be *ejusdem generis* with certiorari.

Pending this appeal, appellants applied for certiorari to perfect the record, on diminution suggested, which was granted, and the omissions supplied. This auxiliary writ did not operate to bring the case before the court or in itself to add any support to the appeal.

Appellants took no appeal from the Circuit Court directly to this court, even assuming that this could have been done. The sole ground on which the jurisdiction of the Circuit Court was invoked was diversity of citizenship and the decree of the Circuit Court of Appeals was made final by the statute. This appeal therefore could not be sustained.

This was a bill filed in the United States Circuit Court for the Northern District of Georgia, January 21, 1891, by J. J. Robinson as trustee, who averred that he was "a citizen of and resided in the State of Alabama," "against the Alabama and Georgia Manufacturing Company, a corporation created under and by virtue of the laws of the State of Georgia and a resident and citizen of said Northern District of Georgia; and against the Huguley Manufacturing Company, a corporation created under the laws of said State of Georgia, and a resident and citizen of said State of Georgia and of the Northern District of said State; and against W. T. Huguley, who your orator avers to be a citizen of said State of Georgia and residing within the said Northern District of Georgia."

The bill averred that on January 2, 1884, "the said Alabama and Georgia Manufacturing Company executed and delivered to said W. T. Huguley, W. C. Yancey, and your orator, as trustees, a certain deed of trust, conveying to said persons named, and to orator, all the property of the said Alabama and Georgia Manufacturing Company upon the terms and upon the trusts therein stated for the purpose of securing certain negotiable bonds of said company in the principal sum of sixty-five thousand dollars, and interest thereon, which deed of trust was accepted by said trustees and duly recorded." A copy of the trust deed was attached and conveyed certain real estate in the State of Georgia and certain real estate in the State of Alabama as therein described.

It was further averred that the bonds were duly issued by

the Alabama and Georgia Manufacturing Company and sold or otherwise disposed of; that the company was insolvent and had ceased to do business; that under and by virtue of a decree in chancery of the Superior Court of Troup County, Georgia, all the property of the manufacturing company covered by the deed of trust had been sold and purchased by certain persons who afterwards conveyed the same to the Huguley Manufacturing Company, and that the last-named corporation was now in the possession of the same; that the sale was made subject in all respects to the rights and lien of the trust deed for the holders of the first mortgage bonds; that W. T. Huguley, defendant herein, and named as one of the trustees for said bondholders, was interested in the purchase of said property, and in the property and assets of the Huguley Manufacturing Company, and adversely to complainant as trustee for said bondholders, and that the other trustee, W. C. Yancey, had departed this life since the execution and delivery of the deed of trust.

The bill then set up default on the part of the Alabama and Georgia Manufacturing Company in the payment of interest; the election of a majority of the bondholders to treat the whole of the principal sum named in the bonds as due; request of complainant to begin proceedings to secure the property pledged for the payment of the indebtedness, and which he deemed to "the best interest of the bondholders;" and prayed for an accounting, foreclosure, and sale of the property.

Defendants acknowledged service, and the two defendant companies filed a demurrer to the bill, which was subsequently overruled on hearing, Mr. Justice Lamar presiding. 48 Fed. Rep. 12. Answer was filed by these defendants and the bill taken as confessed as to W. P. Huguley. The cause subsequently went to final decree adjudging recovery on all the bonds and of foreclosure and sale, which decree was afterwards reversed by the Circuit Court of Appeals for the Fifth Circuit, 56 Fed. Rep. 690, because all the bonds were not due, acceptance of interest on some of them having waived default, and the cause remanded. Pending the appeal the property was purchased for the bondholders under the decree and $10,000 paid

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into court by the purchasers as required by the decree, who organized a company under the name of the Galeton Cotton Mills, which corporation was placed in possession of the property and remained in such possession for a period of three years and six months. The decree of foreclosure having been vacated, the Circuit Court granted a petition on behalf of the Huguley Manufacturing Company to restore it to the possession of the property, on condition however that it pay into court the $10,000 which had been paid in by the purchasers. The Huguley Manufacturing Company did not comply with this condition, and a second decree of foreclosure was entered adjudging that, out of a total of one hundred and thirty bonds, ninety were due when the bill was filed, and forty were not then due because of waiver of default, though now due; that the property was indivisible and could not be sold to satisfy part of the bonds only; and that the proceeds of sale should be proportionately distributed on all the bonds. Thereupon an appeal was taken to the Circuit Court of Appeals, and the decree of the Circuit Court was affirmed. 72 Fed. Rep. 708.

A second foreclosure sale took place and the property was again purchased for the bondholders, and this sale was confirmed June 25, 1896. Defendants filed a petition for an accounting of the rents and profits from the time of the first sale, and an amendment thereto, and a reference was made to a special master, who on November 2, 1897, filed his report in which he found the Galeton Cotton Mills liable for rents and profits in the sum of $39,715.31. Exceptions were filed to the master's report by both parties. February 23, 1898, the exceptions of appellants were overruled and the exceptions of appellees sustained to the extent of reducing the master's finding to $35,857.54, and a decree to that effect was entered February 28, 1898. Thereafter the Circuit Court entered a decree that the rents and profits should be used in reduction of the mortgage debt, and later a decree fixing the amount of the mortgage debt and costs and directing the manner of applying thereto the rents and profits and the amount of cash already received and reserving all questions of costs and expenses not therein disposed of. 89 Fed. Rep. 218. At the last foreclosure sale a balance was left due on

the trust deed of $33,414.21. September 22, 1898, the purchaser at the second sale petitioned for a final conveyance, and on October 15, 1898, a decree was entered directing the completion of the sale by a cash payment, and conveyance. A motion was made to set aside this decree, which was overruled, whereupon an appeal was taken to the Circuit Court of Appeals. The appeal was heard, and the decree of the Circuit Court was on May 16, 1899, affirmed. 94 Fed. Rep. 269. Application was made to this court for a certiorari, which was denied October 30, 1899. 175 U. S. 726. May 12, 1900, an appeal to this court was allowed by Pardee, J., in order to preserve any possible rights of the applicants, although he expressly stated that he seriously doubted the right of appeal. Appellees moved to dismiss the appeal, the consideration of which motion was postponed to the hearing on the merits.

Mr. John T. Morgan for appellants.

Mr. Louis D. Brandeis for appellees. *Mr. William H. Dunbar* was on his brief.

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

The act of March 3, 1891, c. 517, 26 Stat. 826, provides in section 6 that the Circuit Courts of Appeals shall have appellate jurisdiction to review judgments and decrees of the Circuit Courts in all cases in which a direct appeal is not allowed by section 5 to this court, and that the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely on diversity of citizenship.

The jurisdiction referred to is the jurisdiction of the Circuit Court as originally invoked. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Press Publishing Company* v. *Monroe*, 164 U. S. 105; *Ex parte Jones*, 164 U. S. 691; *American Sugar Refining Company* v. *New Orleans*, 181 U. S. 277; *Arkansas* v. *Kansas & Texas Coal Company*, 183 U. S. 185.

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If after the jurisdiction of the Circuit Court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section five, then the case may be brought directly to this court; although it may be carried to the Circuit Court of Appeals, in which event the final judgment of that court could not be brought here as of right. *Loeb* v. *Columbia Trustees*, 179 U. S. 472. If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then if carried to the Court of Appeals, the decision of that court would not be made final, and appeal or writ of error would lie. *American Sugar Company* v. *New Orleans*, 181 U. S. 277.

The general intention of the act was to distribute the appellate jurisdiction and to permit an appeal to only one court. *Robinson* v. *Caldwell*, 165 U. S. 359.

In this case appellants did not attempt to take an appeal directly to this court from the Circuit Court, nor could they have done so since no question was so raised as to bring the case within either of the classes named in section 5. *Cornell* v. *Green*, 163 U. S. 75. The ground on which the jurisdiction of the Circuit Court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the Circuit Court of Appeals cannot be regarded otherwise than as made final by the statute.

The question before us is whether this appeal was properly granted and can be maintained. In all cases where the decree or judgment of the Circuit Court of Appeals is made final by the statute, an appeal does not lie, but any such case may be brought here "by certiorari or otherwise." The latter words add nothing to our power, for if some other order or writ might be resorted to, it would be *ejusdem generis* with certiorari. The writ is the equivalent of an appeal or writ of error as declared by the statute, and it is issued in the discretion of the court.

The record filed in this case June 25, 1900, was entirely in-

sufficient, and appellants applied for certiorari to perfect it by bringing up the alleged lacking portions. We granted that application, and the omissions were supplied. This auxiliary writ did not operate to bring the case before us or in itself to add any support to the appeal, which must stand or fall according as the statute did or did not allow it to be taken. Many matters are urged, such as alleged lack of indispensable parties below and so on, as reasons why an appeal ought to lie, but our jurisdiction depends on the statute and cannot be enlarged by the supposed hardship of particular cases. Finally, it is argued that a large part of the property dealt with by the decree is situated in the State of Alabama and it is said that therefore the decrees of both courts are void for want of jurisdiction over the subject matter.

As the Circuit Court had jurisdiction over the mortgagor company, the company claiming under it, and the surviving co-trustee of complainant, and the trust deed was made and executed in Georgia, where part of the property was situated, the courts below may have assumed that the case came within *Muller* v. *Dows*, 94 U. S. 444; *International Bridge Tramway Company* v. *Holland Trust Company*, 52 U. S. App. 240; and kindred cases.

But we need not discuss the validity of the decrees in this regard. If the point had been raised in the Circuit Court and its decision would have justified an appeal directly to this court, no such appeal was taken. If its existence in the record justified a review of the decree of the Circuit Court of Appeals, the proper course was to apply for a certiorari. That course was taken in this case, and the application was denied. In view of repeated and well considered decisions of this court, some of which we have cited, we are unable to find any ground on which this appeal can be sustained.

Appeal dismissed.

In re THE HUGULEY MANUFACTURING COMPANY AND THE ALABAMA AND GEORGIA MANUFACTURING COMPANY, PETITIONERS.

ORIGINAL.

No number. Submitted November 20, 1901.—Decided February 24, 1902.

Where there is a plain and adequate remedy by appeal, a writ of prohibition or mandamus will not be granted.

Prohibition or mandamus was applied for in this case in respect of an interlocutory order of the Circuit Court granting an injunction, on the ground of want of jurisdiction. *Held*, That a plain and adequate remedy by appeal to the Circuit Court of Appeals was provided for by the act of Congress of June 6, 1900, and the issue of either of the writs applied for was denied.

THE Riverdale Cotton Mills, by leave of court, filed June 10, 1901, in the Circuit Court of the United States for the Northern District of Georgia, a bill against the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company, and also certain solicitors of said companies, as ancillary to the bill of foreclosure in that court, brought by Robinson, trustee, against said companies, the appeal in which has just been disposed of.

The bill averred that the defendant companies were corporations of Georgia, and if they had also been authorized under the laws of Alabama, they had no place of business in that State, but only in Georgia; and that the only officers, directors and stockholders they ever had were the officers, directors and stockholders of the corporations organized in Georgia; that as long as they had any property, it was situated partly in Georgia and partly in Alabama, and was operated as one business from each of the offices of the corporations in Georgia; and that the property of the Alabama and Georgia Company was fully described in the trust deed, a copy of which was attached, being the trust deed foreclosed at the suit of Robinson, and the property of the Huguley Manufacturing Company was an equity

of redemption therein acquired after the execution and delivery of that trust deed. The bill then set forth the acquisition by the Huguley Company of the property, subject to the trust deed, by proceedings in the Superior Court of Troup County, Georgia; the filing by Robinson of the bill to foreclose the trust deed; the decree of foreclosure; the sale to representatives of the bondholders, and the transfer to the Galeton Cotton Mills; the reversal of that decree by the Circuit Court of Appeals; the second decree and second sale; the confirmation of sale and deed to complainant, who paid all the purchase money; and the appeal thereupon to the Circuit Court of Appeals, and the affirmance of the decree and proceedings. 94 Fed. Rep. 269. It was further averred that from this decree of affirmance an appeal was prosecuted May 16, 1899, to the Supreme Court of the United States where it was still pending.

The bill further showed that thereafter the Huguley Manufacturing Company and the Alabama and Georgia Manufacturing Company filed in the chancery court of Chambers County, Alabama, their bill of complaint against the Riverdale Cotton Mills, the Galeton Cotton Mills, Robinson, trustee, Huguley, trustee, and the West Point Manufacturing Company, alleging that the Alabama and Georgia Manufacturing Company was an Alabama corporation; that all the property described in the trust deed was situated in Alabama, and that no sale of the property was ever made in Alabama, and that all judicial proceedings in the Circuit Court for the Northern District of Georgia were null and void, so far as affected the title of the two companies to the part of the lands lying in Alabama; and it was sought to hold the Riverdale Cotton Mills, the Galeton Cotton Mills and the West Point Manufacturing Company, for the rents and profits of the property since May, 1892.

Complainant further averred that each and all of the claims to relief set up by these two companies in the Chambers chancery court were set up, or could have been set up, and were adjudicated in the proceedings had in the Circuit Court in the suit of Robinson, trustee, as aforesaid, as appeared from the record and proceedings in that case; and that all the substantial issues raised in the suit in Chambers County had been adjudged

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and determined by the Circuit Court. Complainant alleged that a large part of the property described in the trust deed was situated in the State of Georgia, and another part in the State of Alabama, and that the Circuit Court acquired and had full jurisdiction to order the sale of all the property described in the trust deed, and that neither the Huguley Manufacturing Company, the Alabama and Georgia Manufacturing Company, nor W. T. Huguley, who were defendants to the bill filed by Robinson, ever during the progress of the cause in the Circuit Court raised any issue as to the jurisdiction of that court to render a decree for the sale of all the lands; and complainant alleged that the property was in fact indivisible. Complaint reiterated that the same companies were seeking by the bill of complaint filed in Chambers County to again raise and have investigated by a court of equity the same identical matters and issues which had theretofore been passed upon and adjudicated by the Circuit Court in the suit of Robinson. Complainant invoked the jurisdiction of the Circuit Court as ancillary to the main suit instituted by Robinson to protect it against the violation of its rights by the prosecution of the bill of complaint in the chancery court of Chambers County, and prayed for an injunction and general relief.

The Circuit Court, on consideration of the bill, ordered defendants to show cause why an injunction should not issue as prayed for, and in the meantime granted a restraining order. The two defendant companies appeared and showed cause, setting up that they were corporations chartered under the laws of Alabama; that the Alabama and Georgia Manufacturing Company was a distinct and separate legal entity from the Alabama and Georgia Manufacturing Company incorporated under the laws of Georgia, and that it was the Georgia corporation and not the Alabama corporation that was made party defendant to the suit of Robinson; and they alleged, on information and belief, that the Huguley Manufacturing Company never was incorporated under the laws of Georgia. They insisted that in the proceedings in Alabama the decree of the Circuit Court in the foreclosure suit was not conclusive upon them as the Circuit Court was without jurisdiction, and that

the Circuit Court had no jurisdiction of this bill because it was an original and not an ancillary bill, and complainants and defendants were citizens of Georgia; and further, that the foreclosure suit was pending in the Supreme Court of the United States. It was also averred that the Circuit Court was without jurisdiction to issue the injunction prayed in view of section 720 of the Revised Statutes; and further, because after filing the bill in Alabama, all the defendants thereto, without pleading in abatement, had filed demurrers, pleas and answers.

The response further set up that the Circuit Court was without jurisdiction of the original foreclosure suit because the complainant therein and the Huguley Manufacturing Company were citizens of Alabama, and that the charter of the Alabama and Georgia Manufacturing Company in Georgia had expired by legal limitation before any sale of the property under the foreclosure proceedings. And it was further alleged that the Circuit Court was without jurisdiction to sell the mortgaged property because it was all situated in the State of Alabama, or, if not, to sell that portion lying in the State of Alabama, and it was denied that the property in Alabama and Georgia were parts of an indivisible whole. Respondents asked that the rule might be discharged, and the bill dismissed.

Upon a hearing the Circuit Court granted an injunction as prayed until the further order of the court. 111 Fed. Rep. 401.

On November 20, 1901, the Huguley Manufacturing Company and the Alabama and Georgia Manufacturing Company submitted a motion for leave to file their petition for a writ of prohibition to restrain the Circuit Court of the United States for the Northern District of Georgia from taking any further steps in the suit of the Riverdale Cotton Mills or in respect of the suit in Alabama, and for a mandamus requiring the Circuit Court to dismiss the bill of the Riverdale Cotton Mills. The petition, which they asked leave to file, averred that they were complainants in the chancery suit in Alabama filed for the purpose of redeeming the property in question, and stated that they were not parties to any litigation in the Circuit Court for the Northern District of Georgia, but that they had been served with what purported to be process from that court to

appear in the alleged ancillary proceedings. Petitioners charged that the Circuit Court had no jurisdiction over the original suit in Georgia because the property was located in the State of Alabama; that the Alabama and Georgia Manufacturing Company of Alabama was not made a party to the suit in Georgia; that one of the trustees was not joined as complainant; that bondholders protesting against the foreclosure were not made parties; that the other bondholders were not made parties; that the Huguley Manufacturing Company was not given its day in court for redemption; and, in brief, reiterated the grounds presented in their response to the rule to show cause.

Mr. J. C. Welles, *Mr. John M. Chilton* and *Mr. Alexander C. King* for petitioners.

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

It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. *In re Rice*, 155 U. S. 396. And that the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy. *In re Atlantic City Railroad Company*, 164 U. S. 633.

And it may be added that it is also the general rule as to the writ of certiorari when sought as between private parties and on the ground that the proceedings below are void, that it will be granted or denied in the sound discretion of the court, and will be refused where there is a plain and adequate remedy by appeal or otherwise. *In re Tampa Suburban Railway Company*, 168 U. S. 583.

In this case there was under the act of Congress of June 6,

1900, 31 Stat. 660, c. 803, a plain and adequate remedy by appeal to the Circuit Court of Appeals for the Fifth Circuit from the interlocutory order granting an injunction. After a final decree an appeal to this court would lie in respect of the jurisdiction if the question were properly raised and certified, or if issues were raised and decided bringing the case within section five of the act of March 3, 1891; or to the Circuit Court of Appeals. The case as presented is far from being one in which we should regard it as a proper exercise of our jurisdiction to interfere with the orderly progress of the suit below by the issue of either of the writs applied for. *In re New York and Porto Rico Steamship Company, Petitioner*, 155 U. S. 523, 531.

The contention of counsel seems to go to the extent of insisting that the proceedings in the foreclosure suit were wholly void, and without force and effect as to all persons and for all purposes, and incapable of being made otherwise; and in declining to go into the subject at large we are not to be understood as concurring in that proposition.

Leave denied.

WAITE *v.* SANTA CRUZ.

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

No. 39. Argued April 24, 25, 1901.—Decided February 24, 1902.

On the facts, as stated in the opinion of the court, the city of Santa Cruz is estopped to dispute the truth of the recitals in the bonds in suit in this case, which stated that they were issued in pursuance of the act of California of 1893, as well as in conformity with the constitution of California, authorizing it to incur indebtedness or liability with the assent of two thirds of the qualified voters at an election held for that purpose, and that all acts, conditions and things required to be done precedent to issuing the bonds had been properly done and performed in due and lawful form as required by law.

The Circuit Court having correctly found that the parties who placed said bonds in the plaintiff's hands were *bona fide* purchasers, without notice

of anything affecting the truth of the recitals in them, the city cannot escape liability by reason of the fact, disclosed by its ordinances, that the eighty-nine first mortgage bonds of the Water Company assumed by the city, were included in its refunding scheme.

As to the question whether the person who signed said bonds was or was not, at the time of the signature, the rightful mayor of Santa Cruz, this court holds—(1) that the acts of a *de facto* officer are valid as to the public and third persons, although it is sometimes difficult to determine whether the evidence is such as to warrant a finding that a particular act or acts, the legality of which may be in issue, were those of a *de facto* officer: (2) That a *de facto* officer may be defined as one whose title is not good in law, but who is, in fact, in the unobstructed possession of an office, and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper: (3) That in such a case third persons, having occasion to deal with him in his capacity as such officer, are not required to investigate his title, but may safely deal with him upon the assumption that he is a rightful officer: (4) That if they see him publicly exercising such authority, and if they ascertain that it is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, they ought not to be subjected to the danger of having his acts collaterally called in question.

As the plaintiff does not own the bonds or coupons in suit in this case, but holds them for collection only, the Circuit Court was without jurisdiction to render judgment upon such of the claims, in suit, whether bonds or coupons, owned by a single person, firm or corporation, and which, considered apart from the claims of other owners, could not have been separately sued on by the real owner by reason of the insufficiency of the amount of such claim or claims.

Mr. John F. Dillon for petitioner. *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on his brief.

Mr. James G. Maguire and *Mr. F. R. Coudert, Jr.*, for respondent.

Mr. Frank J. Sullivan filed a brief as *Amicus Curiæ.*

Mr. Justice Harlan delivered the opinion of the court.

This action was brought in the name of Waite, a citizen of Massachusetts, against the city of Santa Cruz, a municipal corporation of California of the fifth class, to recover the principal and interest of certain negotiable bonds, nine in number, and

certain negotiable coupons thereof, two hundred and eighty-two in number, issued April 16, 1894, in the name of the defendant city.

Each bond, signed by "Wm. T. Jeter, Mayor of the city of Santa Cruz," and attested by "O. J. Lincoln, City Clerk," contained these recitals:

"And for the payment of the principal sum [$1000] herein named, and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound, and its faith and credit and all the real and personal property of said city are hereby pledged for the prompt payment of this bond and interest at maturity.

"This bond is one of a series of bonds of like date, tenor and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California, entitled 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city and town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

"And in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened and performed, in legal and due form, as required by law. This

bond ceases to bear interest when due, unless presented for payment."

The parties having by written stipulation waived a jury, the case was determined in the Circuit Court upon a special finding of facts. The result was a judgment against the city for the full amount of the bonds and coupons held by the plaintiff, except as to three coupons transferred to him by the Northern Counties Investment Trust Company. 89 Fed. Rep. 619. That judgment was reversed in the Circuit Court of Appeals with directions to enter judgment for the city. 98 Fed. Rep. 387. The case is here upon writ of certiorari granted upon the application of the plaintiff Waite.

The propositions advanced on behalf of the city are numerous, but most of them are involved in the general contention that there was a want of power in the city to issue the bonds in question, and that nothing occurred that could estop it from disputing its liability even to those who may have purchased them in good faith and for value.

The circumstances under which the bonds were executed should be first set forth. That being done, we will take up such of the questions raised by the assignments of error as are necessary to be determined.

On the 16th day of September, 1889, the City of Santa Cruz entered into a contract with certain persons doing business under the name of Coffin & Stanton, which recited that the former desired to acquire, and the latter desired to furnish, a waterworks system for the city—the city agreeing to grant to Coffin & Stanton a franchise for the construction of waterworks in Santa Cruz and that firm agreeing to construct or cause to be constructed a waterworks system in conformity with specifications theretofore made by the city engineer. The city agreed to purchase the waterworks after they were constructed and pay for them the sum of $320,000. It was also stipulated that Coffin & Stanton should cause to be organized a corporation to be known as the City Water Company of Santa Cruz, to which the above franchise should be assigned. It was further provided that the Water Company should execute a first mortgage upon all its properties, rights, titles and franchises, then owned or thereafter

acquired, for the payment of bonds (not exceeding $400,000 in amount, except as provided in the contract) to be issued to Coffin & Stanton as the work of construction progressed, they to make all necessary cash advances. The contract provided: "And when said Water Company shall have fully completed said waterworks, then said Water Company shall convey absolutely to said city of Santa Cruz all its property, rights, titles and franchises, to have and to hold forever, subject only to the mortgage and to the deed of trust or escrow hereinbefore mentioned. . . . And said Water Company shall commence operations on the construction of said waterworks as soon as practicable, and shall have the whole completed within one year of such commencement."

Pursuant to the above agreement the city, by ordinance, granted to Coffin & Stanton a franchise and right of way to construct the waterworks, and such franchise and right were assigned by them to the City Water Company, incorporated September 27, 1889.

Under date of May 1, 1890, the Water Company, pursuant to that agreement, executed a mortgage or deed of trust to secure the payment of four hundred bonds of $1000 each. That was done in order to obtain money for the construction of the proposed waterworks.

Subsequently, March 29, 1892, the Water Company executed a deed to the city, which recited that the waterworks had been fully completed to the satisfaction of the city and had been accepted by it. By that deed the Water Company conveyed its entire property, rights, power, privileges and franchises to the city, to have and to hold the same, "subject, however, to said mortgage or deed of trust, and all the obligations thereby imposed, which bonds, mortgage or deed of trust, and obligations, the party of the second part [the city] *agrees to pay and perform.*"

When the act of March 1, 1893, referred to in the bonds was passed, as well as at the time the bonds were issued, the constitution of California provided that "no county, city, town, township, board of education or school district shall incur indebtedness or liability in any manner, or for any purpose, exceeding

in any year the income and revenue provided for it for such year, without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." § 18, Article XI, Constitution 1879.

The ordinance referred to in the bonds—the one of the 26th day of February, 1894, (No. 314) calling a special election of the qualified electors of the city to determine the question of refunding "the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same"—stated that "the outstanding indebtedness evidenced by bonds of said city," which "it is proposed to refund," consisted of (1) 450 bonds, of $500 each, issued in 1889, the proceeds of which had been used "in the purchase and construction of the city waterworks;" (2) 89 first mortgage bonds of the Water Company, of date May 1, 1890, "which said bonds outstanding were, at the time of the conveyance by the City Water Company to the city of Santa Cruz of the property known as the city waterworks, and now are, a valid lien and charge upon the property known as the city waterworks, and become thereby a part of the bonded indebtedness of the city;" and (3) 65 municipal improvement bonds of $500 each, dated September 23, 1887, and 26 municipal improvement bonds of $250 each, of like date.

The ordinance provided for an issue of 360 bonds of $1000 each, payable to bearer, and carrying four per cent interest, payable annually, and which should be of the character known as "serials."

The same ordinance provided for a special election on the question of refunding the above bonds, and prescribed the form of the refunding bonds. That form contained the same recitals, word for word, that appear in the extract from the bonds found

at the beginning of this opinion. The ordinance thus concluded: "§ 12. If, upon the canvass of the returns of said election, it shall be found that two thirds of the voters thereat have voted in favor of refunding said indebtedness, issuing bonds therefor and providing for the payment of the same, then and thereafter said indebtedness shall be refunded, bonds issued therefor and provision made for the payment of the same in the manner herein and as by law provided."

On the same day the city council passed an ordinance, No. 315, which provided for notice of the special election so ordered, such notice to describe fully the indebtedness to be refunded. The required notice was given and contained the same description of the city indebtedness proposed to be refunded as was given in ordinance No. 314. The election was held on the day fixed by the ordinance and notice. The result was that 538 votes were cast in favor of and 57 votes against the proposed refunding of the city's indebtedness. So that more than two thirds of the qualified electors voting were in favor of refunding the then "bonded indebtedness of the said city," including the above 89 first mortgage bonds issued by the Water Company and which the city had assumed to pay when it purchased and took the deed for the waterworks.

On the 26th day of March, 1894, the city passed ordinance No. 320, which provided for refunding the indebtedness and issuing bonds therefor in accordance with the will of the voters at the special election.

That ordinance provided that each bond should contain the same recitals as those set forth in ordinance No. 314 and in the above notice of the special election, as well as this further recital: "And it is hereby certified and declared that all acts, conditions and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened and performed in legal and due form and as required by law."

By the same ordinance provision was made for giving notice by publication of the purpose of the mayor and common council to sell the bonds to the highest bidder, and inviting sealed bids from purchasers, and for levying and collecting an annual tax for forty years to pay such bonds and coupons—the moneys

so collected to constitute a sinking fund for the payment of the principal.

In the finding of facts it was also stated that on April 11, 1892, William T. Jeter was duly elected mayor of Santa Cruz, and J. Howard Bailey, J. F. Hoffman, E. G. Green and F. W. Lucas, on the same day, members of the common council of the city. The persons so elected as mayor and members of the common council qualified for their respective offices within ten days after election, and entered upon the duties of their respective offices. Section three of the act of the legislature of California, entitled "An act to reincorporate the city of Santa Cruz," approved March 11, 1876, provides that the mayor and common council of said city shall hold their offices for a term of two years, and until their successors are duly elected and qualified. On the ninth day of April, 1894, Robert Effey was duly elected mayor of defendant city to succeed William T. Jeter, and duly qualified as such between eleven o'clock A. M. and two o'clock P. M. of April 16, 1894; and Henry G. Ensell, John Howard Bailey, J. D. Maher and Frank K. Roberts were, on April 9, 1894, elected members of the common council of the city, all of them duly qualifying as such before the meeting of the council of the city held April 16, 1894. The persons so elected mayor and members of the common council on April 9, 1894, with the exception of Bailey, who was reëlected councilman, did not actually enter upon their duties as officers until May 7, 1894, and Jeter, Bailey, Hoffman, Green and Lucas continued to act publicly as mayor and members of the common council of the city until May 7, 1894, without protest from any person, and held seven meetings of the council between and including the date of April 16, 1894, and May 7, 1894.

All of the bonds and coupons sued on were in the form and bore date and were signed and attested as alleged in the complaint, but some of them were signed by William T. Jeter on April 16, 1894, after the qualification of his successor. Whether those sued on were among those signed by Jeter after the qualification of his successor does not appear.

On April 16, 1894, to which date the common council of the city had regularly adjourned, Jeter, acting as mayor, and Bailey,

Hoffman, Green and Lucas being present and acting as the common council of the city, and no bids having been received for the purchase of the refunding bonds issued by the city under ordinance 320, the proposition of Coffin & Stanton to take all the bonds, dated February 27, 1894, was accepted, upon the condition that they should furnish satisfactory security for the faithful performance of the agreement contained in that proposition.

Jeter as mayor, and Lucas, Bailey, Hoffman and Green, as members of the common council, publicly met on April 23, 1894, pursuant to adjournment of the common council, and, assuming to act as mayor and members of the common council of said defendant city, without protest or opposition from any one, accepted and approved a bond presented by Coffin & Stanton for the faithful performance of their proposed agreement, and directed the clerk of the defendant city to deliver to them the above refunding bonds, and all of them were in accordance with such direction delivered to Coffin & Stanton on April 24, 1894.

All of the nine bonds and coupons sued on matured April 15, 1895, and no part of them has been paid.

Coffin & Stanton never complied with the agreement upon which the bonds and coupons were delivered to them, and the defendant city never received any consideration on account of the issuing of the bonds, other than the promise of Coffin & Stanton to assume the payment of the bonds mentioned in their agreement.

It thus appears that the construction of the waterworks was brought about by the agreement between the city and Coffin & Stanton, under which the city was to purchase such works when they were completed;

That the waterworks were completed and were accepted by the city, and the city agreed to assume and pay the outstanding bonds issued by the Water Company in order to provide money with which to construct the waterworks, such bonds being secured (as was provided for by the agreement between the city and Coffin & Stanton) by a first mortgage upon the franchise and property of the Water Company;

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That the city by ordinance proposed to refund its indebtedness under the act of 1893, describing in such ordinance 89 of the above first mortgage bonds of the Water Company which it had assumed to pay, and stating therein that those bonds were a valid lien and charge upon the property known as the city waterworks, and became thereby a part of the bonded indebtedness of the city;

That a special election was ordered to determine whether the qualified electors approved the proposed refunding;

That notice of such election was given, which described the bonds proposed to be refunded and which stated that the above 89 bonds had been assumed by the city as part of the purchase price of the waterworks, and were a valid lien upon such works;

That more than two thirds of the qualified voters approved the proposed refunding, including the above 89 first mortgage bonds;

That the city directed that any refunding bonds issued should state, upon their face, by way of recital, that they were issued under and in pursuance of the above act of 1893, and in conformity with the constitution of California, the ordinance of the city, and with a vote of more than two thirds of all the qualified voters of the city at a special election duly and legally called, held and conducted as provided by the act of 1893; and,

That the above bonds should upon their face further certify and declare that all acts, conditions and things required by law to be done precedent to and in the issue of the bonds had been properly done, happened and performed, in legal and due form, as required by law.

The Circuit Court of Appeals was of opinion that purchasers of the bonds were bound to take notice of the ordinances of the city, and that the entire issue of $360,000 in refunding bonds was invalid by reason of its including the $89,000 in bonds executed by the Water Company, the payment of which was assumed by the city. It reversed the judgment of the Circuit Court with directions to enter judgment for the city on the bonds.

1. The refunding act of March 1, 1893, p. 59, c. 47, amendatory of the act approved March 15, 1883, is as follows:

"§ 1. That section one of the above-entitled act is hereby amended to read as follows: '§ 1. That whenever any incorporated city or town, other than cities of the first class in this State, has an *outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, board of trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as "serials," one fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of the treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston or Chicago. Interest upon the same shall not exceed six per cent per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or governing body, to the highest bidder for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.'

"§ 2. That section two of said act be amended so as to read as follows: '§ 2. Whenever sufficient money is in the funding

fund, in the hands of the treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds, (giving the number thereof,) and if the same are not presented for redemption within thirty days after the first publication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the post office a copy of such notice, enclosed in a sealed envelope, with the postage paid thereon, addressed to the owner or owners of such bond or bonds, at the post office address of such owner or owners, as shown by the record thereof kept in the treasurer's office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the treasurer shall proceed to cancel the same by endorsing on the face thereof the amount for which they are received, the word "cancelled" and the date of cancellation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city or town, at least once a month, accompanying the same therewith by the bonds which have been taken up and canceled.'

"§ 3. That section three of said act be amended so as to read as follows: '§ 3. All moneys which shall remain in said funding fund after all outstanding bonds such as were proposed to be refunded have been taken up and canceled, shall be paid into the general fund of such city or town, and become a part thereof.'

"§ 4. This act shall take effect and be in force immediately after its passage."

One of the contentions of the city is that the words "outstanding indebtedness, evidenced by bonds and warrants thereof," in this act do not embrace the 89 bonds executed by the Water Company. Those bonds, although not executed by the city,

certainly constituted a part of its outstanding indebtedness, for the reason that the city had assumed to pay them. Both the city authorities and the qualified electors so regarded the matter. The city's assumption of the bonds imposed as much obligation upon it to pay them as if it had itself directly executed and issued them. It could not acquire complete ownership of the waterworks without paying for them, and it took a deed for the waterworks expressly subject to a valid lien in favor of the Water Company's first mortgage bonds, including the above 89 bonds. In every substantial sense, therefore, these bonds were part of the city's outstanding bonded indebtedness. Such is the argument made in behalf of the plaintiff, and its force is recognized. But whether this view rests upon a sound construction of the act of 1893, we need not now say. That question is left open for determination when it must be decided, and our judgment is placed upon another ground, to be now stated.

2. The refunding bonds in suit, as we have seen, recited that they were issued under, in pursuance of, and in conformity with the act of 1893, the constitution of California, and the ordinances of the city of Santa Cruz, as well as in conformity with the vote of two thirds of all the qualified electors of the city, voting at a special election duly called, held and conducted, as provided by the above act; also, that *all* acts, conditions and things required by law to be done precedent to and in the issuing of the bonds, had been properly done and performed, in legal and due form, as required by law. As between the city and a *bona fide* purchaser of such bonds, can the city be heard to say that the bonds were not of the class embraced by the words in the act of 1893, "outstanding indebtedness, evidenced by the bonds and warrants thereof?" Is the city estopped to dispute the truth of the recitals in its refunding bonds, there being nothing in such recitals indicating or suggesting that they were not true?

The city contends that it is not thus estopped, because the ordinances, under which the special election was held, disclosed the fact that the 89 first mortgage bonds of the Water Company were included in the proposed refunding; that purchasers were bound to take notice of the provisions of such ordinances; and

that the ordinances, being examined, would have disclosed the fact that the bonds, although assumed by the city, were executed by the Water Company, and not by the city. Let us see whether a purchaser of the bonds was bound to know what those ordinances contained.

The first case to which we will refer is that of *Hackett* v. *Ottawa*, 99 U. S. 86, 95. The municipal bonds sued on in that case were issued by the city of Ottawa, Illinois. They contained recitals to the effect that they were issued by virtue of the charter of the city empowering it to borrow money, issue bonds therefor and pledge its credit for their payment, and in accordance with certain ordinances of which the titles and dates were given. The bonds stated upon their face that one of those ordinances, passed June 15, 1869, was entitled "An ordinance to provide for a loan for municipal purposes," and the other, "An ordinance to carry into effect the ordinance of June 15. 1869, entitled "An ordinance for a loan for municipal purposes." The principal defence was that the recital as to a loan for municipal purposes was untrue; that the bonds were not issued for municipal or corporate purposes, but as a simple donation to a private corporation whose business was in nowise connected with or under the control of the city, which facts, it was contended, appeared upon the faces of the ordinances themselves.

The constitution of Illinois provided that counties, townships, school districts, cities, towns and villages "may be vested with power to assess and collect taxes for corporate purposes." But this court did not deem it necessary to determine what were corporate purposes within the meaning of the Illinois constitution, saying: "A direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois constitution, we pass to another point, which, in our judgment, is fatal to the defence. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valua-

ble consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recitals of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors* v. *Schenck*, 5 Wall. 772. It

would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defence." The same principles were announced in *Ottawa* v. *National Bank*, 105 U. S. 342, 343.

A case directly in point is that of *Evansville* v. *Dennett*, 161 U. S. 434, 443. That was an action on negotiable bonds payable to bearer and issued by the city of Evansville, Indiana, in payment of a subscription of stock in a railroad company. Each bond recited that it was issued in payment of such subscription, "made in pursuance of an act of the Legislature of the State of Indiana, and ordinances of the city council of said city, passed in pursuance thereof." There were other negotiable bonds involved in that suit, which were issued by the city, each reciting that it was issued by virtue of the city's charter, by virtue of a certain act of Assembly (its title and date being given), and by virtue of certain resolutions of the city council of named dates; and that the faith, credit, real estate, revenues and all resources of the city were irrevocably pledged for the payment of principal and interest. It was contended in that case that the ordinances of the city, if examined, would show that the election held in the city upon the question of issuing bonds was not legally held, and therefore that the bonds were issued without authority and were void. This court, upon a review of former decisions, said: "As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to

ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature."

The only other case to which we need refer upon this point is *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, 262, 274, 275. That was a suit upon negotiable coupons attached to negotiable bonds executed by the Board of Commissioners of Gunnison County, Colorado, and which recited that they were issued "in exchange at par for valid floating indebtedness of the county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the General Assembly of the State of Colorado entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; that 'all the requirements of law have been fully complied with by the proper officers in the issuing of the bond;' that the total amount of the issue did 'not exceed the limit prescribed by the constitution of the State of Colorado;' and that such issue had been authorized by a vote of a majority of the duly qualified electors of the county, voting on the question at a general election held in the county on the 7th of November, 1882."

The question presented was whether such recitals estopped the county from asserting against a *bona fide* holder for value that the bonds created an indebtedness in excess of the limit prescribed by the constitution of Colorado. The principal defence was that the purchaser of the bonds was bound to take notice of the orders and records of the county commissioners authorizing the issue of the refunding bonds, and that an examination of those orders would have disclosed the fact that the bonds were in excess of the limit prescribed by the constitution of the State.

After a review of previous cases, namely, *Buchanan* v. *Litchfield*, 102 U. S. 278, 290, 292; *Orleans* v. *Pratt*, 99 U. S. 676; *Northern Bank of Toledo* v. *Porter Township*, 110 U. S. 608; 616, 619; *Dixon County* v. *Field*, 111 U. S. 83, 92–94; *Lake*

County v. *Graham*, 130 U. S. 674, 680, 683–684; *Chaffee County* v. *Potter*, 142 U. S. 355, 363, 364, 366, and *Sutliff* v. *Lake County Commissioners*, 147 U. S. 230, 235, 237–8, this court held that the *Gunnison* case was controlled by the decision in *Chaffee County* v. *Potter*, which was a suit on coupons of negotiable municipal bonds that contained the same recitals as were made in the Gunnison County bonds. We said: "It was expressly decided in the *Chaffee County* case that the statute under which the bonds there in suit (the bonds here in suit being of the same class), authorized the county commissioners to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the constitution and the statute; and that the recital in the bond to the effect that such determination had been made, and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule *Chaffee County* v. *Potter*, and upon the authority of that case, and without reëxamination or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the county of Gunnison is estopped to question the recital in the bonds in question to the effect that they did not create a debt in excess of the constitutional limit, and were issued by virtue of and in conformity with the statute of 1881, and in full compliance with the requirements of law." Again: "It is insisted with much earnestness that the principles we have announced render it impossible for a State, by a constitutional provision, to guard against excessive municipal indebtedness. By no means. If a state constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in the open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality under its existing laws, shall be subject to any

defence that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Applying to the present case the principles heretofore announced by this court, is there any escape from the conclusion that the city of Santa Cruz is estopped to dispute the truth of the recitals in the bonds in suit, which stated that they were issued in pursuance of the act of 1893 as well as in conformity with the constitution of California authorizing it to incur indebtedness or liability with the assent of two thirds of the qualified voters at an election held for that purpose, and that all acts, conditions and things required by law to be done precedent to issuing the bonds had been properly done and performed in due and lawful form as required by law? We think not.

The city of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the constitution of the State. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds.

The Circuit Court having found—and as we think correctly—that the "assignors" of the plaintiff, that is, the parties who placed the bonds in his hands, were *bona fide* purchasers, without notice of anything affecting the truth of the recitals in them, our conclusion is that the city cannot escape liability by reason of the fact, disclosed by its ordinances, that the 89 first mortgage bonds of the Water Company assumed by the city were included in its refunding scheme.

3. It is said, however, that the act of 1893 was repugnant to the constitution of California, in that it is a special law, relating to a subject concerning which that Constitution required all laws to be general. In *City of Los Angeles* v. *Teed*, 112 Cal. 319, 328, 329, the validity of the act of 1883 and that of 1893 amendatory thereof having been questioned by counsel, the Supreme Court of California said: "On March 15, 1883, an act was passed (Stat. 1883, p. 370) authorizing the governing body of every municipal corporation, other than cities of the first class, to fund or refund *any* indebtedness of the corporation by a vote of four fifths of their number. That act authorized the issue of bonds, to be exchanged for any existing indebtedness, or to be sold for money to be applied to the payment of such indebtedness. It is contended that this act violates the provision of the constitution against special legislation. But there can be no question that the act classifying municipal corporations is constitutional, *Pritchett* v. *Stanislaus County*, 73 Cal. 310, and that in matters pertaining to municipal organization the legislature may make different regulations for the different classes so created. *Pasadena* v. *Stimson*, 91 Cal. 249. The subject-matter of the act in question—the funding of municipal indebtedness—is 'peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population.' The act is, therefore, not obnoxious to that objection." Referring to the act of 1893, the court said: "It is contended that this act also is invalid, as special legislation; but what we have said as to the act of 1883 on this question applies equally to this act." Nothing further need be said upon this question.

4. Another defence is that Jeter, who signed the bonds, was not the rightful mayor of Santa Cruz. The facts bearing upon this point have been heretofore stated and need not be repeated. The Circuit Court said:

"It is claimed by the defendant that, as it is not shown that the bonds sued on were signed by Wm. T. Jeter before the qualification of his successor in the office of mayor, the plaintiff has failed to prove that the bonds were signed by an officer authorized to do so, and they must therefore be held void, even in the hands of *bona fide* purchasers, under the rule declared in *Coler* v. *Cleburne*, 131 U. S. 162. That case is not authority for the proposition that the action of a *de facto* officer in signing bonds would not be as binding upon the municipality for which he assumes to act as that of an officer *de jure;* and it seems clear to me that if Jeter was the *de facto* mayor when he signed the bonds sued on, then such signature by him was a compliance with the ordinance requiring them to be signed by the mayor; and so, also, if he was *de facto* mayor, and those assuming to act as the common council of the defendant were *de facto* members of the common council at the time when he and they assumed as mayor and common council to accept the proposition of Coffin & Stanton in relation to the bonds, and directed their delivery to that firm, then such acts upon their part are to be treated, so far as concerns the public and third persons having an interest in what was done by them, as the acts of the *de jure* mayor and common council of the city. The rule that the acts of a *de facto* officer are valid as to the public and third persons, is firmly established, although it is sometimes difficult to determine whether the evidence is such as to warrant a finding that a particular act or acts, the legality of which may be in issue in a given case, were those of a *de facto* officer. The contention of the defendant is that Jeter was not the *de facto* mayor at the time of the signing and delivery of the bonds, nor were the old members of the common council, who continued to act as such after the qualification of their successors, and until after the bonds were delivered to Coffin & Stanton, *de facto* members of the common council of defendant, after the qualification of their successors. Whether one was or was

not a *de facto* officer at the time when he assumed to perform duties belonging to a public office, is a mixed question of law and of fact, *State ex rel. Van Arminge* v. *Taylor*, 108 N. C. 196; *S. C.*, 12 L. R. A. 202; *United States* v. *Alexander*, 46 Fed. Rep. 728. And in passing upon the question presented by defendant's contention upon this point, it is necessary to first consider what facts are sufficient to constitute a *de facto* officer. A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer. Thus it is said in *Petersilea* v. *Stone*, 119 Mass. 468: "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question."

After referring to *Johns* v. *People*, 25 Mich. 503; *Attorney General* v. *Crocker*, 138 Mass. 214; *Hamlin* v. *Kassafer*, 15 Oregon, 456; *State* v. *Williams*, 5 Wis. 308, and *Magneau* v. *City of Freemont*, 30 Neb. 843, the Circuit Court said: "The foregoing cases sufficiently illustrate the principle upon which courts proceed in determining whether one who has assumed to act as a public officer was at the time an officer *de facto*, and it only remains to apply the rule which they establish to the facts which have been already stated as appearing in the present case, and in doing so there is but one conclusion that can be reached, and that is that Jeter was the *de facto* mayor of the city of Santa Cruz, and on the sixteenth day of April, 1894, at the time when he signed the bonds in question, and he and the persons who

assumed to act as members of its common council, on the sixteenth and twenty-third of April, 1894, were on those days the *de facto* mayor and the *de facto* members of the common council of the defendant city."

We are entirely satisfied with the treatment of this question by the Circuit Court, and deem it unnecessary to make any additional observations.

5. All of the bonds and coupons sued on were duly transferred to the plaintiff before the commencement of this action. It is agreed that he had at the bringing of this action the legal title to all of them, although he paid no money consideration for the transfer, and that the bonds and coupons were transferred to him for collection only.

It is contended by the defendant that it does not appear that the Circuit Court had jurisdiction, since the citizenship of the persons who put the bonds in the plaintiff's hands for collection is not set forth.

Prior to the passage of the Judiciary Act of August 13, 1888, c. 866, 25 Stat. 433, it was the settled rule that the holder of a negotiable instrument payable to bearer was not an "assignee" thereof within the meaning of the Judiciary Act of 1789, c. 20, or the act of March 3, 1875, c. 137, but was the holder in virtue of an original and direct promise moving from the maker to the bearer, and could sue without reference to the citizenship of the original or any intermediate holder. *Thompson* v. *Perrine*, 106 U. S. 589, 592–3.

The above act of 1888 did not change this rule, but it made some alteration of former statutes. Its first section excluded from the cognizance of any 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." 25 Stat. 434.

The defendant, the city of Santa Cruz, is a corporation within the meaning of that section. *Loeb* v. *Columbia Township*, 179

U. S. 472, 485. So that, in respect of the bonds and coupons here in suit—they being payable to bearer and having been made by a corporation—the complaint need not have disclosed the citizenship of any previous holder of the bonds. It shows —and nothing more was necessary so far as citizenship was concerned—a diversity of citizenship as between the holder of the legal title to the bonds and coupons and the defendant city.

But the act of 1888 did not repeal the fifth section of the act of March 3, 1875, c. 137, *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 339; *Lake Co. Comrs.* v. *Dudley*, 173 U. S. 243, 251, which provides "that if, in any suit, commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." 18 Stat. 470, 472.

Does the present case come within this provision of the act of 1875 in respect of any cause of action embraced in it? It does not, if the only objection to the jurisdiction of the Circuit Court is that the plaintiff was invested with the legal title to the bonds and coupons simply for purposes of collection. But if the transfer was made for the purpose, in any way, of creating a case cognizable in the Circuit Court, of which it could not otherwise have taken cognizance, then the duty of this court is to take notice of that fact and give effect to the statute of 1875. *Metcalf* v. *Watertown*, 128 U. S. 586, 587, and authorities there cited. The jurisdiction of the Circuit Court, it must be observed, depends equally on the citizenship of the parties and the value of the matter in dispute. If the transferrers of the plaintiff were citizens of States other than California, as they seem to have been, each could have sued in the Circuit Court, if the

amount in dispute was sufficient; and therefore the transfers in such cases were not a fraud on the jurisdiction of the Circuit Court, *so far as the question of diverse citizenship was concerned.* But if the transfer enabled the plaintiff to embrace in his suit a claim or claims against the city of which the Circuit Court could not have entertained jurisdiction, at the suit of the transferrer, because of the insufficiency of the amount in dispute, then the act of 1875 would apply.

This question was presented and decided in *Bernards Township* v. *Stebbins*, 109 U. S. 341, 355, 356, which was an action on negotiable bonds brought in the Federal court sitting in New Jersey, the plaintiffs being citizens of New York and the defendant a municipal township of New Jersey. Referring to the decision in *Williams* v. *Nottawa*, 104 U. S. 209, we said that it "establishes that the Circuit Court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued in their own names, either by reason of being citizens of the same State as the defendant, *or by reason of the insufficient value of their claims.* The principle of that decision is equally applicable to suits in equity to assert equitable rights under such bonds." Again, in the same case: "It follows, that these bills should have been dismissed so far as regarded the bond for $200, owned by a citizen of New York in the first case, and also to all the bonds owned by citizens of New Jersey in either case. But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount *by each owner* to sustain the jurisdiction of the Circuit Court."

The same view of the act of 1875 was taken in *Lake Commissioners* v. *Dudley*, 173 U. S. 243, 252, which was an action upon coupons payable to bearer. This court said: "From the evidence in this cause of Dudley himself it is certain that he does not in fact own any of the coupons sued on, and that his name,

with his consent, is used in order that the Circuit Court of the United States may acquire jurisdiction to render judgment for the amount of all the coupons in suit, a large part of which are really owned by citizens of Colorado, who, as between themselves and the Board of Commissioners of Lake County, could not invoke the jurisdiction of the Federal court, but must have sued, if they sued at all, in one of the courts of Colorado. It is true that some of the coupons in suit are owned by corporations of New Hampshire, who could themselves have sued in the Circuit Court of the United States. But if part of the coupons in question could not by reason of the citizenship of the owners have been sued on in that court, except by uniting the causes of action arising thereon with causes of action upon coupons owned by persons or corporations who might have sued in the Circuit Court of the United States, and if all the causes of action were thus united for the collusive purpose of making a 'case' cognizable by the Federal court as to every issue made by it, then the act of 1875 must be held to apply, and the trial court, on its own motion, should have dismissed the case without considering the merits."

Does the record show that the Circuit Court was without jurisdiction of some of the causes of action embraced by the complaint? We say "record," because this court will not reverse a judgment for want of jurisdiction in the Circuit Court, if its jurisdiction sufficiently appears either from the pleadings or from the record. *Railway Company* v. *Ramsey*, 22 Wall. 322; *Briges* v. *Sperry*, 95 U. S. 401; *Robertson* v. *Cease*, 97 U. S. 646, 648. The complaint here shows diverse citizenship, as between the plaintiff and the defendant city, but the record reveals the fact that the plaintiff included in his suit a large number of claims owned by citizens of States other than California, but which, by reason of their small amount, could not have been sued on separately in the Circuit Court by the persons or corporations, the real owners, who put them in plaintiff's hands for collection.

Of this there can be no doubt. The entire issue of refunding bonds was 360, of $1000 each, numbered consecutively from one to three hundred and sixty. They were of the character

known as "serials," each series consisting of nine bonds. The first series included the bonds numbered from one to nine, both inclusive, and each succeeding series included the nine bonds numbered consecutively after those embraced in the next preceding series. The bonds of the first series fell due April 15, 1895, and were the only bonds that had become due when the present action was brought. The remaining series were made payable in consecutive order on the 15th day of April in each succeeding calendar year thereafter until and including the year 1934. Now, this suit is for the amount due on nine of the forty bonds of $1000 each, constituting the first series, and falling due April 16, 1895, and two hundred and eighty-two coupons of $50 each, all which coupons, above the coupon of bond No. 40 of the first series, were attached to bonds that were not yet due. No owner of a $50 coupon attached to a bond not due could have sued upon it in the Circuit Court. Each coupon of that amount was a complete instrument, capable of supporting a separate action, in the proper forum, without reference to the maturity or ownership of the bonds to which they were attached. *Koshkonong* v. *Burton*, 104 U. S. 668, and authorities there cited; *Elgin* v. *Marshall*, 106 U. S. 578. No owner of coupons, aggregating less than $2000, could have sued in the Circuit Court by reason of the bonds to which they were attached (but which were not due) exceeding the jurisdictional amount. But when the several owners of $50 coupons which were due, but which coupons were attached to bonds not due, put them all in the hands of the plaintiff for collection, the amount appeared to be sufficient for purposes of jurisdiction. Thus a case was made by which the Circuit Court was led to take cognizance of certain claims too small for its jurisdiction if they had been severally sued on by the real owners, although there was jurisdiction as to the parties who owned eight of the nine bonds in suit. It also appears that one of the transferrers of the plaintiff owned only one bond of a $1000. The value of the matter in dispute, as to him, was only the amount of that bond and one coupon of $50.

We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the Circuit

Counsel for Parties.

Court was without jurisdiction to render judgment upon any claim or claims, whether bonds or coupons, held by a single person, firm or corporation against the city and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims.

The specifications of error assigned cover eighty pages of the elaborate brief of counsel for the city. They present many minor questions that are not discussed in this opinion. But what has been said embraces every point of substance or that requires consideration and disposes of the case upon its real merits.

The judgment of the Circuit Court of Appeals is reversed, with directions to the Circuit Court to set aside its judgment and enter such judgment as may be in conformity with this opinion.

CLARK *v.* TITUSVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 91. Argued and submitted January 14, 1902.—Decided March 3, 1902.

The city government of Titusville, in Pennsylvania, imposed a license tax upon persons carrying on certain occupations in that city. This court holds that it was a tax on the privilege of doing business, regulated by the amount of the sales, and was not repugnant to the Constitution of the United States.

THE case is stated in the opinion of the court.

Mr. Eugene Mackey for plaintiff in error.

Mr. George Frank Brown for defendant in error, submitted on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case is here on error to the Supreme Court of the State of Pennsylvania. It involves the constitutionality of an ordinance of the city of Titusville imposing a license tax upon the merchants of the city. The particular contention is that the ordinance violates the equality prescribed by the Fourteenth Amendment of the Constitution of the United States, in that it divides the merchants into arbitrary classes.

The trial court sustained the ordinance, and its judgment was affirmed by the Supreme Court upon the opinion delivered by the trial court.

The case was submitted upon a case stated in the nature of a special verdict, from which it appeared that the city was duly incorporated, and passed on June 25, 1888, the ordinance complained of. The provisions of the ordinance were set out, and it was stipulated that if the court should be of the opinion that the ordinance was valid a fine should be entered against the defendant (plaintiff in error) for the total of the taxes prescribed.

The ordinance imposes a license tax upon persons who carry on certain occupations in the city. Persons in different occupations pay different amounts, and persons in the same occupation are classified by maximum and minimum amount of sales. For instance, persons dealing in merchandise are classified as follows, and we quote from the opinion of the trial court:

Class.	Business.	Tax.
1	Over $60,000	$100.00
2	$50,000 to 60,000	80.00
3	40,000 to 50,000	70.00
4	30,000 to 40,000	60.00
5	20,000 to 30,000	50.00
6	10,000 to 20,000	35.00
7	5000 to 10,000	25.00
8	2500 to 5000	15.00
9	1000 to 2500	10.00
10	1000	5.00

Class.	Business.			Tax.
	Wholesale.			
1	$100,000 and upwards			$60.00
2	60,000	to	100,000	50.00
3	50,000	to	60,000	40.00
4	40,000	to	50,000	35.00
5	30,000	to	40,000	30.00
6	20,000	to	30,000	25.00
7	10,000	to	20,000	20.00
8	5000	to	10,000	15.00
9	2500	to	5000	10.00
10			2500	5.00

It is with this classification that we have immediate concern, because the plaintiff is a retail grocer. He was assessed in the sixth class in 1895, and in the seventh class in 1896.

The objection that plaintiff makes to the ordinance is, that it classifies by amount or value with the result (1) that the lowest amount or value of property of a class "is required to pay the same amount of taxes with the highest amount or value of property therein;" (2) that the differences are not in kind but only in amount, or value, and that the taxes decrease in rate or ratio as the value of the class increases; (3) that the so-called classes are subdivisions of a class, and taxes are imposed upon such subdivisions without regard to a common ratio, either as between the several subdivisions, or as between the members of each of the subdivisions. These objections are but the expression of the effect of classification by amount, and have been made before and considered before by this court, and the judgment has been adverse to the contention of plaintiff in error. We do not think that it is necessary to review the cases or enter again into the reasoning upon which they were based.

Classification by amount came up for consideration and decision in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention and attempts to limit its decision to the power of a State over inheritances, and to explain by that power not only the taxes imposed, but the dis-

criminations which were claimed to have resulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion. The contentions of the parties in the case were extremely opposite. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir of everybody; the appellant asserted a natural right of children to inherit. We expressed no opinion on either contention, but chiefly directed our consideration and decision to the alleged discriminating features of the law of Illinois. We said: "Our inquiry must be not what will satisfy the provisions of the state constitutions, but what will satisfy the rule of the Federal Constitution. The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that Constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows:

"On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars. Provided, that an estate in the above case, which may be valued at a less sum than five hundred dollars, shall not be subject to any duty or tax."

Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment of the Constitution of the United States; and the

reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said:

"If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one over $10,000 pays not 3 per cent on $10,000 and an increased percentage on the excess over $10,000, but an increased percentage on the $10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of $10,000 and one dollar by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their illegality has never been questioned."

Plaintiff in error, however, contends that the tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and

is paid by him. But every tax has its final incidence on some individual. That effect, therefore, cannot be urged to destroy well recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States.

Judgment affirmed.

MR. JUSTICE HARLAN did not hear the argument and took no part in the decision.

ROTHSCHILD *v.* KNIGHT.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 108. Submitted October 21, 1901.—Decided March 3, 1902.

A motion being made to dismiss the writ of error in this case on the ground that no Federal question was raised in the Superior Court of Massachusetts this court holds that as Federal questions were raised on writ of error to the Supreme Court of that State, that was sufficient to give this court jurisdiction.

The objection that the writ of error should have been directed to the Supreme Court, and not to the Superior Court, is answered by *McDonald* v. *Massachusetts*, 180 U. S. 311.

To what actions the remedy of attachment may be given is for the legislature of a State to determine: the power of counsel extends to consenting to amendments authorized by the law of the State.

The contention that the debts due to plaintiffs in error by certain citizens of Massachusetts were not subject to attachment in that State because their situs was in New York cannot be maintained.

The preference given by McKeon to plantiffs in error was consummated in Massachusetts; and therefore the proceedings had in New York were immaterial.

JAMES MCKEON was a retail merchant in Springfield, Massachusetts, and became indebted to plaintiffs in error in the sum of about $4000.

The indebtedness being overdue, Frank J. Rothschild, Jr., son of one of the plaintiffs in error, went to Springfield with full

Statement of the Case.

power to collect the debt. When there, he received from McKeon a quantity of fur garments, part of McKeon's stock. The garments had not been purchased of plaintiffs in error, and when they were received by Rothschild, Jr., for plaintiffs in error he knew McKeon was insolvent.

The furs were sent to the railroad station in trunks, checked and taken to New York as the personal baggage of Rothschild, Jr. A receipted bill or list of the goods was delivered by McKeon to Rothschild, Jr. Subsequently, however, in New York it was testified that McKeon "tore from the bill the receipt and wrote on the bill the word abbreviation 'Memo.' to indicate that the goods were on memorandum or consignment, and the defendant said that he would write to his bookkeeper that night and have the entry in his books made to conform with the bill by writing in the word 'Memo.'"

This was done by the advice of the attorney of plaintiffs in error, and so stated by him in an affidavit filed in an action brought by plaintiffs in error in the Supreme Court of the city and county of New York against McKeon.

The advice was given, the attorney deposed, in order to make the transaction appear what it was stated in his presence to be; that is, for security only, and not for the sale of the goods; and he advised a suit by plaintiffs in error against McKeon and an attachment of the goods. The suit was subsequently brought and the goods attached.

On the 20th of December, 1895, McKeon was adjudged an insolvent in Massachusetts, and the defendant in error was appointed his assignee, and as such he brought this action by trustee process in the superior court for Hampden County, Massachusetts, for the value of goods conveyed by McKeon to plaintiffs in error, on the ground that the conveyance was made in fraud of the insolvency laws of Massachusetts. The officer's return on the writ showed service on the trustees, but none on the plaintiffs in error.

The writ was duly entered on the first Monday in May, 1896, and a declaration for goods sold and delivered by McKeon to the plaintiffs in error was duly filed. Subsequently upon its being brought to the notice of the court that plaintiffs in error

were not inhabitants of the Commonwealth of Massachusetts, notice was ordered to be given to them by publication, and that the action be continued until such notice should be given. The notice was returnable on the first Monday in September, 1896, and was given as ordered, but no return or proof of it was made until July 6, 1899. On the 16th of September, 1896, plaintiffs in error (defendants in the action) appeared generally by their attorney, Charles C. Spillman, Esq., thereto duly authorized. On October 12, following, defendant in error (plaintiff) moved to amend his declaration, to which counsel for plaintiffs in error consented, and it was allowed. Plaintiffs in error filed an answer denying each and every allegation in the original and amended declaration. On June 21, 1897, the defendant in error again amended his declaration with the consent of E. N. Hill, Esq., who was then acting as counsel for plaintiffs in error, having been retained generally by plaintiffs in error, though his written appearance was not entered until June 26. By virtue of his general authority he could consent to the allowance of amendments. He conducted the case for plaintiffs in error.

The amendment added two counts to the declaration, charging the conveyance to plaintiffs in error by McKeon as having been made to prevent the property from coming to his assignee in insolvency, in fraud of the laws of the State relating to insolvent debtors.

The jury rendered a verdict against the plaintiffs in error for the sum of $6420, and they moved for a new trial by their attorney, E. N. Hill. On the 31st of July, 1897, plaintiffs in error "alleged sundry exceptions to the opinions and rulings of the court, which, being found conformable to the truth, were allowed and signed by the presiding judge, and the questions were transmitted to the Supreme Judicial Court for consideration."

The bill of exceptions contained the evidence, and concluded as follows:

"Upon this evidence the defendants asked the court to rule that there was no evidence to warrant the finding that McKeon intended to prefer the defendants or intended to prevent this property from coming into the possession of the assignee or

from being distributed according to the laws relating to insolvency, and that the action could not be maintained. The court refused so to rule and the defendants duly excepted.

"And the defendants being aggrieved by these rulings and refusals to rule, and having excepted thereto, after verdict against them, pray that their exceptions and their exceptions to the admission of testimony as hereinbefore stated, be allowed."

On the 15th of February, 1898, the motion for a new trial was denied, and on the 28th of February, 1899, a rescript was received from the Supreme Judicial Court overruling the exceptions of plaintiffs in error.

On the 6th of March, 1899, judgment was entered against plaintiffs in error "for the sum of seven thousand and seventy-one dollars and sixty-three cents, damages, and costs of suit, taxed at ninety-one dollars and seven cents, and that execution therefor issue against the goods, effects and credits of the said defendants in the hands and possession of the said trustees, Smith & Murray and Houston & Henderson, who were by the court adjudged to be trustees" of plaintiffs in error.

On May 12, 1898, plaintiffs in error filed an assignment of errors under the state practice as follows:

"1. That the record discloses that there was no valid and effectual attachment of the goods, estate or effects of the plaintiffs in error upon the writ, which is the necessary foundation of the jurisdiction of said Superior Court to support any proceeding against an unserved, absent defendant.

"2. That the record discloses that the action was an attempt to obtain jurisdiction over these non-resident plaintiffs in error by means of trusteeing a debt due them, and said attempt was an infringement of the rights of the plaintiffs in error as guaranteed by the Constitution of the United States.

"3. That the record discloses that neither the plaintiffs in error nor either of them were voluntarily before said Superior Court, and the record fails to show any service upon them, either personally or by publication, as ordered by said court.

"4. That the record discloses that the judgment, if allowed to stand, will deprive these plaintiffs in error of their property,

contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

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"10. That the record discloses that the various amendments to the declaration of the defendants in error converted the action into one for the recovery of a penalty, and that such attempt is an infringement of the rights, privileges and immunities of the plaintiffs in error, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

"11. That the record discloses that there were counts in the declaration of the defendants in error, which under the laws of this Commonwealth involved a penalty, and that a judgment on said counts would be conclusive on these plaintiffs in error as to their liability therefor, and would, without further trial, subject their rights to such penalty, and that such attempt to obtain jurisdiction over the persons or property of these plaintiffs in error, by the trustee process served on a debtor in this State for the purpose of fixing upon them a liability for such penalty is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States."

The assignments of error were subsequently amended by adding the following:

"16. That the record discloses that the judgment, if allowed to stand, will impair the obligation of contracts, contrary to the Constitution of the United States.

"17. That the record discloses that the Superior Court did not give full faith and credit to the judicial proceedings of the courts of New York, as required by the Constitution of the United States."

On the 17th of June, 1898, the defendant in error filed his plea and traverse. A hearing was subsequently had before a single justice to establish the plea and traverse, who, a doubt being suggested as to his authority to dispose of the case, after finding the facts, reported the case to the full court. The case was heard by the Supreme Court, and on May 15, 1900, a rescript was sent to the Superior Court affirming the judgment. 176 Mass. 48. This writ of error was then sued out and allowed by the Chief Justice of the Superior Court.

Opinion of the Court.

Mr. Robert A. Knight and *Mr. Charles M. Rice* for the motion to dismiss or affirm.

Mr. Harry J. Jaquith and *Mr. Thomas J. Barry* opposing.

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

A motion is made to dismiss the writ of error upon the ground that no Federal question was raised in the Superior Court. Federal questions were raised, however, on writ of error to the Supreme Court, and that, we think, was a sufficient claim. *Meyer* v. *Richmond*, 172 U. S. 82; *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Sully* v. *American National Bank*, 178 U. S. 289.

The objection that the writ of error should have been directed to the Supreme Court and not to the Superior Court is answered by *McDonald* v. *Massachusetts*, 180 U. S. 311.

The constitutional questions raised by plaintiffs in error are (1) that they have been deprived of their property without due process of law; (2) that if the judgment be allowed to stand it will impair the obligation of contracts, contrary to the Constitution of the United States; (3) that full faith and credit was not given to certain judicial proceedings had in the Supreme Court of the State of New York.

(1) (2) These grounds may be considered together. To sustain them plaintiffs in error assert the invalidity of certain public statutes of Massachusetts, viz., chapter 164, relating to absent defendants; chapter 183, relating to the trustee process; and chapter 157, relating to insolvency.

The sections in regard to insolvency are inserted in the margin.[1]

[1] The sections of the insolvency laws of Massachusetts, under which the action was originally brought in the Superior Court of Massachusetts, are sections 96 and 98 of Chapter 157 of the Massachusetts Public Statutes, and are as follows:

"Sec. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, with

The provisions relating to trustee process are as follows:

"SEC. 21. When a person who is summoned as trustee has goods, effects or credits of the defendant intrusted or deposited in his hands or possession, such goods, effects and credits shall be hereby attached and held to respond to the final judgment in the suit, in like manner as goods or estate attached by the ordinary process, except as hereinbefore provided."

"SEC. 25. Any money or other thing due to the defendant may be attached, as herein mentioned, before it has become payable, if it is due absolutely and without any contingency; but the trustee shall not be compelled to pay or deliver it before the time appointed by the contract."

It is difficult to state the argument made to support the contention of plaintiffs in error. It rests ultimately on a claim of immunity from suit in Massachusetts and a claim of immunity from attachment of debts due plaintiffs in error from citizens of

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a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment or conveyance is made in fraud of the laws relating to insolvency, the same shall be void; and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

"SEC. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer or other conveyance of any description, of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede or delay the operation and effect of, or to evade any of said provisions, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the insolvency. And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief."

Massachusetts. Argumentatively, it is said that the action originally brought did not justify trustee process, and that the amendments subsequently made to the declaration were not authorized, though consented to by counsel who appeared in and conducted the case. We do not assent to either proposition.

To what actions the remedy of attachment may be given is for the legislature of a State to determine and its courts to decide, and the power of counsel certainly extends to consenting to amendments authorized by the laws of the State. Indeed, it would be novel to hold that the court could not have granted the amendments, even against the opposition of counsel, without violating the Constitution of the United States. And the contention that the debts due to plaintiffs in error by certain citizens of Massachusetts were not subject to attachment in that State because their situs was in New York, cannot be maintained. We decided adversely to the proposition in *Chicago, Rock Island &c. Ry.* v. *Sturm*, 174 U. S. 710. That case was followed and applied in *King* v. *Cross*, 175 U. S. 396, and we are satisfied with the reasoning of both cases.

But it is urged that the transaction between McKeon and the agent of the plaintiffs in error did not constitute a debt, but was in the nature of an offence to which a penalty was incident, and to the commission of the offence an intent was necessary, and that the intent of the agent of plaintiffs in error could not be ascribed to them. The Supreme Court of the State, however, decided that "the action is not for recovery of a penalty, but to recover the value of goods conveyed in fraud of the laws relating to insolvency, and it properly might be commenced by trustee process. Pub. Sts. c. 157, §§ 96, 97; c. 183, § 1."

We need only add that the law would be of little value if its prohibition did not apply to non-resident creditors, whether acting directly or through an agent. That the conveyance to plaintiffs in error was made to give a fraudulent preference must necessarily have been found as a fact by the jury, and such finding we accept.

(3) No record was introduced in evidence of the judicial proceedings to which, it is claimed, faith and credit were not given. The only evidence in regard to the proceedings consisted of

the affidavit already referred to, and an affidavit of like import made by S. Rothschild, one of the plaintiffs in error. The affidavits were introduced by defendants in error. On behalf of plaintiffs in error Frank J. Rothschild testified as follows: "These goods (meaning the goods received from McKeon) were attached by Simon Rothschild & Bro., and were sold by order of the sheriff. We bought them, that is, Simon Rothschild & Bro. bought them, at the sheriff's sale."

Assuming, but not deciding, that such evidence was sufficient, and that a record properly authenticated was not necessary to give the plaintiffs in error the benefit of the Constitution and statutory provisions, the proceedings, notwithstanding, did not constitute a defence to the action. The preference given by McKeon to plaintiffs in error was consummated in Massachusetts. Therefore the proceedings had in New York were immaterial.

Finding no error in the record, judgment is

Affirmed.

SCHUERMAN *v.* ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 151. Submitted January 28, 1902.—Decided March 3, 1902.

The act of Congress of June 6, 1896, c. 339, 29 Stat. 262, authorizing the refunding of outstanding obligations of the Territory of Arizona, was within the power of Congress to pass, and by it the bonds therein described were made valid.

Under the territorial funding act of Arizona, approved March 19, 1891, it was sufficient for the holder of the bonds to make the demand for the exchange, and it was not necessary that the demand should be made by the municipal authorities.

It was the intent of Congress under the said act of June 6, 1896, to provide that there should be no funding of bonds or other indebtedness which arose subsequently to January 1, 1897; and the statute was not intended to limit the mere process of exchanging one bond for the other to the time specified.

The territorial statute of Arizona of 1887 is the foundation for the appointment of the loan commissioners; and the body thus created comes directly within its provisions.

Statement of the Case.

THIS is an appeal by the defendants below from a judgment of the Supreme Court of the Territory of Arizona affirming a judgment of the district court granting a mandamus. Upon the trial of the case certain facts were agreed upon, in susbtance, that the defendants were the supervisors of the county of Yavapai, and that prior to the year 1890 the county of Yavapai had issued what were known as railroad bonds in aid of the Prescott and Arizona Central Railroad Company, upon which there was due on the 17th of September, 1897, $260,218.80, and on that day they were received in exchange by the board of loan commissioners, who thereupon issued 258 funding bonds of the Territory, each of the denomination of one thousand dollars, and bearing interest at the rate of five per centum per annum, payable semi-annually. On the 18th of November, 1896, the board of supervisors of defendant county requested the board of loan commissioners to fund the bonds issued for the aid of the railroad company, but the board subsequently and on December 5, 1896, rescinded such request before it had been acted upon, and on the 17th of September, 1897, the holders of the bonds requested the board of loan commissioners to refund the same, which they did upon such demand. The statement of facts then continues as follows:

"5. At the meeting of said board of loan commissioners at which said bonds were funded, only two members of said board were present or acted; the third member of said board of loan commissioners was at the time of said meeting absent from the Territory of Arizona, and took no part in the funding of said bonds, and was not in any manner consulted with relation thereto.

"6. On January 15, 1898, there became due and payable as interest on the 258 territorial funding bonds issued in exchange for the bonds of said Yavapai County as aforesaid, the sum of $4288.33 according to the tenor of said territorial funding bonds, and thereafter on the 15th days of July and January of each year there became due and payable as interest on said territorial funding bonds, according to the tenor thereof, the sum of $6450.00, payable at the office of the territorial treasurer of the Territory of Arizona.

"7. In compliance with the terms and conditions of said territorial funding bonds the territorial treasurer of said Territory of Arizona has paid all the interest thereon at the times when the same became due and payable, amounting in all at the date hereof to the sum of $23,638.33, and has taken up and cancelled interest coupons attached to said bonds to that amount."

"9. Save as aforesaid, no demand was ever made by the board of supervisors of said Yavapai County for the funding of said P. & A. C. Railroad bonds, and no notice was ever given to said board of supervisors at or about the time of the funding that said bonds had been funded.

"10. For the year 1899 the territorial board of equalization of said Territory, at its annual session for that year, levied the sum of thirty-seven cents on each one hundred dollars of valuation of the taxable property in said Yavapai County, for the purpose of paying interest on the funded indebtedness of said county of Yavapai, including the interest on the territorial funding bonds aforesaid maturing in the year 1900, and the territorial auditor duly certified the levy of said tax to the board of supervisors of said Yavapai County, that the defendants, comprising the board of supervisors of said county, failed and neglected to levy said tax of thirty-seven cents on the hundred dollars, but only levied the sum of six cents on the hundred dollars for the purpose of paying interest on the funded indebtedness of said county; said sum of six cents on the hundred dollars was sufficient to pay the interest on all the funded indebtedness of said county other than the territorial funding bonds issued in lieu of said P. & A. C. Railroad bonds as aforesaid, but was insufficient to pay the interest on said territorial funding bonds or any part thereof.

"11. The above mentioned P. & A. C. Railroad bonds were originally issued by the county of Yavapai in aid of the construction of the Prescott & Arizona Central Railroad, a line of railway running from Prescott Junction or Seligman to Prescott, Arizona, and were granted and issued as a subsidy to the corporation building and owning said railroad."

The county having refused to levy any taxes for the purpose of collecting money to pay any of the interest maturing on the

bonds of the Territory given in exchange for the bonds issued by the county, this proceeding was undertaken to compel the board of supervisors to levy a tax in accordance with the provisions of the statute, for the purpose of paying the interest which had been paid by the Territory on the bonds.

Mr. Reese M. Ling for appellants.

Mr. C. F. Ainsworth for appellee.

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

It is claimed on the part of the defendants below that the railroad bonds for which the territorial bonds were given were invalid when issued, and it is only by reason of the passage of the act of June 6, 1896, 29 Stat. 262, that any action could be sustained to enforce their payment. That act has been held to be within the power of Congress to pass, and that by it the bonds therein described were made valid. *Utter* v. *Franklin*, 172 U. S. 416.

Three grounds are now urged why the judgments of the lower courts should be reversed. They are:

(1) That the railroad bonds were illegally funded, without any demand having been made by the board of supervisors of Yavapai County upon the territorial loan commission for such funding.

(2) That said bonds were funded after January 1, 1897, and at a time when the board of loan commissioners were by the terms of the statute without power to fund them.

(3) That the bonds were improperly and illegally funded at a meeting of the board of loan commissioners of the Territory of Arizona, at which only two members of the said board were present, the third member being absent from the Territory and not in any manner consulted with reference to such funding.

(1) In regard to the first ground, the Supreme Court of the Territory has held that it was not necessary that a demand should be made by the municipal authorities, but that the

holders of the bonds could themselves make it by virtue of section 7 of the territorial funding act of Arizona, approved March 19, 1891. Act No. 79, p. 120. The seventh section of that act reads as follows:

"SEC. 7. Any person holding bonds, warrants or other evidence of indebtedness of the Territory, or any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at not less than their face or par value, and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

Where a holder of bonds had made the demand it was held sufficient under that section. *Bravin* v. *Mayor*, 56 Pac. Rep. 719; *Yavapai County* v. *McCord*, 59 Pac. Rep. 99.

This construction of the territorial act by the Supreme Court of Arizona we think was correct, and that it was not necessary in order to obtain a refunding of the bonds that the demand for the same must be made by the municipal authorities.

(2) It appears from the records that the bonds were funded after January 1, 1897, and it is objected that there was no power on the part of the board of loan commissioners to fund such bonds after that date.

The act of Congress under which this question arises was approved June 6, 1896, 29 Stat. 262, chap. 339, and is set forth in the margin.[1]

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[1] Chap. 339. An act amending and extending the provisions of an act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto approved August third, eighteen hundred and ninety-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the acts of Congress approved June twenty-fifth, eighteen hundred and ninety, and August third, eighteen hundred and ninety-four, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations

The Supreme Court of Arizona has decided this contention against the defendants upon the authority of its previous decisions in *Gage* v. *McCord*, 51 Pac. Rep. 977, decided in 1898, which was approved in *Yavapai County* v. *McCord*, 59 Pac. Rep. 99, decided in November, 1899. In the first mentioned case the following is that portion of the opinion which discusses this particular objection:

"Stress is put upon the clause 'until January first, eighteen hundred and ninety-seven,' found in section 1 of the act, as bearing out the view that the purpose and intent of Congress was to limit the time within which the loan commissioners might act, and to require the completion of the work of funding, by the sale and disposition of bonds and the liquidation of the indebtedness allowed by this and prior acts to be funded,

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of said Territory, and the counties, municipalities and school districts thereof, as provided in the act of Congress approved June twenty-fifth, eighteen hundred and ninety, until January first, eighteen hundred and ninety-seven, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June twenty-fifth, eighteen hundred and ninety, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded, with the interest thereon, which has accrued and may accrue until funded into the lower interest bearing bonds, as provided by this act.

SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto approved August third, eighteen hundred and ninety-four, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded, as in this act provided, until January first, eighteen hundred and ninety-seven: *Provided*, That nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded.

Approved, June 6, 1896.

by January 1, 1897. Even were we restricted to the more literal meaning of the words used in construing remedial statutes of this kind, the narrow and circumscribed view thus taken of the statute can hardly be justified if regard be had to the whole of the statute, including the plain purpose of the act as expressed in its title. In the latter, it is clearly stated to be an amendment of previous statutes, and the extension and enlargement of their provisions. Again, an analysis of the body of the act bears out the view that, instead of the purpose being to limit or restrict the exercise of any powers, rights or privileges previously granted, the legislative will was to add to, extend and enlarge these. The first section contains two general provisions—one authorizing the amendment and extension of the Congressional acts approved, respectively, June 25, 1890, and August 3, 1894, so as to include in their provisions 'all outstanding obligations' of the Territory; the other directing the funding of all outstanding bonds, warrants and other evidences of indebtedness of the Territory, as well as of the counties, municipalities and school districts thereof, which had been authorized by legislative enactments, and which bore a higher rate of interest than is authorized by the funding law, and which had been sold or exchanged in good faith. The second section likewise has reference to two classes of indebtedness, both of which are recognized obviously so as to confirm, approve, validate and effectually fix their status as binding obligations upon the Territory.

"The acts of June 25, 1890, and August 3, 1894, being referred to, we must therefore consider the act of June 6, 1896, *in pari materia* with the former. The former act confirmed and approved, with amendments, chapter 1, tit. 31, Rev. Stat., passed by the territorial legislature March 10, 1887. These amendments had reference to the rate of interest, the time bonds issued for funding purposes should run, and as to what indebtedness might be funded; the act being amended in this particular so as to include county, municipal and school indebtedness. Congress added to the legislative enactment a provision that in effect validated a class of obligations otherwise invalid, because incurred in violation of the organic law of the Terri-

tory, as found in the 'Harrison Act,' and provided for the funding of all the then existing and outstanding indebtedness, and that which might thereafter be evidenced by warrants issued for the necessary and current expenses of carrying on territorial, county, municipal and school government for the the year ending December 31, 1890, and added to the foregoing the declaration that thereafter no warrants, certificates or other evidences of indebtedness should be allowed to issue or be legal when the same is in excess of the limit prescribed by the Harrison Act. The act of August 3, 1894, provided 'that an act entitled "An act approving, with amendments, the funding act of Arizona," approved June twenty-fifth, eighteen hundred and ninety, and paragraph twenty-two hundred and fifty-two (section 15) of said act, be and the same is hereby amended by adding thereto as follows: "Provided, further, however, that the present outstanding warrants, certificates and other evidences of indebtedness issued subsequent to December thirty-first, eighteen hundred and ninety, for the necessary and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the years ending December thirty-first, eighteen hundred and ninety-four, and December thirty-first, eighteen hundred and ninety-five, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue, or to be legal where the same is in excess of the limit prescribed by the Harrison Act."' It is to be noted that, in both the acts referred to, the only limitation imposed had reference to the class of obligations which were permitted to be funded, and did not in any manner restrict the territorial officers in the method of their procedure previously prescribed by the territorial law, or limit the time within which the acts of funding, by the sale and disposition of bonds, might lawfully be done. Bearing in mind the remedial character of this legislation, and reading the act of June 6, 1896, in the light of the previous Congressional enactment upon the same subject-matter, we construe the former act to express only what obviously appears to be the Congressional intent, viz.,

to extend and enlarge the class of obligations which may be funded, and not to limit the time within which the board of loan commissioners might complete the acts of funding indebtedness, which has expressly been recognized by Congress as fundable. We therefore read section 1 of this act as authorizing the funding of all obligations of the Territory which existed and were outstanding prior to January 1, 1897, and not as limiting the sale and disposition of bonds for funding purposes by the loan commissioners to the absurdly short period of six months for the successful accomplishment of the funding of the varied class of obligations validated and recognized by the act as fundable, and which necessarily amounted to large sums. It is not to be assumed that Congress would in one breath grant liberal and generous concessions, and in the next breath take away their practical benefits by the imposition of a seemingly unreasonable and unnecessary restriction, and thus defeat its own purpose and intent. It is to be noted that no contention is made that any of the indebtedness proposed to be funded by the sale and disposition of the bonds in question has been incurred since January 1, 1897, but the sole contention is as to the time within which the funding of the territorial indebtedness as limited by law may be done."

We are disposed to agree with the conclusions arrived at by the territorial Supreme Court. While it may be said that by the strict letter of the statute of 1896 there could be no funding of a bond after January 1, 1897, although the bond had been issued long prior to that date and represented an indebtedness of the county, which was provided for by the act of 1896, yet taking into consideration the series of acts which have been passed and the provisions made therein relating to the funding of the indebtedness of the Territory and of the various counties and other municipal divisions therein, we think the intent of Congress was to provide that there should be no funding of bonds or other indebtedness which arose subsequently to January 1, 1897, the date named in the statute, and that date was named as the limit of the indebtedness that could be refunded, and the statute was not intended to limit the mere process of exchanging one bond for the other to the time speci-

fied. There was no special reason for a limitation of time for the mechanical exchange of bonds under the statute, so long as the time was limited which applied to the indebtedness to be recognized.

Although bonds executed by many counties in favor of railroads had been held invalid because the acts of the legislature of Arizona permitting the counties to issue such bonds were violations of the restrictions imposed upon the territorial legislature by Congress, *Lewis* v. *Pima County*, 155 U. S. 54, yet the legislative assembly of the Territory of Arizona had adopted a memorial asking Congress to pass such curative legislation in regard to such bonds as would protect the bondholders, when such bonds had been issued under the authority of the acts of the territorial legislature. A copy of the memorial is to be found in the report of the case of *Utter* v. *Franklin*, 172 U. S. 416, 421.

It was, therefore, the desire of the Territory of Arizona to have the bonds validated, and that they should be paid and to pay them. We think it quite plain that the second section of the Federal statute of June 6, 1896, was passed in response to the request of the legislature of Arizona. When these bonds were validated by such statute it would seem hardly reasonable that the short period of six months from June 6, 1896, to January 1, 1897, should be given not alone for their presentation and exchange, but also for all the indebtedness mentioned in that act; while, on the contrary, having made all such bonds valid, it would seem to be quite reasonable that the limitation of time provided for in the Federal act referred to the character of indebtedness which was to be limited and not to the particular time when the bonds were actually to be exchanged.

It is to be noted that by the acts prior to that of June 6, 1896, there was no limit whatever placed upon the time for the board of loan commissioners to act upon the funding of the indebtedness of the Territory, but the limitation was in regard to the time when the debts which were to be refunded were created. The only limit named in the act of Congress of June 25, 1890, chap. 614, 26 Stat. 175, was as to the date when the indebtedness was created. Section 7 of the territorial act of March 19,

1891, it will be perceived, did not limit the date of refunding, but did limit the indebtedness to that which was existing or outstanding on December 31, 1890. By the act of Congress approved August 3, 1894, chap. 200, 28 Stat. 224, the time for the creation of debts of the Territory which might be funded was extended from December 1, 1890, to December 31, 1895, which was over a year beyond the date of the passage of the act, but the time of refunding was not limited.

In none of these acts, as stated, was there any limitation as to the time of refunding, but the limitation in each was in regard to the indebtedness which was to be refunded. Upon consideration of all the circumstances existing when the various acts of Congress were passed, we are inclined to concur with the Supreme Court of Arizona on the construction it has placed upon the act of Congress of 1896. While we admit that it is against the strict letter of the statute, we think the construction adopted is within its clear meaning and intention.

(3) The last objection raised to the validity of the funding is that the bonds were improperly and illegally funded at a meeting of the board of loan commissioners of the Territory of Arizona, at which only two members of the board were present, the third member being absent from the Territory, and not in any manner consulted with reference to the funding.

There is a statute of Arizona (Revised Statutes, par. 2932, subdivison 2) which reads as follows: "All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."

The objection is made that the loan commissioners of Arizona obtained their authority from the act of Congress and not from the territorial legislature, and hence the statute above referred to does not apply. The Territory of Arizona passed an act in 1887 known as the Revised Statutes, in which was "Title XXXI, Funding." That act, by paragraph 2039, created the governor of the Territory, together with the territorial auditor and the territorial secretary, and their successors in office, a board of commissioners to be styled the "Loan Commissioners of the

Territory of Arizona," who should have and exercise the powers and perform the duties provided for in the act, which gave them power to provide for the payment of the existing territorial indebtedness and such future indebtedness as might be authorized by law, and granted them power to issue negotiable coupon bonds of the Territory under the conditions named in the act. This act was somewhat amended and then approved by Congress June 25, 1890, 26 Stat. 175. The powers of the commissioners have been extended from time to time. It is claimed that the power vested in them came from Congress instead of the territorial legislature and that therefore the statute relating to the exercise of powers given to a board of public officers does not apply.

We think that the territorial statute, although approved by Congress, is the foundation for the appointment of the loan commissioners, and that the body thus created comes directly within the provisions of the Arizona statute just referred to. Upon this subject it was said by the Supreme Court of Arizona as follows:

"There is no provision in the funding act of 1887, as amended by Congress in 1890, that the commissioners should jointly act, but the board was treated as a unit. The funding act is not a strictly Congressional act; it is a territorial act, passed by the legislature of the Territory and embodied in the Revised Statutes of 1887. For the purpose of assuring the validity of the act, and of placing any issuance of bonds under it beyond dispute, the act was presented to Congress for its affirmative approval, which it gave with some few amendments, generally verbal in their nature and evidently for the purpose of making the act more specific. The title of the act passed by Congress clearly carries out that view, for the first provision of that act is 'that the act of the Revised Statutes of Arizona of 1887, known as title XXXI, "funding," be and is hereby amended so as to read as follows: and that as amended the same is hereby approved and confirmed, subject to future territorial legislation.' The act being a territorial act, and the commission being the creation of the Territory, is directly affected by par. 2932, *supra*."

The record does not show that the absent commissioner had

not been notified to attend the meeting at which the bonds were funded. It is not to be presumed that notice of the intended meeting was not given. Under the provisions of the territorial act, the proceedings of the board of loan commissioners were legal.

We think the three objections made by the appellants are untenable, and the judgment of the Supreme Court of Arizona was right, and must be

Affirmed.

SKANEATELES WATER WORKS COMPANY *v.* SKANEATELES.

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

No 134. Argued January 24, 27, 1902.—Decided March 3, 1902.

On April 5, 1887, the village of Skaneateles granted a franchise to the waterworks company to maintain and operate within the village a system of waterworks for furnishing pure and wholesome water to the village and its inhabitants, under which the company constructed its works, and on February 1, 1891, contracted to supply water to the village and its inhabitants for the period of five years. At the expiration of the term of this contract some differences arose about the terms of its continuation, which resulted in the construction of an independent system of waterworks by the village authorities. In an action brought by the water company to restrain the village authorities from proceeding with the construction of that system or any other system for the village, it is held by the New York court (1) that the village was not required to institute proceedings to condemn the property of the plaintiff before commencing the construction of a waterworks system for the use of the village; (2) that the waterworks company under the contract did not acquire the exclusive right to furnish the village with water; (3) that subsequently to the termination of the contract no contractual relations existed between the water company and the village: *Held*,

(1) That the power of this court to review the judgment of the New York Court of Appeals is limited to a consideration of whether any right of the plaintiff's protected by the Federal Constitution has been denied;

Statement of the Case.

(2) That the water company, in applying to the village and filing its certificate with the Secretary of State under the act of 1873, acquired no contract right, express or implied, to any exclusive privilege of using the streets of the village for supplying it with water;
(3) That by virtue of its incorporation it secured simply the right to be a corporation and the authority to lay its water pipes in any of the streets and avenues or public streets of the village of Skaneateles;
(4) That when the contract for five years had expired there was nothing in the state legislation upon which to base an implied contract;
(5) That the decrease in the value of the property of the waterworks company, caused by the exercise by the village of its right to build and operate its own plant, furnishes no foundation for the plaintiff's claim.

THIS is a writ of error to the Supreme Court of the State of New York, the record having been remitted to that court from the Court of Appeals after the hearing of an appeal to the latter court and an affirmance by it of the judgment appealed from. 161 N. Y. 154.

The action was brought by the water company to restrain the village of Skaneateles and the individual defendants, its officers, from proceeding further with the construction of a waterworks system, or from doing any thing in furtherance of the construction or operation of any system of waterworks for that village. The plaintiff claimed that the village ordinance under which the proposed action on the part of the village was taken was void as impairing the obligation of a contract between plaintiff and the village; also, that its action if continued would result in the taking of plaintiff's property without due process of law; that the action of the defendant, if permitted, would result in the taking of private property for public use without compensation; and that such legislation denied to plaintiff the equal protection of the laws.

The defendants answered denying the contentions of plaintiff, and the case was referred to a referee for trial, who, after hearing the parties, reported that the defendants were entitled to judgment, dismissing the complaint upon the merits, with costs, and judgment was thereupon entered which was affirmed by the appellate division of the Supreme Court of the State and upon appeal by the Court of Appeals.

Statement of the Case.

As matters of fact the referee in his report found that the plaintiff was a domestic corporation organized under the act of 1873, chapter 737, and the several acts amendatory thereof; that the village of Skaneateles was a municipal corporation and the individual defendants were respectively the president, water commissioners and trustees of the village. On April 5, 1887, the village granted a franchise to the plaintiff to maintain and operate within the village of Skaneateles a system of waterworks for furnishing the village and its inhabitants pure and wholesome water upon the terms and conditions stated in the franchise. The plaintiff constructed the waterworks under this franchise and completed it about the year 1889 and put the same in operation; that the system was a complete and adequate one, no complaint having been made that the water furnished by the plaintiff was not pure and wholesome, or that it had been inadequate for the purposes for which the system was erected. Prior to this time the village of Skaneateles was not supplied with water by any company or corporation, nor did it possess any system of its own; that since its incorporation, and for the purpose of carrying on its works, the plaintiff had incumbered its property by mortgages to secure the payment of bonds issued by it, which bonds were outstanding at the time of the trial. After the erection and completion of the waterworks and on February 1, 1891, the plaintiff and defendants entered into a contract for the supply of water and the erection of hydrants and for the payment of certain compensation therefor by the defendants; that such contract was limited by its terms to the period of five years from February 1, 1891, and that it has not been renewed since the time of its expiration on February 1, 1896; that after such time, without any proceeding to vacate or annul the franchise of the plaintiff, or to dissolve the corporation, the defendant Leslie, as president of the village, appointed some of the other defendants to be water commissioners of the village, having in contemplation the purpose of constructing for said village a waterworks system of its own; that the persons so appointed commissioners entered upon the performance of their duties, called a meeting of the electors of the village, who voted in favor of municipal

ownership of the waterworks, and after such election the water commissioners issued or caused to be issued bonds of the village to the amount of $30,000, which they sold for the purpose of obtaining money to construct a waterworks system of its own; that the board of water commissioners of the village have entered into a contract for the construction of waterworks for said village, and have expended thereon about the sum of $24,000, and the works are substantially completed; that all of the proceedings were taken without instituting any proceeding to condemn the property of the plaintiff herein, although the plaintiff offered to participate in a proceeding looking towards the condemnation of its property; that the works of the plaintiff were constructed at large expense and its property rights and franchise mortgaged to secure its bonds which had been issued, and the income of the plaintiff from the operation of its plant had been insufficient to meet its outgoing expenses, and will be insufficient to meet its outgoing expenses when it shall cease to furnish water to the village of Skaneateles.

As conclusions of law the referee held:

(1) That the village of Skaneateles was not required to institute proceedings to condemn the property of the plaintiff before commencing the construction of a waterworks system for the use of the village.

(2) That the consent of the village of Skaneateles to the organization of the plaintiff as a waterworks company, and the making of a contract by the village of Skaneateles with the plaintiff for the supply of pure and wholesome water, did not vest in plaintiff the exclusive right to furnish said village with water, or prevent the village from granting to another corporation the right to supply water within the said village, or the village from constructing and maintaining a waterworks system to supply itself with water.

(3) That subsequently to February 1, 1896, no contractual relations existed between the plaintiff and the village of Skaneateles, and the village was not under legal obligation to enter into any contract with the plaintiff after that date, or to continue to take water from the plaintiff; but was entitled to construct and maintain a waterworks system of its own.

(4) That the defendants were entitled to judgment dismissing the complaint upon the merits with costs, and judgment was ordered accordingly.

Though not, perhaps, material upon the legal rights of the parties, yet it is seen from correspondence found in the record that prior to the expiration of the contract in February, 1896, the company gave notice to the village that it intended to increase its rents for hydrants, etc., to fifty dollars, which sum was ten dollars per hydrant more than it was entitled to under the franchise granted it, and twenty dollars more than the sum named in the expiring contract. The village authorities refused to pay the increase, and the water company, on learning it had under its franchise the right to charge but forty dollars per hydrant, reduced its demand, but the parties failed to agree, and the contract expired. After its expiration the company notified the village that the hydrants had been closed and that there must be no interference with them, even in case of fire. Both parties became somewhat excited, is would seem, and it resulted in the village taking proceedings under chapter 181 of the laws of 1875, and its amendments for erecting and operating waterworks of its own.

Mr. Charles A. Hawley for plaintiff in error. *Mr. George Barrow* was on his brief.

Mr. M. F. Dillon and *Mr. William G. Tracy* for defendants in error.

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

The power of this court to review the judgment of the New York Court of Appeals is limited to a consideration of the question whether any right of the plaintiff's protected by the Federal Constitution has been denied by the judgment. Whether the plaintiff is entitled to relief under the facts disclosed in the record upon general principles of equitable jurisdiction, is not a matter for us to inquire into, so long as the question does not involve the constitutional rights of the plaintiff.

Opinion of the Court.

The claim is made that the ordinance adopted by the authorities of the village of Skaneateles in 1896, providing in substance for the erection and operation of a water system by the village, which ordinance was passed pursuant to an authority of the legislature under the act, chapter 181 of the laws of 1875, and amendments, (giving authority to cities and villages to build their own waterworks,) impaired the obligation of the contract existing between the village and the company. The contract to which reference is made is not the one which was entered into in 1891 between these parties for the term of five years, because that contract was fully carried out and had expired by its own limitation in February, 1896, but it is the contract which the plaintiff in error claims was implied by reason of its organization and incorporation in 1887, in pursuance of an application made to, and with the consent of, the village authorities, and under the provisions of chapter 737 of the laws of New York of 1873, and the acts amendatory thereof. It is said the village at the time of plaintiff's incorporation had the election to do the work itself under the above act of 1875, or to confer upon a private company like the plaintiff, under the act of 1873, the right to do it, and when with these two different methods for obtaining a supply of water the village chose that which called for a supply by a private company, it impliedly contracted that it would not itself thereafter take the other method for obtaining such supply, unless it bought the plant of the company or condemned it under the provisions of the act of 1875. This, it is said, was implied in the grant made by the village. Sections 1, 2, 3, 4 and 5 of the act of 1873, under which the plaintiff was incorporated, are set forth in the margin.[1]

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[1] CHAP. 737, LAWS OF 1873.

SEC. 1. Any number of persons not less than seven may hereafter organize in any town or village of this State a waterworks company, under the provisions of this act.

SEC. 2. Whenever any persons to the number of seven or more shall organize for the purpose of forming a waterworks company in any of the towns or villages in this State, they shall present to the town or village authorities an application, setting forth the persons who propose to form said company, the proposed capital stock thereof, the proposed number and character of the shares of such capital stock, and the name or names of the streams, ponds,

Under the act of 1875, chap. 181, the village was authorized to erect and operate its own works. Provision was made in the act in detail for the organization of a board of water commissioners and the building of waterworks, the mode of paying for the same, and other matters connected with the supply of water. That part of the twenty-second section of the act, in

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springs, lakes or other sources and their locations, from which water is to be supplied. Such applications shall be signed by the persons who propose to form said company, and shall contain a request that the said town or village authorities shall consider the application of said company to supply said town or village of this State, or the inhabitants thereof, with pure and wholesome water. Upon the presentation of such application, the authorities of any town or village, which authorities are for the purposes of this act defined to consist of incorporated villages and towns, the board of trustees and supervisor, and for all other towns, the supervisor, justices of the peace, town clerk and commissioner of highways. Said authorities shall within thirty days of the presentation of said application determine by a vote of a majority of the authorities of said town or village, whether said application shall be granted; and the authorities of any town or village in this State are hereby authorized and empowered to make such determination, and when the same shall be made, to sign a certificate to that effect, and immediately transmit the same to the person making such application or either of them. Duplicate certificates of such determination shall be filed in the office of the clerk of said town or village, and in the office of the county clerk of the county in which said town or village granting such application shall be situated. The persons named in such application shall thereupon meet and organize as a waterworks company under such corporate name as they may select. They shall file in the office of the secretary of State a certificate of such organization. Said certificate shall contain the name of the corporation, the names of the members of said corporation and their residences, the amount of capital stock, the location of the office of said company. Such certificate shall be subscribed and sworn to by the president of said corporation, and shall be attested by the secretary thereof. Upon the filing of said certificate said waterworks company shall be known and deemed a body corporate, and shall be capable of suing and being sued by the corporate name which they shall have selected, in any of the courts of this State. The capital stock of said company shall be paid in the manner and within the time provided by the "Act to authorize the formation of corporations for manufacturing, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, and the several amendments thereto, and the stockholders of said companies shall be personably liable for the debts of said companies in the same manner and to the same extent as is provided by said act and the amendments thereto.

regard to the taking of the property of a private company, is set forth in the margin.[1]

Pursuant to the provisions of the act of 1873, certain persons on July 5, 1887, apply to the village authorities for permission to organize a water company to supply the village with pure and wholesome water, and on that day the authorities granted the request. On August 1, 1887, a certificate was duly filed in the office of the Secretary of State at Albany, by which the corporation was formed under the name of The Skaneateles Waterworks Company. Subsequently to the incorporation of

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SEC. 3. Said corporation shall have power to take and hold real estate for the purpose of their corporation, and may have, hold and occupy any of the waters of this State; provided, however, that nothing herein contained shall be deemed to infringe upon any private right which shall not have been the subject of an agreement and lease or purchase by said corporation. Provided, that said company shall have no power to take or use water from any of the canals of this State or any canal reservoirs as feeders or any streams which have been taken by the State for the purpose of supplying the canals with waters.

SEC. 4. Any corporation organized under the provisions of this act may, and they are hereby authorized and empowered, to lay their water pipes in any streets or avenues or public places, in any streets or avenues of an adjoining town or village, to the town or village where their application shall have been granted.

SEC. 5. Said corporations are authorized and empowered to supply the authorities or inhabitants of any town or village where they may have organized, with pure and wholesome water, at such rates and cost to consumers as they shall agree upon.

[1] PART OF SEC. 22, CHAP. 181, LAWS OF 1875.

SEC. 22. "Whenever any corporation shall have been organized under the laws of this State for the purpose of supplying the inhabitants of any village with water, and it shall become or be deemed necessary by the board of water commissioners herein authorized to be created, that the rights, privileges, grants and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created shall have the power, and it shall be their duty, to make, or cause to be made, a thorough examination of the works, rights, privileges and properties owned or held by such corporations, or any of them, and if such commissioners shall determine that said works, rights, privileges and properties are necessary for the purposes of this act, they shall have the right to make application to the Supreme Court. . . ." The section then provides for taking the property by condemnation.

the plaintiff it built the waterworks and entered into a contract with the village authorities to supply water to the village for five years from February 1, 1891.

It would seem to be clear, under the decisions of this court, that the plaintiff in applying to the village and filing its certificate with the Secretary of State under the act of 1873 acquired no contract right, expressed or implied, to any exclusive privilege of using the streets of the village for supplying it with water. *Charles River Bridge Company* v. *Warren Bridge Company*, 11 Pet. 420; *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685, 696; *Walla Walla City* v. *Walla Walla Water Company*, 172 U. S. 1, 13. The Court of Appeals of New York held to the same effect in regard to a provision in the charter of Syracuse relating to the rights of a water company, the provision being similar to the charter here involved. *Syracuse Water Company* v. *Syracuse City*, 116 N. Y. 167, decided in 1889; also *Matter of City of Brooklyn*, 143 N. Y. 596, affirmed in this court, 166 U. S. *supra*. Indeed, this proposition is conceded by counsel for the plaintiff, and it admits that the village, notwithstanding its grant to the plaintiff, possessed the power to grant to any other individual company the same kind of privilege it had already granted to plaintiff. But it denies the right of the village to avail itself of the authority to itself build and operate the works, given under the act of 1875, unless the plaintiff's plant be taken by purchase or condemnation.

Having before it the above act of 1873, amended in 1877, the Court of Appeals, in *People ex rel. &c.* v. *Forrest and others*, 97 N. Y. 97, 100, decided in 1884, said that: "The State authorized the formation of waterworks companies in its towns and villages, (Laws of 1877, chap. 171,) but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed."

It is true that by chapter 566 of the laws of 1890 it was provided that the water companies "shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass, with

pure and wholesome water at reasonable rates and cost;" and the act provided that contracts might be made therefor. But there was no provision making it incumbent upon the municipal authorities to take water from any such company.

By virtue of its incorporation under this act of 1873 the plaintiff secured simply the right to be a corporation and the authority to lay its water pipes in any of the streets and avenues or public streets of the village of Skaneateles. The village, however, as stated, was under no obligation to take water from the company. That was a matter for subsequent contract between the parties. Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, after the termination of the contract the plaintiff and defendant were empowered to make, there should be no right in the defendant to build its own system of waterworks under the statute of 1875, unless it purchased or condemned the property of the plaintiff.

There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed.

It is not amiss to here recall the situation at the time plaintiff became incorporated, in 1887, under the act of 1873. That act provided for the organization and incorporation of water companies which might furnish water to cities, villages and towns of the State. There was also the act of 1875 (chapter 181) and its amendments, granting to the village authorities the right to erect and operate a water system of their own. There was the further statutory provision, (chapter 129 of the Laws of 1879, relating to the municipality, and chapter 422 of the Laws of 1885, relating to a water company,) that the contracts to be entered into between the water companies and the municipal authorities should not extend beyond five years, un-

less there was a vote of the electors authorizing a contract for a longer period, but in no case longer than thirty years. Now while the parties are prohibited from contracting for more than five years without a vote of the electors, which was not taken, how can it be said that when they contracted only for the time permitted by the legislature, there was nevertheless an implied contract that the village would never avail itself of the right provided by statute, without purchasing or condemning the property of the plaintiff? No such condition is stated in any statute. We cannot see any solid foundation for the claim that there was a final and conclusive election of methods by the village, out of which sprang the implied contract contended for, when the legislature at that very time prohibited a contract for more than five years. It would seem in the nature of things that the election of methods was for no longer a time than the law permitted a contract to be made under the method chosen by the village. After the expiration of that time we cannot see why the parties were not in the same condition as to their respective rights that they were in before the contract for the five years was made. Otherwise, we have the anomalous condition that the village may grant unconditionally, the franchise to supply it with water, to another private company, while ceasing and refusing to take from the old company, and yet it cannot erect its own water system, (unless it purchases or condemns the plant of the plaintiff,) because it chose to enter into a contract with plaintiff for a supply of water by it for five years, although the contract has expired by its own limitation and the parties are under no legal obligation to renew it. We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years' contract, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract never to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase. We cannot see the logic of such contention.

The very fact that the taking of the plant of a private exist-

ing company was not made a condition for the exercise of the authority to build granted the village by the act of 1875, shows there was no implied contract to take such property. The right to build was specifically given to the village under the act of 1875, whether any private company existed or not, and that right to build was nowhere in the statute conditional upon a taking by the village of the plant of the private company. The act recognized the fact that there might be an existing private company, and the twenty-second section gave the village authority to take it, but did not compel it. It, therefore, authorized the village to build and operate its works without taking the plant of the private company. Both these acts were in existence when the plaintiff was incorporated under the act of 1873, and it took the chance of the village thereafter availing itself of the act of 1875 to build and operate, unconditionally, its own plant.

When the contract for the five years had expired we look in vain for anything in either of the statutes of 1873 or 1875 upon which to base the implied contract contended for. The court below, after careful consideration of the statute of 1875, came to the conclusion that there was nothing in the language of the twenty-second or any other section thereof compelling the village to purchase or condemn the plant of the company, and that no contract could be implied therefrom. Chief Judge Parker, in his opinion in this case, (161 N. Y. 154, at page 162,) says:

"On the other hand, the appellant urges that the statute authorizing villages to supply themselves with water, and permitting the acquisition of the works of any private corporation that may be supplying such municipalities with water, also makes it the duty of the water commissioners to acquire the property of the existing corporation or corporations. But after a very careful examination of the statute it seems to us very clear that this is not so. It is probable that the legislature mistakenly assumed that such authorities would not act unjustly or oppressively, but would recognize the property rights of others. Be that as it may, the right to determine whether the property of an existing waterworks corporation should be taken

or not is clearly submitted to the determination of the local authorities. The refusal of the defendant, therefore, to acquire the plaintiff's property by proceedings *in invitum* does not tend to support the plaintiff's claim for an injunction. The defendant has done precisely what the statute authorizes, and all that remains for the court to determine is whether the act was within the legislative power, or void because in contravention of the organic law."

The judge then proceeded to discuss that question, and held that the action of the village was legal. We concur in this view. The language too plainly leaves it to the discretion and judgment of the water commissioners, to permit of any other construction. Not being bound by the statute to take the property of the plaintiff as a condition of building its own plant, there is, as we have said, no implication of a contract to do that which the statute itself does not direct.

Reference was made on the argument to two Pennsylvania cases, decided by the Supreme Court of that State. They are *White* v. *City of Meadville*, 177 Penn. St. 643, and *Metzger* v. *Beaver Falls &c.*, 178 Penn. St. 1. They decide what is the proper construction to be given certain statutes of that State relating to municipal corporations, and to water companies formed to supply them with water. The actions were brought by taxpayers of the municipalities to restrain the latter from erecting works of their own to supply water. The court held that under the powers given to the municipalities by those statutes, they had not the right to erect such works unless they took the plant of the water companies then operating such plant. They did not hold there was any implied contract on the part of the municipalities that they would so take the plant, or that to operate works of their own without doing so would be a taking of the property without due process of law or without making compensation, or that it would be a denial of the equal protection of the laws. The cases were maintained on equitable principles and in favor of taxpayers who were complainants, and there was no question of contract between the city and the water company upon the basis of which the actions were permitted to stand. It was a simple question of the powers granted to the

parties by the different statutes. The court said that although the city was not bound to become the owner of the works, it had no power to destroy their value by duplicating them at the expense of the taxpayers. A taxpayer was the plaintiff. The court decided no Federal question in either case. The statutes of New York are somewhat different, and the state court has come to the conclusion that under them the village was not bound to take the plant of the plaintiff. We agree in the view that there was no implied contract to take the property of plaintiff, even though the village should subsequently to the expiration of the written contract erect its own water system.

It is also plain that as there was no contract, such as is claimed by the plaintiff, the action of the village has not resulted in the taking of any of the property of the plaintiff without due process of law or without compensation. It has not taken any of the property of the plaintiff in any aspect of the case. Its action may have seriously impaired the value of the plaintiff's property, but it has taken none of it, and such decrease in value, caused by the village exercising its right to build and operate its own plant, furnishes, under the facts in this case, no foundation for the plaintiff's claim. *Lehigh Water Company* v. *Easton*, 121 U. S. 388, 390.

In *Pumpelly* v. *Green Bay Company*, 13 Wall. 466, the land of the plaintiff had been overflowed by water under a claim of right under a statute, and it was held that such continuous overflow and user amounted to a taking of the plaintiff's property.

This is not such a case. The property of the plaintiff remains wholly untouched. Its value has decreased because the village no longer takes water from it, and the inhabitants will probably also take their supply from the village works, but the plaintiff's property has not been taken, as that term is understood in constitutional law. What the village ought to do in the moral aspect of the case is, of course, not a question for us to determine.

The Court of Appeals has held in this case that the provisions in the statute for the taxation of the property of the company in common with other owners of property to pay the obliga-

tions incurred in the construction of the works by the village, and all discriminating taxation of the patrons of the company are invalid. See also *Warsaw Waterworks Company* v. *Village of Warsaw*, 161 N. Y. 176. The plaintiff is, therefore, freed from the obligations imposed by those provisions.

The views above expressed show that there was no such contract as claimed by the plaintiff, and consequently no impairment of the obligations of any contract, and there has been no taking of plaintiff's property, nor has it been denied by the State the equal protection of the laws. The judgment of the Court of Appeals of New York is right, and must, therefore, be

Affirmed.

DETROIT *v.* DETROIT CITIZENS' STREET RAILWAY COMPANY.

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

No. 152. Argued November 4, 5, 1901.—Decided March 3, 1902.

The Detroit Citizens' Street Railway Company, at the time this action was commenced, was operating upwards of one hundred and thirty-five miles of street railways in Detroit, under grants and permissions made by the city government of Detroit, and by the statutes of Michigan set forth in the statement of facts and in the opinion of the court in this case. This litigation arises out of the different constructions placed by the parties upon the statutes of Michigan, called respectively the Tram-railway Act, and the Street-railway Act, both in force when said company acquired its powers. The provisions made by those statutes are summed up in the statement of facts. *Held:*

(1) That this was not such a case as on its face equity could have no jurisdiction over, and that, considering the public interests involved, a case is made out for following the general rule that a defence of want of equity jurisdiction will not be recognized where it has not been taken by answer, or in any other manner, and is not insisted upon on the hearing before the court;

(2) That there can be no question in this court as to the competency of a state legislature, unless prohibited by constitutional provisions,

Statement of the Case.

to authorize a municipal corporation to contract with a street railway company as to the rate of fares, and so to bind, during the specified period, any future common council from altering or in any way interfering with such contract;

(3) That such a contract having once been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract;

(4) That binding agreements had been made and entered into, between the city on the one side and the companies on the other, relating to rates of fare, and such agreements could not be altered without the consent of both sides;

(5) That those binding agreements constituted a contract as to the rates, equally binding with that in regard to taxes;

(6) That the rate of fare having been fixed by positive agreement, under express legislative authority, the subject was not open to alteration thereafter by the common council alone, under the right to prescribe from time to time the rules and regulations for the running and operation of the road;

(7) That the language of the ordinance which provides that the rate of fare for one passenger shall not be more than five cents does not give any right to the city to reduce it below the rate of five cents established by the company;

(8) That the provisions in the Tram-railway Act and the Street-railway Act referred to are entirely harmonious, and may be fully carried out, so as to involve neither incongruity nor inconsistency;

(9) That the extension of the terms of the city's consent beyond the limits of the corporate life of the companies was not illegal and void;

(10) That the fixing of rates, being among the vital portions of the agreement between the parties, it cannot be supposed that there was any intention to permit the common council, in its discretion, to make an alteration which might be fatal to the pecuniary success of the company.

THE bill in this suit was filed by the railway company for the purpose of obtaining an injunction to restrain the city of Detroit and the individual defendants from enforcing certain ordinances of the common council of the city, adopted in 1899, reducing the rates of fare on the various city railways of the complainant and providing for transfers of passengers from one route to another on payment of one fare of five cents, on the ground that such ordinances were violations of the Federal Constitution, because they impaired the obligation of contracts theretofore entered into between the city and the various pred-

ecessors of the complainant. The Circuit Court granted a decree perpetually enjoining the defendants as prayed for, and they have appealed therefrom to this court.

As further ground for equitable jurisdiction, the complainant, after setting up in the bill its alleged contracts with the city, and the attempted violation thereof by the latter, made the following averments:

"Your orator further shows unto the court that as owner and lessee it is now engaged in the operation of upwards of one hundred and thirty-five miles of street railways in the streets of the city of Detroit; that in such operation it has in use upwards of four hundred street cars, which are propelled by electricity, and has in its employ, engaged in such operation, upwards of one thousand men as motormen and conductors; that it carries an average of———thousand passengers per day over the lines owned and operated by it; that under and by virtue of the provisions of said ordinances, Exhibits A, B, C, D and E and the obligation of your orator to carry such passengers as may offer themselves for carriage, it will be subjected to innumerable demands upon the part of the travelling public to sell to such persons as may make such demands tickets in accordance with the provisions of said ordinances, Exhibits A, B, C, D and E, and to issue as provided and required thereby, and to accept and carry such passengers and transfer the same at the rates of fare fixed by said ordinances; that on your orator's refusal to comply with such demands and requests your orator may be subjected to numerous actions at law by persons so refused, and to annoyance, litigation and loss by reason thereof; that the said city of Detroit will seek and now seeks and threatens and intends by such power and authority as it may possess and by vexatious legal proceedings to compel your orator to comply with the provisions of said ordinances, Exhibits A, B, C, D and E, and as a result your orator will be put to great loss, damage, hindrance and annoyance in the transaction of its business, which it is entitled to carry on without such suits, litigation, actions, annoyance, hindrance, loss and damage.

"That, in full reliance upon its right to charge the full rates of fare fixed by the various contracts and grants hereinbefore

referred to, and for the purpose of procuring such money as it was necessary that it should have for the construction, maintenance, repairing, and reconstruction and operation of the various lines of railway hereinbefore described, it issued its bonds and borrowed thereon the money so needed; that your orator and its predecessors and lessors have issued for the purposes aforesaid bonds amounting in the aggregate to eight million two hundred thousand dollars, payable in gold coin, with semi-annual interest at the rate of five per cent per annum; that many of said bonds mature and will be due and payable within the next three years, and it will be necessary for your orator to borrow a considerable amount of money to assist in the payment and retirement of said bonds, by the issue of bonds of the same character; that all of said bonds outstanding are secured by mortgages given at various dates, by the terms of which all of the property, rights, privileges and franchises of your orator, its lessors and predecessors, including the franchises or rights fixed by the said various contracts and grants to charge the rates of fare therein named, together with all the tolls, fares, issues, earnings and profits arising therefrom, have been mortgaged to trustees therein named for the use and benefit and security of the holders of such bonds; that said bonds have been sold to parties purchasing the same in the full faith and belief that your orator, its lessors and predecessors and grantors, had the right to charge the full rates of fare fixed by the various contracts and grants without any right upon the part of the said city of Detroit, or of any other person, corporation, or authority to interfere with, lessen, reduce or impair the same, and, the said right to have and receive the rates of fare so fixed being so mortgaged as a part of the security for the payment of said bonded indebtedness, the action of said city by the adoption of the ordinances, Exhibits A and B, is an impairment of the obligation of said contract as against the rights of said bondholders under and by virtue of the security created by said various mortgages and in contravention of said section 10 of article 1 of the Constitution of the United States."

Complainant also averred in its bill the granting of consent by the city to its predecessors to lay tracks in the streets and

charge tolls at the rates named in certain ordinances, for transporting passengers, and the due assignments by the various companies of all such rights, by purchase or lease to the complainant, and the defendant by its answer makes no issue as to the validity of such assignments or the ownership by complainant of all the interests of the former companies in the contracts and ordinances set forth in the bill.

The answer admits the passage by the common council of the ordinances of 1899, reducing the rates of fare on the roads operated by the complainant, and also admits that the city intends to compel the complainant to comply with the provisions of such ordinances, which the defendants aver are valid because, as they claim, the former ordinances did not constitute a contract as to rates of fare which could not be altered by the city.

This litigation arises out of the different constructions placed by the parties upon the statutes of Michigan, called respectively the Tram-railway Act and the Street-railway Act, and the various amendments of those acts, and also out of the different claims of the parties as to the character and validity of the ordinances passed by the common council subsequently to the passage of those statutes.

The Tram-railway Act was passed in 1855, and the Street-railway Act in 1867. Prior to the amendment in 1861, made to the former act, there was no authority for the incorporation of street railways, and in the year named that act was amended by adding sections 33 and 34, which are as follows:

"SEC. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this State.

"SEC. 34. All companies or corporations formed for such purposes shall have the exclusive right to use the same and operate street railways constructed, owned or held by them: Provided, however, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

Statement of the Case.

In 1867 the above section 34 was further amended by adding an additional proviso, as follows:

"Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises granted shall be destroyed or unreasonably impaired, or said company or corporation be deprived of the right of constructing, maintaining and operating such railway in the streets in such consent and grant named pursuant to the terms thereof."

These sections of the Tram-railway Act, it will be seen, made no special provisions as to rates of fare, and there were no other sections of the act which did. The last amendment, above set out, of section 34 was passed March 27, 1867, or twenty-two days after the passage of the original Street-railway Act, March 5, 1867.

The provisions of the Street-railway Act material in this controversy are as follows:

"SEC. 13. Any street railway corporation organized under the provisions of this act may with the consent of the corporate authorities of any city or village given in and by an ordinance or ordinances duly enacted for that purpose and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways in said city or village as shall be designated and granted from time to time for that purpose in the ordinance or ordinances granting such consent, but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road in and along the streets or highways of any township adjacent to said city or village upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof shall be recorded by the township clerk in the records of his township. . . .

Statement of the Case.

"SEC. 14. After any city, village or township shall have consented as in this act provided to the construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred.

"SEC. 15. Any street railway company may also purchase and acquire at public or private sale, whether judicial or otherwise, or may hire any street railway in any city, village or township owned by any other corporation or company, together with the real and personal estate belonging thereto, and the rights, privileges and franchises thereof, and may use, maintain and complete such road, and may use and enjoy the rights, privileges and franchises of such company and upon the same terms as the company whose road and franchises were so acquired might have done. Every railway company may also purchase, hold, own or take upon lease such real estate, barns, stables, buildings, fixtures and property as may be necessary for the use and business of their road; and the whole or any part thereof, together with their railway fixtures, property and appurtenances, rights, privileges and franchises, may sell, lease, dispose of, pledge or mortgage whenever the corporation may deem it expedient so to do."

"SEC. 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road shall be established by agreement between said company and the corporate authorities of the city or village where the road is located, and shall not be increased without the consent of such authorities.

"SEC. 29. All companies and corporations heretofore organized in this State for the purpose of building and operating street railways under the statutes then in force shall have the same powers, rights, protection and privileges and shall be subject to all of the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

Section 30 in substance provides that all companies and corporations thereafter formed for street railway purposes must be organized under this act.

Statement of the Case.

Some of the railroads of which the complainant is the owner or lessee were organized under the Tram-railway Act and some were organized under the Street-railway Act of 1867. The Detroit Street Railway Company, now owned by the complainant, was organized under the Tram-railway Act, and the city adopted an ordinance assenting to the laying of tracks through the designated streets of the city on November 24, 1862. Section 1 of the ordinance provides:

"SEC. 1. That consent, permission and authority is hereby given, granted and duly vested in Eben N. Wilcox and his associates, who may be approved by the council, their successors and assigns, organized into a corporation, under the laws of the State of Michigan, as aforesaid, to lay a single or double track for a railway, with all the necessary and convenient tracks for turnouts, side tracks and switches, in and along the course of the streets of, and bridges in, the city of Detroit, hereinafter mentioned, and the same to keep, maintain and use, and to operate thereon railway cars and carriages, during all the term hereinafter specified and described, and in the manner and upon the condition set forth in this ordinance."

The following sections then provide for the streets in which the rails are to be laid, the manner of laying, whether double or single track, and various other matters not essential to enumerate.

Section 8 reads as follows: "The rate of fare for any distance shall not exceed five cents in any one car, or on any one route named in this ordinance, except where cars or carriages shall be chartered for specific purposes: Provided, cars so chartered shall not be considered regular cars, within the meaning of the preceding section."

Section 20 limits the powers and privileges conferred by the ordinance to thirty years from and after the date of its passage.

On November 14, 1879, an ordinance was passed supplementary to the one passed on November 24, 1862, which provided for extensions by the railway company of its tracks through various other streets of the city, and also provided, among other things, for a special tax on the gross receipts of the several lines of railway operated by the company, payable to the city, which

tax was to be in lieu of license or other taxes and charges under the existing ordinances.

Section 5 of the supplemental ordinance provided that the powers and privileges conferred and the obligations imposed on the railway company, by the ordinance passed November 24, 1862, and the amendments thereto, should be thereby extended and limited to thirty years from date, (November 14, 1879).

Section 6 provided that the ordinance should take immediate effect when written acceptances of the terms thereof were filed in the office of the city clerk of Detroit by the different companies controlled by the Detroit City Company; and it also provided that all ordinances or parts of ordinances in conflict with the provisions thereof were thereby repealed; and all ordinances and parts of ordinances not in conflict therewith were thereby affirmed and continued in force. The acceptances were subsequently duly filed in the city clerk's office.

A similar ordinance to that of November 14, 1879, was passed on June 30, 1880, relative to the Fort Wayne and Elmwood Street Railway Company, confirming and extending for thirty years its grant under the ordinance of January 31, 1865. Similar ordinances were passed in favor of other lines which had been organized under the Tram-railway Act and its amendments.

And ordinances of the same nature were passed relating to the companies organized under the Street-railway Act of 1867.

The original ordinance under which the city gave consent to the laying of the rails of the Grand River Street Railway was adopted on May 1, 1868, and the section providing for the rate of fare is the same in language as section 8, in the foregoing ordinance relative to the Detroit Street Railway.

The ordinance relating to the Dix Avenue Railway provided in section 6 " that the rate of fare for a single trip shall not exceed five cents for any distance within the city limits." Similar language was used in section 5 of the ordinance approved by the common council July 13, 1886, relating to the Highland Park Railway. The eighth section of the ordinance approved by the common council January 31, 1868, with regard to the Fort Wayne and Elmwood Railway Company, provides that

"the rate of fare for any distance shall not exceed five cents in any car."

These ordinances embrace the various railroads now owned or leased and operated by the complainant, and it is in them, taken in connection with the statutes already referred to, that the complainant finds the contracts or agreements as to the rate of fare, the obligation of which agreements it avers is impaired by the later ordinances passed in 1899.

The charter of the city of Detroit, approved June 7, 1883, by sections 121 and 122, clothed the common council with power over the streets, highways and alleys, to establish, open, widen, extend, straighten, alter, vacate, etc., and generally to control and regulate the manner in which the highways and streets, avenues, lanes, alleys, public grounds and spaces within the city should be used and enjoyed.

The constitution of the State of Michigan, article 15, section 1, provides that—

"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."

The various ordinances which have been referred to contain certain reservations of the right to alter, etc., which are thus worded: Section 19 of the grant of November 24, 1862, to the Detroit City Railway is as follows:

"It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways."

Section 7 of the grant of November 14, 1879, reënacting and extending the grant of November 24, 1862, is as follows:

"The right to amend or repeal this ordinance in case of its violation by said company or companies is expressly reserved."

Section 3 of the grant of January 5, 1885, authorizing the Brush street line, is as follows:

"It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regula-

tions as may from to time be deemed by the common council necessary to protect the interest, safety, welfare or accommodation of the city and public in relation to said railway."

Section 3 of the Trumbull avenue line grant of July 31, 1865, is a literal copy of the one last quoted.

Section 18 of the grant to the Grand River Street Railway of May 1, 1868, is as follows:

"It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, welfare or accommodation of the public in relation to said railways."

The same reservation was contained in section 4 of the grant of June 27, 1885, of the Myrtle street route.

And section 3, of the grant of August 3, 1888, relating to the Grand River line, is the same.

Section 19, of the grant of January 31, 1865, to the Fort Wayne & Belle Isle Company is as follows:

"It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways."

Mr. Timothy E. Tarsney for appellants.

Mr. John C. Donnelly and *Mr. Henry M. Duffield* for appellee. *Mr. Michael Brennan* was on Mr. Donnelly's brief.

Mr. F. A. Baker filed a brief for appellee.

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

A question has arisen at the outset as to the jurisdiction of a court of equity over a case like the one now presented. Assuming the right to relief in some form, has the complainant a plain and adequate remedy at law, or is the case such in its na-

ture and in the relief demanded as would be cognizable in a court of equity? The foundation of the right of action lies in the alleged invalidity of the ordinances of 1899, reducing the rates of fare on the railways of the complainant, because, as averred, those ordinances are in violation of the Federal Constitution, as impairing the obligation of contracts between the parties already existing, and therefore the claim is made that they should not be permitted to be enforced against the complainant where such enforcement might result in a multiplicity of suits, or in harassing and expensive litigation.

The averments in the complainant's bill upon this subject, which are set forth in the above statement of facts, show the additional and special grounds upon which the jurisdiction in equity is invoked. Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of nonpayment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.

The roads operated by complainant are also indebted to an extent of over eight million dollars, secured by mortgages upon the railways, their franchises, rights and privileges, together with the tolls and fares, earnings and profits arising therefrom,

and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned; such belief being based upon the existence and terms of such ordinances.

The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinances of 1899. The immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation.

The mayor and corporation counsel have, as is seen, been joined with the city as defendants in the suit. The reason for the joining of the individual defendants would seem to be that they are the officers upon whom would devolve the execution of the ordinances passed by the common council, and in the answer of the defendants it is admitted that they intend to enforce obedience by the company to such ordinances. The case is similar in some of its aspects to that of *Smyth* v. *Ames*, 169 U. S. 466. It is true there are no penalties fixed in the ordinances for disobedience to their commands on the part of the company, but the bill shows that there are a large number of passengers carried over the roads of the complainant daily, amounting to many thousands, each of whom would have the right to demand transportation at the rates provided for by the ordinances in case they were valid. As is said in *Smyth* v. *Ames*, page 518, "The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy

penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained." While this is not such an extreme case, and there are no penalties provided in the ordinances for disobedience, yet the same principle applies.

It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and once for all, and thus a multiplicity of suits and other complications prevented.

Taking all these facts into consideration, and bearing in mind that the answer does not set up any defence of the lack of jurisdiction of a court of equity over the subject-matter, and does not insist that there is an adequate and plain remedy at law, (and no such objection has been taken at any time, and has not been insisted upon before us,) we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it.

It is not such a case as on its face equity could have no jurisdiction over, such as an action to recover damages for an assault, or for a libel or slander, but the question between the parties as to the validity of various ordinances and the right of the city to enforce them, involving, as they may, the credit and possibly the solvency of the complainant, and taking into consideration the public interests involved in a speedy and final determination of the question, all these as well as other facts already mentioned, we think, make out a case for following the general rule, that a defence of this nature will not be recognized where it has not been taken by answer or in any other manner and is not insisted upon on the hearing before the court. *Reynes* v. *Dumont*, 130 U. S. 354; *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530.

We do not mean to assert that in all cases of this nature, in-

volving simply the validity of a subsequent ordinance or law, a court of equity would be the proper forum, but confine our decision to the special facts of this case, including the fact that no objection has been taken to the jurisdiction of the court at any stage of the litigation, and is not now raised by any party to the same.

This brings us to a consideration of the questions argued at the bar.

In furtherance of the claim by defendants that the ordinances of 1899 reducing the rates of fare are valid, it is urged that express authority from the legislature is required to enable the common council of a city to pass ordinances such as those described in this case, providing for the consent of the city to the laying of tracks and the running and operation of a railroad through its streets and the fixing of rates of fare, and that no such power was granted in this case, and if there were, there has been no agreement made by the passage of the ordinances referred to in the statement of facts. It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare. But there can be no question in this court as to the competency of a state legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract. *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S. 650; *New Orleans Waterworks Company* v. *Rivers*, 115 U. S. 674; *St. Tammany Waterworks* v. *New Orleans Waterworks*, 120 U. S. 64; *Walla Walla City* v. *Walla Walla Water Company*, 172 U. S. 1, 9; *Los Angeles* v. *Los Angeles City Water Company*, 177 U. S. 558, 570; *Freeport Water Company* v. *Freeport City*, 180 U. S. 587, 593. The contract once having been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract.

It is, however, urged that the terms employed in the ordi-

nances under which the complainant runs its different lines of street railways are not sufficient to constitute contracts, which may not be altered at the pleasure of the common council. It is said that at least in regard to the ordinances relating to those companies organized under the Tram-railway Act, no contract can be found in them, as there was no special provision in that act for an agreement between the city and a company applying for the use of its streets, as to the rates of fare, and therefore a statement in an ordinance upon that subject would amount to no more than a license which might be altered or revoked at any time; and that if the language were a contract, it was in the power of the common council to alter or abrogate it under section 34 of the Tram-railway Act.

It will be seen that under section 34 of the Tram-railway Act, as it was enacted in 1861, a railway corporation organized under the act could not construct a railway through the streets of a city without the consent of the municipal authorities, "and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe." Hence, it is argued that any terms or conditions under which the railway company obtained the consent of the municipal authorities might by the same authorities be from time to time altered as they should in their discretion think fit.

In *Pingree* v. *Michigan Central Railroad Company*, 118 Mich. 314; also 76 N. W. Rep. 635, decided in 1898, the Supreme Court of Michigan held that section 15 of the laws of 1846, relating to the incorporation of the Michigan Central Railroad Company and other sections mentioned in the act, which provided that the company might fix, regulate and receive tolls taken for the transportation of passengers or property on the railroad subject only to the limitation, as to passengers, of three cents per mile, etc., the company having the power to charge for tolls and transportation such sums as might be lawfully established by the by-laws of the company, and the board of directors having power to pass all by-laws necessary for carrying into execution all powers vested in the company, conferred a contract right on the corporation to fix tolls within the limits of three cents per mile, which right could not be violated by the acts of a succeeding legislature.

There is no provision in the act referred to in the above cited case, of a nature similar to the one in question here, providing for regulations, terms and conditions which might from time to time be prescribed. The case shows, however, that in the opinion of the Supreme Court of Michigan, language similar to that used in the ordinance, (omitting such provision,) amounted to a contract, and the question remaining would be whether the further language contained in the ordinance permitted an alteration of the terms of the contract as the common council might from time to time prescribe. The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement. Can it be possible that under this language permitting consent upon such terms and conditions as the city might from time to time prescribe, the power was reserved to make a rate of fare which might ruin the whole enterprise? That a rate once deliberately and mutually agreed upon might be thereafter and from time to time altered at the pleasure of the city alone? Will it be believed the parties thus understood the meaning of that provision? It would hardly be credible that capitalists about to invest money in what was then a somewhat uncertain venture, while procuring the consent of the city to lay its rails and operate its road through the streets in language which as to the rate of fare amounted to a contract, and gave the company a right to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council. It would rather seem that the language above used did not and was not intended to give the right to the common council to change at its pleasure from time to time those important and fundamental rights affecting the very existence and financial success of the company in the operation

of its road, but that by the use of such language there was simply reserved to the city council the right from time to time to add to or alter those general regulations or rules for the proper, safe and efficient running of the cars, the character of service, the speed and number of cars and their hours of operation and matters of a like nature, such as are described in the opinion of the court below in this case. Such would seem to be a reasonable construction of the language. It is unnecessary to conclusively determine the question, because we think that under sections 20 and 29 of the Street-railway Act of 1867, above set out, and by the subsequent adoption of the ordinance of 1879, (set out in the foregoing statement of facts,) relating to the Detroit City Railway Company, (and by the adoption of similar ordinances thereafter with regard to the other companies,) binding agreements were made and entered into between the city on the one side and the companies on the other relating to rates of fare, and such agreements could not be altered without the consent of both sides.

These agreements had express legislative authority, not only under the Tram-railway Act, but also and particularly under the Street-railway Act of 1867. By the twentieth section of the latter act it was provided that the rates of toll or fare, which any street railway may charge for the transportation of persons or passengers over its road, should be established by agreement between the company and the corporate authorities of the city or village where the road is located, and should not be increased without the consent of such authorities. The provisions of this section, among others, were by the twenty-ninth section of the act transferred to "all companies and corporations heretofore organized in this State for the purpose of building and operating street railways under the statutes then in force, and shall have the same powers, rights of protection and privileges and shall be subject to all the liabilities as hereby provided for companies organized under the provisions of this act."

It is plain that the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties and not as an exercise of a governmental

function of a legislative character by the city authorities under a delegated power from the legislature. It was made matter of agreement by the express command of the legislature. Ordinances of a like nature were passed by the common council relating to the other companies, and all of them were accepted in writing and they all had in them provisions relating to, or referred to ordinances providing for, the rate of fare in language similar to the foregoing.

Coming to a consideration of the effect of the language used, we think it amounted to a contract as to rates of fare. The ordinance of 1879 and the similar ordinances thereafter passed relating to the other corporations, together with the Street-railway Act of 1867, and sections 20 and 29 thereof, make out plain agreements entered into between the parties in relation, among other things, to the rates of fare to be charged by those companies. In the ordinance of 1879 and in the other ordinances under consideration, there were provisions made for special taxation of the companies which the Supreme Court of Michigan in *Detroit Citizens' Street Railway Company* v. *Common Council of the City of Detroit*, 125 Mich. 673, has held amounted to a contract between the parties which was as binding as though made by the legislature itself. Such decision by the Supreme Court of Michigan is entitled to very great respect and weight. If the ordinance constituted a contract between the parties in relation to taxes which were to be levied upon the company, we do not see any reason, in the language used providing for the rates of fare, for not holding that there is a contract as to those rates equally binding with that in regard to taxes.

In *City Railway Company* v. *Citizens' Street Railroad Company*, 166 U. S. 557, the common council of Indianapolis, on January 18, 1864, adopted an ordinance which said: "Consent, permission and authority are hereby given, granted to and duly vested in the company organized with R. B. Catherwood as president, a body politic and corporate by the name of the Citizens' Street Railway of Indianapolis, and their successors, to lay a single or double track for passenger railway lines," etc., under which ordinance the railway was built. This court

said (page 567): "The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose."

Although in that case there was no provision in the statute directing that the rates of fare should be established by agreement, yet nevertheless it was held that the language used amounted to an agreement upon the subject matter which could not be altered during its continuance by either party.

Upon this question considerable stress has been laid in the brief and in the arguments of counsel for the defendants upon the case of *Georgia Railroad & Banking Company* v. *Smith*, 128 U. S. 174. The twelfth section of the charter to that company declared, among other things, that it should have the exclusive right of transportation or conveyance of persons, merchandise, etc., over the railroad to be constructed, and it provided that the charge of transportation or conveyance should not exceed fifty cents per one hundred pounds for heavy articles, and ten cents per cubic foot on articles of measurement for every one hundred miles, and five cents per mile for every passenger. Permission was granted the company to rent or farm out any part of their exclusive right of transportation to any individual on such terms as might be agreed upon. Pursuant to that authority the company leased to one Wadley for the term of ninety-nine years such privileges. Afterwards the legislature of Georgia created a board of railroad commissioners, (Laws of Georgia, 1879, p. 125,) and gave the board power to prevent

railroad companies from charging other than just and reasonable rates. That board prescribed rates for the transportation of freight and passengers by railroad companies in the State which were less than the maximum rates authorized by the twelfth section of the charter of the company above referred to. The question of the validity of this order of the board of commissioners was brought before this court, and it was held that the language of the charter did not justify the holding that, notwithstanding any altered conditions of the country in the future, the legislature had, in 1833, at the time of the grant of the charter, contracted that the company might for all time charge rates for the transportation of persons or property over its line up to the limits there designated. The reasons for so holding are stated by Mr. Justice Field at pages 180 and 181 of the report, and it was not thought that in the exercise of the merely governmental function of creating a charter and incorporating the banking and railway company the legislature had in regard to this particular matter of rates surrendered the right to alter the maximum charges. The language used was regarded as a mere delegation of authority by the legislature to the company to make those charges until the authority was altered or withdrawn. In other words, that the language did not constitute a contract or agreement between the parties, the legislature and the railroad company.

In the case at bar, however, the rates are fixed under the provisions of a statute which declares that they shall be so fixed by agreement between the parties. The ordinance of 1879 adopts that of 1862 and reaffirms it. The rate of fare therein provided is made a rate under the ordinance of 1879, and that ordinance was adopted while the Street-railway Act was in force, and which specially provided for an agreement as to rates of fare, and the provisions of that act were transferred to the companies organized under the Tram-railway Act. It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them, would be regarded as

forming a contract because the statute provided specially for that mode of determining them. Under such direction, we are of opinion the language used in the ordinances amounts to an agreement, for that is the way in which the rates are to be arrived at, and the reaffirmation of the previous language, by reaffirming and adopting the ordinance of 1862, by the ordinance of 1879, and its acceptance, constitute an agreement as of that time. The same as to the ordinances relative to the other roads. The rate of fare having been fixed by positive agreement under the expressed legislative authority, the subject is not open to alteration thereafter by the common council alone, under the right to prescribe from time to time the rules and regulations for the running and operation of the road.

Nor does the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than five cents, give any right to the city to reduce it below the rate of five cents established by the company. It is a contract which gives the company the right to charge a rate of fare up to the sum of five cents for a single passenger, and leaves no power with the city to reduce it without the consent of the company. The language of section 20 in the Street-railway Act of 1867, which provides that the rate of fare agreed upon shall not be increased without the consent of the city authorities, does not mean that the rate may be reduced without the consent of the railway companies, nor does it show the parties did not suppose there was a contract between them as to rates. That provision does not seem to perform any material function, because without it, the parties having agreed upon the subject of rates, it would follow that the agreement could not be altered by either party without the consent of the other. It may be that it was meant that the company, while unable to increase the rates of fare without the consent of the city authorities, had the right to reduce the rates as it might please without consulting the city.

It was probably inserted from abundant caution, but in no event can it properly or fairly be regarded as an implied permission to the city authorities to reduce the rates of fare as agreed upon without the consent of the railway company. The reasons are obvious and need not be restated.

It is said, however, that section 34 of the Tram-railway Act was amended some twenty-two days after the passage of the Street-railway Act containing the above sections 20 and 29, and that, therefore, the provisions of the amended Tram-railway Act must apply exclusively.

The amendment made to section 34 of the latter act in 1867 has been set forth in the statement of facts above made, but for convenience will be repeated here, as follows:

"Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the streets in such consent and grant named pursuant to the terms thereof."

Referring to this amendment, it is argued that the city had the right to pass these ordinances of 1899 as a regulation and condition for the operation of the road, unless the rights or franchises already granted to the company should thereby be destroyed or unreasonably impaired, or unless the company would be thereby deprived of the right of constructing, maintaining and operating its railway pursuant to the terms of the original consent, and such impairment is not alleged in the complainant's bill. It is obvious that the additions to the original Tram-railway Act made in 1861 and 1867 were laws *in pari materia* with the Street-railway Act passed in 1867, and should therefore be construed together to obtain the legislative meaning.

Bearing in mind the provision of section 29 of the Street-railway Act, granting to other corporations the same powers as are given to the companies organized under that act, and coming to a consideration of the amendment to section 34 of the Tram-railway Act made in 1867, we find no inconsistency or contradiction between the two acts. The amendment to the thirty-fourth section prohibited the city from making any regulations or conditions whereby the rights or franchises of the company should be destroyed or unreasonably impaired, or whereby it

should be deprived of the right of constructing, maintaining and operating its railway pursuant to the terms of the consent, while section 20 of the Street-railway Act provided in terms for an agreement between the parties upon the question of rates of fare, and the parties having fixed such rate by agreement, entered into by authority of the legislature, there can be no question of its binding force. Section 14 of the same act also safeguarded the rights of the companies, and that section might be referred to in aid of its rights, by the company. The Tram-railway Act amendment of 1867 is a general provision regarding regulations or conditions, destroying or unreasonably impairing rights or franchises already granted, or depriving the company of rights of construction and operation, and should be construed also in connection with section 14 of the Street-railway Act, while the matter of rates of fare is specially provided for by section 20 of the last named act, which provides for an agreement on that subject. The two acts are entirely harmonious and may be fully carried out so as to involve neither incongruity nor inconsistency.

But the defendants raise the objection that section 29 of the Street-railway Act cannot be applied to companies formed under any other act for the reason that to apply it to such companies would violate the state constitution, section 20 of article 4, which provides that "no law shall embrace more than one object which shall be expressed in its title."

The title of the Street-railway Act is "An act to provide for the formation of street railways," and the claim is made that the provision of section 29, making the act applicable to other companies, is outside and beyond the object of the act as expressed in its title.

The meaning to be given to the constitutional provision was stated in *People ex rel. Secretary of State* v. *State Insurance Company*, 19 Mich. 392, wherein Chief Justice Cooley, at page 398, said:

"We must give the constitutional provision a reasonable construction and effect. The constitution requires no law to embrace more than one object, which shall be expressed in its title. Now, the object may be very comprehensive and still be

without objection, and the one before us is of that character. But it is by no means essential that every end and means necessary or convenient for the accomplishment of the general object should be either referred to or necessarily indicated by the title. All that can reasonably be required is that the title shall not be made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection."

Similar provisions are to be found in the constitutions of several of the States, among them that of New Jersey, and the meaning of such provision was brought before this court in *Montclair* v. *Ramsdell*, 107 U. S. 147, and it was held that the provision did not require a detailed statement or index or abstract of its contents in the title of an act, and that it did not prevent uniting, in the same act, numerous provisions for one general object fairly indicated by its title.

The constitution of Illinois contains a similar provision, the construction of which also came before this court in *Jonesboro City* v. *Cairo &c. Railway Company*, 110 U. S. 192, 198. In that case this court said, through Mr. Justice Harlan:

"The title of the act is 'An act to amend the charter of the Cairo and St. Louis Railroad Company.' The contention is, that the legalization of an election previously held, and at which the people voted in favor of a subscription of stock to that company, and the granting of authority to issue bonds in payment of such subscription, is not a subject expressed by the title of the act. In this view we do not concur, and our conclusion is justified by the later decisions of the Supreme Court of Illinois construing a similar provision in the state constitution of 1870. It was held in *Johnson* v. *People*, 83 Illinois, 431, that the constitution does not require that the subject of the bill must be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required."

We have examined the various cases cited by counsel for the defendants, arising in the State of Michigan under the constitutional provision in question, and it is sufficient to say that

we think not one of them extends that provision so as to embrace a case like the one at bar. Narrowly considered, an act to provide for the formation of street railway companies should contain nothing but provisions relating to their formation and organization, but it would be absurd to hold that the constitutional provision would prevent the introduction into such an act of various details in regard to the corporations after their formation and in regard to their government, operation, regulation and other matters which might be fairly considered as germane to the particular object named in the title of the statute, and hence, we think it would be a most narrow construction of the constitutional provision to hold that under such a title it was incompetent for the legislature to provide that the benefits and obligations conferred and provided for in the act should be made applicable to corporations of a like character already organized and in operation. It is germane and appropriate to the subject-matter of the act, and to enact under such a title that all companies of the like nature should have the same privileges is fairly within the general object described in the title. This being true, the companies organized under the Tram-railway Act were equally, with those organized under the Street-railway Act, enabled by the express authority of the legislature to enter into a contract for a rate of fare with the city, and when in 1879 and the subsequent years those companies which were organized under the Tram-railway Act entered into further agreements with the city in the way of ordinances, those agreements were valid so far as the objections heretofore considered are concerned, and not subject, in regard to this matter, to alteration at the will of one party only. The agreements being valid in the case of companies organized under the Tram-railway Act, it follows that those entered into with the other companies organized under the Street-railway Act were also valid.

Still another objection is raised by the defendants to the validity of the ordinances passed in 1879 and 1880 and 1885, by which the powers and privileges conferred and the obligations imposed upon the railway companies by the former ordinances were extended and limited to thirty years from the date of the supplemental ordinances, the objection being that the extending of

the term of the consents beyond the then limit of the corporate life of the companies was illegal and void. We are not of that opinion.

This was matter of agreement between the parties. The franchise to be a corporation came from the State, and all that the company required from the city was its consent to the laying down of the rails and the operation of the road through the streets of the city, and such consent was to be given upon terms and conditions to be agreed on. This consent, when given, became a privilege or franchise granted to the corporation, and was property belonging to it. By the ordinance of 1879 the duties and obligations of the company therein mentioned were largely increased, additional taxes were provided for, and also extensions of its tracks as stated in the ordinance. The company also agreed to furnish all the materials and do all the paving mentioned at its own expense. One inducement to the company to agree upon and accept this ordinance was that the term which the city had originally consented to for the use of its streets by the company should be extended to thirty years from the date of the new ordinance. Although the company itself, by the act under which it was incorporated, was limited in its corporate life to a term of thirty years from the date of its organization in 1862, the extension of the term of consent by the city carried such consent about sixteen years beyond its then corporate life. Of course, no one contends that this extension of the term for the use of the streets of the city in any manner affected the limit of the term of the corporate life of the company, but the limitation of its life did not prevent it from taking franchises or other property, the title to which would not expire with the corporation itself. A corporation whose corporate existence was limited to a term of years could always purchase the fee in property which it needed for the operation of its business. If at the end of its term its life were not extended, the property which it owned was an asset payable to the shareholders after the payment of its debts, and in a case like the present, where the consent was assignable and transferable, particularly by virtue of section 15 of the Street-railway Act above set forth, any company itself having corporate exist-

ence for that purpose, could purchase the outstanding term and operate its road thereunder. We see no reason why the company could not take the extended term as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the Circuit Court of Appeals for the Sixth Circuit in *Detroit Citizens' Street Railway Company & Others* v. *City of Detroit*, 12 C. C. A. 365; same case, 64 Fed. Rep. 628. In the course of the opinion of the court in that case, the cases of *People* v. *O'Brien*, 111 N. Y. 1, and *Miner* v. *New York Central Railroad Company*, 123 N. Y. 242, were cited. *People* v. *O'Brien* is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case, in 123 N. Y., announces the same doctrine. It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee.

The case above cited in the Circuit Court of Appeals for the Sixth Circuit, it will be noticed, is between the same parties as the case at bar, and if the judgment therein had been pleaded or put in evidence upon the trial of this action, we cannot now see why it would not have been *res adjudicata* between the parties in this suit upon that question, at least as to the particular road then under discussion.

In *City of Detroit* v. *Ellis, Attorney General*, 103 Michigan,

612, upon an application for a mandamus the decision of the United States Circuit Court of Appeals was regarded as *res adjudicata* of the question in issue in that suit on an application by the city and certain individual citizens for a mandamus to compel the attorney general to file an information in the nature of *quo warranto* to inquire by what right the railway company maintained and used its tracks in the streets after the date named. Without treating the case in the Circuit Court of Appeals as strictly *res adjudicata*, we regard the conclusion arrived at by that court upon the question under discussion as correct, and consequently the objection now urged by the defendants to the validity of the ordinance of 1879 and the other ordinances similar to it cannot be maintained.

The further objection is made that under the power of alteration and repeal, provided for in the constitution of Michigan and under the terms of the various ordinances giving power to the common council in certain cases to provide for further rules and regulations, the right is reserved to the common council to alter the rates of fare provided for in the various ordinances under consideration, as it alone may regard reasonable and just, without the consent of the company.

The constitution of the State of Michigan, article 15, section 1, provides: "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." Counsel for the defendants contends "that the regulation of rates of fare or toll upon the street railway is a governmental function, delegated by the legislature of the State of Michigan to the municipalities, and no matter in what form such delegation of power may be exercised, whether by ordinance or an assumed contract, it is nevertheless a law, subject to alteration, amendment or repeal. It has not been the policy of the State of Michigan since the adoption of the present constitution to permit irrevocable legislation. The State cannot do it itself, and if it cannot, surely one of its creatures, like a city, cannot be permitted to do that which its creator is prohibited from doing."

We have already seen that the legislature was competent to

grant to the city of Detroit the right to give its consent to the laying of the tracks of a street railway and the operation of the same in and through its streets upon such terms and conditions as the parties might agree upon. The grant of this power was not the formation of a municipal corporation, directly or indirectly, either in substance or effect. The legislative act which granted the power to the city could not be altered, amended or repealed by the latter. No such power was given to it by the legislature and probably could not even be delegated in any event. It is sufficient to say that none was attempted. *City Railway Company* v. *Citizens' Railway Company*, 166 U. S. 557, 563.

The legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power so to do is not involved in this case.

We are then brought to the question of the reservations in the ordinances themselves. An examination of them leads us to the conclusion that not one provided or was intended to provide for a power to alter an agreement in relation to the rates of fare entered into between the parties. The right from time to time to make such further rules, orders or regulations as to the common council may seem proper, cannot be held to extend to the alteration of a contract as to the rate of fare which shall be charged for the transportation of passengers. We think, as was stated by the court below, that this reservation permitted the city to make further rules or regulations than those contained in the ordinances, in regard "to all matters incident to the construction and operation of the road, such as the location of the tracks in the streets, the placing of switches and turn tables, the repair of the pavement between the tracks, the removal or limitation of the number of tracks, in the interest of public travel, the frequency with which cars should be run for the public convenience, the stopping of cars at street crossings, the use of fenders, the rate of speed to be maintained, the sale of tickets, and generally to details of the conduct and operation of the railway, which experience might show to be necessary, in addition to or in amendment of those specified in the consent, for the protection of life, the accommodation of the pub-

lic, and the avoidance of injury to private property. Such regulations are not invasions of the contract rights of the company and are just and reasonable." *Lake Shore & Michigan Southern Railway Company* v. *Ohio*, 173 U. S. 285, 305.

The fixing of rates is, as we have already said, among the most vital portions of the agreement between the parties contained in the ordinances. It cannot be supposed for one moment, with regard to a right so fundamental in its nature, that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary success of the company. For the reasons already given, we think the language used does not, in fact, give any such power to the common council. The ordinances of 1899 are, so far as this record shows, the first wherein the common council has assumed to make any change in the rates of fare without the assent of the company to be affected thereby. From 1862 until 1899 there seems to have been no attempt to exercise this alleged power of alteration by the common council without the consent of the railway company. While the rate of fare existed as agreed upon between the city and the railway company, expenditures involving millions of dollars were entered upon, changing the mode of transportation from animal to electric power, and no claim seems ever to have been made on the part of the city of a right of alteration to be exercised in accordance only with its own views of reason and propriety. This in itself is a strong implication of the want of any such power under the various reservations set forth in the foregoing statement of facts and contained in the ordinances specified. But aside from that and considering only the nature of the right itself growing out of the agreement as to fares, we are of the opinion that not one of the reservations of the right to make further rules or regulations could by any fair construction be held to include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in those ordinances.

We have thus answered the chief objections of the city to the maintenance of this action. Some others have been made, which we have examined, but do not think it necessary to fur-

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ther refer to them than to say they are in our opinion not well founded.

We think the conclusions arrived at by the court below are correct, and its judgment is, therefore,

Affirmed.

WILSON *v.* STANDEFER.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 105. Argued January 16, 1902.—Decided March 3, 1902.

This court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the state enactment; but it is the duty of this court to follow the decision of the state court when the question is one of doubt and uncertainty.

The sole question for the consideration of this court in this case is, whether the Supreme Court of Texas erred in overruling the contention of the plaintiff in error that the State was precluded by contract from changing its mode of procedure in respect to purchasers in default; and this court agrees with the Supreme Court of Texas that no contract rights of a purchaser under the act of July 8, 1879, were impaired by the subsequent act of August 20, 1897; that the 12th section of the act of 1879, was not, in legal contemplation a stipulation by the State that the only remedy which might be resorted to by the State was the one therein provided for; that the distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and, without impairing the obligation of the contract, the remedy may be modified as the wisdom of the nation may direct.

THIS was an action brought in the district court of Tom Green County, Texas, in May, 1899, by J. F. Standefer against T. K. Wilson, involving the title and ownership of a tract of land containing 640 acres situated in said county.

At the trial a jury was waived and an agreed statement of facts was filed, which was as follows:

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"1. The land sued for and described in plaintiff's petition, to wit, section No. 42, district No. 11, S. P. R. R. Co., in Tom Green County, Texas, was on May 1, 1882, public free school land, being the alternate section surveyed by said S. P. R. R. Co. for the public school fund of Texas and reserved under the constitution and laws for the use and benefit of the public free schools of Texas, and was a part of the said land, the sale of which was authorized under the act of the legislature of Texas, approved July 8, 1879, and the amendment thereto approved April 6, 1881.

"2. That on the 1st day of May, 1882, said survey of land was recognized and abstracted by the State as situated wholly in Concho County and was so recognized, abstracted, assessed for taxation and taxes paid thereon until the year 1891, when the boundary line between the counties of Concho and Tom Green was run and established under a joint survey made by the two counties, and said land was ascertained to be in Tom Green, and has since said year been recognized and abstracted by the State as situated in Tom Green County and since said year has been assessed for taxation and the taxes paid thereon in said Tom Green County.

"3. That the county surveyor of Concho County, in obedience to and under the act approved July 8, 1879, and the amendment thereto approved April 6, 1881, viewed and appraised said land under oath, as required by said act, and made return of same to the commissioners' court of Concho County, which said court examined and approved same, classifying as suitable only for grazing purposes, no timber or water, and appraised it at $1.00 per acre.

"4. That upon the completion of said appraisement the county commissioners' court of Concho County prepared a tabulated report of their action as to said survey, setting forth the following, to wit, 'Survey No. 42, district No. 11, 640 acres, S. P. R. R. Co., $1 per acre, suitable only for grazing purposes, no timber or water,' one copy of which said report was filed in the office of the county surveyor of Concho County, one copy forwarded to the commissioner of the general land office, and one copy to the treasurer of the State.

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"5. That upon receipt of said tabulated report by the commissioner of the general land office the same was by him examined and in all things approved, and the said commissioner of the general land office notified the county surveyor of Concho County of his approval of said tabulated report and appraisement.

"6. That thereafter, on May 1, 1882, Thomas Dolan made his application, in writing, to the county surveyor of Concho County to purchase said land, which said application was as follows, to wit: 'To the surveyor of Concho County: In accordance with the provisions of an act to amend the caption and sections 1, 2, 3, 4, 5, 6, 7 and 8 of an act to provide for the sale of alternate sections of land in organized counties, as surveyed by railroad companies and other works of internal improvements and set apart for the benefit of the common school fund, to provide for the investment of the proceeds and to repeal all laws in conflict therewith, approved July 8, 1879, and to provide for the sale of such lands in unorganized counties, approved April 6, 1881, I hereby apply to purchase the following land: Section No. 42, district No. 11, Concho County, about N. 12 miles from Kickappoo Springs, surveyed for S. P. R. R. Co. certificates: Beginning at N. E. corner S. P. R. R. Co. survey 117, thence north 1900 varas, thence west 1900 varas, thence south 1900 varas, thence east 1900 varas to the place of beginning. Date, 1st day of May, 1882. (Signed) Thomas Dolan;' which said application was on same day filed with said county surveyor and recorded by him May 22, 1882, and all fees required by law paid to said surveyor.

"7. That immediately thereafter said Thomas Dolan forwarded to the state treasurer his application, with the sum of $32, being 1–20 of the appraised value of said land at $1 per acre, and said treasurer entered a credit on his books in the name of said Dolan, and thereafter, on June 22, 1882, the state treasurer issued a receipt for said first payment as follows: Treasurer's office, Austin, Texas, June 22, 1882. Received of Maddox Bros. & A. on account of Thomas Dolan the sum of $32, the same being first payment on section No. 42, district No. 11, S. P. R. R. Co., of state school land in Concho

County under an act to provide for the sale of the alternate sections of land set apart for the benefit of the common school fund. Approved April 6, 1881. (Signed) F. R. Lubbock, treasurer. And said state treasurer forwarded said receipt, together with said application, to the commissioner of the general land office, who filed said application in his office on June 22, 1882, and issued his certificate in lieu thereof, setting forth the amount paid to the treasurer, and the quantity, description and valuation of the land applied for; which said certificate was by said Thomas Dolan presented to the county surveyor of Concho County, who thereupon surveyed the land embraced in said original application, recorded the field notes thereof in his office, and forwarded same to the commissioner of the general land office and entered said land on his books July 2, 1882, as sold to said Thomas Dolan, and he paid the said surveyor all fees required by law.

"8. That when said surveyor received said application said Thomas Dolan executed and delivered his obligation to the State for the balance of the purchase money of said survey of land, said obligation being as follows, to wit: '$608.00. Note for purchase money, common school lands. For value received, I, the subscriber hereto, do promise to pay to the governor of the State of Texas and his successors in office the sum of six hundred and eight dollars, with interest thereon at the rate of 8% per annum, as hereinafter specified, the same being the purchase money for the following-described tracts of land this day purchased by me from the State of Texas in accordance with the terms of an act of the legislature of said State, viz., An act to amend the caption and sections 1, 2, 3, 4, 5, 6, 7 and 8 of an act to provide for the sale of alternate sections of lands in organized counties as surveyed by railroad companies and other works of internal improvement and set apart for the benefit of the common school fund; to provide for the investment of the proceeds, and to repeal all laws in conflict therewith, approved July 8, 1879, and to provide for the sale of such lands in unorganized counties, approved April 6, 1881, to wit, survey 42, district 11, surveyed for the S. P. R. R. Co., Concho County. I am to pay or cause to be paid into the treasury of the State

of Texas, on the first day of January of each year, one twentieth of the above amount, together with the annual interest of 8 per cent, upon the unpaid principal until this entire obligation is liquidated, and it is expressly understood that I am to comply with all the conditions and requirements and am subject to all the penalties contained and prescribed in the above-recited act. Witness my hand this the 1st day of May, 1882. (Signed) Thomas Dolan;' which said obligation was forwarded to the commissioner of the general land office and by him registered in a book kept for that purpose, setting forth the name of the purchaser, the amount and date of the obligation, the tract of land for which it was given, and the county in which situated, and endorsed said obligation as follows: 'Registered June 22, 1882. W. C. Walsh, commissioner of the general land office,' and delivered said obligation to the treasurer of the State, who filed the same in his office.

"9. That said Thomas Dolan and his vendees paid on account of interest on said obligation as the same accrued the sum of $272.65, which was received and applied as interest thereon, but the other payments of principal, except the first payment of one twentieth of the appraised value of said land, to wit, $32, which paid at the time of his said application to purchase, as aforesaid, was deferred, as authorized and permitted by said act.

"10. That thereafter said Thomas Dolan sold said land and conveyed it by deed in proper form to H. Buckley, duly acknowledged and recorded and filed in the land office, and thereafter by regular and constructive chain of transfers said title vested in the Ostrander & Loomis Land & Live Stock Company on April 4, 1888, all of which said conveyances being properly acknowledged and duly recorded and filed as required by law, each of said vendees in succession assuming to pay to the State the balance of the purchase money and interest, as provided in the obligation of said Dolan.

"11. That said land, among others, was mortgaged by said Ostrander & Loomis Land & Live Stock Company to the Knickerbocker Trust Company to secure payment of $600,000.00 due holders of its coupon bonds; that in 1892 said Ostrander & Loomis Land & Live Stock Company became insolvent and

unable to meet any of its obligations, and in a suit in the district court of Tom Green County, brought to foreclose said mortgage, judgment was entered on the 17th day of May, 1898, foreclosing the same and ordering the sale of the land so mortgaged, including said survey 42 described in plaintiff's said petition; that an order of sale issued in due form and time on said judgment, and said survey of land, with others, was sold thereunder by the sheriff of Tom Green County, after due and legal notice, on the first Tuesday in July, 1898, being the fifth day of said month, when the land described in plaintiff's petition was bid in by T. K. Wilson, defendant herein, with some other lands, for the sum of $3250, the amount of his bid paid, and the said sheriff executed to him a deed in due and legal form, properly acknowledged, conveying to him the title of the said Ostrander & Loomis Land & Live Stock Company, and was on the same day filed and duly recorded in Tom Green County.

"12. That on the 20th day of August, 1897, the commissioner of the general land office of Texas, acting under and by virtue of the authority conferred upon him by the act of the legislature of Texas, entitled 'An act to authorize the commissioner of the general land office to forfeit all lands heretofore sold by the State under any of the various acts of the legislature for failure to pay any portion of the interest thereon, approved March 25, 1897,' endorsed on the application of said Thomas Dolan given as aforesaid 'Land forfeited,' and caused an entry to that effect to be made on the account kept of said Thomas Dolan, purchased as aforesaid, and declared said land forfeited to the State without the necessity of reëntry or judicial ascertainment, and had said land duly and regularly reclassified under chapter 12 A, title 87, of Revised Civil Statutes of Texas of 1895 and the amendment thereto, chapter 129, General Laws of Texas of 1897.

"13. That the commissioner of the general land office did not at any time prior to the forfeit entered and declared on the 20th day of August, 1897, notify the county or district attorney of the county in which said land was situated of the failure of said Thomas Dolan or his vendees to pay any interest due on the said obligation of Thomas Dolan hereinbefore mentioned,

and neither the county nor district attorney of the county in which said land is situated caused any writ to be served upon said Thomas Dolan or his vendees or the mortgagee or beneficiaries thereunder, all of whom resided at said date in Concho and Tom Green Counties, requiring him, them, or any or either of them to show cause why he or they should not be ejected from said land, and no judgment was rendered in any court against said Thomas Dolan or any or either of his vendees or the mortgagee or beneficiary under the mortgage aforesaid awarding a writ of possession against him or them in favor of the State, and no copy of any such judgment was forwarded to the state treasurer and commissioner of the general land office, as required by section 12 of the said act approved July 8, 1879, and no proceedings whatever were had as required and provided by said section 12 of the act aforesaid, but said forfeiture was entered and declared on August 20, 1897, without any judicial proceedings whatever in any court of Texas, and no judicial proceedings of any kind or character have ever been had by the State to forfeit or rescind the sale made to Thomas Dolan, as hereinbefore set out, or to recover on or enforce his obligation given, as aforesaid, for the purchase money of said land, but said forfeiture was made under said act of March 25, 1897, and was without reëntry or judicial ascertainment and without any actual or personal notice to said Dolan or any of his vendees or to the mortgagees or beneficiaries aforesaid.

"14. The commissioner of the general land office of Texas, after the forfeiture entered and declared, as aforesaid, on August 20, 1897, classified said land described in plaintiff's petition as dry grazing land, and appraised and valued the same at $1 per acre, and placed the same upon the market for sale, and notified in writing the county clerk of Tom Green County on September 11, 1897, of the valuation placed by him upon the said land, and that said land was offered for sale, which said notification was duly recorded on September 11, 1897, by the said clerk in a book for that purpose in his office; and it is agreed that in the classification, valuation and the placing of said land on the market September 11, 1897, everything was done as required and in strict compliance with chapter 12 A,

title 87, Revised Civil Statutes of Texas of 1895, and the amendment thereto, chapter 129, General Laws of Texas of 1897.

"15. That thereafter, on September 13, 1897, plaintiff J. F. Standefer, residing upon with his family and being an actual settler on said land, made his application, in writing, as required by law, and on the form adopted and prescribed by the commissioner of the general land office, to purchase said survey 42, district 11, S. P. R. R. Co., 640 acres, in Tom Green County, as an actual settler thereon, at the valuation and classification placed thereon by said commissioner, to wit, $1 per acre, as dry grazing land, and accompanied his said application with his affidavit, stating that he desired to purchase said land for a home, that he had in good faith settled thereon, and that he was not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation was interested in the purchase thereof, which said application was forwarded by said J. F. Standefer to the commissioner of the general land office, together with his obligation to the State, duly executed, binding him to pay to the State on the first day of November of each year thereafter until the whole purchase money was paid one fortieth of the aggregate price of said land, with interest, at the rate of three per cent per annum, on the whole unpaid purchase money, payable on the first day of November of each year, and upon the same day that he forwarded his application and obligation to the commissioner of the general land office he also transmitted to the state treasurer $16, being one fortieth of the aggregate purchase money for said land at $1 per acre; and thereafter on October 25, 1897, the commissioner of the general land office awarded said land to him under his said application to purchase as aforesaid and notified him on that date of said award, and the said Standefer has since said purchase paid all interest due upon his said obligation to the State and has continuously resided upon said land as a home and is now residing thereon, and he has in all things strictly complied with the said laws of 1895 and 1897 and the regulations adopted by said commissioner of the general land office.

"16. That on April 25, 1899, defendant T. K. Wilson, through

his attorneys, tendered to the state treasurer all interest and principal due on account of said Thomas Dolan purchase, as aforesaid, as is fully shown by the following certificate of said state treasurer, to wit: 'I, John W. Robbins, treasurer of the State of Texas, do hereby certify that Messrs. Hill & Wright have tendered to this department all interest and principal due on account for section No. 42, in district No. 11, S. P. R. R. Co., in Tom Green County, sold to Thomas Dolan under act of April 6, 1881, which cannot be accepted for the reason that the account for said land under said act has been forfeited for non-payment of interest to January 1, 1896. In testimony whereof I hereunto set my hand and affix the seal of office, at Austin, Texas, this the 29th day of April, 1899. John W. Robbins, state treasurer, by R. C. Roberdeau, chief clerk and acting treasurer. (Seal.)'

"And on the same day Wilson, by his attorneys, made written application to the commissioner of the general land office for a patent on said survey under said Dolan purchase, and tendered to said commissioner the patent fee of $6, and the commissioner of the general land office refused to issue said patent for the reason that it appeared from the records of his office that the sale to Thomas Dolan was made under the act of 1879 and amendment thereto of 1881, and that the Dolan purchase of this land was forfeited August 20, 1897, by the commissioner of the general land office for non-payment of interest and because this land was afterwards, on September 13, 1897, sold to J. F. Standefer.

"17. It is further agreed that at the time of said forfeiture, August 20, 1897, the State did not pay or offer to pay to Thomas Dolan or any of his vendees the purchase money on said land or any of the interest paid on said obligation and has not since paid or offered to pay any part of said principal or interest, and the said obligation of Thomas Dolan, executed May 1, 1882, as aforesaid, has not been returned or offered to be returned to said Dolan or his vendees or said Wilson, but the same is still held and retained by the state treasurer."

On May 27, 1899, the district court entered judgment in favor of the defendant. Thereupon an appeal was taken to the Court

of Civil Appeals of the Third Supreme Judicial District of Texas, and by that court certain questions were certified to the Supreme Court of Texas, viz.: "1. Did the State, through its commissioner of the land office, without judicial proceedings, have the authority to legally declare a forfeiture of the Dolan title on account of the failure to pay the interest, as stated? 2. Are the principles of law, as decided by the Supreme Court of this State in the case of *Fristoe* v. *Blum*, 45 S. W. 998, applicable and controlling of the question certified?"

On January 15, 1900, the Supreme Court of Texas filed an opinion answering the certified questions in the affirmative, and directing that a copy of the opinion should be certified to the Court of Civil Appeals for the Third Supreme Judicial District, and that said cause be therein proceeded with in accordance with said opinion.

On February 7, 1900, the Court of Civil Appeals, in accordance with the opinion of the Supreme Court, reversed the judgment of the district court, and rendered judgment in favor of Standefer, the appellant. Thereupon a petition was filed in the Supreme Court of Texas by T. K. Wilson for a writ of error to the Court of Civil Appeals, but this application was by the Supreme Court refused. Thereafter a writ of error, bringing the cause to this court, was allowed by the Chief Justice of the Court of Civil Appeals.

Mr. Jared W. Hill for plaintiff in error.

No appearance for defendant in error.

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

The Federal question in this case is founded upon the contention that the act of July 8, 1879, under which the land was purchased by Dolan, having provided in its twelfth section for the forfeiture of the contract of purchase, in event of default in payment of annual interest, by a judicial proceeding, such section became part of the obligation of the contract between the State

and the purchaser, which was impaired by the subsequent act of August 20, 1897, authorizing a forfeiture without judicial ascertainment or proceedings, and that therefore the proceedings under the last mentioned act were null and void, as a violation of section 10, article 1, of the Constitution of the United States.

As the Supreme Court of Texas overruled that contention, and as the Civil Court of Appeals entered the final judgment in the case in accordance with the opinion of the Supreme Court, the question is properly before us for determination.

The reasoning upon which the Supreme Court of Texas proceeded can be best presented by the following extracts from its opinion, as it appears in this record:

"The act of 1897, under which the commissioner took the action the effect of which is in question, authorized the commissioner, when any portion of the interest due by purchasers of such land has not been paid, to declare a forfeiture of the purchase without judicial aid, and gave to his action the effect of putting an end to the contract. That this statute by its terms applies to cases such as this is not disputed.

"We think it clear that all the terms of the contract between the State and a purchaser under the act of 1879 are contained in sections 6, 7, 8, 9 and 10, above outlined, and their rights, the obligations of their contract, arises from a compliance with those provisions. The contract there provided for is an executory contract of sale and purchase, which arises upon an acceptance of and compliance with the stated terms of the offer made by the State for the sale of the lands. The purchaser presents his application, makes the cash payment, causes the land to be surveyed and executes his obligation to perform the things to be done in the future. The contract then is complete, and its terms are fixed. *Jumbo Cattle Co.* v. *Bacon*, 79 Texas, 12. Both the State and the purchaser are bound so long as there is compliance with the obligation—the purchaser to make the further payments, and the State, upon completion thereof, to grant the land to the purchaser; but no title passes, and a right of rescission in the State may arise just as it might arise in an individual upon default in performance on the part of the other party.

"This right might be exercised by legislative act or by the act of some officer properly empowered thereto. The statute of 1879 does not give authority to any officer to rescind without judicial action; but the right of rescission existed in the State, and its exercise might be subsequently authorized through the lawmaking power, and an exercise of it, based upon the default of the other party, would not be a denial of any right of his. It could only be held that the right of rescission for default of the purchaser did not exist by holding that the contract provided that it should not exist, or that it should be exercised in a particular manner; but the contract embraces no such provision. There is no undertaking on the part of the State with the purchaser that the remedy prescribed in this statute, and no other, shall be pursued, unless it is to be implied from the mere presence of the provision in the statute, and we think it is well settled that no such implication arises. In the proposition often stated in the decisions that parties contract with reference to existing laws, and that such laws become a part of the contract, the reference is to those laws which determine and fix the obligation of the contract, the correlative rights and duties springing from it and not to laws of mere procedure prescribing remedies. With reference to these, there is ordinarily no obligation arising, but the contract is made in contemplation of the power of the legislature to change them. Of course, all remedy cannot be taken away, nor can the existing remedy be so altered as to take away or impair any of the rights given by the contract as interpreted by existing law. It is also true that a specific remedy, provided by the contract itself, cannot be changed by legislation, because it constitutes a part of the contract. *Loan Co.* v. *Hardy*, 85 Tex. 610. But none of these limitations on legislative power are applicable to this legislation. The act of 1897 simply enforces a right which existed in the State from the formation of the contract. It takes away no right of the purchaser, unless it can be said that he had the right to demand that the particular remedy provided by the act of 1879 should be followed. This could only be true if the contract made that remedy exclusively applicable, which was not the case.

Opinion of the Court.

"That prompt payment of interest instalments was made an essential part of this contract is made very clear by the terms of the statute, as well as by its purpose, to provide available funds annually for the support of the public schools, and that a breach of his obligation to make such payment on the part of the purchaser gave the State a right to rescind, is equally clear. If the facts did not exist to authorize the action taken by the commissioner, that could be made to appear whenever such action came in question, and thus the purchaser could be deprived of no right by such action. The statute would only be taken as authorizing rescission when the right of rescission existed."

It will be observed that, in this opinion, the Supreme Court of Texas concedes that a contract of sale and purchase of land between the State and Dolan was created by the transactions as they are admitted to have taken place. It is also conceded that it was competent for the parties to have provided, as a substantive part of the contract, special remedies, each against the other, for the enforcement of their respective obligations, and that, in such a case, neither party could, without the consent of the other, resort to any form of remedy other than those stipulated for. But the court held that, in the present case, there was no undertaking on the part of the State with the purchaser that the remedy prescribed for the State in the act of 1879, and no other, should be pursued, if the purchaser should fail to comply with his part of the contract; that section 12 of the act was not a contract with purchasers, but was a general law of the State, regulating its method of procedure against delinquent purchasers, and that purchasers in default had no vested rights in the form of remedy reserved by the State in its own behalf.

We are first confronted with a question of construction. The Supreme Court of Texas having held that section 12 was a law, and not a term of a contract with a purchaser, is it open for this court to put a different construction upon the statute? It is settled law that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the

non-existence of the contract set up, and whether its obligation has been impaired by the state enactment. *Jefferson Bank* v. *Skelly*, 1 Black, 436; *New Orleans Waterworks* v. *Louisiana Sugar Company*, 125 U. S. 18; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486; *Chicago Railroad Company* v. *Nebraska*, 170 U. S. 57; *McCullough* v. *Virginia*, 172 U. S. 102.

But as the general rule is that the interpretation put on a state constitution or laws by the Supreme Court of such State is binding upon this court, and as our right to review and revise decisions of the state courts in cases where the question is of an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of this court, even in such a case, to follow the decision of the state court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating its exercise of the taxing power, or relating to the State's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special function is to expound and interpret the state enactments.

The legislation in question in this case is one of that general character, providing for the sale of public lands theretofore set apart for the benefit of common schools, and was enacted in twenty sections, on July 8, 1879. On April 6, 1881, an act was passed, amendatory of several of the sections of the act of 1879, but such amendments do not seem to have any important bearing on the case. On May 1, 1882, one Thomas Dolan made an application in writing to the county surveyor to purchase the land in question. Under the formalities of the statute, Dolan paid down, on June 22, 1882, the sum of $32, and gave his note, dated May 1, 1882, for the balance of the purchase money, being $608, payable in instalments with annual interest of eight per cent upon the unpaid principal. Thereafter Dolan sold and conveyed said land to one Buckley, and by successive transfers, the title of Dolan became vested, on April 4, 1888, in the Ostrander &

Loomis Land & Live Stock Company—each of the successive vendees assuming to pay the balance of the purchase money and interest, as provided in the obligation of Dolan. Said land with other tracts was mortgaged by said Land & Stock Company to the Knickerbocker Trust Company to secure the payment of $600,000. In 1892 the land company became insolvent, and in a suit in the district court of Tom Green County, to foreclose said mortgage, judgment was entered on May 17, 1898. Upon a sale on said judgment on the first Tuesday of July, 1898, the Dolan tract, with other lands, was bid in by T. K. Wilson, the plaintiff in error, for the sum of $3250, and the sheriff executed and delivered to him a deed conveying the title of the said Ostrander & Loomis Land & Live Stock Company.

On August 20, 1897, the commissioner of the general land office of Texas, acting under the act of March 25, 1897, endorsed on the application of Thoman Dolan that said land was forfeited, and restored the said land to the public domain. Thereafter J. F. Standefer, on September 13, 1897, who was then residing with his family and being an actual settler upon said land, made his application in writing to purchase said land, and on October 25, 1897, the commissioner of the land office awarded said land to him, and Standefer paid the money down and gave his obligation to pay the balance of the purchase money with interest to the State, and has since said purchase paid all interest due upon his said obligation, and has continuously resided upon said land as a home, and has in all things strictly conformed to the laws and with the regulations adopted by the commissioner of the general land office.

On April 25, 1899, T. K. Wilson, through his attorneys, tendered to the state treasurer all the purchase money and back interest due on account of the Dolan purchase, and, on the same day, demanded from the commissioner of the general land office a patent for the land. This tender and demand were refused by the officers, giving the reason that said Dolan purchase had been forfeited on August 20, 1897, for non-payment of interest, and because said land had afterwards, on September 13, 1897, been sold to J. F. Standefer.

It therefore appears that when T. K. Wilson bid in this land

the interest on the Dolan purchase was in arrears from January 1, 1896, to July, 1898, and that when he made a tender to the state treasurer, more than three years' interest was in arrears, and that, in the meantime, and before Wilson's purchase, the land had been declared forfeited and had been sold by the State for a valuable consideration to J. F. Standefer. While the agreed statement of facts shows that Wilson paid $3250 for the lands bid in by him at the sheriff's sale, it does not appear how much, if any, of that sum was on account of the Dolan tract. It seems to have been a lump sum for all the lands bought by Wilson. At the time of that sale Standefer was in actual possession of and residing on the land in dispute. It may fairly be presumed that when Wilson bid at the sheriff's sale he knew of the forfeiture and sale of the Dolan tract, for they were matters of record. But whether this were true or not, he certainly had notice of an existing outstanding title by Standefer's actual possession, a fact admitted in the agreed statement of facts.

But whatever may have been the views of the state courts as to the legal rights and equities between the parties, the sole question for our consideration is whether the Supreme Court of Texas erred in overruling the contention of the plaintiff in error that the State was precluded by contract from changing its mode of procedure in respect to purchasers in default.

There seems to be no ground for complaint by the plaintiff in error in point of equity. His counsel does, indeed, contend that he was deprived by the change of remedy of a right to have the forfeiture declared by a judicial proceeding, and that he was thereby deprived of his property without due process of law. But this argument is refuted by the fact that the only question on which he had a right to be heard was whether he had made payment in compliance with his part of the contract. By the twelfth section of the act of July, 1879, the purchaser was shut up to the defence whether he had paid the annual interest as provided for in his agreement. True he had a right to show that he had made the requisite payments, and thus defeat the forfeiture. But he had the same right and privilege under the act of March, 1897, which expressly provided that "the purchaser of said land shall have the right, at any time

within six months after such endorsement of 'Lands forfeited' to institute a suit in the district court of Travis County, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed and conclusive; and provided, that if any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death." What would have been the rights of the parties, if time had not been given by the last statute within which to contest the forfeiture evidenced by the commissioners' endorsement, is a question not now necessary to be decided.

It is apparent that the purchaser was not deprived by the act of 1897 of the right to be heard in a court of justice as to the fact of payment. His position under that act was quite as favorable as under the prior act of 1879. It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered. *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Spencer* v. *Merchant*, 125 U. S. 345; *Gallup* v. *Schmidt*, 183 U. S. 300, 307; *King* v. *Mullins*, 171 U. S. 404.

Neither Dolan nor any of the successors to his title availed of the opportunity to be judicially heard afforded by the law; and the reason for not doing so clearly appears in the admitted fact that the payments were in arrears for a considerable period of time. The tender made, if it could have had any legal effect at any time, was manifestly too late after the State had declared the forfeiture and sold the land to another.

Upon the whole, we agree with the conclusion of the Supreme Court of Texas, that no contract rights of a purchaser under the act of 1879 were impaired by the provisions of the subsequent act of 1897; that the twelfth section of the act of 1879, was not, in legal contemplation, a stipulation by the State that

Counsel for Parties.

the only remedy which might be resorted to by the State was the one therein provided for; that, in the language of Chief Justice Marshall, "the distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct." *Sturges* v. *Crowninshield*, 4 Wheat. 122.

The judgment of the Court of Civil Appeals for the Third Judicial District of the State of Texas is

Affirmed.

UNITED STATES *v.* RIO GRANDE DAM AND IRRIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 239. Argued November 14, 15, 1901.—Decided March 3, 1902.

The motion made in the court below on behalf of the United States for a continuance of this cause and the application for a rehearing were addressed to the discretion of the trial court, and this court cannot reverse the decree below merely upon the ground that the trial court erred in its denial of those motions; but, as it is quite clear that the record does not contain evidence of a material character, and that the absence of such evidence is due to the action of the trial court in not giving sufficient time to the Government to prepare its case, this court cannot resist the conviction that if it proceeds to a final decree upon the present record great wrong may be done; and it reverses the decree below, without considering the merits, and remands the case with orders that leave should be granted to both sides to adduce further evidence.

THE case is stated in the opinion of the court.

Mr. Marsden C. Burch for the United States, appellants.

Mr. J. H. McGowan for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit presents a contest between the United States and the appellee corporations as to the right asserted by the latter to construct over and near the Rio Grande a certain dam and reservoir for the purpose of appropriating the waters of that river in their private business.

By the seventh article of the treaty of February 2, 1848, between the United States and the Republic of Mexico it is provided that "the river Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. . . . The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits." 9 Stat. 928. And by the fourth article of the treaty of December 30, 1853, between the same countries, it was further provided that "the several provisions, stipulations and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty, that is to say, below the intersection of the 31° 47′ 30″ parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upwards, according to the fifth article of the treaty of Guadalupe." 10 Stat. 1034. Again, by a convention between the United States and Mexico, concluded December 26, 1890, provision was made for an international boundary commission, empowered, upon application by the local authorities, to inquire whether any works were being constructed on the Rio Grande which were forbidden by treaty stipulations. 26 Stat. 1512.

Just before the last named convention, Congress, by the act

of September 19, 1890, c. 907, provided: "That the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offence, and each week's continuance of any such obstruction shall be deemed a separate offence. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States." 26 Stat. 426, 454, § 10.

These treaties with the above and other acts of Congress being in force, the present suit was brought, May 24, 1897, in the District Court for the Third Judicial District of New Mexico—the plaintiff being the United States of America, and the original defendant being the Rio Grande Dam and Irrigation Company, a corporation of that Territory. By an amended bill, the Rio Grande Irrigation and Land Company—a British corporation doing business in the Territory of New Mexico—was also made defendant. The latter corporation, it is alleged, was organized as an adjunct and agent of the New Mexico corporation.

The bill and amended bill show that the object of the suit was to obtain a decree enjoining the defendants from commencing or attempting to construct or build a certain dam and reservoir

or any other dam, breakwater, reservoir or other structure, or obstruction of any character whatsoever, "across the Rio Grande or the waters thereof, or from maintaining such dam or obstruction in the Territory of New Mexico, and especially at Elephant Butte in said Territory, or any other point on said river in said Territory of New Mexico, as shall affect the navigable capacity of said Rio Grande at any point throughout its course, whether in the Territory of New Mexico or elsewhere."

The court of original jurisdiction said it was a fact of which it could take judicial notice, and it adjudged, that the Rio Grande was not navigable within the Territory of New Mexico, and it dissolved the injunction theretofore granted against the defendants, and dismissed the suit. Upon appeal to the Supreme Court of the Territory that decree was affirmed, August 24, 1890.

The case was then brought here by appeal. This court in its opinion rendered May 22, 1899, among other things said that to assert that Congress intended by its legislation "to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress." *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 708, 710.

Referring especially to the above act of September 19, 1890, the court also said: "It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the Territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however

done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of that prohibition. Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question. And it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream. . . . The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." 174 U. S. 690, 708.

The decree of the Supreme Court of the Territory was reversed by this court, and the cause was remanded "with instructions to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish."

The mandate of this court, based upon its final order of May 22, 1899, was issued June 24, 1899. On the 14th of July, 1899, the Supreme Court of the Territory remanded the cause to the court of original jurisdiction to be there proceeded with in accordance with our mandate.

On the 5th day of August, 1899, the District Court heard, at chambers, an application of the defendants, based on notice to the United States, to set the cause for final hearing upon evidence taken under the mandate of the Supreme Court of the Territory. That application was sustained, and the cause was set for final hearing on the 1st day of November, 1899.

Subsequently, October 17, 1899, the United States moved the court for a further continuance and extension of time for the

hearing of the cause, until February 5, 1900, or such other date as the court deemed reasonable and proper. The grounds upon which the motion was based were stated in writing, as follows: "That said plaintiffs have been and are unable to collect and present to this honorable court the necessary and proper evidence and oral testimony from witnesses for a proper presentation of the plaintiffs' side of said cause, notwithstanding having used due diligence to that end, all of which will more fully appear from an affidavit hereto attached and made a part of this motion in support thereof, and to which the court is respectfully referred. The plaintiffs, as a condition for the extension of time for the taking of testimony for the trial of said cause, have offered and hereby offer to enter into any proper and reasonable stipulation to enable the Supreme Court of the Territory of New Mexico to take jurisdiction of any appeal which may be taken by either party at its ensuing January term, and dispose of the cause during said term, or at any adjourned session of the same."

In support of its motion for continuance, the Government filed the affidavit of its attorney, Mr. Burch, who was specially charged with the duty of representing its interests in this litigation. That affidavit is too lengthy to be embodied in this opinion. It is sufficient to say that it fully supported the grounds of the motion made by the Government for further time.

The motion for a continuance was sustained only so far as to fix December 12, 1899, as the date for the final hearing of the cause. The hearing was commenced on the latter day, and continued from day to day until December 21, 1899, when the cause was taken under advisement. On the 2d day of January, 1900, a finding of facts was filed in the court. In the last paragraph of that finding it was stated "that the intended acts of the defendants in the construction of a dam or dams, or reservoirs, and in appropriating the waters of the Rio Grande, will not substantially diminish the navigability of that stream within the limits of the present navigability." The court ordered a decree to be prepared dismissing the bill.

On the 3d of January, 1900, the Government moved to set

aside the findings and grant a rehearing upon the ground of newly discovered evidence which could not by any reasonable diligence on its part have been discovered and procured for use on the hearing of the cause. The grounds of the motion were stated in writing and were abundantly sustained by the affidavits filed therewith.

The motion for rehearing was denied, and by a final order, entered January 9, 1900, the bill was dismissed. From that order the present appeal was prosecuted.

At the argument of the cause our attention was called to the action of the District Court in setting the cause for final hearing at a date so early as the first day of November, 1899; to the denial of the motion made on behalf of the United States on the 17th of October, 1899, to extend the time for final hearing to February 5, 1900; and to the order denying the motion, made after the facts were found but before final decree, for a rehearing. The making of the last order was specially assigned for error.

The inquiry which this court directed to be made, namely, whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande would substantially diminish the navigability of that stream within the limits of present navigability was not only of great importance, but was one that could not properly be made and concluded within the time ordinarily required for the preparation of an equity cause for final hearing. We think that the District Court, upon the showing made by the Government, might well have granted the motion to postpone the final hearing to a date later than that fixed. We make the same observations in reference to the motion for a rehearing in respect of the facts to be specially found, supported by affidavits as to newly discovered evidence, and made before the final decree was entered. The evidence set forth in those affidavits, if it had been brought before the court, would, we think, have materially strengthened the case of the United States.

But the motion for the continuance of the cause, and the application for a rehearing, were addressed to the discretion of the trial court; and it is well settled that matters of discretion

or practice cannot, generally speaking, be made the basis of an appeal, and do not constitute in themselves grounds for the reversal of a final decree. 2 Daniell's Chy. Pl. & Prac. 5th ed. *1462, and authorities cited in n. l. *1463; *Cook* v. *Burnley*, 11 Wall. 659, 672; *Freeborn* v. *Smith*, 2 Wall. 160, 176; *Parsons* v. *Bedford*, 3 Pet. 433, 445; *Wiggins* v. *Gray*, 24 How. 303, 306; *Woods* v. *Young*, 4 Cranch, 237; *Sims* v. *Hundley*, 6 How. 1, 6; *Thompson* v. *Selden*, 20 How. 194, 198; *San Antonio* v. *Mehaffy*, 96 U. S. 312, 315; *Terre Haute & Indiana Railway Co.* v. *Shuble*, 109 U. S. 381, 384. We cannot therefore reverse the decree merely upon the ground that the trial court erred in its denial of the motions to which we have referred.

But there are other considerations which may be properly made the basis for the reversal of the decree to the end that injustice may not be done. As upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper. *Ridings* v. *Johnson*, 128 U. S. 212, 218. If it appears that injustice may be done by proceeding to a final decree upon the record as it is presented to us, we have the power to forbear a determination of the merits and remand the cause for further preparation.

In *Estho* v. *Lear*, 7 Pet. 130–1, involving the validity of a certain paper purporting to be and which had been recorded as the last will and testament of Kosciuszko, the bill charged that the paper was not a will. The bill made no reference to any other will. The answer insisted that the will referred to in the bill was a valid instrument and operative. Chief Justice Marshall, speaking for the court, said: "Before the court can decide the intricate questions which grow out of this will, we think it necessary to possess some information which the record does not give." It appearing that the testator had made another will, which was not in the record, the court said that "since we are informed of its existence, it would be desirable to see it. We do not think the case properly prepared for decision; and therefore direct that the decree be reversed and the cause remanded, with liberty to the plaintiff to amend his bill." In *United States* v. *Galbraith*, 22 How. 89, 96, the question was as

to the validity of a claim for five leagues of land. The Board of Land Commissioners decided against the United States, upon the ground that there was an absence of any rebutting testimony that would overcome the *prima facie* case made by the claimant. Speaking by Mr. Justice Nelson, this court said that it was "of opinion that, in consideration of the doubtful character of the claim, and entire want of any merits upon the testimony, the decree of the court below should be reversed, and the case remitted for further evidence and examination." In *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, one of the questions arising in the pleadings was whether the Illinois Central Railroad Company was entitled to maintain certain docks, piers and wharves on the lake front at Chicago. The Circuit Court decided that question in favor of the railroad company. But this court was of opinion that the evidence in the record was not adequate for the determination of that question, and upon its own motion reversed the decree and remanded the cause with directions for further investigation, as to enable the court to determine whether the structures in question extended into the lake beyond the point of practical navigability, having reference to the manner in which commerce was conducted on the lake.

In the present case it is quite clear that the record does not contain evidence of a material character, and that the absence of such evidence is due to the action of the trial court in not giving sufficient time to the Government to prepare its case. We cannot resist the conviction that if we proceed to a final decree upon the present record, great wrong may be done to the United States, as well as to all interested in preserving the navigability of the Rio Grande. As the record does not show that the representatives of the Government were chargeable with want of diligence in their preparation of the cause, we think that the decree should be reversed and the cause remanded, with liberty to both parties to take further evidence.

We are the better satisfied with this disposition of the case because the questions presented may involve rights secured by treaties concluded between this country and the Republic of Mexico. As the latter country cannot be indifferent to the re-

sult of this litigation and is not a party to the record the court ought not to determine the important question before us in the absence of material evidence, which we are not at liberty upon this record to doubt would be in the record but for the somewhat precipitate action of the trial court.

Without considering the merits

The decree must be reversed, and the cause remanded to the Supreme Court of New Mexico with directions to reverse the decree of the District Court and to remand the case with direction to grant leave to both sides to adduce further evidence. It is so ordered.

MR. JUSTICE GRAY and MR. JUSTICE MCKENNA did not sit in this case nor participate in its decision.

MR. JUSTICE BREWER and MR. JUSTICE SHIRAS dissented.

BOOTH *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 201. Argued November 6, 1901.—Decided March 3, 1902.

If, looking at all the circumstances which attend, or may ordinarily attend the pursuit of a particular calling, a State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere unless, looking through mere forms and at the substance of the matter, they can say that the statute, enacted professedly to protect the public morals, has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

It must be assumed with regard to section 130 of the Criminal Code of Illinois touching options to sell or buy grain or other property at a future time, that the legislature of the State was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time; and this court cannot say that the means employed were not appropriate to the end sought to be attained and which it was competent for the State to accomplish.

This court cannot adjudge that the legislature of Illinois transcended the limits of constitutional authority, when it enacted the statute in question.

Opinion of the Court.

THE case is stated in the opinion of the court.

Mr. Charles H. Aldrich for plaintiff in error. *Mr. Lee D. Mathias* was on his brief.

Mr. Howard J. Hamlin and *Mr. Elbert S. Smith* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

By section 130 of the Criminal Code of Illinois it is provided that "whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than ten dollars nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." Rev. Stat. Ill. Crim. Code, (by Hurd, 1901) § 130.

The defendant was indicted in the Criminal Court of Cook County, Illinois, being charged with violating this statute so far as it related to options to buy grain or other commodities at a future time.

The memorandum of the option purchased by the defendant was as follows:

"B. Al. V. Booth, grain and provision broker.
10 Weare Com. Co. CHICAGO, *Aug.* 16, 1899.
Sep. corn, 1899. C., 31½. Paid.
Good till close of 'change, Sat., Aug. 26, 1899.
"WEARE C. Co.
"J. C. C."

The defendant was found guilty and adjudged to pay a fine of one hundred dollars and the costs of the prosecution.

At the trial, by motions to quash the indictment, in arrest

of judgment, and for a new trial, the accused insisted that the statute under which he was prosecuted was repugnant to that clause of the Fourteenth Amendment of the Constitution of the United States declaring that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This contention was overruled both in the trial court and in the Supreme Court of Illinois. 186 Illinois, 43.

There was no dispute as to the meaning of the above memorandum. It meant that on the 16th day of August, 1899, the defendant, a grain and provision broker, and the Weare Commission Company made an agreement whereby, in consideration of the sum of ten dollars paid by Booth, he obtained from the company and was given the option of purchasing from it 10,000 bushels of corn at 31½ cents a bushel—the option to remain good until the close of business on the 26th day of August, 1899.

In *Schneider* v. *Turner*, 130 Illinois, 28, 39, the question was whether the statute embraced an agreement in these words: "Chicago, November 11, 1885. In consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Fred W. Peck seventeen hundred and eighty-six shares of the capital stock of the North Chicago City Railway at six hundred dollars per share, if taken on or before the 15th day of December, 1885. V. C. Turner."

It was contended that that agreement was not prohibited by the statute; that the legislature only intended to make such option contracts unlawful as were gambling contracts, that is, option contracts that did not contemplate the delivery or acceptance of any property and which only required a settlement by "differences;" whereas, it was insisted, the option there in question had no element of gambling, being only one that entitled the parties obtaining it to elect on or before a named day whether they would buy the stock described in the agreement.

The Supreme Court of Illinois, in that case, observed that at common law all gambling contracts were void, and that an

agreement for the sale of property was a mere wager or gambling contract and void, if made with the understanding of the parties that no property was to be delivered or accepted but could be satisfied by an adjustment simply on the basis of the difference between the contract and the market price. It said: "It must be presumed that the object of the legislature was to declare that unlawful which theretofore had been lawful. Prior to this act it was lawful to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at the common law. The statute makes them unlawful or void in Illinois."

That such is the scope and effect of the statute in question was recognized by the Supreme Court of Illinois in the present case. *Booth* v. *People &c.*, 186 Illinois, 43.

Taking the statute to mean what the highest court of the State says it means, is it unconstitutional?

In support of the position that the statute is repugnant to the Fourteenth Amendment, the learned counsel for the plaintiff advance many propositions that meet our entire approval. They cite, as in their judgment controlling, what this court said in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, namely, that the liberty mentioned in the Fourteenth Amendment "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but 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 vocation, 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."

These declarations state, in condensed form, principles which had been announced in previous cases, and which may be regarded as expressing the deliberate judgment of this court. But those declarations do not, in themselves, determine the question now presented. When it is said that the liberty of the citizen includes freedom to use his faculties "in all lawful ways," and to earn his living by any "lawful calling," the inquiry re-

mains whether the particular calling or the particular way brought in question in a given case is lawful, that is, consistent with such rules of action as have been rightfully prescribed by the State.

It is, however, said that the statute of the State, as interpreted by its highest court, is not directed against gambling contracts relating to the selling or buying of grain or other commodities, but against mere options to sell or buy at a future time without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling. The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Brimmer* v. *Rebman*, 138 U. S. 78; *Voight* v. *Wright*, 141 U. S. 62.

We cannot say from any facts judicially known to the court, or from the evidence in this case, that the prohibition of options to sell grain at a future time has, in itself, no reasonable relation to the suppression of gambling grain contracts in respect of which the parties contemplate only a settlement on the basis

of differences in the contract and market prices. Perhaps, the legislature thought that dealings in options to sell or buy at a future time, although not always or necessarily gambling, may have the effect to keep out of the market, while the options lasted, the property which is the subject of the options, and thus assist purchasers to establish, for a time, what are known as "corners," whereby the ordinary and regular sales or exchanges of such property, based upon existing prices, may be interfered with and persons who have in fact no grain, and do not care to handle any, enabled to practically control prices. Or, the legislature may have thought that options to sell or buy at a future time were, in their essence, mere speculations in prices and tended to foster a spirit of gambling. In all this the legislature of the State may have been mistaken. If so, the mistake was not such as to justify the conclusion that the statute was a mere cover to destroy a particular kind of business not inherently harmful or immoral. It must be assumed that the legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be attained and which it was competent for the State to accomplish.

The Supreme Court of the State in this case said: "The practice of gambling on the market prices of grain and other commodities is universally recognized as a pernicious evil, and that the suppression of such evil is within the proper exercise of the police power has been too frequently declared to be open to discussion. The evil does not consist in contracts for the purchase or sale of grain to be delivered in the future, in which the delivery and acceptance of the grain so contracted for is *bona fide* contemplated and intended by the parties, but in contracts by which the parties intend to secure, not the article contracted for, but the right or privilege of receiving the difference between the contract price and the market price of the article. The object to be accomplished by the legislation under consideration is the suppression of contracts of the latter character, which are in truth mere wagers as to the future market price

of the article or commodity which is the subject-matter of the wager. Clearly a contract which gives to one of the contracting parties a mere privilege to buy corn but does not bind him to accept and pay for it is wanting in the elements of good faith to be found in a contract of purchase and sale where both parties are bound, and offers a more convenient cover and disguise for mere wagers on the price of grain than contracts which create the relation of vendor and vendee. Such contracts are in the nature of wagers, that contracted for being the mere privilege to buy the grain should its market value prove to be greater than the price fixed in the contract for such privilege. The prohibition of the right to enter into contracts which do not contemplate the creation of an obligation on the part of one of the contracting parties to accept and pay for the commodity which is the purported subject-matter of the contract, but only to invest him with the option or privilege to demand, the other contracting party shall deliver him the grain if he desires to purchase it, tends materially to the suppression of the very evil of gambling in grain options which it was the legislative intent to extirpate, for the reason such evil injuriously affected the welfare and safety of the public. The denial of the right to make such contracts tended directly to advance the end the legislature had in view and was not an inappropriate measure of attack on the evil intended to be eradicated. So far as that point is concerned, the act must be deemed a valid law of the land, and as such must be enforced, though it infringe in a degree upon the property rights of citizens. To that extent private right must be deemed secondary to the public good." 186 Illinois, 51.

We are unwilling to declare these views of the state court to be wholly without foundation, and therefore cannot adjudge that the legislature of Illinois transcended the limits of constitutional authority when enacting the statute in question. In reaching this conclusion we have recognized the principle, long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional, unless it be plainly and palpably so.

The statute here involved may be unwise. But an unwise

enactment is not necessarily, for that reason, invalid. It may be, as suggested by counsel, that the steady, vigorous enforcement of this statute will materially interfere with the handling or moving of vast amounts of grain in the West which are disposed of by contracts or arrangements made in the Board of Trade in Chicago. But those are suggestions for the consideration of the Illinois legislature. The courts have nothing to do with the mere policy of legislation.

The judgment of the Supreme Court of Illinois is

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

GOODRICH *v.* DETROIT.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 123. Argued January 20, 1902.—Decided March 3, 1902.

Where a statute providing for the opening of streets requires notice to the parties whose land is to be taken for the street, the fact that it makes no provision for giving notice to the owners of land liable to be assessed for the improvement, does not deprive such owners of their property without due process of law, and is not otherwise obnoxious to the Fourteenth Amendment.

The interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote to require notice of such improvement, in which they have no direct interest.

No notice is required to be given to individual property owners of a resolution fixing an assessment district and levying a gross amount thereon for benefits, where the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement, and an opportunity is given to the owner of the land to be heard upon the question of the benefit derived by him from the improvement.

The fact that certain parcels of land condemned for the improvement are defectively described, is no defence to a proceeding to assess benefits upon other property.

Statement of the Case.

THIS was a bill in equity filed in the circuit court for the county of Wayne by Goodrich and another against the city of Detroit and its treasurer, to enjoin the defendants from enforcing the collection of certain taxes assessed upon several parcels of property owned by the plaintiffs, for benefits derived from the opening of Milwaukee avenue, upon the ground, amongst others, that such assessment was in violation of the Fourteenth Amendment, and deprived plaintiffs of their property without due process of law.

These proceedings were taken under the authority of certain sections of the Compiled Laws of 1897, c. 90, printed in the margin.[1]

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[1] "SEC. 3394. The city, village or county clerk shall make and deliver to such attorney, as soon as may be, a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the city, village or county, in the court having jurisdiction of the proceedings, a petition signed by him in his official character and duly verified by him; to which petition a certified copy of the resolution of the common council, board of trustees or board of supervisors shall be annexed, which certified copy shall be *prima facie* evidence of the action taken by the common council, board of trustees or board of supervisors, and of the passage of said resolutions. The petition shall state, among other things, that it is made and filed as commencement of judicial proceedings by the municipality or county in pursuance of this act to acquire the right to take private property for the use and benefit of the public, without consent of the owners, for a public improvement, designating it, for a just compensation to be made. *A description of the property to be taken shall be given*, and generally the nature and extent of the use thereof that will be required in making and maintaining the improvement shall be stated and *also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises.* The petition shall also state that the common council or board of trustees or board of supervisors has declared such public improvement to be necessary and that they deem it necessary to take the private property described in that behalf for such improvement for the use or benefit of the public. *The petition shall ask that a jury be summoned and empaneled to ascertain and determine whether it is necessary to make such public improvement, whether it is necessary to take such private property as it is proposed to take, for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor.* The petition may state any other pertinent matter or things and may pray for any other or further relief to which the municipality or county may be entitled within the objects of this act.

Statement of the Case.

The proceedings in the case were substantially as follows: On November 14, 1893, a resolution was passed by the common council providing for the opening and extending of Milwaukee avenue, and on January 6, 1894, a petition by the city was filed in the recorder's court, together with a map or plan of the private property proposed to be taken, certified as correct by the city engineer. The owners and persons interested in the real estate proposed to be taken were duly summoned; a jury impanelled, a hearing had, and a verdict rendered condemning certain lands, and fixing the total amount of damages at $15,214.75. This verdict was confirmed by the court.

Thereafter, and on August 7, 1894, a resolution was adopted by the common council, which was rescinded on November 20, and on January 22, 1895, another was adopted of which the following is a copy:

"Resolved, that the said common council of the city of Detroit do hereby fix and determine that the following district and portion of said city of Detroit, to wit: (Here follows list of descriptions, many of which are different from those in first assessment district) is benefited by the opening of Milwaukee avenue, from Chene street to the easterly city limits, where not already opened. And further resolved, that there be assessed and levied upon the several pieces and parcels of real estate included in the above descriptions, the amount of $15,214.75, in proportion, as near as may be, to the advantage which each

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"SEC. 3395. *Upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition*, stating briefly the object of said petition, and commanding them, in the name of the people of the State of Michigan, to appear before said court, at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, *and show cause, if any they have, why the prayer of said petition should not be granted.*

"SEC. 3399. *The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just,*" etc.

Section 3406, which is also pertinent, is reprinted in full in *Voigt* v. *City of Detroit*, *ante*, p. 115.

lot or parcel is deemed to acquire by this improvement. And further resolved, that the board of assessors of the city of Detroit be, and they are hereby, directed to proceed forthwith to make an assessment roll in conformity with the requirements of the charter of the city of Detroit relating to special assessments for collecting the expense of public improvements when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of $15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be of said amount, in accordance to the amount of benefit derived by such improvements."

On March 12, 1895, the assessors reported an assessment roll for defraying the expenses of opening the avenue, which was affirmed by the common council April 4, 1895. The property of plaintiffs was included in the assessment district, which was fixed and determined by the common council.

Defendants filed an answer, which was a little more than a demurrer to the bill, and upon hearing upon pleadings and proofs the bill was dismissed, an appeal taken to the Supreme Court, by which the decree of the circuit court was affirmed. 123 Mich. 559.

Mr. Elbridge F. Bacon for plaintiffs in error.

Mr. Timothy E. Tarsney for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

This case raises the question whether certain proceedings taken under the Compiled Laws of Michigan for the assessment of benefits upon neighboring lots derived from the opening of Milwaukee avenue, in the city of Detroit, deprived the owners of such lots of their property without due process of law.

These proceedings began with a resolution of the common council declaring the necessity of opening the street. Thereupon the city petitioned the recorder's court for a jury to determine the necessity of such improvements and of taking

private property, (a map or plan of which was annexed to the petition,) and "to ascertain and determine the just compensation to be made for such private property proposed to be taken," and for the issue of a summons to all persons mentioned in the petition as being interested in the property proposed to be taken. The jury returned a verdict in favor of the necessity of opening the avenue, of taking private property therefor, and fixed the compensation at the aggregate sum of $15,214.75.

Thereupon the common council passed another resolution fixing the district benefited by the opening, and declaring that there should be assessed upon the real estate included in such district the sum of $15,214.75, "in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement." The resolution further required the board of assessors to make an assessment roll to that amount, assessing upon each lot "a ratable proportion, as near as may be, of said amount in accordance to the amount of benefit derived by such improvements." Thereupon the matter was referred to the board of assessors, who reported the amount assessed against each lot. The bill averred that none of the plaintiffs' land thus assessed abutted upon those parts of the street opened by these proceedings, but that they had already dedicated to the city all that portion of Milwaukee avenue lying in front of their lands, without cost or expense to the city.

Plaintiffs made a large number of objections to the validity of such assessment, none of which require to be noticed, except so far as they are pertinent to the provision of the Fourteenth Amendment, concerning due process of law.

1. The first of these objections is that while the statute provides for a notice to the parties whose land is to be taken for the street, no provision is made for giving notice to the owners of the land liable to be assessed for the improvement. Section 3394 provides for the filing of a petition by the city attorney for the condemnation of land, and that the petition, among other things, shall contain "a description of the property to be taken, . . . also the names of the owners and others interested in the property, so far as can be ascertained, including those in

possession of the premises." Section 3395 provides that, "upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against those named in such petition," that is, all interested in the property to be taken, "commanding them, . . . to show cause, if any they have, why the prayer of such petition should not be granted."

It will be observed that this section makes no express provision for notice to the owners of property *not* to be taken, but *assumed to be benefited* by the improvements. These owners, however, are not then known, because the proceedings for the condemnation of the property taken precedes the determination of the benefits and the fixing of the assessment district. The sections of the statute taken together provide for two distinct and separate proceedings: (1) for the assessment of compensation for property *taken*, and (2) for the assessment of benefits to property *not* taken. In the former, only the owners of the land taken are interested. *Their* rights are amply protected by sections 3394 and 3395, requiring notice to be given to show cause why the petition should not be granted.

The argument of the plaintiffs is that the owners of the property liable to be assessed for the *benefits* are just as much interested in the question as to the necessity of making the improvement and the amount of compensation as are the owners of land to be taken for such improvement, and the same reasons for notice apply in the one case as in the other. A number of cases are cited which, it is argued, give countenance to this position. *Paul* v. *Detroit*, 32 Mich. 108; *Commissioners* v. *Fahlor*, 132 Ind. 426; *The State* v. *Fond du Lac*, 42 Wis. 287; *Stuart* v. *Palmer*, 74 N. Y. 183; *Scott* v. *Toledo*, 36 Fed. Rep. 385.

But whatever weight be given to these authorities, the law in this court is too well settled to be now disturbed, that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvement, in which they have no direct interest. The position of the plaintiffs in this particular would require a readjustment of

the entire proceedings, and a determination of the property incidentally benefited, before any proceedings are taken for the condemnation of land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this court that it is only those whose property is proposed to be *taken* for a public improvement that due process of law requires shall have prior notice.

Thus in *Spencer* v. *Merchant*, 125 U. S. 345, it was held that, if a state legislature direct the expense of laying out a street to be assessed upon the owners of lands benefited thereby, and also determine the whole amount of the tax and what lands are, in fact, benefited, and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Said Mr. Justice Gray (p. 356): "But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited." So, in *Parsons* v. *District of Columbia*, 170 U. S. 45, it was held that an enactment by Congress that taxes levied for laying water mains in the District of Columbia should be at a certain rate per front foot against all lots or lands abutting upon the street in which the main should be laid, was conclusive alike

of the necessity of the work and of its benefit to all abutting property. So, also, it was said in *Williams* v. *Eggleston*, 170 U. S. 304, 311: "Nor can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." Cooley on Taxation, 2d ed. p. 149.

This question, however, is decided in the case of *Voigt* v. *Detroit City*, *ante*, p. 115, recently disposed of, and will not be further considered here. Indeed, so far as this question is concerned, this case might be affirmed upon the authority of that.

2. The second objection is that the resolution of January 22, 1895, fixing the assessment district and levying a gross amount thereon for benefits, does not expressly state that the property included therein is benefited to the amount ordered to be assessed. This resolution was passed in pursuance of section 3406, reprinted in the *Voigt* case, (*ante*, p. 115,) which provides that "if the common council . . . believe that a portion of the city . . . will be benefited by such improvement, they may . . . determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited and thereupon they shall by resolution fix and determine the district or portion of the city . . . benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement."

The resolution declares that the "common council do hereby fix and determine that the following district . . . is benefited by the opening of Milwaukee avenue," . . . and "that

there be assessed and levied upon the several pieces and parcels of real estate, included in the above description, the amount of $15,214.75, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement." If this resolution be not a literal, we think it is a substantial, compliance with the statute, declaring that if the common council *believe* that the property will be benefited by such improvement, they may determine the proportion of the compensation to be assessed upon the owners; but whether this be so or not, there was no want of due process of law within the Fourteenth Amendment, inasmuch as section 3406 expressly provides, following the language already quoted, "that the assessment shall be made and the amount collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded." Interpreting this, the Supreme Court of Michigan held in the case of *Voigt* v. *The City of Detroit*, 123 Mich. 547, that "the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement;" and further, that "when the proceeding has reached that stage when it becomes necessary to decide what proportion of the cost of a proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the owner of the land to be heard upon that question." There was, in that case, as well as in the one under consideration, no claim in the bill that plaintiffs' property was not benefited by the proposed improvement in excess of the amount assessed, nor was there any claim that he was not allowed to be heard in relation to the amount which should be assessed against his property. Upon such hearing the property owner may insist that his property was not benefited to the amount assessed, or that it was not benefited at all, and thus obtain every advantage which he might obtain were he informed of every step of the proceedings. The terms of the resolution, that each lot shall be assessed "in accordance with the amount of benefits derived from such improvements," opens the whole question of the amount of benefit derived by

the lot, even to showing that no benefit whatever was occasioned by the improvement. It does not follow, however, that he has a right to be heard upon the extent of the territory to be embraced within the assessment district.

3. The last objection, that there were several of the parcels of land constituting the extension of Milwaukee avenue so defectively described that the judgment of condemnation was absolutely void, is untenable. Not only is it not shown that the plaintiffs were interested in the lands alleged to be misdescribed, but it is obviously impossible, in a proceeding to assess benefits upon other property, to show a misdescription in the lands taken for such improvement. *Voorhees* v. *Bank of United States*, 10 Pet. 449; *Comstock* v. *Crawford*, 3 Wall. 396. It is not only an attempt to raise the question collaterally by one who has no interest in it, but it is exceedingly doubtful if a simple misdescription involves any Federal question whatever. The errors, too, were merely clerical, since a map of the property taken, annexed to the condemnation proceedings, exhibits accurately the lands affected thereby.

There was no error in the decree of the Supreme Court affirming the dismissal of the bill, and it is therefore

Affirmed.

MR. JUSTICE HARLAN did not sit in this case.

UNITED STATES *v.* MARTINEZ.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 169. Argued and submitted January 31, 1902.—Decided March 3, 1902.

Under the Court of Private Land Claims Act a party holding from the Spanish or Mexican government a title that was complete and perfect at the date of the treaty, may apply for a confirmation of such title upon condition that, if any portion of such lands has been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid; and in such case the grantee

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may obtain judgment against the United States for the value of lands so granted.

Though the act requires that the petitioners shall set forth in their original petition the names of such adverse patentees, or persons in possession, if it be admitted that such adverse possessors or claimants do hold under grants from the United States, and there is no dispute as to boundaries, they need not be made parties, as they could not be affected by the decree.

So while the act contemplates that notice shall be given such adverse holders, and the claim for a money judgment incorporated in the original petition, relief would not be refused solely upon that ground, if sufficient excuse were shown for the omission to make these grantees parties.

But where the original petition for confirmation alleged that there were no such adverse holders or claimants, and no effort appears to have been made to ascertain the facts for more than seven years after such petition was filed, although it appeared such facts were easily ascertainable, it was held that some excuse should be set forth for this long delay, and that a supplemental petition for the value of the lands patented would not be entertained.

THIS was a petition, under the fourteenth section of the Court of Private Land Claims Act, for a money judgment against the United States for lands within a Spanish land claim, which lands had been patented by the United States to third parties before the Spanish land grant had been acted upon or confirmed.

The original proceeding, out of which the present claim for indemnity grew, was a suit begun February 28, 1893, by the present appellees, who, with one exception, claimed to be the heirs at law and legal representatives of Juan José Lobato, against the United States, in the Court of Private Land Claims, for the confirmation of a grant alleged to have been made to Lobato August 24, 1740, of which juridical possession was given, and the grant ratified and confirmed by the proper authorities June 15, 1744. In their petition it was alleged that the same tract had been previously granted to Cristobal de Torres, but that his grant had been revoked in 1733 and the tract declared to be crown lands; that from the date of the grant to Lobato in 1740 and for a period of 153 years, (down to the time of filing the petition,) he and his legal representatives had been in peaceable adverse possession of the same, and that "there are no adverse holders, possessors or claimants of or to any portion

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of said tract." The suit resulted in a decree in favor of the claimants (appellees) confirming the grant, and finding the title complete and perfect in the claimants, at the date of the cession by the treaty of Guadalupe Hidalgo. The decree fixed the boundaries of the tract as shown in a map annexed to the petition. From this decree no appeal was prosecuted, and becoming final, it was executed by a survey approved by the court, and the land patented to the grantees.

More than six years after the confirmation of the Lobato grant the petitioners filed the present petition, alleging that several parcels of land, amounting to 2056 acres in the aggregate, had been disposed of, granted and patented by the United States to certain persons named in an exhibit to the petition; that the lands so granted lay wholly within the boundaries of the Lobato grant as confirmed, and were among the most valuable parts of such grant. The petition concluded with a prayer for judgment against the United States for the value of the lands so patented.

The United States answered, admitting the confirmation of the Lobato grant, and averring that the plaintiffs neglected to make the holders of the patented land parties defendant to the suit as required by law, but that they proceeded to try their cause, obtain a degree of confirmation, which had long since become final; and that by failure to make the patentees parties defendant, and by averring that there were no adverse claimants to any portion of the tract, "they thereby waived and disclaimed all right, if any they had, to challenge any disposition theretofore made under the laws of the United States to any portion of said grant."

The petitioners filed a general demurrer to this answer, accompanied by an affidavit to the effect that the plaintiffs, until the survey of said grant, did not and could not know or certainly allege and affirm that the lands granted and disposed of by the United States, as set forth in their petition, were within the exterior limits of their grant, and consequently no allegation with relation thereto was made in their original petition, and that such knowledge only came to the petitioners within the last two years.

The demurrer to the answer was sustained, the case submitted upon an agreed statement of facts, and a judgment rendered against the United States for $2320.91, for 1856.73 acres, at $1.25 per acre, in accordance with the prayer of the petition—Justices Sluss and Murray dissenting.

Mr. Solicitor General Richards and *Mr. Matthew G. Reynolds* for the United States.

Mr. George Hill Howard and *Mr. Henry M. Earle* for appellees submitted on their brief.

Mr. Justice Brown delivered the opinion of the court.

This case raises the question whether, after a land grant has been confirmed by the Court of Private Land Claims, that court may, after an unexplained delay of over six years, entertain a supplemental petition for the value of certain parcels disposed of and patented by the United States to third parties, before the filing of the original petition.

The following sections of the Court of Private Land Claims Act, 26 Stat. 854, act of March 3, 1891, c. 539, are pertinent in this connection:

"Sec. 6. That it shall and may be lawful for any person . . . claiming lands within the limits of the territory derived by the United States from the Republic of Mexico . . . by virtue of any such Spanish or Mexican grant . . . which . . . have not been confirmed by act of Congress, . . . *and which are not already complete and perfect*, in every such case to present a petition, in writing, to the said court," etc. . . .

"The petition shall set forth fully the nature of their claims to the lands, . . . *the name or names of any person or persons in possession of or claiming the same, or any part thereof*, otherwise than by the lease or permission of the petitioner; . . . and a copy of such petition, with a citation to any adverse possessor or claimant, shall, immediately after the filing of the same, be served on such possessor or claimant in the ordinary legal manner of serving such process in the proper State or Territory," etc.

"SEC. 8. That any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican government *that was complete and perfect* at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases of confirmation of such title.

* * * * * * * *

"8. If in any such case a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for *so much land only* as such perfect title shall be found to cover, *always excepting any part of such land that shall have been disposed of by the United States*," etc.

"SEC. 14. That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, *such title from the United States to such other person shall remain valid, notwithstanding such decree*, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found, shall be a charge on the Treasury of the United States."

Under these sections the holder of a complete and perfect title may resort to either of two remedies: he may bring suit in the local courts upon his title against any one in possession of the land covered by the grant, or any portion of it, *United States* v. *Pellerin*, 13 How. 9; *Ainsa* v. *New Mexico & Arizona Railroad*, 175 U. S. 76; or, he may file his petition in the Court of Private Land Claims under section 8, subject to the condition, that the "confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States." In such case, however, while he affirms the title of the patentee of the United States he may, under section 14, if "it

shall appear that the lands or any part thereof decreed to any claimant . . . shall have been sold or granted by the United States to any other person," recover a money judgment against the United States "for the reasonable value of said lands so sold or granted."

As the petitioners in this case elected the latter remedy they are entitled to a recourse against the United States to recover the value of the land patented, unless they have in some way estopped themselves to make the claim at this time. The argument of the Government in this connection is that, under section 6, the petitioners were bound to set forth in their original petition "the name or names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioners," and that "a copy of such petition, with citation to any adverse possessor or claimant, shall, immediately after the filing of the same, be served upon such possessor or claimant in the ordinary legal manner," etc., whose duty it shall be to enter an appearance and plead, answer or demur to said petition; in default of which the court is at liberty to proceed to hear the case upon the petition and proofs presented. Apparently, however, the only object of requiring notice to be given the adverse possessors or claimants is to compel them to show the location and boundaries of their claims and that they are not mere squatters or trespassers, but hold the land under a grant from the United States, in which case, under section 14, such title from the United States to such other person "shall remain valid notwithstanding such decree." If, however, it appear, as it does in this case, that the petitioners admit that the adverse possessors or claimants do hold under grants from the United States, and there are no disputed boundaries, there would appear to be no substantial reason for making them parties, inasmuch as they could not be affected by the decree. The only consequence of an omission to serve on them a copy of the petition is an acknowledgment of their title and of its boundaries.

The Government could doubtless exonerate itself from payment by showing that it had never granted or disposed of the

lands; but no attempt of that kind was made, and the proof that the lands were entered under the homestead laws and subsequently patented comes from the land office at Santa Fé, as well as by the express stipulation of the parties. It is true that in *United States* v. *Moore*, 12 How. 209, 223, it was said with regard to a similar act that persons holding under patents from the United States "should be compelled to produce their title, so that, if a decree was made for complainant, the court could ascertain what part of the land should be granted to him by patent; and as this could only be done by a specific ascertainment of interfering claims, the decree must of necessity specify their boundaries and quantities." But where, as in this case, the quantities and boundaries of the lands patented or otherwise disposed of are expressly stipulated between the United States and the claimants of the land grant, and the rights of the entrymen cannot be affected by the decree, we see no occasion for making them parties.

The second objection is that the language of section fourteen, "that if *in any case* it shall appear that the lands or any part thereof . . . shall have been sold or granted," limits the recovery of the value of such lands to cases wherein it appears in the original petition for confirmation that such lands have been granted, and that the original petition in this case having gone to a decree affirming the survey, the court lost control of the grant; and in addition thereto that the petitioners had, by the lapse of six years, waived and abandoned their claim, and are guilty of inexcusable laches. The original petition for confirmation was filed February 28, 1893, the decree of confirmation pronounced December 4, 1893, and the decree approving the survey October 19, 1895. The present petition for the value of the lands granted was filed April 23, 1900, over seven years after the original petition was filed, and over four years from the time of the decree approving the survey. While section fourteen evidently contemplates that the names of the adverse holders shall be set forth in the original petition, that notice shall be given them and that the claim for a money judgment for the lands granted them, shall be incorporated therein, we should not refuse relief solely upon that ground, if sufficient

excuse were shown for the omission to make these grantees parties; since it might well be that, if the grant were a large one and its boundaries indefinite or unsettled, entries might inadvertently be made within the exterior limits of such grant and patents issued therefor in good faith and without the knowledge of the original grantee. In such event the right to reimbursement ought not to be denied, if due diligence to ascertain the facts were exercised at the time the petition for confirmation was filed.

But we are unwilling to admit that a claimant may wait an unlimited time and then, upon a simple allegation that certain lands within the grant had been disposed of, may recover their value. We think the claimant is bound to act with promptness, and if a long delay has occurred, to explain it by proper averments. The original petition for confirmation in this case not only suggested no adverse claimants, but alleged positively that "there are no adverse holders, possessors, or claimants of or to any portion of said tract," when a simple reference to the records of the land office at Santa Fé would have shown the facts stated in Exhibit A annexed to the petition in this case, that fifteen homesteads had been entered upon this tract before the original petition was filed, in all but five of which patents had already issued. Not the slightest effort appears to have been made to ascertain these facts, and it was not until more than seven years thereafter that the petition in this case was filed. The petition sets forth that several parcels of land, aggregating 2056 acres, within the Lobato grant, were disposed of by the United States to other parties, but there is no allegation explaining why these grantees were not made parties to the original petition, or why the long delay occurred in making the claim for a money judgment.

The answer of the United States sets up the failure of the petitioners to make the patentees parties to the original petition, and alleges that they thereby waived and disclaimed all right to a money judgment. Upon the same day this answer was filed, April 26, 1900, a demurrer thereto was filed, together with a deposition or affidavit setting up the fact that "prior and up to the survey of said grant, under the decree of con-

firmation," neither the original claimants nor their solicitor "knew or could know, or certainly allege and affirm, that the lands granted and disposed of by the United States as set forth and shown in the above said petition were within the exterior limits of the said Lobato grant," and that the facts were not ascertained "until within the past two years." How this affidavit came upon the record is not shown. No order was made permitting it to be filed. No reference to it or to the allegations it contains was made in the stipulation or agreed statement of facts upon which the case was tried, nor in the finding of facts incorporated in the decree of the court. For aught that appears, it was thrust upon the files without authority. But even if the affidavit were treated as a proper part of the record, it fails to show the slightest diligence to ascertain the real facts, although a map annexed to the original petition exhibited the claimed boundaries of the tract, and a reference to the records of the land office would have shown the description of each parcel entered as a homestead. Indeed it virtually confesses a neglect to file the petition for two years after the facts came to the knowledge of the petitioners.

The case then comes to this: Whether upon a petition for value filed seven years after the original petition for confirmation, a decree against the United States can be entered upon a simple allegation that certain parcels had been conveyed and patented by the United States, without showing some excuse for the delay in presenting the petition, or some diligence in ascertaining the real facts. Under the Court of Claims Act petitions must be presented to that court within six years from the time the cause of action accrues, act of March 3, 1887, c. 359, 24 Stat. 505, and while there is no limitation of the time for petitions of this character to be filed in the Court of Private Land Claims, we have held that a similar act required that cases should be heard and disposed of upon equitable principles, and that we were "bound to give due weight to lapse of time." *United States* v. *Moore*, 12 How. 209, 222; *Indiana* v. *Kentucky*, 136 U. S. 479, 509, 510. We think there has been such unexplained delay in this case as to justify the court in holding that petitioners had abandoned their claim for a pecuniary judgment.

Syllabus.

The decree of the Court of Private Land Claims is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

MR. JUSTICE HARLAN and MR. JUSTICE GRAY did not sit in this case.

O'BRIEN *v.* WHEELOCK.

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

No. 38. Argued October 21, 22, 1901.—Decided February 24, 1902.

An unconstitutional law cannot be held valid as to particular parties on the ground of estoppel, and executed as a law.

In accordance with a certain act of the General Assembly of Illinois, bonds had been issued by commissioners appointed for the purpose of constructing a levee, and assessments had been made to pay for them against lands alleged to have been benefited; some of the land owners contested judgment on the assessments, and the act was adjudged by the Supreme Court of the State to be unconstitutional; the bonds and the assessments fell with the act, and the land owners were not estopped from denying its validity.

A party who has received the full benefit of proceedings under a law found to be unconstitutional may, on occasion, be compelled to respond on the theory of implied contract.

But in this case the land owners had not received and could not receive the benefits contemplated. The scheme embraced not only the construction but the maintenance of the levee, and its maintenance by compulsory process failed with the law; the consideration was indivisible and incapable of apportionment, and the evidence showed that by the breaking of the levee the land owners had sustained losses in excess of the amount of the bonds.

If any ground of relief as on implied contract had ever existed, the want of diligence presented an insuperable bar to its assertion.

Bond holders had filed a bill against the commissioners to compel the collection of assessments, to which the land owners were not parties, which went to a decree July 7, 1880, finding certain amounts due to complainants, without prejudice, and giving them leave to file "a bill or bills, original, supplemental, or otherwise" against the land owners for the recovery of the amounts due, but no bill was filed until April 22, 1889. The act under which the proceedings were taken was held to be uncon-

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stitutional at January term 1876 of the state Supreme Court. *Held:* That the present bill was an original bill as to the land owners, and not having been filed until thirteen years after the act was declared to be unconstitutional and nearly nine years after the leave granted, there had been such laches as precluded granting the relief sought, the conditions of the property and the relations of the parties having in the meantime greatly changed as detailed in the opinion.

THIS case is brought here by certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a decree of the Circuit Court of the United States for the Southern District of Illinois, 78 Fed. Rep. 673, affirmed by the Court of Appeals, 95 Fed. Rep. 883. The bill relates to certain proceedings under an act of the General Assembly of the State of Illinois, approved April 24, 1871, entitled "An act to provide for the construction and protection of drains, ditches, levees and other works." The opinion of the Circuit Court of Appeals was delivered by Mr. Justice Harlan, presiding as Circuit Justice, and the case is therein stated thus:

"By the above act of the General Assembly of Illinois, it was provided that whenever one or more owners or occupants of lands desired to construct 'a drain or drains, ditch or ditches, across the lands of others, for agricultural and sanitary purposes, such person or persons may file a petition in the county court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of its or their proposed starting point, route and terminus, and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same as proposed, and may pray for the appointment of commissioners for the construction of such work, pursuant to the provisions of this chapter.' § 1.

"The act required notice by publication to be given of any petition filed under its provisions, and that: 'Such notice shall state when and in what court the petition is filed, the starting point, route and terminus of the proposed drain or drains, ditch or ditches, or levees, and if a levee or other work is intended

to be constructed in connection therewith, shall so state, and at what term of court the petitioners will ask a hearing upon such petition.' § 2.

"If the drain or drains, ditch or ditches, levee or other work proposed to be constructed, was to pass through or over, or be constructed upon, lands lying in different counties, the petition could be filed in the county court of either county. § 4.

"The court in which the petition was filed was empowered to determine all matters pertaining to the subject-matter of the petition.

"If it appeared that the proposed drain or drains, ditch or ditches, levee or other work, was necessary or would be useful for the drainage of the lands for agricultural and sanitary purposes, the court was required to so find, and appoint three competent persons as commissioners to lay out and construct such proposed work. § 5.

"It was made the duty of the commissioners to examine the lands proposed to be drained, and those over or upon which the work was proposed to be constructed, and determine: '(1) Whether the starting point, route and terminus of the proposed drain or drains, ditch or ditches, and if a levee or other work is proposed, the proposed location thereof, is or are in all respects proper or most feasible, and if not, what is or are so; (2) The probable cost of the proposed work, including all incidental expenses, and the expenses of the proceeding therefor; (3) What lands will be injured thereby, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of the proposed work; (4) What lands will be benefited by the construction of the proposed work, and whether the aggregate amounts of benefits will equal or exceed the costs of constructing such work, including all incidental expenses and costs of the proceeding.' § 9.

"If the commissioners found and reported that the expense would more than equal the benefits, the proceedings were to be dismissed; if less, then they were to have plans, profiles, surveys, and specifications made, and report the same to the court. §§ 10, 11.

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"The commissioners were not confined to the point of commencement, route, or terminus of the drains or ditches, or to the number, extent, or size of the same, or the location, plan, or extent of any levee or other work, as indicated in the petition. But they were directed to locate, design, lay out, and plan the same as they thought would drain the petitioner's land with the least drainage, and for the greatest benefit of all the lands to be affected thereby. All plans proposed by the commissioners could be changed by the court on the application by them or by any person interested. § 12.

"The act required due notice by publication to be given of any application to confirm the report, and the privilege was given to all persons interested to appear and contest its confirmation, or to ask any modification thereof. If no objections were made to the report, or if the objections made to it were not well taken, it was to be confirmed. If the court was of opinion that the report should be modified, it was given authority to make such modification as would be equitable. §§ 13, 14.

"If the report was confirmed, then the court was authorized to impanel a jury of twelve men competent to serve as jurors, who, being duly sworn, were required to assess damages and benefits according to law; or the court could direct that a jury be impaneled before a justice of the peace for the assessment of damages and benefits, in which case the commissioners could apply to any justice of the peace in the county, who should immediately, without the formality of any written application, proceed to summon and impanel a jury of six men competent to serve as jurors, who should be sworn in the same manner as was provided in case of a jury impaneled by the court in which the proceeding is pending, the justice to enter upon his docket a minute of such proceeding before him, and the names of the jurors. § 16.

"The duty of the jury was to examine the land to be affected by the proposed work; ascertain to the best of their ability and judgment the damages and benefits sustained by or accruing to the land affected by the construction of the proposed work; make out an assessment roll, in which should be

set down in proper columns the names of owners, when known, a description of the premises affected, in words or figures, or both, as was most convenient, the number of acres in each tract, and, if damages were allowed, the amount of the same; and in case damages were allowed to, and benefits assessed against the same tract of land, the balance, if any, should be carried forward to a separate column for damages or benefits, as the case might be. § 17.

"In making the assessment the jury were required to award and assess damages and benefits in favor of and against each tract of land separately, in the proportion in which such tract of land would be damaged or benefited; and in no case should any tract of land be assessed for benefits in a greater amount than its proportionate share of the estimated cost of the work and expenses of the proceeding, nor in a greater amount than it would be benefited by the proposed work, according to the best judgment of the jury. § 18.

"The commissioners, or any person who made objection to the assessment, were given the right of appeal from the finding of the jury. If, upon such appeal, there were corrections of the assessment, or if the assessment roll was confirmed, then the roll was to be spread upon the record, with right of appeal or writ of error therefrom. §§ 24, 26.

"At the time of confirming the assessment the court could order the assessment of benefits to be paid in instalments of such amounts and at such times as would be convenient for the accomplishment of the proposed work; otherwise, the whole amount should be payable immediately upon the confirmation, and should be 'a lien upon the lands assessed until paid.' § 27.

"It was made the duty of the clerk, immediately after the entry of the order of confirmation, to make out and certify to the commissioners a copy of the assessment roll, and also to make out and deliver to the commissioners separate copies of the same, pertaining to the lands situated in different counties, to be recorded in the recorder's office of the respective counties in which the lands were situated, and which should be notice of the lien thereon to all persons. § 28.

"Upon receiving a certified copy of such assessment, the com-

missioners could proceed to collect the same, or any instalment thereof, or certify the assessment of any instalment thereof which they might be entitled to collect at the time to the county clerk of the county in which the lands assessed were situated, who was required to 'extend the same, in a separate column, upon the proper tax books for the collection of state and county taxes: Provided, the owner, agent or occupant of any land through or on which any drain, ditch or levee shall be constructed shall have the right, under the direction of said commissioners, within such time as they shall prescribe, to construct such drain, ditch, or levee, or any part thereof, at his own cost; and in case he shall so construct the same, he shall be allowed for the value thereof upon his assessment.' § 29.

"In case the assessment for benefits should be payable in instalments, such instalments were to draw interest at the rate of ten per centum per annum from the time they became payable till they were paid, and the interest could be collected and enforced as part of the assessment. § 30.

"Other sections of the act are as follows:

"'§ 31. When the commissioners shall have elected to collect any assessment or instalment thereof themselves, or shall not have caused the same to be extended upon the state and county tax books, and any assessment or instalment shall be due and uncollected, and as often as any instalment shall become due and be uncollected at the time for making return of the tax books for the collection of state and county taxes next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any instalment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for the collection of state and county taxes in the counties or respective counties where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amounts so collected to the commissioners.'

"'§ 34. The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be

necessary in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee or other work for which they shall have been appointed, including all necessary bridges, crossings, embankments, protections, dams and side drains, and may employ all necessary agents and servants, and enter into all necessary contracts, and sue and be sued.

"'§ 35. The commissioners may borrow money, not exceeding in amount the amount of assessment unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment on account of which the money is borrowed shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof.'

"'§ 37. All damages over and above the benefits to any tract of land shall be payable out of all the amounts assessed against other lands for benefits, and shall be paid or tendered to the owner thereof before the commissioners shall be authorized to enter upon his land for the construction of any work thereon. In case the owner is unknown, or there shall be a contest in regard to the ownership of the land, or the commissioners cannot, for any reason, safely pay the same to the owner, they may deposit the same with the clerk of the court, and the court may order the payment thereof to such party as shall appear to be entitled to the same.'

"'§ 45. Any person who shall wrongfully and purposely fill up, cut, injure, destroy or in any manner impair the usefulness of any drain, ditch or other work constructed under this chapter, or that may have been heretofore constructed, for the purposes of drainage or protection against overflow, may be fined in any sum not exceeding two hundred dollars, to be recovered before a justice of the peace in the proper county; or if the injury be to a levee, whereby lands shall be overflowed, he may, on conviction in any court of competent jurisdiction, be fined in any

sum not exceeding five thousand dollars, or imprisoned in the county jail not exceeding one year, or both, in the discretion of the court. All complaints under this section shall be in the name of the people of the State of Illinois, and all fines when collected shall be paid over to the proper commissioners, to be used for the work so injured.

"'§ 46. In addition to the penalties provided in the preceding section, the person so wrongfully and purposely filling up, cutting, injuring, destroying or impairing the usefulness of any such drain, ditch, levee or other work, shall be liable to the commissioners having charge thereof for all damages occasioned to such work, and to the owners and occupants of lands for all damages that may result to them by such wrongful act, which may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction.' Laws of Ill. 1871–2, pp. 356–365.

"Proceeding under the above act, numerous owners and occupants of the lands known at the time as the 'Mississippi bottom lands,' in the counties of Adams, Pike, and Calhoun, Illinois, filed a petition in the county court of Pike County, expressing their desire to construct drains and ditches, and also a levee and other works, across the lands of others in that bottom, for agricultural and sanitary purposes, so as to reclaim the bottom land from overflow by the waters of that river, 'in order to make the location salubrious, and render the soil available for tillage and otherwise develop the agricultural resources of said bottom land.' They represented that 'said bottom land has been from time immemorial, and now is, a low and nearly level tract of land formed by deposits of alluvion from said river; that it is traversed throughout nearly its entire length by a slough or bayou known as 'the Sny Cartee slough;' that said bottom land is also variously intersected by other and smaller sloughs, some of which are short channels putting out from the river and returning thereto, while others start from and return to the said Sny Cartee slough, and others are, again, lateral branches connecting said Sny Cartee slough with the river; that the said bottom land is below the level of the high water mark of said river, and absolutely without protection there-

from; that the greater part thereof is nearly every year inundated by the waters of said river, and all are subject to inundation, and have been repeatedly submerged by said overflow, the river on such occasions being a stream from about four to eight miles wide, and running from bluff to bluff on either side;' 'that, by reason of said exposure to overflow, the mass of the said bottom land has been allowed to remain in its primitive condition, and will so remain unless reclaimed; that it is but sparsely populated, and that the occupants thereof support themselves almost exclusively by the cultivation of the soil; that they are every year greatly embarrassed in putting in their crops by the peculiar character of the rise in said river, which has no regular time for reaching its maximum height, nor any fixed number of rises during a season; that their crops when planted are frequently destroyed by an unexpected rise in said river, and in such cases they are either compelled to replant their crops, or the crops are destroyed so late in the year as to render the operations of the season a total failure;' 'that upon the subsiding of the waters the said bottom land is left in a wet and marshy condition, so that the stagnant water is left on various parts of its surface, and the succeeding heat of summer and autumn evolve therefrom malaria and disease;' 'that by reason of said facts said bottom land not only now remains sparsely populated, while the territory around it is thickly settled, but the same is practically incapable of supporting any further population, so that the average taxable value of the lands now subject to overflow is no more than about fifty cents per acre, and the present occupants of said bottom lands have been in most cases induced to remain solely by the prospect of the ultimate reclamation of said land, a consummation which has been the theme of their enterprise and endeavor ever since the settlement of the bottom land described.'

"The petitioners called the attention of the court to the act of 1871, and asked the appointment of commissioners, in accordance with the provisions of that law, 'for the purpose of constructing a levee on the Mississippi River, from a point on said river at or near the head of the Sny Cartee, in the county of Adams and State of Illinois, and thence in a southerly direc-

tion along or near the east bank of the Mississippi River, as shall be deemed advisable for the safety of the proposed work, to a point at or near the mouth of Hamburg Bay, in the county of Calhoun, State of Illinois, and to do and perform any and all acts, as provided in said law, for the surveying, laying out, and constructing, altering, repairing, enlarging, protecting, and maintaining, said proposed levee, or to render it efficient for the protection and reclamation of the lands lying east of the said levee, and between it and the bluffs, and now subject to overflow by the Mississippi River and other streams.'

"After asking a confirmation of the report of the commissioners, if they found and reported that the proposed levee could be constructed at a cost not exceeding $5 per acre for all lands benefited and reclaimed from overflow, the petitioners prayed: 'That the assessment for benefits upon the property to be affected by the construction of said work shall be paid in ten equal annual instalments, the first instalment being due and payable three years after the date of the commissioners' report and the filings of the plans and specifications with the court, and one-tenth of such assessment, with accrued and accruing interest, each year thereafter, until the whole amount shall have been paid.'

"The county court of Pike County having found that the proposed work was necessary, appointed in 1871, William Dustin, George W. Jones and John G. Wheelock commissioners, and they duly qualified and acted in that capacity. In the same year the commissioners reported the result of their examination, and in their report indicated, by map and profiles, the work to be done. The report was confirmed without objection, and a jury of twelve was organized to assess damages and benefits, and make an assessment roll. The assessments were made and put upon the record of the court. Certified copies of the assessments were recorded in Pike, Adams, and Calhoun Counties. An order was made requiring the assessments to be paid in ten annual instalments, with interest from October, 1872.

"In conformity with the order of the court, the commissioners issued bonds from time to time, upon estimates made by the engineer as the work progressed, to be used in the construction

and completion of the work. They were delivered directly to the contractors as they were earned. The first issue of bonds amounted to $499,500, of which Francis Palms purchased $202,500. A second issue was made, amounting to $148,500, which were also purchased by him. That issue was the result of a second petition under the act of 1871, proceedings under which resulted in further assessments.

"It may be here stated that by an act of the general assembly of Illinois, approved April 9, 1872, it was provided that whenever it appeared by the findings of the court before which proceedings were pending or might be had, under the act of April 24, 1871, that any drain, ditch, levee, or other work authorized by that act to be made would be of public benefit for the promotion of the public health, or in reclaiming or draining lands, the same should be deemed 'a public work;' and that it should be lawful for the commissioners appointed under the act of 1871 to register at the office of the auditor of public accounts any bonds issued by them under order of court; such registration to show the date, amount, number, maturity, and rate of interest of the bonds, and the fact of such registration to be certified by the auditor, under his seal of office, upon each bond. The act contained other provisions, but it is not necessary to refer to them.

"All of the bonds issued by the commissioners were in the same form. We give here a copy of one of them, issued in 1872:

"'No. 6. United States of America. $500.

"'Sny Island Levee Bond.

"'State of (Ten per cent interest bond.) Illinois.

"'The commissioners appointed by the county court of Pike County and State of Illinois, on the petition of John Morris and others, to locate and construct a levee on the Mississippi River, in the counties of Adams, Pike, and Calhoun, by virtue of an act of the general assembly of the State of Illinois entitled "An act to provide for the construction and protection of drains, ditches, levees and other works," and by power vested in them by said act, acknowledge themselves, as such commis-

sioners, held and firmly bound unto John G. Wheelock or bearer in the sum of five hundred dollars, lawful money of the United States, payable in the city of New York, at the bank or agency used by the treasurer of the State of Illinois, on the first day of October, A. D. 1882, with interest at the rate of ten per cent per annum, interest payable on the first day of July in each year, on the surrender of annexed coupons as severally due.

"'This bond is one of a series of five hundred thousand dollars issued for the purpose aforesaid, and after an order of the county court of Pike County aforesaid approving of the assessment made by a jury of the cost of said levee.

"'In witness whereof, the said commissioners,' etc.

"Annual interest coupons, payable to bearer, were attached to each bond.

"On each bond was endorsed a certificate in these words:

"'Auditor's Office, Illinois.

"'Springfield, Nov. 12th, 1872.

"'I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of an act entitled "An act to provide for the registration of drainage and levee bonds, and secure the payment of the same," approved April 9th, 1872, and in force July 1st, 1872.

"'In testimony whereof,' etc.

"At the January term, 1876, of the Supreme Court of Illinois, the case of *Updike* v. *Wright*, 81 Ill. 49, was decided. That case involved, among other questions, the constitutionality of the above act of April 24, 1871, providing for the construction and protection of drains, ditches, levees, and other works. The case related to certain proceedings taken for the construction of a levee on the banks of the Wabash River. The representation to the county court was that the lands of the petitioners were subject to overflow from that river, that their fences and crops were liable to be swept away and destroyed by such overflow, and that the same could be prevented by an earthwork levee.

"After observing that the above act of 1871 was evidently passed in view of article 4, section 31, of the Illinois constitution of 1870, declaring that 'the general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others,' Chief Justice Scott, delivering the unanimous judgment of the court, said: 'Apparently, an effort was made to have the law enacted conform to the constitutional provisions in every particular. Hence it is declared the work to be done is the construction of drains and ditches for agricultural and sanitary purposes, and if it becomes necessary, in the construction of a system of drainage, that a "levee or other work" be adopted to make that system available, such levee or other work may be constructed under the provisions of the statute. But it is nowhere intimated the owners or occupants of land may undertake, under the provisions of this law, the building and maintenance of an immense levee on the borders of a river, not connected with any system of drainage by ditches. Neither the constitution nor the statute contemplates any such work. What was in the minds of the framers of the constitution, and the legislators who enacted the law in pursuance of its provisions, must have been the drainage of lands by means of drains and ditches, and what is said in the statute on the subject of a "levee or other work" is always in connection with a system of drainage in that mode. The work outlined by the constitution and the statute is comparatively insignificant, and may be done at no great cost; but that which is undertaken in this case is the construction of a levee on the banks of the Wabash River, of many miles in length, and estimated to cost a great many thousands of dollars. No system of drainage by drains and ditches was planned, nor deemed necessary for agricultural and sanitary purposes. The representation to the county court is, the lands of the petitioners are subject to overflow from the Wabash River; that their fences and crops are liable to be swept away and destroyed by such overflow; and that the same can be prevented by an earthwork levee. The undertaking is one of great magnitude, and will require the expenditure of large sums of money. The assess-

ment on complainant's land is over $10,000. And the allegation in the bill is that, unless all further assessments proposed to be made be arrested, the levee will cost more than the land is worth. Any construction of the statute that would warrant the owners or occupants of lands to enter upon such an immense and costly work seems forced and unreasonable. It is only in connection with drainage for agricultural and sanitary purposes that "levees or other works" may be undertaken, as auxiliary to the drainage of the lands. Our opinion is, this is the only construction the statute will bear, consistently with the constitution; otherwise, one owner, whose lands are subject to overflow at certain seasons of the year from a river, could set in motion the proceedings for the erection of a levee sufficient to protect his lands, no matter how expensive, and have the cost levied upon the lands of others in the vicinity which commissioners appointed by the court might deem benefited by the improvement. Such a work cannot be said to be draining lands by drains and ditches over the lands of others; nor is such a levee, in any just sense, in the language of the statute, "necessary to the drainage of the lands." The work of constructing a great levee along the banks of a river subject to overflow, which defendants are about to do, is not embraced within the provisions of the statute, and is therefore without authority of enabling law.'

"But the court proceeded to observe that the decision could be placed on the ground that the general assembly possessed no power under the constitution to vest commissioners or juries selected, or the county court, with authority to assess and collect taxes or special assessments for the contemplated improvement. It said: 'Section 5, article 9, of the constitution of 1848, which declared "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with the power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same," was always construed by the decisions of this court as a limitation upon the power of the general assembly to grant the right to assess and collect taxes to any other than the cor-

porate or local authorities of the municipalities or districts to be taxed. *Board of Directors* v. *Houston*, 71 Ill. 318; *Harward* v. *The St. Clair and Monroe Levee and Drainage Co.*, 51 Ill. 130; *South Park Commissioners* v. *Salomon*, 51 Ill. 37; *Gage* v. *Graham*, 57 Ill. 144; *Hessler* v. *Drainage Commissioners*, 53 Ill. 105. It was also held that power in the legislature was subject to the further limitation that a local burden of taxation or special assessments could not be imposed upon a locality without the consent of the taxpayers to be affected. That section of the constitution of 1870, upon this subject, provides: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The clause in the present constitution, like that in the constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the general assembly can only vest cities, towns, and villages with power to make local improvements by special assessments or special taxation upon contiguous property benefited by such improvement. By necessary implication, it is inhibited from conferring that power upon other municipal corporations or upon private corporations. Only cities, towns, and villages are within the constitutional provisions; and, although other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, the limitation is absolute, such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same. With equal propriety, this clause of the present constitution must be regarded as restricting the general assembly in conferring the power to levy and collect taxes, either general or special, to the mode and manner therein indicated. We do not understand the legislature possesses plenary power, unlimited and unrestricted, to invest whomsoever it may choose with authority to assess and collect either special assessments

or taxes for every conceivable purpose. As we have seen, only cities, towns, and villages may levy special assessments or special taxation for local improvements, and all other municipalities can only be vested with jurisdiction to assess and collect taxes for corporate purposes; and that, too, under the positive inhibition such taxes shall be uniform in respect to persons and property. It would seem, therefore, to follow, as a corollary from the propositions stated, that neither the commissioners or the juries selected, nor the county court, is such a body as, under the constitution, may be given power to make local improvements by special assessments or by special taxation upon contiguous property. There is still another consideration that has an important bearing upon the decision of the case. The clause of the constitution we have been considering, like that in the constitution of 1848, must be understood, in the light of the decisions of this court, as forbidding the general assembly from imposing a burden by taxation upon any locality, without the consent of the citizens affected. Under this law, the people whose property is subject to taxation or assessments have never given any consent to it, if we exclude those who may have signed the petition addressed to the county court. No opportunity was afforded them to do so, nor does the law make any provision for submitting the question to a vote, to ascertain the will of those whose property is subjected to this local burden. It is imposed upon them under the statute, by the decision of the county court. Obviously, that section of the constitution that declares "the general assembly may pass laws permitting the owners or occupants of lands to construct drains or ditches, for agricultural and sanitary purposes," implies that the community whose property is to be taxed may have the right of election in the matter. Otherwise, an onerous burden may be imposed upon them, without their consent, and such proceedings might be had as would result in the deprivation of property. How can the land owners be permitted to construct drains and ditches, unless some election is guaranteed to them? The language employed implies voluntary action. Illustration will make the inconsistency of the present law apparent. For example, the privilege is given to any occupant,

as well as the owner of land, of presenting a petition to the county court. Should the construction contended for prevail, a tenant residing upon land adjacent to a river subject to overflow might present a petition, and, under the decision of the court, the work of erecting a levee miles in length, and costing large sums of money, might be entered upon, and the expenses assessed upon the property in proximity to the river that might in any degree be deemed benefited. An intention to confer such unwarranted power upon one man, who would himself be subject to none of the burdens imposed, ought not to be imputed to the legislature. Any laws not permitting an election as to the propriety of undertaking the work are vicious, and within the inhibition of the constitution. It does not militate against this construction that the land owner may appear before the county court when the petition is presented, and resist the application, or may contest the assessment upon his property when made. Whether the contemplated work shall be undertaken, and his property subjected to taxation, is not made to depend upon his election, but upon the decision of the court. It would be a solecism to call that privilege an election.'

"At the same term of the court, the case of *Webster* v. *The People* (unreported) was decided. That case related to the above work undertaken under the authority of the county court of Pike County. The efforts of the commissioners to collect instalments of interest on the assessments were resisted by certain land owners. The Supreme Court of Illinois said: 'The principal questions raised and discussed in this case are the same as in *Updike* v. *Wright*, decided at the present term, and for an expression of our views reference is made to the opinion in that case. For the reasons there given, the judgment in this case will be reversed, and the cause remanded.'

"It may be well to state in this connection that the Supreme Court of the United States, in *Harter* v. *Kernochan*, 103 U. S. 562, 570, referring to section 5, article 9, of the Illinois constitution, declaring that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes,

has said: 'It is the settled law of the State, as heretofore recognized by this court, that this constitutional provision was intended to define the class of persons to whom the right of taxation might be granted, and the purposes for which it might be exercised, and that the legislature could not constitutionally confer that power upon any other than corporate authorities of counties, townships, school districts, cities, towns, and villages, or for any other than corporate purposes. *County of Livingston* v. *Darlington*, 101 U. S. 411;' *Weightman* v. *Clarke*, 103 U. S. 256, 259.

"After the above decision in *Webster* v. *The People*, certain land owners undertook to provide for the protection of their lands from overflow by the execution of deeds of trust to the commissioners. Under these deeds as much, perhaps, as $30,000 was raised and expended by the commissioners.

"In May, 1878, while those deeds were in force, Palms, on behalf of himself and others instituted a suit in equity in the Circuit Court of the United States for the Southern District of Illinois against the levee commissioners. The bill in that case recited the above legislation, and the proceedings resulting in the appointment of the commissioners, the assessments by the jury, and the issuing of bonds by the commissioners, and charged that the expense of the work was paid by the commissioners with money furnished by Palms and others, of which, it was alleged, the owners and occupants of the lands benefited and assessed were at the time well aware. Referring to the twenty-ninth section of the act of 1871, prescribing the duties of the commissioners, and also to the above act of 1872, that bill alleged that the commissioners made efforts 'to collect the amount of some of the instalments of said assessments, and the interest thereon, but the courts of the State of Illinois, before whom the question of the collection of such assessments and the instalments thereof under said statutes was brought, refused to give effect to the provisions of said acts, so far as they purported to authorize the collection of the same by the collectors of taxes under extensions on the tax books; and no means are left for the collection of such assessments and interest, except such as may be supplied by the general authority of

the courts that have jurisdiction of such questions. And your orator would further show unto your honors: That the whole amount of the moneys advanced by him, and by other purchasers of the bonds, with interest thereon, remains unpaid, and that said commissioners remain and continue in the actual use and possession of the said levee and other works constructed with the moneys borrowed of your orator and others, by the said commissioners, under the proceedings aforesaid; and they do also, by and under the direction of the owners of said lands, keep and use the said works to protect their own lands, and the lands of the other owners and occupants, from overflow from said river. And your orator further shows unto your honors: That the said commissioners refuse to pay to your orator and the other holders of said bonds, the whole or any portion of their principal—money loaned to them for the purposes aforesaid, or interest, and they also refuse to enforce the collection of said assessments on the several tracts of land described in said Exhibit A, or the interest thereon, as it is their duty to do, and the owners and occupants of said lands refuse to pay said assessments, or the interest thereon, so that the moneys loaned by your orator for the construction of said works is wholly lost, together with the interest thereon. And your orator would further show unto your honors: That the owners and occupants of said lands are very numerous, as will appear by the lists of land and the names of the owners thereof, as stated and set forth in the said Exhibit A, and the names of many of them are unknown to your orator, but all of them reside in other of the States of the United States than the State of Michigan; the greater number of them are residents and citizens of the States of Illinois and Missouri; and that the said commissioners, John G. Wheelock, George W. Jones, and Benjamin F. Westlake are citizens of the State of Illinois, and of the Southern District aforesaid.'

"The relief asked was a decree directing an account to be taken of 'the moneys loaned and advanced' by Palms to the commissioners, 'to be used by them in the purchase and acquisition of the lands required for the location and construction of the said levee and other works, and for the construction and

the completion of the said levee and all the works and improvements connected therewith, together with interest thereon at the rate of ten per cent per annum, according to the terms of said bonds and the coupons thereto attached;' the amount due Palms being ascertained, then that such amount be adjudged a lien in favor of Palms 'upon the said levee and other works, and the lands acquired, owned, and held by the said commissioners for the site of said levee, and all other improvements, and upon the said assessments upon all of the said lands described in the said Exhibit A, for the benefits to said lands afforded by the said levee and other works, and the interest thereon;' and that 'the said commissioners proceed at once, under the order and direction of your honors, to collect such assessments upon all and every of said tracts of land and the interest that has, or that may hereafter, accrue thereon, or so much thereof, from time to time, as will be sufficient to pay the interest money or the principal, payable to your orators as the same falls due; or that it may please your honors to appoint one or more competent persons, as receiver or receivers, to take possession and charge of the said levee and other works, and manage and control the same, together with all the books, papers, and properties of said commissioners, and with authority to collect, under the order and direction of this honorable court, the said assessments and interest thereon, as often and in such sums as may be sufficient to meet and satisfy the claims of your orators as aforesaid.'

"The commissioners answered in that case, insisting, among other things that the bonds in question having been registered with the auditor of public accounts under the act of 1872, they were not responsible for the failure to collect the money to pay interest, and were without any duty in respect to the said assessments. They referred to the fact that certain land owners had at all times opposed the proceedings instituted to assess their lands for benefits on account of the said levee, and refused to pay interest on assessments, in consequence whereof the township collector had returned nearly all the land owners involved in the proceedings as delinquents; that thereupon the county collector made application to the Pike County Court to

enforce said assessments against the delinquent lands; that some of the land owners opposing the assessments filed objections to judgment for such assessments, setting up that the law under which the assessments were imposed was unconstitutional; that the commissioners employed counsel to prosecute the application for judgment and for the collection of said assessments, and the county court gave judgment against the lands; that the land owners appealed to the circuit court, which affirmed the judgment of the county court; that thereupon the land owners carried the case by appeal to the Supreme Court of the State, stipulating that one appeal should be decisive of all the assessments; that the commissioners themselves employed counsel in the argument of the case in the Supreme Court of the State, and said court decided adversely to the right to collect said assessments; and that such decision of the highest court of the State was decisive of any question of right on their part to enforce assessments. The case referred to by the commissioners in their answer was the above case of *Webster* v. *People*. The commissioners also averred that 'as such commissioners they are not now, and never have been, in any actual possession of any part of said levee or other work, except for the purpose of constructing, maintaining, and repairing the same; that they have never had title to any portion of the said levee, as they are likewise advised and believe on account of the unconstitutionality of the law under which said work was done; and that since said law was declared unconstitutional these respondents, as commissioners, have only exercised authority over said levee in warning parties against injuring said levee, but this was in their private capacity, at the request of a portion of the land owners, who supplied them with funds for that purpose, in whose behalf they have, in like private capacity, tried to keep said levee in repair.'

"On the 13th day of March, 1879, that cause was heard upon bill and answer in the Circuit Court of the United States. By that court it was adjudged and decreed 'that the said defendants [the commissioners] take, retain, and hold the right of way, levee, and other works and property in question, and described in the pleadings, and keep, take care of, preserve,

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and protect the same, under the order and control of this court, for the benefit and on behalf of the complainant and all other parties interested therein, or who may hereafter be found to be interested in the same, in whole or in part.'

"It was further decreed 'that the complainants and all other persons who may have loaned or advanced money to the defendants for the acquisition by those of the said right of way, or for the construction of the said levee and other works and property connected therewith, or who may be the holder of any of the bonds issued by said defendants to raise money for the purposes aforesaid, or to pay for such right of way or the construction of such levee and other works, or to pay any of the proper expenses connected therewith, who may come into this suit, contributing their proper proportion to the expenses thereof, have liberty to go before the master and produce these said bonds and coupons for interest thereon, and make proof of the amount due them of principal and interest on account of such loans, advances, and bonds; and the cause is referred to John A. Jones, master in chancery, for the purposes aforesaid, who will, upon the application of the complainants, or other persons who may come into the cause as complainants upon the terms hereinbefore prescribed, and reasonable notice to the defendants or their solicitors, proceed to take the proofs of the amounts due to the complainants, and allow parties who may have before that time come into the cause, and, after such proofs are taken, make a report to the court of the amounts found by him to be due each and any party who may appear before him, and the ground, and facts of his several findings and conclusion;' and 'that after the coming in of the master's report of the amount or amounts found by him to be due to the complainant or other persons who may come into the cause as aforesaid, and the approval of said report, and the determination and adjustment by the court of the amount or amounts due to the complainant or other persons who may come into the cause for moneys advanced or loaned on bonds held as aforesaid, the said complainants or other persons have the liberty to exhibit and file their supplemental bill or bills against any or all the present or former

owners of the said lands alleged in said bill to be benefited by the said levee and other works, or who have heretofore or who may now be in any way interested in the said levee and other works, or the lands benefited thereby, to compel them to contribute to the payment of the amount or amounts which may be found due to the said complainant or other persons as aforesaid, and for such other and further relief as they may be advised they are entitled to; and the court reserves all other questions of relief to the parties, and of the costs, to be considered hereafter. And the said complainant is at liberty to use the names of the defendants in any such proceeding by way of supplemental bill, if they are advised it is necessary to do so, upon rendering them a sufficient indemnity against all costs and expenses.'

"The master to whom the cause was referred to ascertain the amount of the several bonds and coupons made his report, showing the names of various persons, and the amount of bonds held by them, respectively. The amount reported as due to Francis Palms on the bonds held by him was $221,228.26. The total amount found due to him and certain parties who became co-plaintiffs with him in the cause was $304,908.26. In the decree confirming the master's report it was declared: 'And it is further ordered, adjudged, and decreed by the court that the said several sums of money so found to be due to the said complainants as aforesaid are a lien upon the assessments made under the order of the county court of Pike County, in the State of Illinois, upon the lands described in the bound book, Exhibit "A" with complainants' bill, and upon the said lands, as provided in the twenty-seventh and thirty-seventh sections of an act of the general assembly of the State of Illinois entitled "An act to provide for the construction and protection of drains, ditches, levees and other works," approved April 24, 1871. And it further appearing to the court that the defendants, commissioners under the several orders of the county court of Pike County, aforesaid, have no money in their hands for the payment of the amounts so found and adjudged to be due to the said several complainants, and it also appearing to the court from the allegations of the complainants' bill, and not denied by the said

defendants in their answer thereto, that they have taken no steps for the collection of the assessments made upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the court that the complainants have the right and liberty to proceed in this court, in the name of the said defendants as complainants as such commissioners, or in their own names as complainants, against the lands described in the said Exhibit "A," and the owners thereof, or such of such lands and the owners thereof, or other persons, and said commissioners, as they may be advised, are liable for or bound to pay the sums found to be due to the complainants as aforesaid, jointly or severally, by a bill or bills, original, supplemental, or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid, and also for the costs of this suit.'

"It should be here stated that after the decision in *Webster* v. *People*, and after the institution by Palms of the suit in the Circuit Court of the United States, the following amendment to the constitution of Illinois was adopted: 'The general assembly of Illinois may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, and vest the corporate authority thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State by a special assessment upon the property benefited thereby.' 1 Starr & Curtis' Anno. Stat. Ill. p. 122.

"Subsequently the legislature of Illinois passed an act which took effect May 29, 1879, entitled 'An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts.' 1 Starr & Curtis' Anno. Stat. Ill. p. 919.

"Some of the defendants in the present case made efforts to secure the passage of the act last referred to. That act provided for the formation of drainage districts with authority not only to construct drains, ditches, and levees for agricultural,

sanitary, and mining purposes, but also to maintain and keep in repair any such drains, ditches or levees 'heretofore constructed under any law of this State;' and, in cases where a levee had been theretofore built 'under any law of this State,' the annual assessment for keeping the same in repair was made due and payable on the first of September annually.

"Subsequently, on the 26th of January, 1880, some of the land owners whose lands were described and included in the original assessments and in the original bill filed by Palms instituted proceedings under the act of 1879. In their petition they described the route and terminus of the levee, alleging that the levee 'was constructed, under the laws of Illinois then in force, in the counties of Adams, Pike, and Calhoun, for the years 1872, 1873, and 1874.' They further alleged that, by proper repair and maintenance of the levee, the lands aforesaid (which are alleged to be part of the lands described in the original bill and in the present bill, amounting in the aggregate to about 90,000 acres) would be reclaimed and brought into cultivation; that, in addition, it would greatly improve the sanitary condition of the locality through which the levee passed; and that it was absolutely necessary for the health and proper drainage and protection of the said land that the levee be repaired as speedily as possible. They prayed that a drainage district, to be know as 'Sny Island Levee Drainage District,' be formed out of the lands subject to periodical overflow by the Mississippi River in the townships named, for the repair and maintenance of such levee, according to the statute; that commissioners be appointed under the act of 1879, with directions to do all acts provided in the law for repairing levees, ditches, and drains, through assessments to be ordered; and for other and further relief.

"Such proceedings were had that the county court of Pike County duly created the Sny Island Drainage District, and in 1880 it received the surrender of the levee from the original Sny Levee Commissioners, and now retains possession and control of the same.

"Palms died on the 24th day of November, 1886, more than six years after the last order made in the suit brought by him in the Federal court.

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"The present suit was brought by his executors; the defendants herein being the surviving Commissioners, Wheelock and Jones, and numerous individuals who own lands within the territory described in the proceedings instituted in the county court of Pike County under the act of 1871.

"The bill proceeded upon the general ground that each tract of land in question was chargeable in equity with the amounts assessed against it under the act of 1871, with interest, and that the plaintiffs had a lien on each tract for such sums as had fallen due and might become due under such assessments. It alleged that each defendant owned or claimed one or more tracts (Exhibit 'A' showing a description of the various tracts, and the names of the persons against whom the assessments were made); that each defendant who acquired title to any of the lands after the assessments of 1872 and 1873 did so with full knowledge of such assessments and the above issue of bonds, as well as of the fact that the plaintiffs had purchased the bonds, and that the levee was constructed with the proceeds thereof; that, with like notice and knowledge, each of the defendants had appropriated and used the levee for the protection of their lands, and continued so to do; that all the defendants named in Exhibit 'A' participated in causing said bonds to be issued and sold, and the proceeds expended by actively soliciting the passage of the act of 1871; that before and at the passage of the act of 1871 the reclamation and protection of the lands described in that exhibit had been a subject of consideration and discussion amongst the owners and occupants of the same, as well as others, and it was understood by all parties interested in such lands that in order to reclaim and protect the same a statute was absolutely necessary, under the provisions of which the persons interested in the lands could be united and organized, and a common agency created, with authority to make all necessary plans, estimates, and contracts for the location of the levee, and to borrow money upon bonds or otherwise, to be secured by assessments or pledges of the lands benefited; that the defendants, through the agency of their co-defendant Charles M. Clark, had procured the passage of that statute, and caused its provisions to be made known to the

people interested, and thereupon devised a plan for the organization of a corporation composed of persons interested in the lands, for the purpose of raising money to put the act into effect; that a large number of the defendants subscribed to the capital of that corporation in order to effect the objects of its creation; that the other defendants purchased lands through such last-named land owners, with full notice of the equities of the plaintiffs; that all of the defendants who purchased after May 4, 1878, did so with full notice of said assessments, and that the same were unpaid, and also that said original suit in the Federal court was pending; that certain other defendants participated in causing the said bonds to be issued and sold to the plaintiffs' testator, and the proceeds thereof to be expended in the construction of the levee, and in causing the said assessments to be made by signing the original petition to the Pike County court in the year 1872; that certain other defendants purchased lands from other land owners who had joined in the petition, with full knowledge of what had previously taken place; that other defendants participated in procuring the bonds to be sold, and the proceeds to be expended as stated, and in causing said assessments, by signing on the 20th day of November, 1874, a petition for a second assessment under the act of 1871; and that other defendants purchased from or through persons of the class last mentioned, with full knowledge of all the facts.

"The plaintiffs also alleged that certain named defendants, after the above decision by the Supreme Court of Illinois, knowing the levee to be constructed with the plaintiffs' money, and having full notice of all the facts, executed to Jones, Wheelock, and Westlake deeds of trusts; that said deeds were made for the purpose of defeating the claims of the plaintiffs, and it was stipulated between the trustees and the last named defendants that no part of the funds collected by the former should ever be applied to the payment of any indebtedness created by or on account of the original levee; that said deeds of trust continued in force until 1887, when the same were canceled, said Jones, Wheelock, and Westlake having, it is alleged, devised another scheme for defeating the claim of

the plaintiffs; and that certain other defendants purchased from defendants of the class last mentioned, with full notice of all the facts.

"It was further alleged that after the decree of March 13, 1879, namely, on January 26, 1880, certain defendants named filed a petition in the county court of Pike County setting forth that they owned certain lands, and alleging that a certain levee (the one heretofore described) had been constructed under the laws of the State of Illinois; that said petition set forth the purposes for which the levee had been constructed; that the same was in bad repair; that, in the faith that the same would be properly constructed and repaired, they had expended large sums of money, had improved farms, and that all such improvements would be washed away, unless the levee should be repaired and kept up; and that the lands subject to overflow amounted to an aggregate of 90,000 acres. The bill set forth the substance of the petition, and the various steps taken, as already stated, for the formation of a new drainage district, to be known as the 'Sny Island Levee Drainage District,' and alleged that all the defendants so joining had full notice of all the facts and of the making of the assessments aforesaid; that certain other defendants purchased lands from the defendants of the class last mentioned, with notice of all the facts; that certain other named defendants, pursuant to the statute of Illinois approved May 29, 1879, were severally made parties to, and had notice of, all the proceedings for the organization of the Sny Island Levee Drainage District, as well as of the contents of the petition therefor, and were bound by such proceedings and the appropriation of the levee aforesaid; that certain other named defendants acquired title to said lands, or interest therein, after July 26, 1880, and were bound by said proceedings and the appropriation of said levee; that certain other defendants named were heirs at law and took title to portions of said lands from ancestors who took part in some or all of the aforesaid proceedings; that certain other defendants had acquired title to some of said lands by accepting deeds of conveyance expressly recognizing the lien of plaintiffs on said tracts; and that every one of the present defendants had full

notice of the claims of plaintiffs and of the facts aforesaid; and that all of the defendants now appropriated said levee and other works and refuse to contribute anything to the payment of the plaintiffs.

"The bill alleged that the Sny Island Levee Drainage District had every year made large assessments, and, contriving and intending to defeat the plaintiffs, had caused many of the tracts of land to be sold for non-payment of such assessments (such sales, it was alleged, being merely colorable, as against the rights of the plaintiffs, and mere clouds on the title to said land); that before the construction of said levee the lands were wet, and not worth exceeding fifty cents per acre; that the average amount assessed against the lands for the cost of the levee was greatly in excess of the then value of the lands, but it was expected that the work would, when constructed, drain every tract, and so enhance the value of the same as to make the lands ample security for the money borrowed; that the plaintiffs, relying on this and on the assurances of the land owners and commissioners, purchased the bonds in question; and that the lands were enhanced in value by said expenditures until they became worth $25 per acre.

"It was also alleged that, if the levee had been kept up, it would have afforded full protection, and would have caused the lands to have continued to be good security; that defendants had spent some money in repairing said work, but made such improvements and repairs so unskillfully that they were insufficient; and that by neglect of defendants the lands had again become wet and overflowed, and were not now good security for the plaintiffs.

"After stating that the defendants were, by reason of the matters and things set forth in the bill, bound to preserve, protect, improve, and repair the said levee and other works described, by sufficient contribution in money, ratably or otherwise, and by further assessments upon the lands, in order to protect and keep the security of the plaintiffs adequate and sufficient, the plaintiffs prayed that by the appointment of a receiver with ample powers, and by other appropriate order, the defendants should be compelled to preserve, protect, repair, im-

prove, and make said levee and other works protective of said lands, 'or to give and confer upon such receiver the power to make needful assessments upon said lands in proportion to benefits and the relative value of each tract thereof, and with the money arising therefrom, or by the mortgage of such assessments and the lands upon which they are made, raise the money necessary for the repair and improvement of the said levee and other works, and with the money so raised proceed to repair and improve said levee until it is made adequate for the drainage and protection of all of the said lands; that each and every of said defendants herein may be enjoined by this honorable court from selling, transferring, or assigning the title to said lands owned by them, or any part thereof, upon which any of said assessments may rest, except subject to the lien of said assessments, as the same shall be determined by this honorable court, or in any manner whatsoever changing, altering, or affecting the title thereto so as to in anywise impair, diminish, hinder, or prejudice the lien of said assessments thereon, or on any portion thereof, and that the Sny Island Levee Drainage District, its officers and agents, be enjoined from selling or offering for sale any lands covered by any of the assessments herein in question, for any pretended assessments or alleged liens by said district attempted to be assessed, except subject to the lien of all assessments and liability on said lands, respectively, as the same shall be determined by this honorable court.'

"It was further asked in the bill that the court order, determine, and declare the amounts due to the plaintiffs and all other holders of bonds and coupons who would come in and contribute to the expense of this suit, 'and the amount due for principal and interest on the several assessments made against and upon each tract of land described in the pleadings and exhibits, and the proportion of the amount of such assessments upon each tract of land necessary to the payment of the amount of the principal and interest now due upon the bonds and coupons of your orators and others who may come into the cause and contribute as before mentioned, and that each of the said tracts of land be sold under the order and decree of this court for the amount chargeable upon and against the same, unless the

owner of the same, or some other person for him, shall, within a day limited, pay said amount, with a just proportion of the costs of this suit;' and also that the court would 'appoint one or more commissioners or receivers in the place and stead of the said John G. Wheelock and George W. Jones, or appoint a commissioner in the place of the said Benjamin F. Westlake, deceased; and, if one or more commissioners or a receiver or receivers are appointed in the place and stead of the said John G. Wheelock and George W. Jones, the said Wheelock and Jones may be ordered and directed to turn over and deliver to such commissioners or receivers so appointed all books, papers, documents, and property now in their possession or under their control.'

"The defendants demurred to the bill, and the demurrers were overruled. They subsequently filed answers, which put the plaintiffs upon proof of many essential allegations of their bill, without proof of which, independently of the question of law arising upon the face of the bill, no part of the relief asked could have been granted. In the view which is taken of the case by this court, it is unnecessary to extend this opinion by setting forth the averments and denials of the several answers.

"Upon final hearing the Circuit Court dismissed the bill."

Mr. Henry M. Duffield for complainants.

Mr. Thomas Worthington and *Mr. W. H. H. Miller* for certain respondents. *Mr. Asa C. Matthews*, *Mr. Harry Higbee*, and *Mr. J. Otis Humphrey* were on their brief.

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

The Circuit Court held in substance, among other things, that the decretal order of that court on the bill first filed adjudging the amounts reported by the master to be due the several complainants and giving them liberty to file a supplemental bill against the owners of the lands benefited to compel them to contribute to the payments of the amounts thus reported, was not an adjudication which precluded the land owners from deny-

ing their liability; that as it was thirteen years after the act was declared to be unconstitutional and nine years after leave was given to file the supplemental bill, before any step was taken except as against those who were originally commissioners, there had been such laches as precluded complainants from having the relief sought, the conditions of the property and the relations of the parties having in the meantime greatly changed. The Circuit Court of Appeals held that even when exercising an independent judgment a Federal court should give effect to rules of construction previously established by the highest court of a State, and not act upon a different view unless compelled to do so to prevent an absolute denial of justice; that, applying the settled rule of construction of the State to the state constitution relating to the subject, the act of April 24, 1871, was unconstitutional, and assessments made thereunder were not enforceable; that the fact alone that land owners advocated and used their influence to secure the passage of a law under which bonds were issued, to be paid by special assessments against their lands, which law was subsequently declared unconstitutional, and the assessments void, did not afford ground on which a court of equity should declare a lien on such lands in favor of the bondholders, in the absence of fraud, and where both the land owners and the purchasers of the bonds acted in the mistaken belief that the bonds were valid; and that where bonds issued by commissioners in payment for the construction of a levee to protect lands from overflow, were void, a court of equity had no power to determine that certain lands received the benefit of the expenditure, and on that ground to declare a lien thereon in favor of the bondholders. The decree of the Circuit Court was not affirmed on the ground of laches, but the Circuit Court of Appeals nevertheless said (95 Fed. Rep. 110): "The plaintiffs can take nothing, as against the individual land owners, defendants in this cause, by reason of any order made in the suit instituted by Palms in the Circuit Court of the United States against the commissioners designated under the act of 1871; for the present defendant land owners were not parties to that suit, and could not be concluded by any order made in it. It is evident from the orders entered in that case that Judge

Drummond did not intend to pass upon the rights of the land owners, but was of opinion that if Palms had any ground of action against them, in respect of the lands attempted to be specially assessed under the act of 1871, he must bring them before the court by supplemental bill. He was given leave to file such a bill by an order entered in 1879. But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889,—about nine years after it could have been filed. If the case depended alone upon the question of laches, there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land owners that a court of equity ought to decline giving them any relief. The application of such a principle would be peculiarly appropriate, because it is provided by statute in Illinois that no execution can issue upon a judgment after the expiration of seven years from the time it becomes a lien, except upon the revival of the same by *scire facias*, and that an action to recover real estate shall be barred by seven years' residence thereon under a title of record, etc.; by seven years' adverse possession under color of title and payment of taxes; or, as to unoccupied land, by seven years' payment of taxes under color of title. 2 Starr & C. Ann. Stat. Ill. p. 1386, c. 77, § 6; Id. pp. 1538, 1539, 1547, c. 83, §§ 4, 6, 7. In this case most of the defendants made proof of adverse possession. Besides, as said in *Johnston* v. *Mining Company*, 148 U. S. 360, 370, 'the mere institution of a suit does not of itself relieve a person from the charge of laches,' and 'if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun.'"

The bill is stated by counsel to be a bill to "enforce severally against the lands of certain defendants the lien of separate assessments for the construction of the levee, with the proceeds of which the levee was built, upon the grounds, 1st, that such assessments were levied in strict conformity with the terms of the statute of 1871, which was a valid law; and, 2d, that even if that statute was unconstitutional, many of the defendants

owning such lands are estopped to deny the constitutionality of said act and attack the assessments on that ground. It is not a bill to compel contributions to, or collect proportionate amounts of, a gross sum, but is a bill in the nature of a foreclosure bill to enforce, on the several and separate parcels of land, the liens of several and specific assessments upon the faith of which the moneys which built the levees were advanced."

It is insisted that it is not a bill to collect a tax, or a bill "to hold any municipal corporation or any individual liable, directly or indirectly, at law or in equity."

The bill purports to be an original bill in the nature of a supplemental bill, supplemental to the bill originally filed by Palms, either by way of enforcing the decretal order entered on that bill, treated as a final decree, or, treating that order as interlocutory merely, of obtaining a decree on the whole case as against new parties. Which view is taken is perhaps not material, for "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill." *Lawrence Manufacturing Company* v. *Janesville Mills*, 138 U. S. 552, 561. And, moreover, the bill is an original bill as to the land owners.

Palms filed that bill, on behalf of himself and others similarly situated, May 4, 1878, against Wheelock, Jones and Westlake, as commissioners appointed under the act of April 24, 1871, praying that the moneys "loaned and advanced" by complainant to those commissioners be ascertained, and a decree entered that complainant was entitled to a lien on the levee, and other works and lands, acquired by the commissioners, and the assessments for benefits to said lands, which had been made; and further that the commissioners be decreed to proceed at once to collect the assessments, or so much thereof from time to time as would be sufficient to pay the interest and principal payable to complainant as the same fell due, or that the court appoint a receiver or receivers with authority to collect said assessments.

The commissioners were not impleaded as representing the land owners in the litigation. Their duties were such as the

act of 1871 defined, if that act were valid, and their powers were created and limited thereby, and did not include the power to bind all or any of the land owners of the district in such a suit. The suit was brought to compel the commissioners to discharge the duty, under the act, of enforcing the collection of assessments in the interest of the bondholders, as creditors, and in that sense, they occupied an adverse relation to the land owners who were *quasi* debtors.

The commissioners had filed in the county court of Pike County their assessment roll in 1872, and objections thereto by certain land owners having been decided adversely to them by the county court, and, on appeal, by the circuit court of the county, they took the case to the Supreme Court of the State, which decided that the act of 1871 was unconstitutional. This judgment was pronounced at January term 1876. It was after this that, interest being overdue on the bonds held by him, Mr. Palms filed his bill. Some other bondholders became parties complainant, and on March 13, 1879, an order was entered permitting complainants to bring the land owners into court and test the question of their liability, and the cause was referred to a master. July 7, 1880, the report of the master was confirmed and the court adjudged and decreed that there was due to Palms $221,228.66, and to various other complainants some thousands of dollars as specified, the whole aggregate sum found due complainants being $304,908.26, it being added: "The above amounts are found due without prejudice." It was further decreed that the sums of money found due were "a lien upon the assessments made under the order of the county court of Pike County, in the State of Illinois, upon the lands described in the bound book Exhibit A" as provided in the twenty-seventh and thirty-seventh sections of the act of April 24, 1871. The order proceeded that it appearing that the commissioners had no moneys in their hands for the payment of the amounts so found due, and that they had taken no steps for the collection of the assessments, it was further ordered by the court "that the complainants have the right and liberty to proceed in this court in the name of the said defendants as complainants and as such commissioners, or in their own names as

complainants against the lands described in the said Exhibit A and the owners thereof, or such of such lands and the owners thereof, or other persons, and said commissioners as they may be advised are liable for or bound to pay the sums found to be due to the complainants as aforesaid, jointly or severally, by a bill or bills, original, supplemental or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid and also for the costs of this suit." Both these orders show that the Circuit Judge was of opinion that to subject the lands to the assessments in that suit the land owners must be made parties; and even the amounts found due were in terms so found without prejudice to their rights.

No steps were subsequently taken, and Mr. Palms died November 24, 1886. His executors, on April 22, 1889, filed the present bill against some thousand land owners of the district as well as Wheelock and Jones, two of the alleged levee commissioners, Westlake in the meantime having deceased.

It was an original bill as to these new parties and they were entitled to all the defences which existed when it was filed, and were unaffected by the principle of *lis pendens*. The Supreme Court of Illinois had held in 1876 that the act of April 24, 1871, was in contravention of the constitution of the State and void. This decision was made after the bonds in question had been issued and purchased by Palms from the contractors, but the judgment was rendered on objections by the land owners to the confirmation of the assessments, the collection of which was relied on for the payment of the principal and interest of the bonds, so that it might well be held to be binding on the Federal courts. But we agree with the Circuit Court of Appeals that even if the Circuit Court was not obliged to accept that decision, yet that there was so little doubt of its correctness as to require the same conclusion. The rulings of the state Supreme Court were that the work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, was not embraced within the act of 1871; that section 31 of article IV of the constitution of 1870, that "The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches

——— for agricultural and sanitary purposes across the lands of others," did not authorize the construction of a levee independent of drainage; that section 9 of article IX of that constitution was a limitation on the power of the Legislature, which could only vest such power in such municipalities and not in any other bodies, though other municipalities might be vested with jurisdiction to assess and collect taxes for corporate purposes subject to the rule of uniformity as to persons and property; and that the burden of taxation by special assessment could not be imposed on a locality without the consent of the taxpayers to be affected. And the court held, in respect of the act of 1871, "that neither the commissioners or the juries selected, nor the county court, is such a body as, under the constitution, may be given power to make local improvements by special assessments or by special taxation on contiguous property;" and also that "under this law, the people whose property is subject to taxation or assessments have never given any consent to it, if we exclude those who may have signed the petition addressed to the county court."

Section 5 of article IX of the state constitution of 1848 provided: "The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Section 9 of article IX of the constitution of 1870 read: "The General Assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform, in respect to persons and property, within the jurisdiction of the body imposing the same."

These provisions of the two constitutions are substantially identical, and while prior to the act of 1871, the clause of the constitution of 1870 had not been construed by the Supreme Court of the State, the similar provision in the constitution of

1848 had been construed in several instances. And it was ruled that the right of taxation could not be granted by the general assembly in any form to private persons, or to private corporations; that the provision limited the power of the general assembly to grant the right to assess and collect taxes to the corporate or local authorities of the municipalities or districts to be taxed; that a local burden of taxation or special assessment could not be imposed upon a locality without the consent of the taxpayers to be affected; and that corporate authorities were municipal officers directly elected by the people of the municipality or appointed in some mode to which they had given their assent. *Harward* v. *St. Clair and Monroe Levee & Drainage Company*, 51 Ill. 130; *Hessler* v. *Drainage Commissioners*, 53 Ill. 105; *Lovingston* v. *Wider*, 53 Ill. 302; *Wider* v. *City of East St. Louis*, 55 Ill. 133; *People* v. *Salomon*, 51 Ill. 37.

The construction of the state constitution in *Harward's* case and others has been repeatedly recognized by this court as authoritatively established.

And as this was the settled law of the State when these bonds were issued, and the constitution of 1870 admitted of no other construction, we concur in the opinion that the act of 1871 was repugnant to the constitution of Illinois; the bonds due under it were void; and the lands intended to be benefited could not be specially assessed by any action taken in conformity with the provisions of that act.

The case of *Blake* v. *People*, 109 Ill. 504, conducts to no other result. That case arose under the act of May 29, 1879, which was passed after the amendment of the state constitution adopted in 1878. That amendment provided that the general assembly might pass laws permitting the owners of lands to construct drains, ditches and levees across the lands of others, and to organize drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, "and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessment upon the property benefited thereby." The new levee district was organized under this act to repair

the levee which had been built under the invalid law of 1871. The objection was raised by a land owner, on the application of the collector of the county for judgment against his land on an assessment, that the old levee had not been built under a law of the State within the meaning of the act and of the constitution, because the act of 1871 was no law. The court held that the point should have been raised before the confirmation of the assessment roll, and came too late. The court also held that it could not take judicial notice that the purpose for which the corporation was created was not to keep in repair levees theretofore constructed under a law of the State, but assuming the question to be properly before the court, that while the act of 1871 was unconstitutional as affecting those over whose lands the drains, levees, etc., were to be constructed without the owners' consent, and those against whose property it was proposed to assess the cost of constructing such drains and levees without their consent, yet that there might be some person so situated as to be precluded from raising the question of the validity of the law. And while, strictly speaking, there neither was nor could be any levee in Illinois constructed under a law of the State, yet that the legislature plainly meant to authorize the completion and repair of levees that had been constructed under an act purporting to be a law, though it was not. The court said: "There was no law in force authorizing the construction of levees over the lands of others (save the act of April 24, 1871) at the time *Updike* v. *Wright*, and *Webster* v. *Levee Commissioners*, were decided. To obviate the effect of those decisions—allow the construction of levees, as well as drains, upon the lands of others—and to authorize the formation of municipal corporations for the purpose of constructing drains and levees, the amendment to section 31, article IV, was submitted to, and adopted by, the people, at the November election, in 1878. The act of May 29, 1879, but repeats, in this respect, the language of that amendment. The levees, therefore, which must have been referred to, because none other could reasonably have been intended, were the levees which had been constructed, but could not be

kept in repair because of the decisions in *Updike* v. *Wright*, and *Webster* v. *Levee Commissioners*."

The act of April 24, 1871, being invalid, the corporate existence of the levee commissioners, and the assessments made at their instance, and the collection of the latter under that act, or under the act of April 9, 1872, entitled "An act to provide for the registration of drainage and levee bonds, and secure the payment of the same," failed with it. But it is contended that while all this may be so as to the general public, yet that appellees, or some of them, have so conducted themselves that they are estopped from asserting such invalidity, and that the Circuit Court should have enforced the assessments exactly as if the law had been a constitutional enactment. The bill sought to collect not only the assessments already made, but asked to have further assessments made to pay the bonds in full, and to maintain and preserve the security; and the court was also asked to declare that the assessments created valid liens upon the lands, and to decree that the bonds sued on were a lien on the assessments and to enforce their collection. In other words, that the court execute the act, either as in itself wholly valid or valid as to these defendants. We are unwilling to assent to the doctrine of legislation by estoppel. The courts cannot, by the execution of an unconstitutional law as a law, supply the want of power in the legislative department.

In *South Ottawa* v. *Perkins*, 94 U. S. 267, this court said: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

In that case the invalidity of the law grew out of the fact

that the journals of the Senate and House did not show the passage of the bill as the constitution required it to be shown. Bonds had been issued, bought innocently, and the town had paid one installment of interest, but it was held that the bonds could not be sustained on the doctrine of estoppel. In this case the bonds were signed, issued and sold by the commissioners, and the interest which was paid was paid by the commissioners. The land owners had no control of the question whether bonds should be issued, and were not in privity of contract with the purchasers of the bonds. As the act, the assessments, and the bonds were void, the land owners, when it was sought to subject their property to those assessments for the payment of the void bonds, could not be estopped on the ground that the law itself, though void, was valid as to them.

Even in the instance of contracts of a corporation beyond the scope of its corporate powers, the law is well settled in this court that nothing which has been done under them or the action of the courts can infuse any vitality into them. *Central Transportation Company* v. *Pullman Company*, 139 U. S. 24.

Daniels v. *Tearney*, 102 U. S. 415, though not precisely in point, is illustrative of the distinction between enforcing an invalid law in an executory way, and awarding relief in respect of things accomplished under it. In that case, the secession convention of the State of Virginia had passed an ordinance providing that any person whose property had been taken on execution, might, by giving a bond for the payment of the judgment, have his goods released so long as the law should remain in force. Porter recovered a judgment against Daniels in the Circuit Court of Jefferson County, and Daniels availed himself of the ordinance by filing the required bond. To a suit brought on the bond by Tearney *et al.*, executors of Porter, after the close of the civil war, the defence was made that the law under which the bond was given was unconstitutional, and so that the bond was void. There was a difference of opinion in the court as to whether the bond was good as a voluntary bond or not, but it was held that conceding the bond to have been wholly void, the judgment upon it ought not to be reversed, on the principle that where a party has availed himself for his benefit

of an unconstitutional law he is estopped as between himself and others not occupying that position from setting up its unconstitutionality as a defence. The obligee of the bond sued on had not availed himself of the void ordinance, but was deprived of his rights by it. He had not in any way, expressly or impliedly, made himself a party to the illegal proceeding, or affirmatively agreed to take any advantage from it, while the consideration of the bond had been fully received by the obligor, who could not, under such circumstances, be permitted to deny a liability put upon the obligee *in invitum*.

It follows that this bill cannot be maintained on the theory of the validity of the act of 1871, even though some other equity might have been asserted if in the exercise of reasonable diligence. The result is not inconsistent with the cases that hold that although a law is found to be unconstitutional, a party who has received the full benefit under it, may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced.

In the case before us, the land owners did not and could not receive the benefits which it was contemplated would accrue to them from the proceedings if they had been valid. As the Circuit Court of Appeals pointed out what the land owners, who promoted the passage of and proceeded under the act of 1871, had in view "was not simply to have a levee constructed, but to have a sufficient levee, which could be repaired from time to time and permanently maintained under legal authority." The scheme embraced not only the construction but the maintenance of the levee and must be looked at in its entirety. "If it be said that the plaintiffs' testator would never have purchased the bonds except in the belief that the act of 1871 was valid, with equal truth it may be said the land owners would never have sought nor desired such legislation except in the belief that the levee would be maintained by the same authority that constructed it." When the law fell, the method of maintaining it by compulsory process also failed, and if it be said that there

was only a partial failure of consideration, it is plain that the consideration was indivisible and not susceptible of apportionment, while the evidence demonstrates that the losses suffered by the land owners by reason of the breaking of the levee exceeded the amount of the bonds in question.

The grounds of estoppel claimed in this case seem to be, that one or more of the defendants secured the passage of the act of 1871; that others actively participated as petitioners and otherwise in the organization of the levee district before the bonds were issued; that others who took no part whatever in any of the proceedings, after the bonds were issued and the law was held to be unconstitutional, united in an attempt to maintain and repair the levee by voluntary contributions; that others, who neither said nor did anything, knowing that the proceedings were pending and that the levee was in course of construction, remained quiescent; that others paid interest on their assessments for the years 1873 and 1874; that others participated in the organization of the new and legal levee district after the constitution of Illinois had been amended and a law passed authorizing the formation of levee districts; and that others purchased lands after the *Webster* case was decided, and their deeds contained certain references to the act of 1871.

We think that the evidence fails to show that Palms relied, or had the right to rely, on the acts, or assurances, or silence, of any of these different classes of land owners, and was thereby misled. He purchased the bonds, not of the land owners, or any of them, nor from the levee commissioners, but in the open market, and on the advice of counsel as to the legality of the proceedings. The land owners who participated in any way in the creation of the drainage district were as vitally interested in the matter as any purchaser of bonds could be, and they acted equally in the mistaken belief that the law was valid. "It is a novel idea," as the Supreme Court of Illinois remarked in *Holcomb* v. *Boynton*, 151 Ill. 300, "in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all." But we need not pursue the discus-

sion, for, in view of the invalidity of the proceedings, if complainants had a cause of action, that cause of action arose before May 4, 1878, when Palms filed his bill, yet the land owners were not proceeded against until the 22d of April, 1889.

The statute of limitations of Illinois provided that actions on unwritten contracts, express or implied, and all civil actions not otherwise provided for, should be commenced within five years next after the cause of action accrued. Courts of equity usually consider themselves bound by the statutes of limitation which govern courts of law in like cases. In the second aspect of their bill appellants did not rely on their bonds as legal instruments, but they sought the aid of a court of equity for the enforcement of a lien in payment of the bonds by reason of an estoppel *in pais*, and the cause of action so created would seem to have been barred by that statute. But courts of equity go farther in the promotion of justice, and where laches exist, deny the relief sought, even though the statutory period may not have run under the applicable statute.

The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief.

Palms purchased these bonds of the contractors to whom they had been delivered by the commissioners, who assumed a right to issue and make that disposition of them by virtue of the power to borrow money granted by the act of 1871. The enterprise of erecting such a barrier to the incursions of the river was, in its nature, hazardous, and the levee required not only the utmost skill in construction, but the utmost effort and vigilance in its repair and maintenance. The transaction was in its nature speculative as the value of the reclaimed lands depended on the permanency of the structure.

The enforcement of the assessments for benefits on which the payment of the cost of the work depended was resisted from the first by certain land owners, who had opposed the scheme as attempted to be authorized, and their legality was brought

to the test as soon as in the orderly progress of judicial proceedings it could be done. The result was that in 1876 the act of 1871 was held void and the assessments illegal. In that same year the levee broke and the lands were devastated. In 1877 some of the land owners raised some thousands of dollars, giving trust deeds as security, for the repair of the levee, the money to be devoted to that purpose exclusively, and repairs were made.

May 4, 1878, Mr. Palms filed his bill, to which the land owners were not made parties. The principal of the first and largest assessment was payable one tenth annually beginning with 1882, but the interest, at the rate of ten per cent per annum from October 1, 1872, was collectible annually, and the interest on the bonds was also payable yearly. The instalments of interest for 1875, 1876 and 1877 had not been paid, and those succeeding remained unpaid.

In 1880 the Circuit Court entered the order permitting Palms to bring in the land owners by filing a supplemental or an original bill; and in that same year there were numerous breaks in the levee.

During the same year a new drainage district was organized under the provisions of the act of 1879, which had been passed in accordance with the constitutional amendment of 1878. Large assessments were levied upon the lands, aggregating hundreds of thousands of dollars, and the money was put into the property. In 1881 the levee broke again, but the new drainage corporation went on with its work. The levee broke again in 1888, and additional assessments were levied.

Palms did not avail himself of the order, in the original cause, of July 7, 1880. He took no further steps, and died November 24, 1886. His executors filed this bill April 22, 1889. The record affords no explanation of the delay, and it seems to us that this was such laches as forbid relief. To enforce these bonds against those by whose courage, energy and expenditure the lands have attained whatever value they now possess, would in our judgment be too inequitable to be permitted.

Mr. Palms knew of the decisions of the Supreme Court of Illinois in the *Webster* and *Updike* cases; of the breaks in the

levee; of the efforts of the land owners to rebuild and maintain it by large expenditures of money; and he could not lie by until after such expenditures, and with the condition of the district and the personnel of its people constantly changing, and then insist that during all this time the parties were under a liability to him which, in equity, they were estopped to deny.

So far as part of the old levee became part of the new levee, the new drainage corporation used it because they could not do otherwise, and besides Palms, as a purchaser of bonds in the open market, was a stranger to the work. Even if the contractors could have claimed an equitable lien on the structure itself, Palms could not, and, indeed, any resort to subrogation is disclaimed by appellants' counsel. Such a claim could not have been successfully maintained under our decision in *Ætna Insurance Co.* v. *Middleport*, 124 U. S. 534. There the town of Middleport had issued certain bonds to aid in the construction of a railroad; the road was constructed and the bonds delivered to the railroad company in payment of the work, and were afterwards sold to the complainant. The Supreme Court of the State of Illinois held the bonds void, and a bill was filed in the Circuit Court of the United States to enforce their collection on the theory of subrogation to the right of the railroad company to enforce the contract evidenced by a vote of the town appropriating the amount involved to pay for the railroad, and the acceptance and fulfillment of the contract by the railroad company. But it was decided that complainant having bought the bonds as negotiable securities from the railroad company, could not be substituted to any rights which it might have had against the defendants; that no right of subrogation existed; that subrogation was applicable only in cases where a junior incumbrancer was forced to pay off a superior lien for the protection of his rights, or in some similar case; and that a mere volunteer was not entitled to claim the right.

It is worthy of remark that the decree of the Circuit Court in that case was placed on the ground that the right of action of the railroad company, resting only in parol, was barred by the statute applicable to contracts not in writing. Blodgett, J., 31 Fed. Rep. 874.

Here no bonds were ever sold by the commissioners to Palms or any one representing him. They were delivered to the contractors and were taken in payment at ninety cents on the dollar of their face value. If the acts of any of the land owners created any equities against them it was in favor of the contractors, and these equities could not be asserted by Mr. Palms, unless by subrogation, which could not be availed of. And if it could be held that the money of Mr. Palms did enter into the construction of the levee, yet it was inextricably intermingled with that furnished by private individuals, by the new levee and drainage district, by three railroad companies, and by the United States government, the total aggregating half a million dollars, from 1877 to 1893.

In *Litchfield* v. *Ballou*, 114 U. S. 190, it was held that a creditor who had loaned to a municipal corporation, in excess of the amount of the indebtedness authorized by the constitution, money which had been used in part for the construction of public works, was not entitled to a decree in equity for the return of his money, because the municipality had parted with the specific money and it could not be identified; that a bill in equity praying for the return of specific and identical moneys borrowed by a municipal corporation from complainant in violation of law would not support a general decree that there was due from the municipality to him a sum named, which was equal to the amount borrowed; and further, that a constitutional provision forbidding the municipality from borrowing money operated equally to prevent moneys loaned to it in violation of this provision and used in the construction of a public work, from becoming a lien upon the works constructed with it.

And if in this case any ground of relief on the theory of implied contract ever existed, the want of diligence presented an insuperable bar to its assertion.

Decree affirmed.

Mr. Justice Brown did not hear the argument and took no part in the decision of this case.

TULLOCK *v.* MULVANE.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 59. Argued October 25, 28, 1901.—Decided March 3, 1902.

The propositions in this case involving Federal questions were duly raised below.

Previous to the bringing of the suit in the state court upon the bond, by stipulation filed in the equity cause in the United States court, upon which an order of the court was entered, the bill of complaint had been dismissed as to all the defendants but Mulvane, and it was expressly agreed that all demand for relief by way of specific performance should be withdrawn.

The Circuit Court of Appeals correctly decided that the necessary effect of this agreement was to withdraw from the case all controversy on the subject of the injunction. As by the stipulation Mulvane had not waived any rights of action by reason of damages caused by the injunction, if any, but on the contrary his rights were expressly saved, and as the stipulation was made the basis of an order of the court which had the necessary effect to dismiss from the cause all the grounds upon which alone the rightfulness of the injunction could have been asserted, we think there was a final decision, within the import of the condition of the bond, that the injunction ought not to have been granted.

The claim of immunity from liability for attorney's fees as one of the elements of damage under the injunction bond presented a Federal question, which was incorrectly decided by the court below in holding that it was proper to award the amount of such fees in enforcing the bond.

A bond given in pursuance of a law of the United States is governed, as to its construction, not by the local law of a particular State, but by the principles of law as determined by this court, and operative thoughout the courts of the United States.

GEORGE P. WESCOTT and Samuel Hanson were complainants in a bill in equity which was filed, on January 13, 1893, in the Circuit Court of the United States for the District of Kansas. Joab Mulvane and various other persons and corporations were made defendants to the bill. The principal relief sought was to compel the specific performance of a contract alleged to have been entered into between the complainants and Mulvane for the sale by the latter and purchase by the former of all the capital stock of the Topeka Water Supply Company, a Kansas cor-

poration, also a defendant to the suit. Incidentally it was sought to annul a purported sale of the waterworks plant to another of the defendants, the Topeka Water Company, a Kansas corporation, which it was asserted had been organized by Mulvane. The bill also sought to prevent the Topeka Water Company from encumbering the plant with a mortgage which, it was averred, was about to be executed, and to restrain the issuing and negotiation of bonds proposed to be secured by such mortgage and the sale or disposition of stock of both the Topeka Water Supply Company and the Topeka Water Company. The members of a copartnership, styled Coffin & Stanton, doing business in the city of New York, whom it was charged were offering to the public for sale the bonds so proposed to be issued, were likewise joined as defendants in the bill.

On February 13, 1890, the court ordered a temporary injunction to issue, as prayed, upon the giving of an approved bond. Two days later, however, it was ordered that instead of a bond the complainants "may deposit with the clerk of this court the sum of $75,000 in cash, and that said deposit shall stand for a bond for all damages from the commencement of this suit until the further order of the court, whereby said complainants will be obligated and bound to pay to the defendants all costs and damages aforesaid, if it shall be finally held that said injunction or restraining order was improvidently granted."

On April 4, 1890, upon a hearing, the court sustained a motion which had been filed on behalf of Coffin & Stanton to dissolve the temporary injunction. The dissolution was predicated upon the ruling that an indispensable party had not been made a defendant and could not be made without ousting the jurisdiction of the court, because such party defendant and the plaintiffs were citizens of the same State.

Thereafter, on June 3, 1890, by leave of court, a formal bond was substituted for the cash deposit which had been made under the order of the court previously stated. A. J. Tullock and W. M. D. Lee were the sureties. The bond recited the order for an injunction, the subsequent permission to deposit cash in lieu of a bond, the making of such cash deposit, the withdrawal of the deposit with the sanction of the court on

the condition that a bond be executed. The fact that the injunction had been in the meanwhile dissolved by the court was also recited. The condition of the bond is reproduced in the margin.[1]

In October, 1890, pursuant to a stipulation made between complainants and certain of the defendants, filed in the cause, the bill was dismissed as to all the defendants except Mulvane, and so much of the bill as sought a specific performance of the alleged contract between complainants and Mulvane was withdrawn. By the stipulation the defendants who were dismissed from the cause expressly waived all right of action upon the injunction bond or otherwise, by reason of the allowance of the temporary injunction.

On September 26, 1892, upon the hearing of the cause as between complainants and Mulvane, the bill was dismissed. The case was then appealed to the Circuit Court of Appeals for the Eighth Circuit. That court decided the appeal on the assumption that the question for decision was whether, in view of all the circumstances attending the making of the agreement between complainants and Mulvane, it was one which a court of equity could specifically enforce. The court observed that the cause had evidently been argued and disposed of in the court below on the theory that under the stipulation, even though the right to have specific performance had been waived, nevertheless damages might be assessed by a court of equity as for a breach of the contract, if the court was of opinion that the ap-

[1] "Now, therefore, if the said George P. Wescott and Samuel Hanson shall pay, or cause to be paid, to the said Joab Mulvane, the Topeka Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, and to each of them, all damages which they, or either of them, have already sustained or may at any time sustain by reason of the granting or issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be finally decided that said restraining order or said temporary injunction ought not to have been granted, or the withdrawing from the hands of the clerk the said sum of seventy-five thousand dollars deposited in lieu of the bond as required by the court to be given, then the above obligation shall be null and void; otherwise shall be and remain in full force and effect."

pellants were, at the time the bill was filed, entitled to specific performance. Assuming, then, the regularity of this procedure, and its power as an equity court to execute the agreement, the court reviewed the evidence, and held that the complainants were not at the time the bill was filed entitled to the specific performance of the contract, for the reason that they had never put the defendant Mulvane in default by tendering him the sum which he was entitled to receive under the contract of sale, to enforce which the bill had been filed. The court further observed :

"It is assigned for error that the Circuit Court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think is all sufficient to say, that the appellants cannot be heard to complain in this court of the order dissolving the temporary injunction after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn, the injunction necessarily shared the same fate."

Intermediate the dismissal of the bill by the Circuit Court and the affirmance of the decree of dismissal by the Circuit Court of Appeals, Mulvane, on November 5, 1892, instituted the present action in the state district court of Shawnee County, Kansas, against A. J. Tullock and W. M. D. Lee, the sureties upon the injunction bond above referred to. In this action recovery was sought for the sum of $75,000 as damages sustained by reason of the injunction. Service was not made upon Lee, however, and the action was prosecuted solely against Tullock. An answer was filed, which consisted of a general denial and a plea that the action was prematurely brought because of the pendency of the appeal in the Circuit Court of Appeals.

The action in the state court was tried to a jury. Because of the ruling by the trial judge, in excluding evidence as to expenditures for attorneys' fees in procuring the dissolution of the

injunction, Mulvane prosecuted error, and the judgment entered by the trial court was held by the Supreme Court of Kansas to be erroneous because of such ruling. 58 Kansas, 622.

A new trial was thereupon had in the lower court. At this trial, on the offer by Mulvane, the plaintiff, of evidence tending to show payments made by him for attorneys' fees, such evidence was objected to as follows:

"The defendant further objects because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds or in such proceeding in Federal courts attorneys' fees are not included."

At the close of all the evidence, the court allowed the respective parties to amend their pleadings. The petition was amended, among other particulars, by setting out specifically the sum of asserted damage resulting from the payments alleged to have been made by Mulvane to various attorneys in resisting the allowance and procuring the dissolution of the injunction. In the amendment of the answer it was specifically pleaded that the sums paid to the attorneys by Mulvane were not elements of damage embraced within the terms of the injunction bond, if such bond was construed and enforced according to the rules applicable in the courts of the United States as expounded by the Supreme Court of the United States. It was asserted that the bond must be measured by the principles controlling in the court where it was given, and that to hold otherwise would deprive the surety of the protection of the law of the United States, in contemplation of which he had contracted.

After the amendments and in negation of requests for instructions to the jury made by the plaintiff, the defendant asked the court to charge in substance as follows: 1. That as by the condition of the bond liability could not arise until it had been finally determined by the United States court, that the injunction ought not to have been granted, the sureties upon the bond were discharged from liability by the effect of the stipulation filed in the cause in which the injunction had been granted, whereby it resulted that a final determination by the court

Counsel for Parties.

whether the injunction ought not to have been granted was by consent of parties prevented. 2. If the stipulation had not the effect thus claimed, then at the time the action on the bond was commenced an appeal was pending in the Circuit Court of Appeals of the United States from the judgment rendered in the cause, wherein the injunction had been allowed and the bond given, and that the action upon the bond was premature. In addition, the immunity which had been previously asserted, arising from the rule governing in the courts of the United States on the subject of attorneys' fees was, in view of the pleadings and the prior proceedings in the case, reiterated by a request for an instruction that no attorneys' fees could be recovered on the bonds. All the requests of the defendant having been denied and the court having charged the jury to the contrary, a verdict was returned in the sum of $25,000, of which it may be inferred that about the sum of $20,000 was for payments which Mulvane asserted he had made on his own behalf to the attorneys who had represented his interest in resisting the allowance of and procuring the dissolution of the injunction, albeit that most of the attorneys to whom the payments in question were made were likewise attorneys of record for the other defendants who had specifically in the stipulation waived all claims of damages growing out of the injunction. From the judgment rendered on the verdict of the jury the cause was carried to the Supreme Court of Kansas, and in that court it was affirmed. 61 Kansas, 650. The opinion of the court in effect considered and disposed of the claims of alleged Federal right which have been previously referred to, and hold them to be untenable. To this judgment of affirmance error was prosecuted and the cause is here for review.

Mr. W. H. Rossington for plaintiff in error. *Mr. Charles Blood Smith* and *Mr. Clifford Histed* were on his brief.

Mr. N. H. Loomis for defendant in error. *Mr. A. L. Williams* was on his brief.

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

Opinion of the Court.

The assignments of error, though fourteen in number, are reducible to three propositions.

1. A contention that as the bond provided for a liability only in case it was finally decided that the injunction was wrongfully granted, no recovery could be had upon the bond, because the stipulation between the complainants and certain of the defendants had the effect of rendering it impossible to have a final determination in the courts of the United States whether the injunction ought originally to have been granted.

2. A claim on the part of the defendant that as the bond for injunction was executed under the order of a court of equity of the United States, and therefore by an authority exercised under the United States, and as liability was only to arise when it had been finally decided that the injunction ought not to have been granted, action on the bond could not be brought pending an appeal to the Circuit Court of Appeals of the United States, and the final determination by that court of the controversy.

3. An assertion that as, by the settled rule of the courts of equity of the United States, attorneys' fees were not an element of damage covered by the terms of an injunction bond given in such court, recovery of such fees on such bond was not within the purview of the bond when construed with reference to and by the light of the authority under which the bond was given.

It is urged by the defendant in error that these contentions involve no Federal question and that if they do they were not sufficiently set up in the lower courts, and therefore this court has no jurisdiction to review them. We dispose at once of the contention that if the propositions involve Federal questions they were not duly raised below, by referring to the statement which we have made of the case, whereby it appears that the contentions were raised below by the pleadings, by the objections to evidence and by the requests for instructions, and indeed as so raised were expressly considered and directly passed upon by both the trial court and the Supreme Court of the State of Kansas, which latter fact in and of itself suffices to present the Federal question, even if it had been otherwise

ambiguously raised on the record, which is not the case. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648.

In determining whether these Federal questions are involved, we shall for the moment take it for granted that the premises upon which such asserted questions rest are well founded, and if under such hypothesis we find that there is jurisdiction it will then be our duty to put such assumption out of view and determine the merits of the contentions.

Whilst apparently the propositions involve several distinct assertions of Federal right, in their ultimate analysis they reduce themselves to one and the same contention; that is, that a bond given for an injunction in an equity cause in a court of the United States is to be construed with reference to the liability administered in the courts of the United States on that subject as settled by this court. That this fundamental proposition embraces all the contentions would seem to be clear, when it is borne in mind that the controversy as to the stipulation and as to the pendency of the cause in the Circuit Court of Appeals assert both the generic right of the defendant to have the obligations under the bond measured and determined by the law prevailing in the courts of the United States and the claim as to the attorneys' fees propounds but the same right as to one of the elements of damage which it was asserted the bond embraced. Whilst the unity of the propositions is thus demonstrable, as in the court below and in argument they have been separately treated and different considerations have been assumed to apply to them, we shall consider the propositions separately.

We embrace the first two contentions under one heading, as follows:

First. *Did the claim that there had been no breach of the condition of the bond because of the stipulation filed in the cause in which the bond was given and because of the pendency of the appeal in the Circuit Court of Appeals present Federal questions, and, if yes, were they well founded?*

It may not, we think, be doubted that a bond for injunction in an equity court of the United States given under the order of such court is a bond executed in and by virtue "of an author-

ity exercised under the United States." Rev. Stat. sec. 709. Certainly, the courts of the United States derive all their powers from the Constitution and laws of the United States, and their authority is therefore exercised thereunder. Being then an obligation entered into by virtue of such authority, the conclusion cannot be escaped that the defence specially set up that no liability on the bond could arise until the court of the United States in which the controversy was pending had finally determined that the injunction should not have been granted, was the assertion of an immunity from liability depending on an authority exercised under the United States, and therefore necessarily involved the decision of a Federal question. To state the result which must necessarily flow from a contrary deduction is sufficient of itself to demonstrate the unsoundness of the reasoning by which the non-Federal nature of the question can alone be upheld. For it is clear that if it be true that the bond given in a Federal court of equity on the granting of an injunction is not to be construed with reference to the rules of law applicable to such bonds in such court, then there can be no certain general rule by which to determine the liability of the obligors upon the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various States, which would imply that the parties did not contract with reference to any definite rule of liability. Indeed, the argument conduces to a conclusion which necessarily cripples the power of the court under whose order an injunction bond is executed. It is settled that such court has the inherent right to set the bond aside and to determine in its discretion whether recovery could be had upon it. *Russell* v. *Farley*, 105 U. S. 433. And yet if the liability upon the bond when given can be measured in courts other than the court requiring the execution of the bond, by a wholly different rule of liability from that which obtained in the court which had ordered the giving of the bond, it must follow that although the latter court had decreed that the injunction had rightfully issued, yet in an action upon the injunction bond in another forum the sureties might be made to respond in damages without hope of redress.

A reference to some of the decided cases concerning what

constitutes a claim of immunity arising from an authority exercised under the United States, will serve at once to refute the contention that no Federal question is here presented.

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, the question for decision was whether a state court had given due effect to a decree of a court of the United States, and it was asserted that the contention that it had not presented no Federal question. Speaking through Mr. Justice Bradley, the court said (p. 134):

"Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts."

In *Factors' & Traders' Insurance Company* v. *Murphy*, 111 U. S. 738, a court of the United States sitting in bankruptcy had ordered a sale of real property of the bankrupt free from encumbrances. The property was purchased at the sale on behalf of lienholders. Subsequently one who possessed a lien on the property at the time the order was entered and sale made, brought suit in a state court of Louisiana to foreclose such lien, claiming that she had not been a party to the bankruptcy proceedings, and that her lien was unaffected by the sale. The defendant, in whose name title had been taken, while averring that the plaintiff was interested in the purchase at the sale made under the order of the United States court, insisted that the lien of the mortgage of plaintiff had been extinguished by such sale. The state court having decreed in favor of plaintiff, a writ of error was prosecuted from this court. In reversing the judgment of the state court, it was said (p. 741):

Opinion of the Court.

"Counsel for defendant in error deny the jurisdiction of this court and move to dismiss the writ. But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the District Court of the United States, to sell the mortgaged property free from incumbrance. Both parties assert rights under this order and sale. Plaintiffs in error assert that the sale as made was valid, and, being sold free from incumbrances, extinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under Federal authority, and as the right of plaintiff in error was denied by the court the writ of error lies."

In *Avery* v. *Popper*, 179 U. S. 305, the two cases last above referred to were approvingly cited, and the rule was declared to be that where a controversy in the state court presented a contention as to the validity or proper construction of an order or decree rendered by a court of the United States, a Federal question was presented reviewable by this court (p. 314).

In *Crescent Live Stock Company* v. *Butchers' Union*, 120 U. S. 141, the facts were briefly these: Under a bill filed in a Circuit Court of the United States, a temporary injunction had been allowed after hearing, and a bond had been given under an order of the court, the injunction was perpetuated by the Circuit Court on the final hearing. The case was appealed to this court, and the decree of the Circuit Court was reversed. Suit was brought in a court of the State of Louisiana upon the injunction bond given in the Federal court, against the principal and surety *in solido* and against the principal alone, to recover damages for the malicious prosecution of the injunction suit in the Federal court. It was claimed by the defendants that the final decree of the Circuit Court of the United States, although subsequently reversed by this court, constituted probable cause, and therefore there could be no recovery on the alleged cause of action for malicious prosecution. Both the state trial court by way of instructions to the jury and the Supreme Court of Louisiana decided that the decree of the Circuit Court of the

United States did not constitute probable cause, because prior to the decision of the Circuit Court of the United States a contrary view to that which the Circuit Court adopted had been announced by the highest court of the State of Louisiana. The jurisdiction of this court to review the controversy was challenged upon the very grounds now relied upon, and the court said (p. 146):

"It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the courts of that State is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final; and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States."

In *Meyers* v. *Block*, 120 U. S. 206, the case came to this court on error to a state court, and involved the correctness of the construction by that court of the terms of an injunction bond given in a court of the United States. This court treated the matter of jurisdiction as one of course, held that the parties signing the bond must be presumed to have been cognizant of the order under which the bond was given, and to have contracted in reference thereto, and that the bond should be read in the light of the order, and the court applied to the interpretation of the bond its own views of the applicable principles of law.

The cases of *New York Life Insurance Co.* v. *Hendren*, 92 U. S. 286; *Provident Savings Society* v. *Ford*, 114 U. S. 635; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571, and others of like character, do not conflict with the rule which we apply in this cause, and which was expounded in the cases to which we have previously referred. This results when it is observed that none of the cases just above referred to involved

the construction or effect of a law of the United States or a judgment, decree or order or other act done under and by virtue of the authority of a court of the United States or a claim of immunity thereunder.

The contention as to the prematurity of the suit presenting then a Federal controversy, the question is, was the claim of prematurity well founded?

Previous to the bringing of the suit in the state court upon the bond, by stipulation filed in the equity cause in the United States court, upon which an order of the court was entered, the bill of complaint had been dismissed as to all the defendants but Mulvane, and it was expressly agreed that all demand for relief by way of specific performance should be withdrawn. We think that the Circuit Court of Appeals correctly decided that the necessary effect of this agreement was to withdraw from the case all controversy on the subject of the injunction. As by the stipulation Mulvane had not waived any rights of action by reason of damages caused by the injunction if any, but on the contrary his rights were expressly saved, and as the stipulation was made the basis of an order of the court which had the necessary effect to dismiss from the cause all the grounds upon which alone the rightfulness of the injunction could have been asserted, we think there was a final decision, within the import of the condition of the bond, that the injunction ought not to have been granted. As respects the argument that by reason of the execution of the stipulation, the sureties upon the injunction bond were absolutely discharged, because thereby a final determination of the rightfulness of the allowance of the injunction was prevented, we think it obvious that the sureties when executing the bond did so, subject to the right of the complainants in good faith to dismiss their bill, or to make a stipulation such as that we have referred to, which was in effect the equivalent of the dismissal of the bill in so far as all equitable relief was concerned. We are thus brought to consider the second contention, which is,

Second. *Did the claim of immunity from liability for attorneys' fees, as one of the elements of damage under the injunction bond, present a Federal question; and if yes, was it cor-*

rectly decided by the court below that it was proper to award the amount of such fees in enforcing the bond?

The first branch of this question has already been disposed of by the reasons given and authorities cited in the consideration of the proposition previously passed upon. It is insisted, however, that such is not the case, because whilst it is true the courts of the United States exercise their authority under the Constitution and laws of the United States, that, as there is no express statutory authority regulating injunction bonds, therefore in determining the measure of liability on them no claim of immunity arising from an authority exercised under the United States can arise. But this is a mere form of restating the contention we have already disposed of. The test is not the particular source, or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it.

Besides, by express provision of the Revised Statutes (sec. 617) proceedings of the courts of the United States in equity causes are subject to regulation by this court, with power to modify and change such rules. And rule No. 90, promulgated under the authority thus conferred, provides as follows:

"In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may be reasonably applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

And it is by the force and effect of this rule that the equity courts of the United States exercise their power with respect to the exaction of security when granting writs of injunction. *Russell* v. *Farley*, 105 U. S. 433.

It follows that proceedings in courts of equity of the United States are regulated by rules promulgated by this court deriving their force from statutory authority, and the argument which we have just considered, even if it were not erroneous,

would be inapposite. The jurisdiction to review being then established, it remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the bond. That they were not, is settled.

In *Oelrichs* v. *Spain*, 15 Wall. 211, this court, speaking through Mr. Justice Swayne, said (p. 230):

"The decree of the court below was preceded by the report of a master, which the decree affirmed and followed. Upon looking into the report we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees, as a part of the damages covered by the bonds.

"In *Arcambel* v. *Wiseman*, 3 Dall. 306, decided by this court in 1796, it appeared 'by an estimate of the damages upon which the decree was founded, and which was annexed to the record, that a charge of $1600 for counsel fees in the courts below had been allowed.' This court held that it 'ought not to have been allowed.' The report is very brief. The nature of the case does not appear. It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent. *Tesse* v. *Huntingdon*, 23 How. 2 (64 U. S. XVI. 479); *Whittemore* v. *Cutter*, 1 Gall. 429; *Stimson* v. *The Railroads*, 1 Wall. Jr. 164. They cannot be allowed to the gaining side in admiralty as incident to the judgment beyond the costs and fees allowed by the statute. *The Baltimore*, 8 Wall. 378 (75 U. S. XIX. 463).

"In actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions *ex delicto* vindictive damages may be given by the jury. In regard to that class of cases this court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.' *Day* v. *Woodworth*, 13 How. 370, 371.

"The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant and *assumpsit* damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed then are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

"We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

It is strenuously urged, however, and this was in effect the view taken by the court below, that although the rule against allowing attorneys' fees in actions on injunction bonds was thus settled by this court adverse to the right to recover such fees, as the local law was to the contrary, the injunction bond given in the Federal court must be enforced, not by the law of the forum in which it was given, but according to the rule of the local law. This proposition, again, however, but embodies the contention that the question of the allowance of attorneys' fees involved no Federal question, which has already been disposed of. For if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with

reference to the authority under which it was given and the principles of jurisprudence controlling such authority, and not by the local law. To hold the contrary, as we have previously pointed out, would be but to declare that although the power conferred by Congress upon this court to adopt equity rules is controlling, nevertheless the interpretations of the rules and the limitations which arise from a proper construction of them, as expounded by this court and enunciated in its decisions, are without avail. And this yet further points out the fallacy involved in the contention that the lower court, in passing upon the issues, decided merely a question of general law involving no Federal controversy. Now it is at once conceded that the decision by a state court of a question of local or of general law involving no Federal element does not as a matter of course present a Federal question. But where on the contrary a Federal element is specially averred and essentially involved, the duty of this court to apply to such Federal question its own conceptions of the general law we think is incontrovertible. *Avery* v. *Popper*, 179 U. S. 305, 315.

Whilst in the absence of authority the foregoing considerations suffice to dispose of the case, it is also effectually concluded by authority. *Bein* v. *Heath*, 12 How. 168. In that case, as in this, it was insisted that the local law should have been applied in construing and enforcing an injunction bond given in a court of the United States. But the court, in negativing the contention, speaking through Mr. Chief Justice Taney, said (p. 178):

"Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the State. The proceeding in a Circuit Court of the United States in equity is regulated by the laws of Congress, and the rules of this court made under the authority of an act of Congress. And the ninetieth rule declares that, when not otherwise directed, the practice of the High Court of Chancery in England shall be followed. The eighth rule authorizes the Circuit Court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and

mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.

"And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court may grant it or not, according to the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery, as contra-distinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

"In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the State."

Indeed, the principles announced in *Bein* v. *Heath* were in effect but the reiteration of the doctrine previously established by this court, that a bond given in pursuance of a law of the United States was governed, as to its construction, not by the local law of a particular State, but by the principles of law as determined by this court, and operative throughout the courts of the United States. *Cox* v. *United States*, 6 Pet. 172; *Duncan's Heirs* v. *United States*, 7 Pet. 435.

It follows from what we have stated that there was error committed in allowing the recovery of attorneys' fees as an element of damage upon the bond in question.

The judgment of the Supreme Court of Kansas must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion, and it is so ordered.

FULLER, C. J., HARLAN and BROWN, JJ., dissenting.

MR. JUSTICE HARLAN, with whom concurred THE CHIEF JUSTICE and MR. JUSTICE BROWN, dissenting.

This was an action in one of the courts of the State of Kansas upon an injunction bond executed in a suit in equity in the Circuit Court of the United States for the District of Kansas—the condition of the bond being that the obligors would pay or cause to be paid to the obligees and to each of them, "all damages which they, or either of them, have already sustained, or may at any time sustain, by reason of the granting and issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be finally decided that said restraining order or said temporary injunction ought not to have been granted."

There was a verdict and judgment against Tullock, one of the sureties in the bond. Mulvane, the plaintiff, being dissatisfied with the amount of the verdict and the rulings of the trial court, prosecuted a writ of error to the Supreme Court of Kansas, where the judgment was reversed and the cause remanded for another trial. *Mulvane* v. *Tullock*, 58 Kansas, 622. That court said (p. 632):

"That counsel fees are recoverable as damages upon an injunction bond has been the uniform holding of this court from the beginning, and this appears to be the view taken by most of the courts of the country. *Underhill* v. *Spencer*, 25 Kansas, 71; *Loofborow* v. *Shaffer*, 28 Kansas, 71; *Loofborow* v. *Shaffer*, 29 Kansas, 415; *Nimocks* v. *Welles*, 42 Kansas, 39; 10 Am. & Eng. Ency. of Law, 999, and cases cited. It appears, however, that there are some decisions of the Federal courts to the contrary, holding that the obligation of an injunction bond imposes no duty upon the obligor to pay the attorney's fees if the injunction is wrongfully obtained. *Arcambel* v. *Wiseman*, 3 Dallas, 306; *Oelrichs* v. *Spain*, 15 Wall. 211. It is contended that, as the bond was given in a case in one of the Federal courts, the obligation must be interpreted in accordance with the decisions of those courts. The claim is that the rules and decisions of the Supreme Court of the United States have the force of legislative declarations; that they enter into, and become a part of, the

contract of the sureties, who can only be held liable for such consequences as are the direct result of the breach and were within their contemplation at the time the bond was executed. No statute, however, prescribed the conditions of the bond nor limited the extent of liability thereon. It is true that it was within the general equitable power of the Federal court to prescribe the conditions upon which the injunction should issue. It could have granted an injunction without requiring a bond, or it might, in its discretion, have imposed such terms as it saw fit as a condition of granting the injunction. It did require the giving of a bond, and the bond was executed in accordance with the order of the court. The bond executed is in the ordinary form; is in the nature of a contract; and the liability of the obligors depends, not on the Federal Constitution or a Congressional act, but on the proper interpretation of the bond itself. In the absence of a statute fixing the measure of damages or limiting the recovery, we think the bond should be viewed in the light of an independent contract, and is to be interpreted by the general principles of the common law. It is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal court. Being an independent contract, actionable in any state court where service upon the sureties can be obtained, the interpretation of the forum applies. As the action on the bond could be brought in the state court—and, indeed, the present action could not have been brought in any other—it cannot be said that the sureties contracted with reference to the view of the law taken by the Federal courts. They knew that the obligation was enforceable in the courts of the State of which the plaintiff and defendants were all residents, and that the highest court of that State had consistently held that counsel fees were recoverable upon an injunction bond. That the bond was given in a Federal court, where a different rule of interpretation obtains, has not been deemed to affect the state court in determining the liability upon such bond when suit was brought thereon. *Mitchell* v. *Hawley*, 79 California, 301; *Hannibal & St. Joseph Railroad* v. *Shepley*, 1 Mo. App.

254; *Wash.* v. *Lackland*, 8 Mo. App. 122; *Aiken* v. *Leathers*, 40 La. Ann. 23; *Corcoran* v. *Judson*, 24 N. Y. 106."

In addition to *Corcoran* v. *Judson*, 24 N. Y. 106, cited by the state court, see *Coates* v. *Coates*, 1 Duer, 664; *Edwards* v. *Bodine*, 11 Paige, 223, and Sedgwick on Damages, 177; also, *Barton* v. *Fisk*, 30 N. Y. 166, 171; *Behrens* v. *McKenzie*, 23 Iowa, 333, 342; *Ford* v. *Loomis*, 62 Iowa, 566, 588; *Cook* v. *Chapman*, 41 N. J. Eq. 152, 154; *Noble* v. *Arnold*, 23 Ohio St. 264, 270; *Morris* v. *Price*, 2 Blackf. 457; *Derry Bank* v. *Heath*, 45 N. H. 524; *Ryan* v. *Anderson*, 25 Ill. 372; *Garrett* v. *Logan*, 19 Alabama, 344.

At the second trial Mulvane obtained a verdict and judgment which embraced his counsel fees in the injunction suit, and that judgment having been affirmed by the Supreme Court of Kansas, (61 Kansas, 650,) it is sought to have it reviewed by this court, under section 709 of the Revised Statutes, upon the ground that by the action of the Supreme Court of Kansas the plaintiff in error, Tullock, was denied an "immunity" belonging to him under an "*authority* exercised under the United States." The *immunity* so claimed is that he, Tullock, was erroneously held to be liable for the attorneys' fees which the obligee in such bond paid or became bound to pay in or about obtaining or dissolving the injunction in the suit in the Federal court.

Can this court review the action of the state court upon any such a question? Is it true that the alleged "immunity" arises from an "*authority* exercised under the United States?"

In *Avery* v. *Popper*, 179 U. S. 305, 314, 315, this court, speaking by Mr. Justice Brown, said: "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 those 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." Again: "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."

Surely this case does not involve a Federal immunity simply because the bond in suit was taken under the authority of the Circuit Court of the United States. If it does, then this court erred in its decision in *Provident Savings Society* v. *Ford*, 114 U. S. 635, (reaffirmed in many subsequent cases,) in which it was contended that a suit upon a judgment rendered by a Federal court necessarily involved questions arising under the laws of the United States. That contention was overruled. This court, speaking by Mr. Justice Bradley, said: "What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might

be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States."

In *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571, it was held that the judgment of the Supreme Court of a State could not be reviewed simply because the case involved a contest between rival claimants of a mine under certain sections of the Revised Statutes. To the same effect are *Florida Central & Peninsular Railroad Co.* v. *Bell*, 176 U. S. 321; *De Lamar's Mining Co.* v. *Nesbitt*, 177 U. S. 523; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.

There is no question in this case as to the validity of any authority exercised under the United States. The only question is as to the rights of one party and the liabilities of the other party under an ordinary injunction bond. What those rights and liabilities are cannot be determined by reference to the Constitution or any statute of the United States. Nor has any rule been adopted by the Circuit Court of the United States limiting the legal effect of the words of the bond or declaring what damages should be covered by it. Of course, if Congress had enacted a statute prescribing the form of injunction bonds, and directing what liabilities should arise thereon against the obligors, that statute would control. But no such statute has been passed, and the question is left to be determined by the principles of general law.

Reference has been made to *Oelrichs* v. *Spain*, 15 Wall. 211, in support of the proposition that the question presents an "immunity" which exists under Federal authority. That case was brought in a Circuit Court of the United States. It does decide that attorneys' fee should not be allowed in a suit on injunction bonds. But there is in the opinion no hint even that the decision as to what damages can be allowed in such a suit rests upon a Federal ground. On the contrary, the court, after citing some authorities, says that "the principle of disallowance rests on a solid foundation, and that the opposite view is forbidden by the analogies of the law and sound policy."

We have been referred also to Equity Rule 90 of this court, which declares that "the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may be reasonably applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." I cannot perceive that this rule has any pertinency, as it relates merely to *practice*, and not to the principles of law by which the rights and obligations of parties to injunction bonds are determinable.

Bein v. *Heath*, 12 How. 168, 178, has been cited as showing that in allowing attorneys' fees the state court invaded a Federal right. That was a suit in the Circuit Court of the United States on an injunction bond taken in the same court. The trial court determined the case according to a statute of Louisiana defining the rights and obligations of the parties. This court held that "in proceeding upon such a bond, the court would have no authority to apply to it the *legislative* provisions of the State. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit." Absolutely nothing is to be found in the opinion of the court sustaining the proposition that the rights and obligations of the parties to an injunction bond are determinable upon any principle of a *Federal* nature. The court referred to the 90th and 8th Equity rules, as furnishing authority for the *taking* of injunction bonds, but took care to say that those rules relate only to "forms of proceeding and mode of practice," and not to "the rights and obligations of parties to injunction bonds." And what was said in that case touching the rights and obligations of parties to injunction bonds was an expression of the views of the state court as to the general principles of law applicable in such cases. This is apparent from the extract given in the opinion of the court

from the opinion in *Bein* v. *Heath*. In *Meyers* v. *Block*, cited in the opinion in this case, 120 U. S. 206, 211, the court said that there was no question "as to the power of a court of equity to impose any terms in its discretion as a condition of granting or continuing an injunction." *Russell* v. *Farley*, 105 U. S. 433. Consequently the terms being prescribed, their meaning, in the absence of a statute, depends upon general, not Federal law.

Cases have been cited which show that this court can re-examine the final judgment of the highest court of a State which fails to give due effect to a judgment, decree or order of a court of the United States. But such cases have no pertinency to the present discussion; for in the present case the state court did not disregard any judgment, decree or *order* of the Federal court. It did nothing more than enforce its views as to the rights and obligations of parties under a bond theretofore taken in a suit in a Federal court.

Meyers v. *Block*, cited in the opinion, shows that our jurisdiction in that case was maintained solely because the case involved the question whether the injunction bonds there in suit were in conformity with the order of the Federal court in which they were taken.

In *N. Y. Life Ins. Co.* v. *Hendren*, 92 U. S. 287, which was brought here from the highest court of Virginia, it was said: "The case, therefore, having been presented to the court below for decision upon principles of general law alone, and it nowhere appearing that the Constitution, laws, treaties or executive proclamations of the United States were necessarily involved in the decision, we have no jurisdiction." In *United States* v. *Thompson*, 93 U. S. 586, which came here from the highest court of Maryland, and in which suit the United States was a party, seeking payment of a debt it held against an insolvent partnership, the court said: "It is not contended that this decision is repugnant to the Constitution, or any law or treaty of the United States; but the argument is, that, as the check of McFreely & Hopper was not paid, it did not pay their debt. Whether this is so or not does not depend upon any statute of the United States, but upon the principles of general law alone. We have

many times held that we have no power to review the decisions of the State courts upon such questions. *Bethel* v. *Demaret*, 10 Wall. 537; *Delmas* v. *Ins. Co.*, 14 Wall. 666; *Ins. Co.* v. *Hendren*, 92 U. S. 287; *Rockhold* v. *Rockhold*, 92 U. S. 130." In *San Francisco* v. *Scott*, 111 U. S. 268, referring to the question as to the effect of an alcalde grant of the pueblo title, and which was decided by the Supreme Court of California, it was said: "This does not depend on any legislation of Congress, or on the terms of the treaty, but on the effect of the conquest upon the powers of local government in the pueblo under the Mexican laws. That is a question of general public law, as to which the decisions of the state court are not reviewable here. This has been many times decided."

Let it be observed that the jurisdiction of the state court, as between the parties and as to the subject-matter, is not disputed. The question before it was as to the extent of the liability of the sureties in the injunction bond. The decision of that question did not depend, in any degree, upon the Constitution or statutes of the United States. It depended entirely upon the meaning of the words of the bond, and the principles of law applicable to such an instrument. It was manifestly, therefore, a question of general law as distinguished from Federal law. Upon such a question the state court was entitled to give effect to its own views. The question could not become a question of Federal law by reason alone of the fact that the bond was executed under the authority of the Circuit Court; for, as already said, neither the *order* under which the bond was taken, the validity of the bond nor the authority of the court was disputed. Nor could it become a Federal question because of any decision by this court in cases theretofore decided between other parties. Suppose this court had not, prior to the trial of this case, expressed any opinion upon that question of general law. Could it then have been contended that the judgment complained of denied any Federal immunity? If not, then the Federal immunity now claimed arises entirely from the failure of the state court to take the same view of a question of general law which this court took in prior cases between other parties. There has been a wide difference of opinion between this court and some of the state

courts upon certain questions of general law. But it has never been supposed that any one has such a vested interest in the views of this court upon questions of general law that he may complain of the refusal of a state court to accept those views as denying him an "immunity" existing or belonging to him, in virtue of an "authority exercised under the United States." In *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S. 371, 390, which came to this court from the highest court of Minnesota, it was said: "The fact that the Supreme Court of Minnesota, in the present cases, did not acquiesce in the correctness of the decision of the Circuit Court of the United States, did not constitute a Federal question. Neither the Constitution of the United States nor any act of Congress guarantees to a suitor that the same rule of law shall be applied to him by a state court which would be applied if his citizenship were such that his suit might be brought in a Federal court."

Or, suppose two actions were brought in the Federal court (there being diversity of citizenship in each case) one on an injunction bond executed in a Circuit Court of the United States, and the other upon a like bond executed in a state court. What would be the ruling as to the measure of damages? Would the court disallow counsel fees in the first case and allow them in the second case where the highest court of the State had established the principle that counsel fees could be recovered? Each branch of the latter question must, upon the principles of the opinion just delivered, be answered in the affirmative. But they cannot be so answered without placing the decisions of the courts upon a question of general law, on the same basis as a legislative enactment prescribing the measure of damages in suits on injunction bonds.

Being unable to assent to the principle that a Federal immunity arises when a state court, in determining a question not involving the Constitution or laws of the United States nor the validity of an authority exercised under the United States, reaches a conclusion upon a question of general law different from that announced in prior cases by this court and denying our authority to compel a state court to disregard its own views

upon a question of general law, I am constrained to dissent from the opinion and judgment.

MR. CHIEF JUSTICE FULLER and MR. JUSTICE BROWN concur in this opinion.

MONROE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 98. Submitted January 14, 1902.—Decided March 10, 1902.

The approval of the Chief of Engineers was necessary to the legal consummation of the contract in this case.

A final reviewing and approving judgment was given to the Chief of Engineers, by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract.

The contract was not approved, and the legal consequence of that cannot be escaped.

THE appellants brought suit against the United States in the Court of Claims for the sum of $25,485.89, for expenses incurred and for damages. The latter consisted of losses suffered by them by the breach of a contract entered into by the United States through W. S. Marshall, Captain in the Corps of Engineers. The contract was made in pursuance of an advertisement made by the United States, inviting proposals for constructing a canal to be known as the Illinois and Mississippi Canal, upon the terms, conditions and specifications set forth in an exhibit which was attached to and made a part of the petition.

The contract contained the following clause: "This contract shall be subject to approval of the Chief of Engineers, United States Army." There was no averment that the contract had been so approved, and the United States demurred. The demurrer stated: "Not only does the contract itself, a copy of which is attached as above, fail to show that the same was ever approved by the Chief of Engineers, U. S. A., but the testimony in the

case fully and conclusively shows, and the same is not denied by the claimant, that said contract has never been approved by the said Chief of Engineers, U. S. A., in any manner whatsoever."

It was prayed that the petition "be quashed and the action be dismissed accordingly."

The action of the court is expressed in the following order: "Allowed in part and judgment for defendants on findings of fact filed."

As a conclusion of law from the findings the court ordered the petition dismissed and a formal judgment was entered accordingly. 35 Court of Claims Rep. 199. This appeal was then taken.

The findings of fact are as follows:

On or about the 25th of May, 1892, the United States through W. S. Marshall, a Captain in its Corps of Engineers, advertised for proposals for constructing a canal to be known as the Illinois and Mississippi Canal. The claimants submitted a bid to do certain parts of the work. The bid was accepted by Captain Marshall, acting under an authority contained in a letter from the Chief of Engineers of the United States Army.

"On the 20th day of July, 1892, Captain Marshall forwarded to claimants the formal contract, annexed to and forming part of the petition, and bonds to be executed within ten days thereafter, all which claimants fully executed and returned to the said engineer on the 28th day of July, 1892, which formal contract was duly signed by Captain Marshall. The form of the contract had been prepared by the Chief of Engineers and forwarded to Captain Marshall for use in such cases.

"Immediately upon receiving notice of the acceptance of their said bid claimants began preparation for the commencement of said work. They shipped their plant from Portsmouth, Ohio, to Rock Island, Ill.; rented and furnished a boat and had the same taken to Rock River, in the vicinity of the work, to be used as a boarding house for men employed on the work; built stables for their teams; hired men and teams; purchased a large amount of plant, consisting of shovels, plows, scrapers and the like, and generally equipped themselves in a proper

manner to expeditiously perform the work, and commenced the work with men and teams about the 1st day of August, 1892.

"On the 6th day of August, 1892, without fault on their part and while the work was progressing, claimants were stopped by the United States and their contract abrogated against their consent, and the work that they had contracted to do readvertised, for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract binding the contractor not to permit his workmen to labor more than eight hours per day, and the United States refused to permit claimants to continue the work either under the terms of the contract or under the terms of the law of August 1, 1892, but immediately, and against the protest of claimants, readvertised and let the said work to other parties.

"In the prosecution of said work under said contract, prior to the abrogation thereof on August 6, 1892, claimants expended the sum of $678.21, which has not been paid to them.

"By reason of the abrogation of said contract claimants lost the following sums expended and were deprived of the following profits which they would have made in the execution of said work:

"Expenses incurred.....$ 678 21
"Profits if they had been permitted to perform...7150 00"

Mr. John C. Fay for appellants.

Mr. Assistant Attorney General Pradt and *Mr. Franklin W. Collins* for appellees.

Mr. Justice McKenna delivered the opinion of the court.

We agree with counsel that the question in the case is a narrow one. It is not denied that the approval of the Chief of Engineers was necessary to the legal consummation of the contract. It is, however, insisted that the approval was not required to be formally expressed, but could and did consist of

acts preceding the written instrument, though the latter contained the terms and covenants of the parties. In other words, it is contended that the advertisement, claimants' bid made under competition, which was submitted to the Chief of Engineers, who, after some correspondence with the engineer in Chicago in relation thereto, had in writing directed it to be accepted, the preparation of the formal contract on a blank furnished by the Chief of Engineers, its execution by both the officer in charge and the claimants, in due form and in strict accordance with the provision of section 3744 of the Revised Statutes, constituted an approval.

We are unable to assent to this view. It is the final written instrument that the statute contemplates shall be executed and signed by the parties, and which shall contain and be the proof of their obligations and rights. And it was such written instrument that was to be approved by the Chief of Engineers. The approval was to be a future act. The provision of the contract was: "This contract" (that is, the instrument to which the contracting officer and the claimants attached their signatures and seals) "shall be subject to approval of the Chief of Engineers of the United States Army." The approval, therefore, did not consist of something precedent, but was to consist of something subsequent. That which preceded was inducement only, and contemplated an instrument of binding and remedial form, and hence to contain covenants imposing obligations and giving rights and remedies, containing provisions for the time of performance and the manner of it; provisions for changes and for extra work—indeed, of the provisons which prudence and necessity require and those which the statutes of the United States might require. And the final right to see that this was done, the parties agreed, should be devolved on the Chief of Engineers, and it was not satisfied by prior instructions. In other words, a final reviewing and approving judgment was given to the Chief of Engineers, and was given by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract. If the covenant did not mean that, it was idle. Construed as prospective, it had a natural purpose. The engagement of the parties

did not end with the bid and its acceptance. The performance of the work was to be secured, and the final judgment of what was necessary for that, as we have already said, was to be given by the Chief of Engineers.

The case of *United States* v. *Speed*, 8 Wall. 78, cited by appellants, is not apposite. In that case the facts were that the Secretary of War, through the Commissary General, "authorized Major Simonds, at Louisville, in October, 1864, and during the late rebellion, to buy hogs and enter into contracts for slaughtering and packing them to furnish pork for the army. On the 27th of October, Simonds, for the United States, and Speed, made a contract by which the live hogs, the cooperage, salt and other necessary materials, were to be delivered to Speed by the United States, and he was to do the work of slaughtering and packing. The contract was agreed to be subject to the approval of the Commissary General of Subsistence. No advertisements for bids or proposals were put out before making the contract, nor did the contract contain a provision that it should terminate at such times as the Commissary General of Subsistence should direct. After the contract was made, Simonds wrote—as the facts were found under the rules, by the Court of Claims, to be—to the Commissary General, informing him substantially of its terms; but no copy of it nor the contract itself was presented to the Commissary General for formal approval. The Commissary General thereupon wrote to Simonds, expressing his satisfaction at the progress made, and adding: 'The whole subject of porkpacking at Louisville is placed subject to your direction under the advice of Colonel Kilburn.'"

After reciting those facts this court said by Mr. Justice Miller: "We are of the opinion that, taking all this together, it is a finding by the court as a question of fact that the contract was approved by that officer; and inasmuch as neither the instrument itself nor any rule of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did."

In *United States* v. *Speed*, therefore, the acts which were held to constitute an approval of the contract relied upon were

subsequent to the contract, and referred to it. In the case at bar it is stated in the opinion of the Court of Claims that after the contract was signed it was mailed "to the Chief of Engineers in Washington for his approval," and that "it was immediately disapproved and returned to the officer (engineer in charge at Chicago) with instructions to readvertise the work."

The declaration, in the opinion of the Court of Claims, that the contract was disapproved, is asserted to be incorrect by claimants, and the findings are quoted to show that the contract was abrogated, not disapproved. That is undoubtedly the expression of the finding, but its meaning is manifest. An order to the officer in charge to abrogate the contract was certainly a very definite and unmistakable disapproval of it. At any rate, there was no approval of it, and that was a necessary condition to its final effect and obligation.

It is further urged that the terms of the contract were not disapproved, and that the action of the Chief of Engineers was "for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract binding the contractor not to permit his workmen to labor more than eight hours per day." It may be assumed that the Chief of Engineers considered that the contract took effect by his approval, and that if he approved it he would incur the penalties of the statute. But however that may be, the reasons for his action is not open to our inquiry. The contract was not approved, and how can the legal consequence of that be escaped? We could not have compelled the approval of the contract, and we cannot treat it as approved and adjudge rights as upon the performance of a condition which was not performed.

This case has some features of hardship. They are, however, explained and somewhat lessened by the facts stated in the opinion of the Court of Appeals. It is there stated:

"The contract bears date the 19th July, 1892. It provides in terms that the contractors 'shall commence work on or before the 1st day of August, 1892,' but it appears by evidence *aliunde* that the instrument was not mailed to the contractors for signature until the 20th July, 1892; that it was returned for cor-

rections; that it was not finally mailed for signature until the 27th of July, 1892, and that it was not signed by the contractors until some day between the 27th of July and the 1st of August, 1892. On the faith of the agreement executed by the contracting officer, but without his knowledge or direction, the contractors proceeded to make ready for their work and, indeed, performed, to some extent, incurring thereby a loss of $678.21."

And further, that "the work was done without the knowledge or direction of the officer in charge, and no benefit resulted thereby to the defendants" (United States).

Judgment affirmed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* ELLIOTT.

ERROR TO THE KANSAS CITY COURT OF APPEALS FOR THE STATE OF MISSOURI.

No. 148. Argued and submitted January 29, 30, 1902. — Decided March 10, 1902.

The Supreme Court of Missouri having necessarily decided that the Kansas City Court of Appeals, in passing upon the claim of immunity in this case, was the final court of Missouri where such question could be decided, it follows that the writ of error properly ran to the Kansas City Court of Appeals, and that the claim of absence of jurisdiction was without foundation.

For the reasons given in the opinion of the court in *Tullock* v. *Mulvane*, *ante*, 497, that there was error committed by the Kansas City Court of Appeals in affirming the action of the trial court in allowing in the judgment rendered by it, attorneys' fees as an element of damage upon the injunction bond, contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments.

THE action below was brought by Elliott in the state circuit court of Cooper County, Missouri, against the railway company, plaintiff in error herein. Recovery was sought upon an injunction bond given in an equity cause in a suit in the Circuit Court

Statement of the Case.

of the United States for the Central Division of the Western District of Missouri. The railway company was complainant in the equity cause and Elliott was defendant. The Circuit Court of the United States, as the result of a mandate of the Circuit Court of Appeals, entered an order dissolving the injunction, and thereupon this action was commenced. The damages which it was alleged were embraced in the condition of the bond were averred to consist of payments made for attorneys' fees, traveling and other similar expenses of the plaintiff, asserted to have been disbursed during the course of the litigation in the United States court.

The answer consisted of a general denial, and alleged that the equity suit in which the bond was given was made necessary to enable the defendant to make its defence to an action at law, which had prior to the equity suit been brought against the railway company by Elliott. The cause was tried by the court without a jury. It appeared on the trial that in dismissing the bill in the equity cause the statutory allowance to attorneys and other costs had been taxed, and paid by the complainants in the equity cause in the United States Circuit Court. No objection was interposed at the trial to evidence introduced for the plaintiff as to the value of attorneys' services and the other sums disbursed for the expenses alleged in the petition. At the close of the trial the court, over the objection of the defendant, declared the law to be that the plaintiff was entitled to recover his reasonable personal expenses and reasonable attorneys' fees incurred for the services of attorneys in procuring the dissolution of the injunction. The following, among other prayers asked by the defendant, were refused:

"2. The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on any sum which he may have paid out or become liable for as attorneys' fees."

"5. The court declares the law to be that the plaintiff, having received the amount taxed in his favor as attorneys' fees as part of the costs in the equity suit mentioned in the pleadings and evidence in this case, he cannot now recover anything on account of attorneys' fees in this case."

Statement of the Case.

Judgment having been entered in favor of plaintiff and a motion for a new trial having been overruled, an appeal was taken to the Kansas City Court of Appeals, and the judgment was affirmed. In the course of its opinion the court recited the contentions of the defendant, and held each of them to be untenable. These contentions were thus stated by the court:

"1. Defendant's objections to the judgment below may be thus stated: First, that there was no breach of the conditions of the bond in that it was not alleged or proved that any damages had been previously adjudged against the defendant, whereas the condition of the bond is that defendant 'should pay all sums of money damages and costs that shall be adjudged against it,' etc.; and, *secondly, it is contended that as the injunction bond was given in a proceeding pending in the United States court, the damages must be fixed and determined according to the rules and practice of the Federal courts; that attorneys' fees are not there considered elements of damage in suits on injunction bonds, and that therefore our state courts should apply the same rule in suits on bonds given in the Federal courts;* and thirdly, it is insisted that the trial court erroneously allowed as damages attorneys' fees for defending the entire case—that the injunction was merely incidental to the principal case, and no attorneys' fees were paid to secure its dissolution."

A motion for a rehearing was thereafter filed, in which, among other things, it was contended that the cause involved a Federal question, "for the reason that the controversy in this suit arises under the authority of the United States, and under the laws of the United States governing and applicable to United States courts," and the court was asked in the event that it should refuse to grant a rehearing, to transfer the case to the Supreme Court of the State of Missouri, "for the reason that a Federal question is involved, and because the subject of the controversy of this suit arises under the authority of the United States and under the exercise of such authority, and under the laws of the United States governing and controlling the courts of the United States and the proceedings therein." The motion for a rehearing having been overruled, it appears

from a stipulation contained in the record that an application was made to the Supreme Court of the State of Missouri for a writ of prohibition against the judges of the said Kansas City Court of Appeals to restrain the further exercise of jurisdiction in the cause, and to require the record and proceedings to be certified to the Supreme Court. This application was denied. 154 Missouri, 300.

Thereupon the present writ of error was allowed and the record of the cause was brought here from the Kansas City Court of Appeals.

Mr. George P. B. Jackson for plaintiff in error.

Mr. William M. Williams for defendant in error.

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

The proposition relied upon to secure the reversal of the judgment below is that the state court erroneously allowed as an element of damage upon an injunction bond given in a court of the United States the sum of alleged counsel fees for procuring a dissolution of the injunction, and that as such fees under the rule prevailing in the equity courts of the United States are not properly allowable, therefore the state court denied an immunity asserted in favor of the defendant below and arising from an authority exercised under the United States.

We are at the outset met by an objection that there is no jurisdiction to review the judgment of the Kansas City Court of Appeals. It is contended on behalf of the defendant in error that the Federal question relied upon was not raised below, and therefore is not reviewable here.

The general rule undoubtedly is that those Federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court intended to and did assert such a Federal right in the state court. But

it is equally true that even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a Federal question, although arising on ambiguous averments, then a Federal controversy having been actually decided the right of this court to review obtains. *Oxley Stave Co.* v. *Butler*, 166 U. S. 648, 660. All that is essential is that the Federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago &c. Ry. Co.* v. *Chicago*, 166 U. S. 226. And of course, where it is shown by the record that the state court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a Federal question in a petition for rehearing in the highest court of the State is too late, yet when a question is thus raised and it is actually considered and decided by the state court, the right to review exists. *Mallett* v. *North Carolina*, 181 U. S. 589, 592.

Now it plainly appears that the Kansas City Court of Appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, viz., that attorneys' fees are not a proper element of damage. We say this is undoubted, since the opinion of the Kansas City Court of Appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock* v. *Mulvane*. True it is that the Kansas City Court of Appeals held, contrary to the rule announced in the *Tullock* case, that the state court was not bound to apply the rule of damages pre-

vailing in the courts of the United States, and in effect while so concluding decided that the claim that the bond should be enforced according to the rule prevailing in the courts of the United States, involved no Federal question. But the fact that the state court, whilst deciding the Federal question, erroneously held that it was not a Federal one, does not take the case out of the rule that where a Federal question has been decided below, jurisdiction exists to review. The result of the contrary doctrine would be this, that no case where the question of Federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was non-Federal in its character. The assertion that a Federal right was not raised below is therefore without merit.

It is, however, insisted that as the writ of error in this case was directed to the Kansas City Court of Appeals, there is no jurisdiction, because if there was a Federal question presented that court was not, under the constitution of the State of Missouri, the highest court of the State in which a decision on such question could have been had.

The Kansas City Court of Appeals was created by an amendment to the constitution of Missouri adopted in 1884. Rev. Stat. of Missouri, 1899, vol. 1, p. 92. By section 4 of the amendment the said court was given the same jurisdiction over lower courts within certain territory—embraced within which was Cooper County—as was possessed by the St. Louis Court of Appeals. As provided by a prior constitution, that of 1865, and continued by the constitution of 1875, the St. Louis Court of Appeals was a court of general appellate jurisdiction, but its judgments were not final in certain cases, among which were: *a*, cases where the amount in dispute, exclusive of costs, exceeded the sum of $2500; *b*, cases involving the construction of the Constitution of the United States or of the State of Missouri; *c*, cases where "the validity of a treaty or statute of or authority exercised under the United States is drawn in question;" as well as in other enumerated cases, not necessary to be particularly referred to. In such cases, where the jurisdiction of the St. Louis Court of Appeals was not final, the judg-

ment of the St. Louis Court of Appeals was reviewable by the Supreme Court of Missouri. Ib. art. VI, sec. 12, p. 87.

By the amendment to the constitution of 1884, by which the Kansas City Court of Appeals was created, in cases where the action of the St. Louis Court of Appeals had been theretofore reviewable by the Supreme Court of Missouri, it was provided that the St. Louis Court of Appeals should no longer have appellate jurisdiction, but that writs of error, in such cases, should run directly from the Supreme Court to the trial courts, and this provision was made applicable to the Kansas City Court of Appeals which the amendment created. By the amendment in question superintending control over the trial courts in such cases was conferred upon the Supreme Court. Ib. sec. 5, p. 93. It thus resulted that the Kansas City Court of Appeals, within the area of territory over which its jurisdiction extended, had no appellate jurisdiction in cases where the amount in dispute, exclusive of costs, exceeded $2500, and where the cases involved the construction of the Constitution of the United States or of the State, and cases where was drawn in question the validity of a treaty or statute of or authority exercised under the United States, and in other cases not necessary to be mentioned.

By the amendment to the constitution of 1884, the Supreme Court of Missouri was expressly, moreover, given general superintending control over the courts of appeal, by mandamus, prohibition and certiorari. Ib. sec. 8, p. 93.

After the Kansas City Court of Appeals had affirmed the judgment of the Cooper County circuit court, the railway company filed a motion for a rehearing, and prayed therein that in the event a rehearing was not granted the case should be transferred to the Supreme Court of Missouri. The motion for the transfer of the case to the Supreme Court was pressed upon two grounds, the second of which was, in substance, that the decision of the cause involved a Federal question, of which the Supreme Court of Missouri should take exclusive cognizance, because of its appellate jurisdiction, "in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question."

The court, in overruling this motion, necessarily decided that

the case came within its appellate jurisdiction and not within the exclusive appellate power conferred by the constitution on the Supreme Court of the State. This doubtless rested upon the predicate upon which the court had based its opinion, which was not that the issue whether attorneys' fees could be allowed upon the bond given in the Federal court had not been raised but, because, although that question had been raised and been decided, it was not one of the class of questions within the purview of the exclusive jurisdiction of the Supreme Court of the State. And this seems to us to be the view held by the Supreme Court of Missouri, when, in consequence of the refusal to transfer the cause to it, its superintending power over the Kansas City Court of Appeals was invoked through the medium of the application for writs of prohibition and certiorari. We so conclude, because, although in its elaborate opinion overruling the application for the writs named, the Supreme Court declared that the question of the power of the state court to award attorneys' fees on the injunction bond given in a court of the United States, contrary to the rule of damages prevailing in the courts of the United States, had been raised in the case and had been decided by the Kansas City Court of Appeals, the writs of prohibition and certiorari would not be allowed, because such a question was not within the appellate jurisdiction of the Supreme Court of Missouri, but was within the jurisdiction of the lower appellate court. After fully stating the contention below and its decision by the Kansas City Court of Appeals, the Supreme Court of Missouri said:

"We fail to discover from the record, anywhere, how the validity of a treaty or statute of, or authority exercised under the United States is drawn in question, or that a Federal question may be said to be involved in the case."

In other words, as the exclusive appellate jurisdiction of the Supreme Court of Missouri over cases which, by the amount involved, would otherwise have gone to the Kansas City Court of Appeals, was conferred only in special cases, among other cases involving the construction of the Constitution of the United States and cases where "the validity of a treaty or statute of or authority exercised under the United States is drawn in

question," the court held that as the validity of the bond given in the Circuit Court of the United States was not questioned, no claim made by the defendant of immunity under an authority exercised under the United States was embraced within the exclusive appellate jurisdiction conferred by the constitution upon the Supreme Court of Missouri, and therefore such question had been properly determined by the Kansas City Court of Appeals. We are constrained to this construction of the opinion of the learned court from the fact that it elaborately discusses and demonstrates that the defence of immunity from liability for attorneys' fees under the bond given in a court of the United States was not an attack on the validity of the bond, and therefore not within the cognizance of the Supreme Court of Missouri, and from the further fact that in the course of the opinion the court said:

"Neither the rules, the practice or procedure, nor the mode and manner of administering the law in the United States court, applicable to the liability of bondsmen on an injunction bond given in that court, *can in anywise be drawn in question, so as to present a Federal question*, in a suit in a state court on the bond, when the validity of the bond, as in the case of *Elliott* v. *Railway Co.*, begun in the Cooper County circuit court, and now pending on appeal in the Kansas City Court of Appeals, is admitted, and where no question as to the court's authority to order the bond as given is or was made by the relator."

It results, therefore, under the view we take of the opinion of the Supreme Court of Missouri, the court decided that as the case presented merely a claim of immunity under an authority exercised under the United States, and did not involve, to quote the language of the Missouri constitution, the drawing in question "the validity of an authority" so exercised, therefore, the Kansas City Court of Appeals was vested under the constitution and laws of Missouri with final jurisdiction. But if, however, we were to give to the opinion of the Supreme Court of Missouri the contrary construction, the finality of the judgment of the Kansas City Court of Appeals in this case would be none the less apparent. It is manifest, we conceive,

from the opinion of the Supreme Court of Missouri, that if it had been deemed that a Federal question not within the cognizance of the Kansas City Court of Appeals had been decided by that court, the superintending power of control conferred by the state constitution on the Supreme Court of Missouri would have been exerted for the purpose of preventing the Kansas City Court of Appeals retaining jurisdiction of the cause. If, then, the action of the Supreme Court of Missouri can be held not to have been rested on the phraseology of the Missouri constitution, including within the exclusive appellate power of the Supreme Court of Missouri not claims of immunity arising from an authority exercised under the United States, but only cases where was drawn in question the validity of an authority exercised under the United States, then the necessary effect of the action of the Supreme Court of Missouri was this, that because it held to the opinion that it was impossible for a Federal question ever to arise from a claim of immunity resulting from the exercise of an authority under the United States in the giving of an injunction bond in the courts of the United States, therefore, under the constitution and laws of Missouri, the action of the Kansas City Court of Appeals was final.

It being then demonstrated that whatever view may be taken of the opinion of the Supreme Court of Missouri, that court necessarily decided that the Kansas City Court of Appeals, in passing upon the claim of immunity, was the final court in Missouri where such question could be decided, it follows that the writ of error properly ran to the Kansas City Court of Appeals, and the claim of the absence of jurisdiction is without foundation.

Having thus disposed of the question of jurisdiction, we come to the merits of the case. It suffices to say, for the reasons given in the opinion in *Tullock* v. *Mulvane*, before referred to, that there was error committed by the Kansas City Court of Appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the

Counsel for Plaintiff in Error.

courts of the United States are governed in requiring the execution of such instruments.

The judgment of the Kansas City Court of Appeals must be reversed and the cause remanded to that court with directions for further proceedings in conformity with this opinion, and it is so ordered.

CONNOLLY *v.* UNION SEWER PIPE COMPANY.

ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 46. Argued April 22, 23, 1901.—Decided March 10, 1902.

If a claim is made in the Circuit Court that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, this court may review the judgment, at the instance of the unsuccessful party.

If the alleged combination in this case was illegal, it would not follow that they could, at common law, refuse to pay for pipes bought for them under special contracts.

The contracts between the plaintiff and the respective defendants were collateral to the agreement between the plaintiff and other corporations, etc., whereby an illegal combination was formed for the sale of sewer pipe.

The first special defence in this case, based alone upon the principles of the common law, was properly overruled.

The special defence, based upon the act of Congress of July 2, 1890, 26 Stat. 209, was also properly rejected. That act does not declare illegal or void any sale made by such combination or its agents of property acquired for the purpose of being sold, such property not being at the time in the course of transportation from one State to another, or to a foreign country; and the buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination, which might be restrained or suppressed in the mode prescribed by the act of Congress.

THE case is stated in the opinion of the court.

Mr. Henry D. Coghlan for plaintiffs in error. *Mr. Joseph A. O'Donnell* was on his brief.

Mr. Herbert Hamlin and *Mr. Edwin Walker* for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The Union Sewer Pipe Company—a corporation organized under the laws of Ohio and doing business in Illinois—brought its action against Thomas Connolly, a citizen of Illinois, in the Circuit Court of the United States for the Northern District of Illinois, on two negotiable promissory notes both executed at Chicago by the defendant; one, dated December 15, 1894, the other dated January 15, 1895, and each payable to the order of the plaintiff corporation ninety days after date at the First National Bank of Chicago.

These notes were given on account of the purchase by the defendant from the plaintiff of sewer pipe commonly known as standard Akron pipe, at prices agreed upon between the parties.

The Pipe Company also brought an action in the same court against William E. Dee, a citizen of Illinois, upon an open account for $2389.26, the value at agreed prices of certain pipe purchased by him from the plaintiff in June, 1896. The plaintiff supplied the pipe under a written contract executed between it and the defendant in Illinois under date of August, 1895.

Each of the defendants filed a plea of the general issue, with notice of special defences and of set-off.

The special defences in each case were substantially the same. The notice in the Connolly case was that the defendant on the trial of the action would rely on these special matters:

"First. That the plaintiff is, and at all times since about the first day of January, 1893, has been a trust or combination of the capital, skill and acts of divers persons and corporations carrying on a commercial business in the States of Ohio and Illinois and between said States and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to wit, in the trade of buying, selling and otherwise dealing in certain articles of merchandise, to wit, sewer and drainage pipes, and also for the express purpose of

unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacture, making, transportation, sale or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use and consumption in this State should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff, or being the pretended stockholders thereof, to wit, have bound themselves not to sell, dispose of or transport said article of commerce below certain common standard figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others, so as to preclude a free and unrestricted competition among themselves and others in the sale and transportation of said articles of commerce, and by which they have agreed to pool, combine and unite any interests they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all of the claims of the plaintiff against the defendant in this action arise wholly out of and are in respect of sales of said articles of merchandise made between the 1st day of January, A. D. 1893, and the 1st day of March, 1896, to this defendant by

the plaintiff in the ordinary course of its business as such a trust or combination acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

"Secondly. That the plaintiff is and at all times since the 1st day of January, 1893, was a combination in the form of a trust, in restraint of trade and commerce among the several States, and doing business as such throughout the United States and between the States of Ohio and Illinois, contrary to the provisions of an act of Congress of date of July 2, 1890, and entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' and that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

"Thirdly. That the plaintiff is and at all times since the 1st of January, 1893, was a trust doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an act of the legislature of the State of Illinois entitled 'An act to define trusts and conspiracies against trade, declaring contracts in violation of this provision void, and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof and matters connected therewith, approved June 20, 1893, in force July 1, 1893;' that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defence to this action and the whole thereof."

The set-offs claimed by Connolly were: Treble the amount of the actual damages sustained and allowed by the act of Congress of July 2, 1890, c. 647, known as the Sherman anti-trust act, $56,970.44; actual damages sustained by reason of the violation by the plaintiff of the provisions of the Illinois statute of July 1, 1893, $17,323.48; and for money had and received by plaintiff of defendant contrary to law, $17,323.48.

The set-offs claimed by Dee were of like character but of larger amounts.

Both cases were, by agreement, submitted to the same jury and were treated as one consolidated case. At the trial the defendants respectively asked leave to amend their notices of special defences, but leave was denied.

The Circuit Court disallowed both the first and second of the above special defences, and in respect of the third its decision was that the Illinois Trust statute of 1893 was in violation of the Constitution of the United States. It consequently directed the jury to find a verdict for the plaintiff in each case; in the Connolly case, for the amount of the two notes sued on; in the Dee case, for the amount of the plaintiff's open account against him. Verdicts having been returned as directed, and a motion for new trial in one case, and motions for new trial and in arrest of judgment in the other, having been overruled, judgments were entered on the verdicts.

1. The defendant in error insists that these cases should have gone to the Circuit Court of Appeals, and has moved on that ground that the writ of error be dismissed. The defence in each case was based in part on the Illinois statute of 1893. The plaintiff insisted at the trial that that statute was in violation of the Constitution of the United States, and its position was sustained by the Circuit Court. There have been suits in which the Circuit Court upon the claim of the defendant has applied the Constitution of the United States to the case before it and put the plaintiff out of court. Here, the plaintiff claimed that the state enactment upon which defendants relied was unconstitutional, and its position upon that point was sustained. In *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 477, this court said: "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 Constitution 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 statute is in contravention of the Constitution of the United States." Upon the authority of that case, the motion to dismiss is denied.

2. The defendant Connolly purchased Akron sewer pipe from the plaintiff and for the agreed price thereof gave the two promissory notes upon which he was sued. The defendant Dee also purchased Akron sewer pipe at an agreed price as shown by the account upon which he was sued. Each defendant disputed his liability to the plaintiff upon the ground that prior to the making of the contracts with the defendants respectively for pipe, the plaintiff corporation entered into a combination with certain firms, corporations and companies engaged in Ohio in the manufacture of Akron pipe; which combination, it is alleged, was in illegal restraint of trade and therefore forbidden by the principles of the common law as recognized and enforced both in Ohio and Illinois.

The defence cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe.

In *Strait* v. *National Harrow Co.*, 51 Fed. Rep. 819, a suit in which the plaintiffs sought a permanent injunction restraining the defendant from instituting or prosecuting any action against the plaintiffs for the infringement of letters patent owned by the defendant covering certain improvements in spring-tooth har-

rows, or from instituting or prosecuting any such suits against any person using the spring-tooth harrows manufactured by the plaintiffs, the court said: "In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may be an odious and a wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. 'The exercise of the legal right cannot be affected by the motive which controls it.' *Kiff* v. *Youmans*, 86 N. Y. 329."

In *National Distilling Co.* v. *Cream City Importing Co.*, 86 Wisconsin, 352, 355, which was an action to recover the price of goods sold and delivered, one of the defences was that the plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce. The Supreme Court of Wisconsin said: "The first defence does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of trade and com-

merce and in restraint thereof and to accomplish the ends therein set forth. . . . Conceding, for the purposes of this case, that the trust or combination in question may be illegal and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called 'trust,' or 'combination,' the defendant might voluntarily purchase the goods in question of it at any agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences."

That case was cited with approval by the Circuit Court of Appeals for the Seventh Circuit in *Dennehy* v. *McNulta*, 86 Fed. Rep. 825, 827, 829. In that case the court said: "The mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal—a status apparently held in *Distilling & Cattle Feeding Co.* v. *People*, 156 Illinois, 448—cannot serve, *ipso facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any

manner its independent contract obligations." Again: "In the case of an injurious combination of the nature asserted here, the remedy is by well recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination is illegal, or that its prices were unreasonable."

It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it; as in *Embrey* v. *Johnson*, 131 U. S. 336, 348. That was an action upon a promissory note given in execution of a contract for the purchase of "future delivery" cotton, neither the purchase or delivery of actual cotton being contemplated by the parties, but the settlement in respect to which was to be on the basis of the "difference" between the contract price and the market price of cotton futures, according to the fluctuations in the market. The contract was held to be a wagering contract, and therefore illegal and void. As there could be no recovery upon the original agreement without disclosing the fact that it was illegal and one that could not, for that reason, be enforced or made the basis of a judgment, it was held, that attention could not be withdrawn from the illegality of the contract by the device of taking notes for the amount claimed under that contract. So, in *Miller* v. *Ammon*, 145 U. S. 421, 427. That was an action to recover the value of 1125 gallons of wines sold in Chicago by one who had not obtained a license to sell liquors at all—an ordinance of that city expressly declaring that no person, firm, or corporation should sell or offer for sale "any spirituous or vinous liquors in quantities of one gallon or more at a time, within the city, without having first obtained a license therefor," under a penalty of not less than $50 or more than $200 for each offence. It was held that the action could not be maintained, because "an act done in disobedience to the law creates no right of action which a court of justice will enforce." In that case the sale from which it was attempted to imply the promise of the buyer to pay for what

he received, was itself expressly forbidden by law under a penalty. The action there was upon the sale, and there was a direct connection between it and the purchase of the wines. So, again, in *McMullen* v. *Hoffman*, 174 U. S. 639, 654, after an extended review of the cases, American and English, the court said: "The authorities from the earliest time to the present unanimously held that no court will lend its assistance in any way toward carrying out the terms of an illegal contract."

In the present case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe.

We are of opinion that the first special defence, based alone upon the principles of the common law, was properly overruled.

3. The special defence based upon the act of Congress of July 2, 1890, c. 647, 26 Stat. 209, was also properly rejected.

That act declares illegal "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations"—every person making any such contract or engaging in any such conspiracy being subject to a fine not exceeding $5000, or to imprisonment not exceeding one year, or to both punishments in the discretion of the court. § 1. So, every person monopolizing or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, is liable by that act to the like penalties in the discretion of the court. § 2. The several Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violations of its provisions. § 4. Any property owned under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof), and being in the course of transportation from one State to another, or to a foreign country, is subject to be forfeited, seized and condemned. § 6. By another section it is declared: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." § 7.

Much of what has just been said in reference to the first special defence, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the

time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.

In the case of *The Charles E. Wisewall*, 74 Fed Rep. 802, which was a libel *in rem* by certain tug owners against a steam dredge to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the services thus rendered upon the ground that the tug owners were members of an association which was illegal and void under the Sherman act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said: "He [the claimant] should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services and having accepted the benefit thereof, he should pay. . . . An agreement by the tug Mayflower to tow the dredge Wisewall, for a reasonable sum, from Albany to Troy, is not void because the Mayflower is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market price because the vendor and other tailors of that city had combined to keep up prices."

Nor can the defendants refuse to pay for what they bought upon the ground that the seventh section of the Sherman act

gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts or torts disconnected with plaintiff's claim cannot be set off under the statute." *Robinson* v. *Hibbs*, 48 Ill. 408, 409, 410; *Hawks* v. *Lands*, 3 Gilm. 227, 232; *Hubbard* v. *Rogers*, 64 Ill. 434, 437; *Evans* v. *Hughey*, 76 Ill. 115, 120; *Clause* v. *Bullock Printing Press Co.*, 118 Ill. 612, 617; *Dushane* v. *Benedict*, 120 U. S. 630, 648. If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defence of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision.

4. We come now to the consideration of the defence based upon the Trust statute of Illinois of 1893.

As that statute is alleged to be repugnant to the Constitution of the United States, and that its full scope may be seen, it is here given in full:

"§ 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First—to create or carry out restrictions in trade. Second—to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities.

Fourth—to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer. Fifth—to make or enter into, or examine or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

"§ 2. That any corporation holding a charter under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"§ 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the Attorney General or prosecuting attorney, upon his own motion, to institute suit or *quo warranto* proceedings, at any county in this State in which such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

"§ 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proper proceedings, in any county in which such foreign corporation does business, in the name of the State on his relation.

"§ 5. Any violation of either or all of the provisions of section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof, shall be punished by fine not less than two thousand dollars nor more than five thousand dollars.

"§ 6. In any indictment or information for any offence named in this act, it is sufficient to state the purposes and effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how or where it was created.

"§ 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

"§ 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforcible either in law or equity.

"§ 9. The provisions of this act *shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*

"§ 10. Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the

price or payment of such article or commodity and may plead this act as a defence to any suit for such price or payment." Laws, Ill. 1893, p. 182, act of June 20, 1893; Hurd's Rev. Stat. Ill. (1899), p. 618, title "Criminal Code."

Some reference was made to the act of the legislature of Illinois approved June 10, 1897, amending an act approved June 11, 1891, in force July 1, 1891, relating to the punishment of persons, partnerships or corporations forming pools, trusts and combines, and prescribing the mode of procedure and rules of evidence in such cases. The act of 1897 amended section one of the act of 1891 so as to read: "If any corporation organized under the laws of this or any other State or country for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of persons shall be deemed and adjudicated guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act: provided, however, that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this State to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages." As this act of 1897 was passed after the date of the transactions here involved, it has nothing to do with the present case. Besides, the special defence was based on the act of 1893. The act of 1897 is referred to only as showing the exemption of another class from the operation of the general law relating to pools, trusts, combinations and confederations organ-

ized to regulate prices of articles, commodities and merchandise. Laws, Ill. 1897, c. 38, p. 153; Hurd's Revised Statutes of Illinois, pp. 615, 639.

That the arrangement or combination made between the Union Sewer Pipe Company and other companies, corporations and firms, created such a trust as the Illinois statute forbids is manifest from the evidence in the record. It is equally clear that if the plaintiff was an Illinois corporation, its charter could be forfeited and an end put to its corporate existence by proceedings instituted by the Attorney General of the State. §§ 1, 2 and 3. It is also clear that, if the statute is not altogether invalid the defendants could plead non-liability for the pipe purchased by them upon the ground that the plaintiff was, under the statute of Illinois, an illegal combination and the contracts which it made with the defendants were void. §§ 8, 10. The statute expressly authorizes such a defence. In that particular, the defence based upon the statute of Illinois differs from the other special defences.

The vital question, however, is whether the statute of Illinois of 1893 is not inconsistent with the Constitution of the United States, by reason of the fact that by the ninth section it declares that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of producer or raiser." The Circuit Court held this section to be repugnant to the Fourteenth Amendment of the Constitution of the United States, and to be so connected and interwoven with other sections that its invalidity affected the entire act.

Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure

or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations or associations of persons, who shall have combined their capital, skill or acts, in respect of their property, merchandise or commodities held for sale or exchange, is made by the statute a public offence, and every principal, manager, director, agent, servant or employé knowingly carrying out the purposes, stipulations and orders of such combination is punishable by a fine of not less than two thousand nor more than five thousand dollars. Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause of the Fourteenth Amendment which declares that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws?"

By section 26 of a statute of Illinois it is provided: "Foreign corporations, and the officers and agents thereof, doing business in this State shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon associations of like character organized under the general laws of this State, and shall have no other or greater powers." 1 Starr & Curtis, 619. The contracts upon which these suits are based were made in Illinois. The purpose of the above statute was "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character and bring them all under the influence of the same law." *Stevens* v. *Pratt*, 101 Ill. 206; *Farmers' Loan and Trust Co.* v. *Lake St. Elevated R. R. Co.*, 173 Ill. 439. These matters are called to our attention as showing—as undoubtedly they do—that the Union Sewer Pipe Company, while doing business in Illinois, was subject to

the statute of Illinois concerning trusts or combinations, and which, in terms, applies to both domestic and foreign corporations. But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for the purpose of defeating the plaintiff's claims in these actions.

The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626.

What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general ques-

tion we have said that the guarantee of the equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Missouri* v. *Lewis*, 101 U. S. 22, 31. We have also said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." *Barbier* v. *Connolly*, 113 U. S. 27, 31. This language was cited with approval in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, in which it was also said that "the equal protection of the laws is a pledge of the protection of equal laws." In *Hayes* v. *Missouri*, 120 U. S. 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, "shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed." "Due process of law and the equal protection of the laws," this court has said, "are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the

powers of government." *Duncan* v. *Missouri*, 152 U. S. 377, 382. Many other cases in this court are to the like effect.

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.

The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere ar-

bitrary selection." *Gulf, Colorado and Santa Fé Railway* v. *Ellis*, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws.

Attention has been called to the cases of *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, and *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; and it is supposed that the grounds upon which the decision of the present case is placed are inconsistent with the principles announced in those cases. We do not think so.

In *Magoun* v. *Illinois Trust and Savings Bank* we held that the progressive inheritance tax law of Illinois of June 15, 1895, was not in conflict with the Constitution of the United States by reason of the fact that the amount of the tax was determinable by valuation so that every person and corporation should pay in proportion to the value of his, her or its property inherited. The classification made by the statute was held not to be arbitrary by reason of the fact that inheritances were classified according to amount, and each class taxed at a different rate; for it was based upon principles of equality between the members of each distinct class. Such classification was held not to be inconsistent with the Fourteenth Amendment.

In *American Sugar Refining Co.* v. *Louisiana*, we held that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses, did not deny the equal protection of the laws to such persons and corporations as were thus taxed. It was as if the statute had imposed a tax upon the *business* of refining sugar and molasses, and had declared, as reasonably it might have done, that those who only refined their own sugar and molasses should not be regarded as belonging to that class. We said in that case:

"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.'" Again: "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 decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the

United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land. We only need to say in this connection that the constitutional validity of the statute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing laws.

Other cases have been cited, but they are equally inapplicable in the present discussion, and only serve to show the extent to which the police powers of the States may be exerted without infringing the Federal Constitution.

Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect

of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.

We therefore hold that the act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

MR. JUSTICE MCKENNA, dissenting.

The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section.

Whether it is also within the prohibition against the deprivation of property without due process of law, is a question which it is unnecessary to consider at this time.

Perceiving no error in the record, the judgment in each case must be affirmed.

Affirmed and it is so ordered.

MR. JUSTICE MCKENNA dissenting.

The trust statute of Illinois of 1893 is directed against com-

binations in trade made to affect prices of commodities. The court holds that the statute is repugnant to the Constitution of the United States because of the ninth section, which excludes from the operation of the statute "agricultural products or live stock while in the hands of the producer or raiser." In other words, and to present the discriminations of the statute in its application to persons, it punishes as a criminal conspiracy the acts enumerated in section one, except when they are done by producers and raisers of agricultural products and live stock in respect thereto. The statute also takes away a right of action for the price of the commodities sold. One of the defences of the plaintiffs in error was based on that provision.

The view of the court is that the legislation is purely discriminative and is not justified by any legal principle of classification. To sustain the view the rule expressed in *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150, is quoted. It was there said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." Undoubtedly. Without the observance of that principle, there can be no classification at all in any proper sense. There will be arbitrary grouping—not association of persons or things on account of common properties or characters or relations. But differences are recognized in classification as well as resemblances, and this court has found it necessary to so state. In *Atchison, Topeka & Santa Fé Railroad* v. *Matthews*, 174 U. S. 96, we said: "Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

It seems like a contradiction to say that a law having inequality of operation may yet give equality of protection. Viewed rightly, however, the contradiction disappears; indeed, need not even be expressed. There are very few exertions of

government which can be made applicable to all persons as such. Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a legislature must be allowed a wide latitude of discretion and judgment. This has been decided many times against contentions based on a variety of facts. I will content myself by citing the later cases and commenting upon them very briefly. The cases are *Magoun* v. *Illinois Trust &c. Bank*, 170 U. S. 283; *Clark* v. *Kansas City*, 176 U. S. 114; *Gundling* v. *Chicago*, 177 U. S. 183; *Petit* v. *Minnesota*, 177 U. S. 164; *Williams* v. *Fears*, 179 U. S. 270; *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89.

In these cases and the cases cited in them classifications were sustained which depended upon differences in the amounts of legacies; on differences between corporations; on differences between land dependent on its use for agriculture and other purposes in regard to the power of a city to annex it; on differences between fire insurance and other insurance; on the right of a legislature to declare as a matter of law that the work of a barber was not a work of necessity, while as to all other kinds of labor the fact was to be determined by a jury; on the difference between hiring persons to labor in the State and hiring persons to labor out of the State; on differences between sugar refiners based entirely and only on the fact of the production or purchase of the sugar refined.

In *American Sugar Refining Co.* v. *Louisiana*, a license tax was imposed on those engaged in carrying on the business of refining sugar and molasses. It was provided, however, that the law should not apply to "planters and farmers grinding and refining their own sugar."

Wherein did the Louisiana statute, which was held constitutional, differ from the Illinois statute, which is held to be unconstitutional? In the former case the distinction (in the opinion in the case it is called "discrimination") was between manufacturers of sugar and growers of it. In the case at bar the distinction is between traders in products and growers of them. Is not a parallel obvious? Can the cases be distinguished because

in one a tax was imposed and in the other conduct is regulated or penalized? Indeed, is not the distinction verbal, each being means to an end? Besides, what justification for the distinction is there under the Constitution? None, I submit, can be found in the words of that instrument. Any state legislation which denies the equal protection of the laws is prohibited. The prohibition is independent of form or means. It would be strange, indeed, if the power of a State is limited and confined by the Constitution of the United States, when the State attempts by law to regulate conduct, and is unbounded in its discretion when it imposes taxes; that in one case it may see a difference between manufacturers and planters, and in the other case may not see a difference between traders in commodities acquired for the purposes of sale and such property when held by farmers by whose labor they were produced.

The reasoning of the cases is as strong and demonstrative as their instances. We have declared that we could not investigate or condemn the impolicy of a state law, and that this court is not a refuge from the mere injustice and oppression of state legislation. Many of the exercises of government, it has been pointed out, were addressed to persons, not absolutely or abstractly, but according to their relations, and that classification, based on those relations, need not be constituted by an exact or scientific exclusion or inclusion of persons or things. Therefore, it has been repeatedly declared that classification is justified, if it is not palpably arbitrary.

The cases afford not only affirmative examples but also by a negative deduction illustrate what is legal classification. Mr. Justice Bradley said in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232: "Clear and hostile demonstrations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition." That is, the prohibition upon the States to deny to any citizen the equal protection of the laws. The thought of Mr. Justice Bradley was developed and illustrated by Mr. Justice Brown, speaking for this court in *American Sugar Refining Co.* v. *Louisiana*, and tests of the unconstitutionality of the discriminations of a state law

were expressed, which were as ready as they were significant. Speaking of the Louisiana act, which discriminated between refiners of sugar, Mr. Justice Brown said: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely *arbitrary, oppressive or capricious* (the italics are mine), 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."

Of course, the enumeration of some tests does not exclude others, but why the enumeration of the special kind? Did not the case require it? What ingenuity can find a difference in the act and process of sugar refining when done by a purchaser of raw sugar and a raiser (planter) of it; what difference in the product after it shall be refined, or in any element, thing or circumstance, which can affect its use or sale. The whole and only distinction in the classes which the statute made was between the grower of sugar and the buyer of it—the exact and only distinction of the Illinois law now held to be void, and yet the Louisiana law was sustained as constitutional.

I have already adverted to the distinction which may be claimed to exist between taxing laws and regulating laws, but a few words more may be justified. The opinion of the court makes a great deal of the penal provisions of the trust law, and its discriminations are displayed and intensified more by the recitation and effect of those provisions than by the provision upon which the defence of plaintiffs in error was based, that is, the provision (sec. 10) which precludes recovery of the price of "any article or commodity sold" by an offender against the statute.

The penal provisions of the statute are not before us for judgment. If they were, and the unconstitutionality of the statute could be attributed to them, they might be construed as separable and be discarded. But, not insisting on that, and consider-

ing the comments on those provisions to be more than incidental illustration of the character of the statute, it is very clear to me that they do not in any way affect the power of the State. In other words, the power of the State cannot be impugned or affected by the sanctions which the State may impose to secure obedience to its commands or prohibitions. It may be through a tax or it may be through penalties, and the question will always be, is the thing which is directed or forbidden within the power of the State? And when a statute is assailed as denying the equal protection of the laws its equal operation is only involved.

The principle of classification, therefore, is not different in tax laws than in other laws. That principle, as I have said, necessarily implies discrimination between the persons composing the class and other persons. The equality prescribed by the Constitution is fulfilled if equality be observed between the members of the class. It is violated if such equality be not observed, and the latter was the case in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79. That case, therefore, does not sustain the ruling now made.

Any further remarks may be only repetition, but the application of the cases to the statute now before us should be pointed out.

The equality of operation which the Constitution requires in state legislation cannot be construed, as we have seen, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions and relations of men. Classification, therefore, is necessary, but what are its limits? They are not easily defined, but the purview of the legislation should be regarded. A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation. But a wide latitude of selection must be left to the legislature. It is only a palpable abuse of the power of selection which can be judicially reviewed, and the right of review is so delicate that even in its best exercises it may lead to challenge. At times, indeed, it must be exercised, but should always be exercised in view of the function and necessarily large powers of a legislature.

MR. JUSTICE MCKENNA, dissenting.

What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the State to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that State? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stockraisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That differences exist cannot be denied. To describe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action, based upon those differences, is legislative and cannot be reviewed by the judiciary.

I am, therefore, constrained to dissent from the judgment of the court.

MR. JUSTICE GRAY took no part in the decision of this case.

UNITED STATES *v.* CAMOU.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 35. Submitted March 22, 1901.—Decided March 17, 1902.

From its examination of the evidence in this case this court concurs in the view of the Court of Private Land Claims that a definite location and possession of the grant here in question, prior to the date of the Gadsden treaty, are shown with reasonable certainty, and affirms the decree of that court confirming the claim to the extent of the four sitios granted and paid for.

In December, 1891, Juan Pedro Camou filed a petition in the Court of Private Land Claims, praying to have confirmed to him a certain tract of land situated in the county of Cochise, Territory of Arizona, known and designated as the San Rafael del Valle grant. Subsequent proceedings resulted in a trial and a decree in favor of the Government, adjudging petitioner's claim and title invalid, and dismissing the petition. The case was then brought by appeal to this court, where the decree of the Court of Private Land Claims was reversed and the case remanded for further proceedings. 171 U. S. 277.

Subsequently further proceedings were had in the Court of Private Land Claims in pursuance of the mandate of this court, resulting, on June 2, 1899, in a decree confirming the petitioner's title to 17,474.93 acres. From this decree of confirmation an appeal was allowed to this court.

Mr. Solicitor General, *Mr. Matthew G. Reynolds* and *Mr. William H. Pope* for appellants.

Mr. William Herring and *Mr. Rochester Ford* for appellee.

Mr. Justice Shiras delivered the opinion of the court.

When this cause was before us, in 171 U. S. 277, the validity of the claim was, upon full consideration, upheld. It was, however, held that the recovery should be restricted to the land

claimed in the petition and paid for, and as it was shown that the survey was in excess of the land granted and paid for, the cause was remanded to the Court of Private Land Claims for further proceedings which resulted, as shown by this record, in a final decree of confirmation, establishing the boundaries of the grant, and finding it to contain four sitios, or 17,474.93 acres.

The contention made on behalf of the Government, in this appeal, is that this grant of four sitios was a mere float within exterior boundaries containing a larger tract; that there were no means afforded of identifying where, within those exterior boundaries, such four sitios were located; that accordingly, as matter of law, prescribed in the sixth section of the Gadsden treaty, the tract cannot be said to have been located, and hence the grant must be held to be invalid.

It may well be doubted whether, even if this contention were well founded, it can be urged at this stage of the controversy.

When the case was originally tried in the Court of Private Land Claims, and subsequently was heard on appeal in this court, the principal contention on the part of the Government was that the State of Sonora had no power to make a grant of public lands, and hence that the grant in question, although made in the name and by the proper officers of that State, was invalid. The subject was fully considered by this court, and it was held that the several States of the Republic of Mexico, of which Sonora was one, had, at the time when the transaction in question took place, authority to make sales of vacant public lands within their limits.

The Government further contended that this and similar grants by the separate States had been annulled by certain decrees of Santa Anna, when acting as dictator of Mexico, and that, as the Government of the United States had recognized Santa Anna, in purchasing the territory covered by the Gadsden treaty, the courts of the United States must recognize, when dealing with personal rights existing in the ceded territory, his declarations or decrees in respect to titles, as authoritative. But this view of the legal effect of the decrees of Santa Anna

upon the private rights of residents within the ceded territory was not accepted by this court, and, for reasons given in the opinion of Mr. Justice Brewer, it was held that, as the grant made by the State of Sonora was valid when made, it was not destroyed by the arbitrary decree of a temporary dictator.

As, however, it appeared that the survey of the land claimed in the petition was in excess of the four sitios granted and paid for, the court applied the rule laid down in *Ely's Administrator* v. *United States*, 171 U. S. 220, that where there is a valid grant for a certain number of acres within the outboundaries of a larger tract, the Court of Private Land Claims may inquire, and, if it finds sufficient reasons for determining the true boundaries of the tract that was granted, it can so prescribe them, and sustain the claim to that extent.

Upon this second appeal we have only to consider whether the Court of Private Land Claims reached its final decree in due pursuance of the previous opinion and mandate of this court. The decision there made is the law of the case, and is not open for reconsideration in the subsequent appeal. This subject was recently considered in *Illinois* v. *Illinois Central Railroad*, 184 U. S. 77, and it was there shown that it is the settled law of this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances for changes in its members.

Accordingly, in the present case, everything involved in the question of the validity of the grant might be deemed to have been determined on the first appeal, as well its alleged invalidity for want of definite location, as for the want of power in the

State of Sonora to make the grant. However, even if this view were waived, and it were conceded that our former mandate left it open to the Government to urge the invalidity of the grant by reason of alleged want of definite location, our examination of the record has satisfied us that the final decree of the Court of Private Land Claims defining the boundaries of the grant was justified by the evidence.

It is clearly shown that on March 12, 1827, Rafael Elias presented his petition to the treasurer general of the State of Sonora, asking for a grant of public lands adjacent to the ranch of San Pedro, within the jurisdiction of Santa Cruz; that on July 1, 1827, the treasurer general issued an order directed to the alcalde of the police of Santa Cruz, empowering him to proceed to survey, appraise and offer at public sale for thirty consecutive days the lands indicated in the petition; that on August 20, 1827, in obedience to said order, the alcalde executed what is called an act of obedience, wherein he stated that he would go to the ranch of San Pedro in order to proceed with the survey of the lands petitioned for; that he appointed four citizens to act as counters, tallymen and chainmen, who were duly qualified; that the survey was so proceeded in that there resulted a segregated tract of land containing four sitios, of which Rafael Elias took possession; that, at the conclusion of the survey, the testimonio states the alcalde proceeded to the appraisement of the land through experts, who adjudged the value of the four sitios to be $240, at the rate of $60 each, and that upon this appraisement the alcalde put them up at auction, asking for bidders, for thirty consecutive days, from August 30 to September 30, 1827. On September 30, 1827, after summoning the interested party, the alcalde remitted the proceedings to the treasurer general, who transmitted them to the fiscal attorney, who on February 7, 1828, reported his opinion that "the proceedings be continued to adjudication, according to the forms and requisites in use." The testimonio then states that the treasurer general, being satisfied with the report of the fiscal attorney, by order of April 16 proceeded, asking for bidders, and none appearing, the four sitios were auctioned off in favor of Rafael Elias. The testimonio further discloses that

the purchase money was duly paid into the treasury, and a certificate of the treasurer general, of April 21, 1828, concluded the proceedings; that, on December 25, 1832, followed the grant or patent by the treasurer general of the State of Sonora, stating that the proceedings had been concluded with all the requisites and formalites provided by law, and remained in the custody of the treasurer general as a perpetual monument of title; that therefore, in the exercise of the faculties conferred on him by law, and in the name of the sovereign State of Sonora, he granted in due form of law the four sitios of land for the raising of cattle and horses, comprised in the locality of San Rafael del Valle, situated in the jurisdiction of the presidio of Santa Cruz, in favor of the citizen Rafael Elias, to whom he conceded, gave and adjudged the said land by way of sale, with the condition and premanency established by the law, for himself and his successors, with the injunction and condition that he must keep said sitios occupied and settled, without letting them be abandoned or deserted at any time, with the understanding that if they be abandoned for the period of three consecutive years, and there should be any person to petition for them, in such event, with previous proof of the fact, they would be declared public lands and granted anew to the highest bidder, excepting in such cases where the abandonment was caused by the notorious invasion of the public enemies; and admonishing said Elias and his successors that they must keep and confine themselves to the land and limits as marked precisely in the foregoing proceedings of survey, and comply exactly with the law which imposed obligations to mark the metes and boundaries with monuments of stone and mortar. It is admitted by the Government that the expediente of this grant is on file in the archives of Hermosillo, and is in the usual form, and that on folio 11 and on the back of it, of the book of "Toma de Razon," is recorded an entry of the delivery of the title deed to Rafael Elias for four sitios of land, comprised in the place called Rafael del Valle, situate in the jurisdiction of the presidio of Santa Cruz. This was followed by evidence showing the continuous possession of the tract by Rafael Elias until forced to leave it by hostile incursions of the Apache Indians.

There was also proof of a regular deraignment of title from the original grantee to Camou, the appellee in the present case.

Taken together, the evidence adduced by the claimant on the first trial before the Court of Private Land Claims, and that introduced after our mandate had gone to that court, we think it is satisfactorily shown that the land described in the final decree is that described in the original survey and of which Rafael Elias was put in possession. The principal witnesses, in this part of the case, were George J. Roskruge, a surveyor of more than twenty years' experience in that part of the country, and who made the survey and map of the San Rafael del Valle land grant, which was used upon the trial. Douglass Snyder and Max Marks, who assisted in making that survey, were also examined. These witnesses were subjected to a rigorous cross-examination by the attorney of the Government, and their testimony has been minutely criticised in his brief.

But we are not able to perceive that the statements of these witnesses have been materially shaken. Some discrepancies indeed appear, but they are not important, and are naturally to be expected from the nature of the case. Neither the original nor the subsequent surveys were made with the care and precision that characterize surveys made in the long settled parts of the country. But it is evident, and this is the important point, that the latter surveys were made to verify and renew the original survey, and not with a purpose to locate a floating grant of uncertain boundaries and extent. In this particular this case is plainly distinguishable from the case of *Ainsa* v. *United States*, 161 U. S. 208, where the claimant's case failed because there had been no actual location of the grant prior to the Gadsden treaty, and because there was no satisfactory evidence that the act of juridical possession had ever taken place.

From our examination of the evidence we concur in the view of the Court of Private Land Claims, that a definite location and possession of the grant in question, prior to the date of the Gadsden treaty, are shown with reasonable certainty, and accordingly the decree of that court, confirming the claim to the extent of the four sitios granted and paid for, is

Affirmed.

EIDMAN *v.* MARTINEZ.

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

No. 287. Argued November 21, 1901.—Decided March 17, 1902.

Congress is bound to express its intention to tax in clear and unambiguous language, and a liberal construction should be given to words of exception confining the operation of the duty.

The war tax law of 1898 imposing a tax upon legacies or distributive shares arising from personal property passing "from any person possessed of such property, either by will or by the intestate laws of any State or Territory," does not apply to the intangible personal property in this country, of an alien domiciled abroad, whose property passed to his son, also an alien domiciled abroad, partly by will and partly by the intestate laws of such foreign country.

The act does not make the duty payable, when the person possessed of such property dies testate, if it would not be payable, if such person had died intestate; and the words "passing by will" are limited to wills executed in a State or Territory under whose laws the property would pass, if the owner had died intestate.

THIS case came up upon certain questions of law arising in an action brought in the Circuit Court for the Southern District of New York by Martinez, as ancillary administrator with the will annexed of the estate of Salvador Elizalde, against the Collector of Internal Revenue, for the refund of an inheritance tax paid to the defendant upon certain personal property in the city of New York.

The facts out of which the questions arose are as follows:

Salvador Elizalde, a non-resident alien, a subject of the King of Spain, who had never resided within the United States, died in Paris, France, on April 27, 1899, leaving a will in the Spanish language, executed in Paris, in the year 1891, pursuant to the laws of Spain. This will was filed and protocolized in the office of the Spanish consul in Paris, and thereby under the laws of Spain and the consular convention or treaty between Spain and France, Arturo Elizalde, the sole legatee under said will, became entitled to the possession and administration of all the

personal property of the decedent. Said Arturo Elizalde is the only son and sole next of kin of the decedent, and is a non-resident alien and a Spanish subject. He has resided all his life in Spain and France, and has never resided in the United States. Said will purports to give all of the personal property of the decedent to his said son, but, by the laws of Spain, only one third of the property passed by the will, and the remaining two thirds passed to said son by and under the Spanish intestate law.

The decedent left certain Federal, municipal and corporate bonds, of the par value of $225,400, in the custody of his agents in the city of New York, and they were within the third collection district of New York at the date of his death.

After the filing of said will in Paris, Arturo Elizalde entered upon the administration of the decedent's personal estate, and appointed the defendant in error, Miguel R. Martinez, his attorney for the purpose of receiving ancillary letters of administration with the will annexed in the State of New York, and such letters were issued to him by the surrogate of New York County. After receiving such letters, said Martinez took possession of said bonds.

The United States Commissioner of Internal Revenue, under the alleged authority of the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," 30 Stat. 448, assessed an internal revenue tax of $4293.76 upon a legacy and distributive share arising from personal property in the hands of the administrator, defendant in error, who paid said tax to the United States collector of internal revenue for the third district of New York, plaintiff in error, under protest and upon compulsion of the collector's threat of distraint and sale, and made the statutory application for its refund to the Commissioner of Internal Revenue, who rejected the application. The administrator then brought this action in the Circuit Court of the United States for the Southern District of New York against the collector to recover the amount of the tax.

The collector demurred; the demurrer was overruled, and a

final judgment entered against the collector for the amount claimed, with interest and costs. The collector then brought the action into the Circuit Court of Appeals, which certified to this court the following questions of law arising out of the foregoing facts:

"1. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures and for other purposes,' upon the passing of any legacy arising out of the personal property of a non-resident alien who has never resided or had a domicil within the United States, and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicil, pursuant to the laws thereof, by which he gives all his property to a non-resident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?"

"2. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures and for other purposes,' upon the passing of any distributive share arising out of the personal property of a non-resident alien who has never resided or had a domicil within the United States, and who dies without the United States, in the year 1899, intestate, and by the law of his foreign domicil all of his personal property passes to his son, also a non-resident alien, and who leaves certain personal property within the State of New York, exceeding $10,000 in value?"

Mr. Solicitor General for the United States.

Mr. Wheeler H. Peckham and *Mr. John G. Carlisle* for defendants in error. *Mr. William Edmond Curtis* and *Mr. Henry M. Ward* were on their brief.

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

This case raises the question whether the inheritance tax law

of the United States applied, in 1899, to the intangible personal property of a non-resident alien, who never had a domicil in in the United States and died abroad—such personal property being within the United States and having passed to his son, also an alien domiciled abroad, as sole legatee and next of kin of the deceased, partly under a will executed abroad and partly under the intestate laws of Spain.

By the twenty-ninth section of the war tax law of June 30, 1898, c. 448, 30 Stat. 448, 464, "Any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property . . . passing . . . from any person possessed of such property, either *by will or by the intestate laws of any State or Territory*, . . . shall be, and hereby are, made subject to a duty or tax," etc.

The ancient maxim of the law, *mobilia sequuntur personam*, was the outgrowth of conditions which have largely ceased to exist, and of an age when personal property consisted principally of articles appertaining, as the name indicates, to the person of the owner, such as gold and silver, jewels, apparel, and less immediately to horses, cattle and other animals, and to the products of the farm and the shop. As this property was, in primitive times, usually kept under the personal supervision of the owner, and was often carried about by him on his journeys, (as it often still is in Oriental countries,) the principle became incorporated in the law that its locality was determined by the domicil of the owner, and that his rights with respect to such property were fixed by the law of that domicil.

While the enormous increase in the amount and variety of personal property during the past century has necessitated certain limitations of the maxim, particularly in matters of taxation, it is by no means obsolete. It is still the law that personal property is sold, transmitted, bequeathed by will, and is descendible by inheritance according to the law of the domicil and not by that of its *situs*. *Cross* v. *United States Trust Co.*, 131 N. Y. 330; *Ennis* v. *Smith*, 14 How. 400, 424; *Dammert* v. *Osborn*, 141 N. Y. 564. In matters of taxation, however, and of subjecting the personal property of non-residents to the

claims of local creditors of the owner, serious encroachments have been made upon the ancient maxim, and a rule has grown up in modern times that legislatures may deal with the personal as well as with the real property of non-residents within their jurisdiction; and that such property, while enjoying the protection and benefits of the local law, may be taxed for the expenses of the local government. These doctrines have found expression in a large number of cases in this court. *Green* v. *Van Buskirk*, 5 Wall. 307; *S. C.*, 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Walworth* v. *Harris*, 129 U. S. 355; *Security Trust Company* v. *Dodd*, 173 U. S. 624, and cases there cited.

Recent cases in this court have affirmed very broadly the right of the legislature to tax the local property of non-residents, and particularly of corporations who are permitted by comity to do business within the State. *The Delaware Railroad Tax*, 18 Wall. 206; *Erie Railway Co.* v. *Pennsylvania*, 21 Wall. 492; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Adams Express Co.* v. *Ohio*, 166 U. S. 185. The same principle has been applied not only to tangible property but to credits and effects. *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Savings Society* v. *Multnomah County*, 169 U. S. 421; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133.

The question in each case is not of the power of the legislature to tax the personal property of non-residents, both tangible and intangible, since that is well established both in England and America, *Mager* v. *Grima*, 8 How. 490, but of its intent to do so by the particular act in question. The inheritance tax law of the United States above cited applies to property "passing by will or by the intestate laws of any State or Territory." As the property in this case did not pass under any will executed in any State or Territory of the United States, or by the intestate laws of any such State or Territory, the case is not within the literalism of the act, unless we are to use the word "State" in a sense broad enough to include a foreign State or Territory. As

matter of fact, the decedent was a Spanish subject, who had never resided in the United States, had executed a will at Paris in the Spanish language, pursuant to the laws of Spain, under which will one third of his property passed to his son and two thirds to the same person under the intestate laws of Spain. The property left by the will consisted of Federal, municipal and corporation bonds, in custody of the agents of the deceased in New York. It is the locality of the property within the jurisdiction of the United States which subjects it, if at all, to the legacy or succession tax.

It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty, *Warrington* v. *Furbor*, 8 East, 242, 247; *Williams* v. *Sangar*, 10 East, 66, 69; *Denn* v. *Diamond*, 4 B. & C. 243, 245; *Tomkins* v. *Ashby*, 6 B. & C. 541; *Doe* v. *Snaith*, 8 Bing. 146, 152; *Wroughton* v. *Turtle*, 11 M. & W. 561, 567; *Gurr* v. *Scudds*, 11 Exchq. 190, though the rule regarding *exemptions* from general laws imposing taxes may be different. Cooley on Taxation, 146; *In Matter of Enston*, 113 N. Y. 174, 177.

We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. *Hartranft* v. *Wiegmann*, 121 U. S. 609; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *United States* v. *Wigglesworth*, 2 Story, 369; *Powers* v. *Barney*, 5 Blatchford, 202.

It is pertinent in this connection to examine similar statutes passed in other countries and in the several States of this Union, and to inquire what construction is given to them. By the English tax legacy act of 1796 a tax was imposed on every legacy "given by any will or testamentary instrument to any person who shall die after the passing of this act." In *Attorney General* v. *Cockerell*, 1 Price, 165, (1814) this was held by the Court of Exchequer to apply to a legacy bequeathed by a

British subject residing in the East Indies to persons living in England, if the executor proved the will in England, and paid the legacy there, though the testator held his property in India, and resided and made his will and died there. The case was put upon the ground that the will was proved in England, that the executors had received the property there, and that the legatees resided there and were to be paid there. But the case is further distinguishable from the one under consideration in the fact that the testator was a British subject and domiciled in a British possession, although the stress of the case was laid upon the residence of the legatees in England. *The Attorney General* v. *Beatson*, 7 Price, 560, (1819) differs from the last one only in the fact that the property bequeathed was in India, and was remitted to England and paid to legatees residing in Scotland. But it was held in the *Estate of Ewin*, 1 Cr. & Jer. 151, (1830) that foreign stocks, the property of a testator domiciled in England, were liable to the legacy duty, although the stocks were transferable and the dividends were payable in the foreign countries. In this case the law of the domicil was held to be controlling and the domicil to be the *situs* of the personal property. The two cases from Price were not cited.

In *Jackson* v. *Forbes*, 2 Cr. & Jer. 382, a testator born in Scotland, who resided and died in India, leaving property there but none in England, left his property to his four natural children. The property was collected by his executors, sent to England and invested in their own names. The court held the property exempt from legacy duties, apparently upon the ground that the property was administered by the executors without necessarily invoking the aid of the Court of Chancery, although no reasons were given in the opinion. Up to this time it had been thought that, if the legacy were paid from assets administered in England, the duty was payable. The two cases from Price were cited but not discussed. This case was subsequently affirmed by the House of Lords under the name of *The Attorney General* v. *Jackson*, 8 Bligh, (N. S.) 15. The case of *Logan* v. *Fairlie*, 1 Mylne & Craig, 59, was a similar case, and the legacy was held to be exempt upon its authority.

But in *Arnold* v. *Arnold*, 2 Mylne & Craig, 256, a similar

case of a testator residing and dying in India, leaving property there which was remitted to England and administered there, the legacy tax was held not to be payable, and the question was regarded as finally settled by *Attorney General* v. *Jackson*. The two cases from Price were overruled.

Finally, in *Thompson* v. *Advocate General*, 12 Cl. & Fin. 1, a British born subject died, domiciled in a British colony. At the time of his death he was possessed of personal property in Scotland. Probate of his will was taken out in Scotland for the purpose of administering that property, and legacies were paid to legatees residing there. It was held by the House of Lords that no legacy duty was payable. The two cases from Price were flatly overruled, the other cases cited and discussed at length, and the doctrine of domicil applied. This case must be regarded as settling the law of England upon the subject.

It will be observed in these cases that the testator was a British subject, but in the *Case of Bruce*, 2 Cr. & Jer. 436, the testator was an American who lived and died abroad, having appointed an English executor and bequeathed property in England to legatees residing there. The case is exactly in point, and the court had no difficulty in reaching the conclusion that the property was not liable to legacy duty.

There are some later cases in England, but none that seem to qualify the rule laid down in *Thompson* v. *Advocate General*. In some of them a distinction is drawn between the legacy tax act and the succession duty act, which came into operation May 19, 1853, and in *In re Lovelace*, 4 De Gex & Jones, 340, it was said that the latter act applied to a succession *inter vivos* under a British settlement to British property vested in British trustees, and falling under the jurisdiction of a British court, although the persons entitled were aliens domiciled abroad. This case arose under an English marriage settlement made in England on the marriage of two English subjects, and affected English personalty only. In *Wallop's Trust*, 1 De Gex, Jones & Smith, 656, a distinction was drawn between the legacy act of George III and the succession duty act, and a broader construction given to the latter. In *Wallace* v. *Attorney General*, L. R. 1 Ch. App. 1, it was held that a succession duty was

not payable on legacies given by the will of a person domiciled in a foreign country. The law was treated as settled by *Thompson* v. *Advocate General*, 12 Cl. & F. 1, and the question discussed on principle in a vigorous opinion. The converse of this case is that of *Attorney General* v. *Napier*, 6 Exch. 217, in which a British born subject died in India, though he had never acquired a domicil there, and it was held that the whole of his property, though chiefly situate abroad, was liable to a legacy duty. This case is similar to that of *Ewin*, 1 Cr. & Jer. 151, above cited, though decided twenty years later. See also *Attorney General* v. *Campbell*, L. R. 5 H. L. Eng. & Irish Apps. 524; *Lyall* v. *Lyall*, L. R. 15 Eq. 1.

From this analysis of the English cases it clearly appears that, under a general act imposing a duty upon legacies, the law of the domicil of the testator controls, and if he be domiciled abroad, whether an alien or a British subject, his legacies are exempt, whether the property be in England at the time of his death, or be subsequently remitted there by his executors for local administration and distribution.

We proceed now to an examination of the state decisions upon the same subject, which, with one or two exceptions, tend in the same direction. The Massachusetts collateral inheritance law of 1891 imposes a tax upon "all property *within the jurisdiction of the Commonwealth*, . . . *whether belonging to inhabitants of the Commonwealth or not*, and whether tangible or intangible, which shall pass by will or by the intestate laws of the Commonwealth regulating intestate succession," etc. In *Callahan* v. *Woodbridge*, 171 Mass. 595, it was held that under this act the succession to property of non-residents was expressly taxed as if the property belonged to inhabitants of the Commonwealth, and that the language, "which shall pass by will or by the laws of the Commonwealth regulating intestate succession," taken in connection with the clauses immediately preceding it, applies to foreign wills, and to property that passes under the statute of this Commonwealth which regulates the succession to the property of a non-resident owner after his death." The testator in that case lived in the State of New York, but the property was within the jurisdiction of Massa-

chusetts. The statute was held to apply to property tangible or intangible. We make no criticism of this case, which was placed expressly upon the language of the statute.

The inheritance tax law of New York of 1885 imposed a tax upon "all property which shall pass by will or by the intestate laws of the State, from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within this State, or any part of such property . . . transferred by deed, grant, sale or gift made or intended to take effect . . . after the death of the grantor," etc. In the *Matter of Enston*, 113 N. Y. 174, this was held not to apply to property within the State which passed by will or intestacy from a non-resident decedent to collateral relatives or strangers, legatees domiciled in the State, and the latter clause, "or which property shall be within the State," was held to be limited to such as was transferred by deed, grant, sale or gift *inter vivos*. The act was amended in 1887 so as to include "all property which shall pass by will or by the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, or *if such decedent were not a resident of this State at the time of his death*, which property or any part thereof shall be within this State." And in *Romaine's case*, 127 N. Y. 80, it was held to apply to personal property in New York, owned by a non-resident intestate at the time of his death, which was habitually kept or invested by him there. There can be but little doubt of the propriety of this ruling. In *Whiting's case*, 150 N. Y. 27, the same rule was extended to bonds of foreign as well as domestic corporations, and certificates of stock of domestic corporations, (but not of foreign,) owned by a non-resident decedent, but deposited by him in a safe deposit vault in New York. See also *Bronson's case*, 150 N. Y. 1, and *Houdayer's case*, 150 N. Y. 37. These cases seem rather to accentuate the general principle that general statutes imposing taxes upon legacies do not apply to the personal property of non-resident testators, and that a special inclusion of such is necessary to subject it to taxation.

The inheritance tax law of Maryland subjects to taxation all

property "passing from any person who may die seized or possessed thereof, *being in this State;*" and it was held in *State* v. *Dalrymple*, 70 Md. 294, that the words "being in this State" referred, not to the decedent himself, but to his property. The testator was a resident of California, and his property was also bequeathed to residents of the same State. The property which was in Maryland consisted of an undivided quarter of the personal estate of the brother of the testator who died in Maryland. The act was held to apply, though the testator's domicil was in California. The English cases were cited and held to be distinguishable by reason of the peculiar language of the Maryland act. The language was evidently ambiguous, but the court having held that the words "being in this State" applied to the property and not to the person, of course its liability followed. A like construction was given to the same words in *Commonwealth* v. *Smith*, 5 Penn. St. 142; *In re Short's Estate*, 16 Penn. St. 63. The case of *Billings* v. *The People*, 189 Illinois, 472, is of no value, as the testator as well as his legatees were domiciled in Illinois, and the question was as to the liability of the widow's dower.

The case of *Alvany* v. *Powell*, 2 Jones Eq. 51, is directly in point, and undoubtedly sustains the positions of the government in this case. The North Carolina inheritance act imposed a tax upon "all personal property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to, or amongst the next of kin, of any intestate, when such next of kin are collateral relations of such intestate." The act was held to apply to property in North Carolina descending to a brother from an intestate domiciled in Canada. The court was satisfied that the true principle, both in regard to real and personal property, was the *situs* of the property. The English case of *Thompson* v. *Advocate General*, 12 Cl. & F. 1, decided by the House of Lords, was considered at length, and thus criticized: "No one can read the opinion delivered before the Lords in the case of *Thomson* v. *The Lord Advocate*, which is the case in which the principle of the domicil is finally settled, without being struck by the fact that there is throughout a marked paucity of reasoning." The North Carolina case was decided in 1854, and, so far as we

know, has not been followed in any other State, and it is the only one to which our attention has been called that seems to be in point in favor of the construction contended for by the Government.

There are a number of other cases in the state courts, but they either involve questions of taxation under general laws imposing taxes upon real and personal property, not being special inheritance taxes, or the language of the particular statute is such as to create little doubt as to the intention of the legislature to tax or not to tax the particular inheritance in question. *Small's Estate*, 151 Penn. St. 1; *Weaver's Estate* v. *State*, 81 N. W. Rep. 603; *State* v. *St. Louis Co. Court*, 47 Mo. 594; *Catlin* v. *Hall*, 21 Vt. 152; *People* v. *Home Ins. Co.*, 29 Cal. 533; *Hoyt* v. *Commissioners*, 23 N. Y. 224; *People* v. *Gardner*, 51 Barb. 352. In some jurisdictions a distinction has been made between tangible and intangible property which does not arise in this case. *Orcutt's Appeal*, 97 Penn. St. 179.

The tax in question in this case not being upon the property itself, but upon the succession, *United States* v. *Perkins*, 163 U. S. 625; *Magoun* v. *Illinois Trust & Savings Co.*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41, laws imposing general taxes upon real and personal property are not controlling when applied to taxes upon the succession, when such succession takes place and is governed by the laws of a foreign country. The actual *situs* of the property in such cases cuts but a small figure, while in the case of general taxes upon such property it is now considered determinative of the whole question.

The question involved in this case, however, arose under the act of June 30, 1864, before Mr. Justice Gray of this court, while holding the Circuit Court for Massachusetts, in *United States* v. *Hunnewell*, 13 Fed. Rep. 617. Section 124 of that act imposed a duty on legacies or distributive shares arising from personal property passing from any person possessed of such property, either by will, or by the intestate laws of any State or Territory. The action was brought to recover the tax upon American securities bequeathed by a French citizen domiciled in France to a son, who was also domiciled there. The will was executed in conformity with the French law and was

duly proved there, though a local executor was appointed by the probate court in Boston to transfer to the legatee the securities in question. It was held that section 124 did not make the duty payable when the person possessed of such property died testate if it would not be payable if such person died intestate; and as if the deceased had died intestate her son would not have taken a distributive share by the intestate laws of any State or Territory, his rights were the same if he took by will. In other words, that the words "either by will or by the intestate laws of any State or Territory" must be construed together, and would apply only to wills executed within any State or Territory of the United States. The case is precisely in point.

We regard this case as a correct exposition of the law. It is not necessary to rely exclusively upon the English cases, or upon those in the state courts, which hold that a general law imposing an inheritance tax upon property passing by will or descent does not apply to intangible personal property within the jurisdiction of the taxing power, but owned by persons domiciled abroad, under the laws of which domicil the property passes, since the statute in question here applies only to property passing "either by will or by the intestate laws of any State or Territory." Now, as the finding in this case is that the property passed partly under a Spanish will and partly under the intestate laws of Spain, the only question is whether the words "passing by will" are limited by the subsequent words "or the intestate laws of any State or Territory." We are clearly of opinion that they are, and that the words "passing by will" are limited to wills executed in "any State or Territory" under whose laws the property would pass, if the owner had died intestate. The whole scheme of the act evidently contemplates the application of the tax only to the property of a person domiciled in a State or Territory of the United States whose property is transmitted under our laws. This is evident not only from the language of section 29, above quoted, but from the provision of section 30, "that every executor, etc., . . . shall pay to the collector or deputy collector of the district *of which the deceased person was a resident* the amount of the duty or tax assessed upon such legacy or distributive

share," etc. It would be difficult to find language more expressive of an intent to confine the tax to persons domiciled in this country. It need only be added that while the words "State or Territory" are used in treaties, and perhaps also in some acts of Congress regulating our international relations as including foreign States, they are used in the Constitution and in ordinary acts of Congress as applying only to States or Territories of the United States.

If, as in several of the States, the words "passing by will or by the intestate laws of this State," or similar words, are connected with words declaring that the tax was intended to be imposed upon the estates of persons domiciled abroad, the latter provision is held to apply, and the words "passing by will or the intestate laws of this State" are held to include the estates of persons domiciled abroad. Such is the case in Illinois: *Billings* v. *People of Illinois*, 189 Ill. 472; Massachusetts: *Callahan* v. *Woodbridge*, 171 Mass. 595; *Greves* v. *Shaw*, 173 Mass. 205; Maine: *State* v. *Hamlin*, 86 Me. 495; Ohio: Laws of 1894, p. 166; Connecticut: Laws of 1889, p. 106; Tennessee: *State* v. *Alston*, 95 Tenn. 674. But it is hardly necessary to say that the construction given to these statutes would have no application to cases where words expressly providing for the estates of non-residents are omitted.

To say that we recognize by comity the law of a foreign domicil as controlling the transmission or succession of personal property because it thereby becomes *our* law, (and the property therefore taxable,) as is indicated in some cases, notable in *Alvany* v. *Powell*, 2 Jones Eq. 51, is misleading and little more than a play upon words. When we speak of *our* laws we mean to be understood as referring to our own statutory laws or the common law we inherited from the mother country, and when we apply the laws of a foreign domicil we do so, not because they are our laws, but because upon principles of comity we recognize those laws as applicable to the particular case. But to speak of such foreign laws as thereby becoming "the intestate laws of any State or Territory," wherein they are enforced, is practically to confound the whole distinction between the law of the *situs* and the law of the domicil. We do not

enforce the law of Spain in this case because it is our law, but because the practice of all civilized nations is to recognize the law of the domicil as governing the transmission and inheritance of personal property, and to prevent the confusion that would follow, if estates, situated possibly in half a dozen countries, were administered and distributed according to the laws of each country in which any portion of such estate happened to be located. We decline to hold the tax involved in this case applicable to this estate because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country. It is true that Congress may, and in certain cases has seen fit to, adopt the laws of a particular State, and apply them within a Territory, as was done when Congress applied the laws of Oregon to Alaska, Act of May 7, 1884, c. 53, § 7, 23 Stat. 24, 25, and certain statutes of Nebraska to Oklohoma, Act of May 2, 1890, c. 182, § 11, 26 Stat. 81, 87. They thereby became the laws of those Territories as much as if enacted by a territorial legislature, and were universally applicable. But that result follows expressly from the statute, and not from the recognition of the foreign law as applicable to a particular case. Section 2694 of the New York Code recognizes this distinction, in its requirement that "except where special provision is otherwise made by law, the validity and effect of the testamentary disposition of any other" (than real) "property situated within the State, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the State or country of which decedent was a resident at the time of his death."

Conceding it to be within the power of Congress to impose an inheritance tax upon property in this country, no matter where owned or transmitted, it has not done so in this case, and

The questions propounded by the Court of Appeals must be answered in the negative.

Mr. Justice White and Mr. Justice McKenna concurred in the result.

MOORE *v.* RUCKGABER.

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

No. 295. Argued November 21, 1901.—Decided March 17, 1902.

The war tax law of 1898 does not apply to intangible personal property located in this country and passing by the will of an alien domiciled abroad, to a daughter who is also an alien domiciled abroad, although the will was executed in this country during a temporary sojourn here.

As the tax is not imposed upon the property but upon the succession to the property, the law of the country in which the succession takes place determines the liability to taxation.

The law does not apply to property passing under a will, if it would not apply in case the testator had died intestate, and as in this case the property would have passed under the intestate laws of France, the succession is not subject to a tax here, although the will was executed in this country.

THIS was also an action brought in the Circuit Court for the Southern District of New York by Ruckgaber, as executor of the last will and testament of Louisa Augusta Ripley-Pinède, against the Collector of Internal Revenue, to recover an inheritance tax paid to the defendant upon certain personal property in the city of New York. It was argued with No. 287, *ante*, 578.

The material facts, as set forth in the certificate, are briefly as follows:

The testatrix, Louisa Augusta Ripley-Pinède, died at Zürich, Switzerland, on September 25, 1898, being at that time a non-resident of the United States, and having, for at least eight years immediately preceding her death, been domiciled in, and a permanent resident of, the Republic of France. She left a will dated November 6, 1890, which was made in New York and in conformity to the laws of that State, where the testatrix was then sojourning, whereby she bequeathed all her personal property in the United States to her daughter, Carmelia von Groll, who was then, and is now, also a non-resident of the United States, domiciled in Germany. Said will was probated

in the Surrogate's Court of Kings County, New York, on February 17, 1899, and letters testamentary were thereupon issued to the defendant in error, a resident of said county and State, who alone qualified as executor.

At the time of her death the testatrix owned a claim in account current against one Carl Goepel and one Max Ruckgaber, Jr., constituting the firm of Schulz & Ruckgaber, both of whom resided in the county of Kings and State of New York. She was also the owner of a share of stock in The Tribune Association, a New York corporation. The testatrix was also the owner of bonds and coupons of divers American corporations hereinafter particularly described. Said chose in action, stock, bonds and certificate constituted all the personal property of every kind in the United States of America referred to in the said will. The value of the said property of the testatrix at the date of her death, September 25, 1898, as fixed and determined by appraisers duly appointed, was $105,670.70. On or about the 15th day of June, 1899, upon the written demand of the collector of internal revenue for the first district of New York, and under protest the executor did make and render in duplicate to the said collector a return of legacies arising from personal property of every kind whatsover, being in charge or trust of said executor, passing from Louisa Augusta Ripley-Pinède to her said daughter by her will, as aforesaid.

The following questions of law which arose out of the foregoing facts were certified to this court:

"1. Can the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinède, actually located within the United States at the time of her death, September 25, 1898, be deemed to have a *situs* in the United States for the purpose of levying a tax or duty upon the transmission or receipt thereof under sections 29, 30 and 31 of the act of Congress entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' approved June 13, 1898?"

"2. Was the transmission or receipt of the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinède, which was actually located in the United States at the time of her death, September 25, 1898, subject to taxation un-

der sections 29, 30 and 31 of the act of Congress entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' approved June 13, 1898?"

Mr. Solicitor General for the United States.

Mr. Alfred E. Hinricks for defendant in error.

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

This case differs from the one just decided only in the fact that the will of the non-resident testatrix was executed in New York, November 6, 1890, during a temporary sojourn there, although, as in the preceding case, the testatrix was domiciled abroad, and bequeathed her personal property in New York to a daughter, who was married, and also lived abroad.

There can be no doubt whatever that, if Madame Pinède had died intestate, the personal property would not have passed by the law "of any State or Territory," (using the words of the act,) but by the laws of France. The question then is, whether the condition is changed, if the property pass under a will executed in this country. In the *United States* v. *Hunnewell*, 13 Fed. Rep. 617, cited in the preceding case, the will was executed in France, but the decision of Mr. Justice Gray, holding that the tax was not payable, was not put upon the ground that the will was executed in a foreign country, but upon the broader ground that the legacy duty was payable only upon the estate of persons domiciled within the United States. In delivering the opinion he observed: "Section 124" (of the similar act of 1864) "imposes a duty on legacies or distributive shares arising from personal property 'passing from any person possessed of such property, either by will, or by the intestate laws of any State or Territory;' it does not make the duty payable when 'the person possessed of such property' dies testate, if it would not be payable if such person died intestate; and if Madame de la Valette had died intestate, her son would not have taken a distributive share 'by the intestate laws of

any State or Territory,' but, if at all, by the law of France, the domicil of his mother at the time of her death. And section 125, by requiring the executor or administrator to pay the amount of this duty 'to the collector or deputy collector of the district of which the deceased person was a resident' leads to the same conclusion."

The real question then is, as said by Mr. Justice Gray, whether the act makes the duty payable when the person possessed of such property dies testate, if it would not be payable if such person died intestate, although the actual question involved in this case differs from the one there involved, in the fact that in the *Hunnewell* case the will was executed abroad, while in the present case it was executed in this country.

Bearing in mind the fact that the tax in this case is not upon the property itself, but upon the transmission or devolution of such property, the question again recurs, as it did in the preceding case, whether the succession took effect in France or in New York. We are aided in the solution of this problem by the language of section 2694 of the New York Code of Civil Procedure, also cited in the preceding case, which is as follows: "Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other" (than real) "property situated within the State, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the State or country of which the decedent was a resident at the time of his death." Now as, if Madame Pinède had died without leaving a will, her property would have passed under the intestate laws of France and been exempt from this tax, it follows under the *Hunnewell* case that it is equally exempt though it passed by will.

The will of Madame Pinède is confined to her personal property in this country, and the record does not show whether she was possessed of other property in France or in any other foreign country. If she had, that property would either pass by will executed there or under the intestate laws of her domicil. For reasons stated in the prior opinion, we do not think Congress contemplated by this act that the estates of deceased persons should be split up for the purposes of distribution or taxa-

tion, but that, so far as regards personal property, the law of the domicil should prevail.

A question somewhat to the converse of this arose in the *Estate of Romaine*, 127 N. Y. 80, which was a proceeding to compel payment of an inheritance tax by the administrator of the estate of Romaine, who had died intestate in Virginia, leaving a brother and sister resident in New York, as his next of kin. The act of 1887 subjected to an inheritance tax "all property which shall pass by will or by the *intestate laws of this State*, from any person who may die seized or possessed of the same while a resident of this State, or if such decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State." The question was whether the property of Romaine, who died in Virginia intestate, was subject to the tax. After deciding that the tax applied to two classes, namely, resident and non-resident decedents, the court observed: "But does it apply to all persons belonging to these two classes? It is not denied that it applies to all *resident* decedents, and to all non-resident *testators*, but it is contended that it does not apply to non-resident *intestates* because property 'which shall pass . . . by the intestate laws of this State' is expressly mentioned to the implied exclusion of property passing by the intestate laws of other States. This is the position of the appellant, whose learned counsel claims that the act, in its present form, was designed to meet cases of succession by will, but not of succession by intestacy, unless the intestate was a resident of this State. It is difficult, however, to see why the legislature should discriminate simply for the purposes of taxation between the property of a non-resident decedent who made a will, and of one who did not. It is not probable that there was an intention to tax the estates of non-resident testators and to exempt those of non-resident intestates, because there is no foundation for such a distinction. . . . Property of the same kind, situated in the same place, receiving the same protection from the law, and administered upon in the same way, would naturally be required to contribute toward the expenses of government upon the same basis, regardless of whether its last owner died testate or intestate."

By parity of reasoning, we think it follows that no discrimination was intended to be made between non-residents who died testate, even though the will were made in this country, and those who died intestate; and as we have held in the preceding case that the law does not apply to non-residents who died intestate, or testate under a will executed abroad, we think it follows that it does not apply to deceased persons domiciled abroad who left property by will executed in this country.

The questions certified must, therefore, be answered in the negative.

Mr. Justice White and Mr. Justice McKenna concurred in the result.

BUSCH *v.* JONES.

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

No. 96. Argued January 14, 1902.—Decided March 17, 1902.

The appellees' contention as to jurisdiction in this case is not justified for reasons expressed in *Clark* v. *Wooster*, 119 U. S. 322, and *Beedle* v. *Bennett*, 122 U. S. 71.

This was an action to recover for infringements of a patent. The lower courts found as a fact that all the claims of the patent had been infringed by appellant, and the evidence sustains the finding. The accounting in the lower court, however, was had upon the basis of the validity of the process, and therefore the judgment of the Court of Appeals must be reversed and the cause remanded with directions to that court to reverse the judgment and decree of the Supreme Court, and remand the cause to the latter court for further proceedings in accordance with this opinion.

This suit was brought by appellees against appellant for the infringement of letters patent No. 204,741, and letters patent No. 452,898, issued to Joshua W. Jones, one of the appellees. An accounting was prayed, and also an injunction, pending the suit. The bill contained the usual allegations of invention and utility, and of infringement by the defendant (appellant). The

answer traversed those allegations, and alleged prior use, disclosure of the invention in prior publications, and also anticipation by prior devices and processes. The answer contained a list of the devices. No evidence was given as to, and no judgment passed on, patent No. 452,898. This appeal, therefore, is only concerned with patent No. 204,741. The patent was issued to Joshua W. Jones, one of the appellees, for a press and process (the relation of the two is disputed) for "dry pressing" and removing type indentations from printed sheets. The validity of the patent was sustained, and its infringement by the defendant (appellant) was found by the Supreme Court of the District of Columbia, and decree passed adjudging appellees the sum of $3491.70 with interest and costs. The decree was affirmed by the Court of Appeals. 16 D. C. App. 23. The case was then brought here. The facts are stated in the opinion.

Mr. George J. Murray for appellant.

Mr. M. W. Jacobs for appellees.

Mr. Justice McKenna delivered the opinion of the court.

1. A question of jurisdiction is raised. It is contended by appellant that the case was not one of equitable cognizance, the appellees' remedy being, it is claimed, at law. The specification of error upon which the contention is based is expressed as follows:

"Because at the time of the hearing it appeared from the record that the only patent before the court had expired before the hearing, no motion for preliminary injunction having been made prior to the expiration of the patent, and defendant being a mere user of one machine, which machine was destroyed by fire before the case was brought to hearing."

This seeks to determine the jurisdiction of the court by conditions which came into existence after the commencement of the suit, not upon those which existed at the time the bill was filed. It is, however, urged in argument that the contract between Jones and the W. O. Hickok Manufacturing Company

conveyed the patent rights to the press only, and not the process described in the fifth claim of the patent, and that "the court, sitting as a court of equity, had no jurisdiction to order an injunction at the time the bill of complaint was filed." But what the contract provided was an issue to be made in the case, and pending its decision the preliminary relief by injunction could have been granted. Appellees' contention as to the jurisdiction is, therefore, not justified, and a discussion of the reasons for this conclusion is not necessary. They are expressed in *Clark* v. *Wooster*, 119 U. S. 322, and *Beedle* v. *Bennett*, 122 U. S. 71.

2. The patent is designated an "Improvement in Bookbinder's Dry-press and Sheet-tie." That is, a new press and process for removing type indentations from printed papers or sheets, the latter when folded being designated technically as "signatures."

The type indentations are made in printing, the type displacing somewhat the fiber of the paper, and the removal of the indentations is technically known in the art as "dry pressing," and the device by which it is done is called a "dry press." Such a press the patent is intended to cover, and also a particular process for dry pressing. As a process the validity of the patent is questioned, as a new machine its invention is controverted. An inquiry into the prior art becomes therefore important, and a witness, describing it and its imperfections, testified as follows:

"Previous to the invention of Mr. Jones as described in said patent, it was the custom to press printed sheets by inserting them between heavy paper boards, sometimes called 'fuller-boards,' but generally now called 'glazed boards,' and putting said boards with the printed papers between them into a powerful press, by which pressure was produced on said boards by various means, sometimes by means of screw pressure, sometimes by hydraulic pressure. After the pressure was produced on the paper it was continued by allowing the press to remain with its pressure on to its fullest extent for ten or twelve hours or more, say from one night to the next morning, when the pressure was removed, the papers and boards taken from the press and separated by removing the boards from the pile of

combined boards and paper, and putting the boards on one side on one pile and making another pile of the printed papers. This was necessarily comparatively a slow process, inasmuch as with one press only as much printed paper as the press would hold when put between the boards could be pressed in about ten or twelve hours, so that where much work had to be done a number of such presses were necessary. It was also costly as to labor, because the sheets had to be placed between the boards and removed therefrom afterwards, which took much time, especially where, as in the case of fine work, only one sheet was placed between two boards; and when this was done comparatively few sheets could be pressed at once because the boards took up much more room than the paper did, they being quite thick."

It was to meet this condition that the Jones patent was conceived, and its object is stated to be first to "furnish a bulk-compressor device, to be used to prepare the matter properly before it is inserted in the dry-press proper, thus saving time or repeated travel by the latter, before the operation of tying; second, to furnish a dry-press proper in which the compressing parts or heads—that is, the base and plunger—are constructed dividedly, or with ways through them, to afford access through them, to readily insert and manipulate the twine, and to tie the bundles of paper while held compressed, thus securing the bundle together by a powerful tie, which, when they are removed from the press, retains its force *ad libitum;* third, a press-frame, having sides peculiarly set and arranged, and provided with longitudinal slots therein corresponding with the ways in the press-heads, above referred to, and for the same purpose, as well as to rightly lodge and center the paper with relation to the middle of the press-heads; fourth, certain ledges in the said press-frame and guides on the plunger thereof, to properly center different-sized sheets in press to secure the tie at the middle of the bundles both ways; fifth, a new process for treating printed and folded sheets of paper in dry-pressing, consisting of subjecting a collection of such sheets to pressure without the use of fuller-boards, and while under such pressure tying them into compact bundles, with end boards thereon;

then removing them immediately from the press, and allowing them to remain tied sufficiently long to fix and complete the dry-pressing."

The press is described in the patent with particularity, and illustrated by drawings. It may be said, generally, that it is a press in which bundles of signatures (sheets) are placed, at the end of which bundles rigid boards are attached to distribute the pressure which is exerted by the press. The press moves in a "trough formed" bed so mounted as to incline laterally "so that the folded paper may securely lodge and carry therein while being operated on." Rectangular blocks are rigidly secured at both ends of the bed. The lower block is the base of what is called in the specifications "a divided head," constructed with "openings or ways." Opposing this there is a "plunger or follower," to which there is also attached a "divided head" having "openings and ways" between the parts of the head. The "openings and ways" are to enable the operator to pass his hand between the parts of the press and tie the bundles. The operation of the press is as follows: A bundle of signatures (sheets) with rigid boards at its ends is placed in the press, pressure is exerted by means of a screw (other means may be used) which passes through the upper block and operates on the plunger or follower and the "divided head" attached to it, and as the bundle rests on the lower block and its "divided head," it is evident that the pressure on the sheets will be in proportion to the power applied. While under pressure in the press the bundles are tied, access to them being had through the openings in the "divided head." The bundle is then removed from the press and allowed "to remain tied sufficiently long to fix and complete the dry pressing."

The advantage of the new method is that it is not so dilatory as the old and is more economical. In the old method the sheets, coming damp from the printing press, had to be dried before dry-pressing, and had also to be subjected to pressure in the press a number of hours to effect the smoothing (dry pressing) of the sheets. The quantity of the work, therefore, was limited by the number of presses. In other words, as expressed by one of the witnesses, "where much work had to be done a number of

such presses were necessary." And it was further testified that "it (the old method) was also costly as to labor, because the sheets had to be placed between the boards (fuller boards) and removed therefrom afterwards, which took much time, especially where, as in the case of fine work, only one sheet was placed between two boards, and when this was done comparatively few sheets could be pressed at once, because the boards took up much more room than the paper did, they being quite thick." In the new method there is no such limitations as to time, nor does it require the same expenditure of money. In the new method the initial pressure is applied in the press—the subsequent pressure necessary to remove the type indentations is continued in the tied up bundle. The operation, therefore, is comparatively rapid. "Putting the paper in the bundle," a witness testified, "tieing it up in a bundle and removing it therefrom," takes a few minutes. And the longer the sheets remain in the bundles the better the effect. Some time is necessary. Another advantage is claimed. It was testified that in the Jones method the sheets when folded have the convex impression of one half of the sheet brought in contact with the convex side of the other half of the sheet or of the sheet next to it, "and these convex impressions coming in contact with each other tend, when under pressure, to efface each other."

There is, however, no revelation in the specifications of the patent of the operation of opposing "convex impressions," nor a word to indicate that Jones was conscious of the advantage of that assistance to the pressure upon the sheets. The discovery seems to have been made by one of the witnesses, and also seems to have been disclaimed by Jones in the following question and answer:

"X-Q. 56. Throughout the testimony a good deal has been said about the advantages derived from your supposed invention from the fact of the type indentations being concaved or convexed, whatever that may mean. Is there anything said in the patent about that?

"A. No; neither do I claim that they are produced by my process."

There is a dispute as to the character of the patent. Appel-

lees contend that it is "a *process* of 'dry pressing' *or removing type indentations from printed sheets*" (claim 5 of the patent). Second. "A *press* of peculiar construction and *adapted to the convenient carrying of this process into effect.* The novel features of which press are covered by claims one to four inclusive." The appellees contend that the patent is for a machine (claims 1 to 4) and also for a process (claim 5). And it is asserted the latter claim is but an operation or function of the machine. It is further contended that the machine and process were anticipated.

In discussing these contentions, it is not necessary to minutely observe the distinctions made and disputed by counsel. Even if the patent is primarily for a novel process, there is a claim for a novel press, and, by the consideration of the latter, we think, the validity of the former will be determined.

Was, then, the press anticipated, including broadly in the term the inquiry whether the press exhibited invention, in view of the prior state of the art? Anticipation is a question of fact, and the burden of establishing it is on the appellant. The patent bears a presumption of novelty and invention, and the lower courts, passing on the evidence, found against appellant's contention. Such united judgment this court accepts unless there is a clear showing to the contrary. *Brainard et al.* v. *Buck et al.*, *ante*, p. 99. That showing appellant claims the record establishes, and even urges that presses of various kinds had become so familiar, before the Jones patent, that judicial knowledge can be invoked for them. Hay presses, cotton presses, tobacco, wool and other presses are instanced, all of which, it is said, were used for applying pressure to masses of matter to compact them into bundles, and in all of which the pressure was retained by strings, ropes or bands of some kind. But wherein those presses differed one from the other and received special characterization and utility would be a matter of proof, not of assumption, and wherein the Jones patent differs from either of them and has derived its special applicability is certainly not so clear that it is demonstrated against the judgment of the Supreme Court and the Court of Appeals of the District. Nor are we nearer that demonstration by the specific patents,

put in evidence by appellant. There is generic sameness we concede, but there are differences, and the Patent Office and both lower courts found novelty and invention in those differences.

The appellant introduced in evidence a patent issued to D. Kellogg, October 12, 1852, for a wool press; one to W. R. Dingham, October 20, 1863, for improvement in paper presses; one to S. Cooley, October 16, 1866, for a wool press; to Thomas Stibbs, September 19, 1871, for pressing yarn; to W. P. Craig, for a baling press; to Thomas G. Hardesty, for tobacco press; to G. B. Archer, for baling manure and other substances; to C. Brown, for baling short cut hay, and another for baling short cut straw; and a patent for a signature press to R. A. Hart. There was also testimony of the existence of a press used in the bookbindery of one John Palmer, in Philadelphia. The press was used in a later stage of bookbinding than "dry pressing," for the purpose of tying printed sheets into bundles for storing. It was an upright press with opposing platens or heads in which there were grooves to receive the cords by which the bundle was tied while under pressure.

There is a certain resemblance between all of the devices. They are all instruments for exerting pressure upon substances placed between compressing heads or followers to compact such substances into bundles and afford facilities for tying the bundles while they are under pressure. The Dingham patent, the one most relied on by appellant, may be selected for illustration.

The Dingham device is an "Improvement in Paper Presses," and the inventor claimed to have "invented a new and useful machine for combining and facilitating the operation of pressing and tying paper into reams or bundles," which he called "the combination paper press and tie engine."

There were defects in the art of pressing and tying paper very similar to the defects in the art of dry pressing "signatures," and Dingham described the former as follows:

"The process of pressing and tying paper now generally employed requires a large and somewhat expensive press, which is located in some corner of the finishing room, and as the paper comes from the machine it is carried to the finishing

table, there counted and folded, and when sufficient is obtained to fill the press (usually about one hundred reams) it is conveyed to the press and placed therein, and, by means of a large screw and follower, pressed for about twelve hours, or during the night. It is then removed and conveyed to the tie-table and there tied into reams. After this (it being, when it comes from the machine, usually double-crown, or double the length of the ordinary ream of wrapping paper) it is cut into two reams or single crown. The usual mode of tying paper is by passing a strong cord or twine around the ream, with a noose or loop at the end, through which the other end is passed, and then drawn upon with the hand until the loose ream or bundle is sufficiently compressed. This operation is laborious and tedious, occupying much time, requires strong twine, and unavoidably draws the ream away or the paper out of place."

This language is quite similar to that used by Jones and his witnesses to describe the defects which existed in the bookbinder's art, and the presses of the inventors also have similarity. In both sheets of paper are pressed by being placed between "compressing heads," which "are constructed dividedly," to use the words of the Jones patent, "separate and sufficiently disconnected (to use the language of the Dingham patent) to allow the string or cord for tying the paper to pass between." Each machine, therefore, comprises a compress and tie-table. In each there is the same rapidity of operation, the same economy of time and means, and in each the pressure first applied by the machine is retained by cords and continued in the bundle. And it is manifest that this retained and continued pressure, which has for its purpose in the Jones patent to remove type indentations from the sheets, and in the Dingham patent to retain the sheets in the bundle, adds nothing to the operation of the press of the former and detracts nothing from the operation of the press of the latter. But notwithstanding these resemblances we may ascribe invention to the Jones patent if it be confined to the press proper. In other words, the press may be regarded as a form, adapted to the bookbinder's art, and although preceded by the Dingham patent in a general way, may be considered as an invention of that form.

Opinion of the Court.

The fifth claim of the Jones patent—the claim for the process—must be viewed from a different standpoint. The first four claims of the patent, as we have said, describe the elements, "In a printer's and bookbinder's dry press and sheet tie." The fifth claim is as follows:

"5. The process herein described for treating folded printed sheets of paper in dry pressing, the same consisting of subjecting a collection of such sheets to pressure without the use of fuller-boards, and while under such pressure tying them into a compact bundle with end boards, then removing them immediately from the press, and allowing them to remain tied sufficiently long to fix and complete dry pressing."

The dependence, therefore, is not, as counsel for appellees contends, the press upon the process. It is the other way, the process upon the press; for it is impossible to consider the fifth claim as describing anything but the operation and effect of the press. Indeed, the process is the whole value, the sole purpose of the press. What, indeed, is the process—what is the force at work? And the inquiry is entirely independent of questions as to what constitutes a patentable process discussed by this court in *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68, and in *Westinghouse* v. *Baden Power Brake Co.*, 170 U. S. 537. What, then, is the force at work and how is it applied? It is force (pressure) applied to sheets of paper placed between "compressing heads." In other words, a special application of pressure begun in the press and continued in the bundle by means of strings and cords. This, however, is the operation and effect of the machine, and it is none the less so because the pressure is held indefinitely. Its existence in the bundle is not independent of the press. The pressure is as much an effect in the bundle as when first applied. The pressure is applied by the press and so, substantially, are the bands or cords which continue the pressure, and we cannot assent to the view that the continuation of the pressure in the bundles with the consequence of removing type indentations in the printed sheets is anything but the natural and direct effect of the machine.

Infringement was put in issue by the pleadings and passed on by the lower courts. They found as a fact that all the claims

of the patent had been infringed by appellant. The finding is not absolutely disputed. The assignment of error is "that the patented machine used by defendant, in view of the state of the art preceding Jones' invention, did not infringe any claims of the patent in suit." That is, appellant contends that the evidence exhibits a complete anticipation, or so limits and narrows the Jones invention as to make the differences between the Jones press and that which was used by appellant more than formal. We have decided that the Jones press had not been anticipated, and both of the lower courts have found that the differences between it and appellant's press were not substantial. The evidence sustains the finding. The witnesses on behalf of appellees testified to the differences between the presses. They pointed out the essential resemblances of the presses and the merely formal character of the differences. There was no opposing testimony.

The accounting in the lower court, however, was had upon the basis of the validity of the process, (claim 5,) and therefore

The judgment of the Court of Appeals must be reversed and the cause remanded, with directions to that court to reverse the judgment and decree of the Supreme Court and remand the cause to the latter court for further proceedings, in accordance with this opinion, and it is so ordered.

PATTON *v.* BRADY, EXECUTRIX.

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

No. 1. Argued December 6, 1901.—Decided March 17, 1902.

A case arises under the Constitution of the United States, when the right of either party depends on the validity of an act of Congress, which is the fact in this case.

In this case the cause of action survived the death of the defendant, and was rightfully revived in the name of his executrix.

Statement of the Case.

The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article.

The tax which is levied thereby is an excise.

Taxation may run *pari passu* with expenditure, and the courts cannot revise the action of Congress in this respect.

A general tax may be charged upon property once charged with an excise; and the power to tax it as property, subject to constitutional limitations as to the mode of taxing property, is not defeated by the fact that it has already paid an excise.

The legislative determination as to the reasonableness of an excise in amount or as to the property to which it is applied, is final.

It is within the power of Congress to increase an excise, at least while the property is held for sale, and before it has passed into the hands of the consumer.

On July 14, 1899, plaintiff in error, as plaintiff below, commenced this action in the Circuit Court for the Eastern District of Virginia against J. D. Brady, collector of internal revenue for the second district of Virginia. In his declaration he alleged that in May, 1898, he had purchased in the open market and in the regular course of business 102,076 pounds of manufactured tobacco; that all the requisites of the internal revenue laws of the United States then existing had been fully complied with, stamps placed upon the boxes containing the tobacco, and regularly and duly canceled subsequent to April 14, 1898, and the tobacco removed from the factory, and that when he made his purchase the entire tax due the United States under and by virtue of such laws had been paid. The declaration then proceeded:

"After the act of Congress approved June 13, 1898, entitled 'An act to provide ways and means to meet war and other expenditures, and for other purposes,' had been enacted, the defendant, James D. Brady, who is the collector of internal revenue for the second district of the State of Virginia, in which he and plaintiff reside, and in the month of June, 1898, demanded of plaintiff that he pay the sum of $3062.28 as an additional tax to be paid upon said tobacco, which he claimed was imposed upon the same by the second paragraph of the third section of said act. Plaintiff refused to pay the same; whereupon the defendant threatened plaintiff that unless he did

Counsel for Plaintiff in error.

pay it he would treat plaintiff as a delinquent, and would seize his property under the provisions of an act of Congress applicable to such case, and would sell the same. Under the coercion of this demand and threat plaintiff paid the sum of $3062.28 to the defendant, but he did so under protest and with notice to the defendant that he would sue him to recover it back.

"Plaintiff avers that said section 3 of said act of June 13, 1898, imposing said additional tax upon his tobacco is repugnant to the Constitution of the United States, and said acts of Congress authorizing the defendant to seize plaintiff's property and sell it if he did not pay the same are also repugnant to said Constitution, and that his suit therefore arises under the Constitution of the United States.

"On the 17th day of June, 1899, the plaintiff set out all of the foregoing facts in an application to the Commissioner of Internal Revenue of the United States, according to the laws in that regard and the regulations of the Secretary of the United States established in pursuance thereof, and he appealed to said Commissioner of Internal Revenue to have said money so unlawfully extorted from him returned to him; but said Commissioner of Internal Revenue on the — day of July, 1899, rejected said appeal and refused to direct said money to be returned to plaintiff. The said Commissioner did not reject said appeal because of any informality in the manner in which it was made, but because he was of opinion that said act of Congress imposing said tax was consistent with the Constitution of the United States, and that said tax was lawfully collected; by all of which acts and doings the plaintiff is damaged six thousand dollars, and therefore he sues."

Summons having been served the case came on for hearing on the motion of the United States attorney for the district to dismiss the action on the ground that the act of Congress set forth in the declaration was not repugnant to the Constitution of the United States, which motion was sustained, and on September 22, 1899, the action was dismissed. To review such ruling plaintiff sued out this writ of error.

Mr. William L. Royall and *Mr. Fred. Harper* for plaintiff in error. *Mr. John W. Daniel* was on their brief.

Opinion of the Court.

Mr. Assistant Attorney General Beck for defendant in error.

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

The first contention of the defendant is that the Circuit Court did not have jurisdiction. The parties, it is true, were both citizens of Virginia, but the question presented in the declaration was the constitutionality of an act of Congress. The plaintiff's right of recovery was rested upon the unconstitutionality of the act, and that was the vital question. The Circuit Courts of the United States "have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States." Act of August 13, 1888, c. 866; 25 Stat. 433.

That a case arises under the Constitution of the United States when the right of either party depends on the validity of an act of Congress, is clear. It was said by Chief Justice Marshall that "a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either," *Cohens* v. *Virginia*, 6 Wheat. 264, 379; and again, when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 822. See also *Gold-Washing & Water Company* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257; *White* v. *Greenhow, Treasurer*, 114 U. S. 307; *Railroad Company* v. *Mississippi*, 102 U. S. 135, 139. In the latter case the following statement of the controversy was given in the opinion: "From this analysis of the pleadings, and of the petition for removal it will be observed that the contention of the State rests in part upon the ground that the construction and maintenance of the bridge in question is in violation of the condition on which Mississippi was admitted into the Union, and inconsistent with the engagement, on the

part of the United States, as expressed in the act of March 1, 1817. On the other hand, the railroad company, in support of its right to construct and maintain the present bridge across Pearl River, invokes the protection of the act of Congress passed March 2, 1868." And upon these facts it was held that the case was rightfully removed to the Federal court. Within these decisions obviously the Circuit Court had jurisdiction.

A second contention of the defendant is this: After the case had been brought to this court the defendant, J. D. Brady, died. Whereupon the plaintiff took steps to revive the action, and on November 4, 1901, Maggie A. Brady, the executrix of the deceased, was substituted as party defendant. Now it is insisted that the action was one based upon a tort, and, as such, abated by reason of the death of defendant.

Congress has not, speaking generally, attempted to prescribe the causes which survive the death of either party. Section 955, Rev. Stat., provides that—

"When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."

This does not define the causes which survive. In the absence of some special legislation the question in each case must be settled by the common law or the law of the State in which the cause of action arose. *United States* v. *Daniel*, 6 How. 11; *Henshaw* v. *Miller*, 17 How. 212; *Schreiber* v. *Sharpless*, 110 U. S. 76; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673; *Baltimore & Ohio Railroad Company* v. *Joy*, 173 U. S. 226, 229. It matters not whether we consider the common law or the statute law of Virginia as controlling. By either the cause of action stated in the complaint survived the death of defendant.

Section 2655 of the Code of Virginia (Code of 1887) reads as follows:

"An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or

carrying away any goods, or for the waste or destruction of or damage to any estate of or by his decedent."

The term "goods" is broad enough to include money, and as used in this statute must be held to be so inclusive, for it would be strange that a cause of action for taking and carrying away a thousand pieces of silver, should survive the death of the defendant, while a like action for taking and carrying away a thousand dollars in money should not. In *The Elizabeth and Jane*, 2 Mason, 407, 408, Mr. Justice Story said: "It cannot be doubted that money, and, of course, foreign coin, falls within the description of goods at common law." But more than that, the estate of plaintiff was reduced to the amount of three thousand dollars and over, by the action of decedent, and such reduction was a direct damage and comes within the rule laid down by the Court of Appeals in *Mumpower* v. *Bristol*, 94 Va. 737, 739, in which the court held that: "The damages allowed to be recovered by or against a personal representative by section 2655 of the code are direct damages to property, and not those which are merely consequent upon a wrongful act to the person only," and in which the presiding judge of the court, delivering the opinion and showing that the act sued for was not within the scope of the statute, said:

"The wrongful act which the defendant is alleged to have committed and for the injury resulting from which the plaintiff sues, consisted in maliciously and without probable cause suing out an injunction against the plaintiff, whereby the operation of his mill was suspended. It is quite obvious that this injunction did not operate to take or carry away the goods of the plaintiff, nor cause the waste or destruction of, or inflict any damage upon, the estate of the plaintiff. It is true that the language of the statute is comprehensive, and embraces damage of any kind or degree to the estate, real or personal, of the person aggrieved; but the damage must be direct, and not the consequential injury or loss to the estate which flows from a wrongful act directly affecting the person only. No part of the defendant's property was taken or carried away; no part of it was wasted or destroyed. The plaintiff's use of his property, and not the property itself, was affected by the act of which he complains."

See also *Ferrill* v. *Brewis' Adm'r*, 25 Gratt. 765, 770, and *Lee's Adm'r* v. *Hill*, 87 Va. 497.

If we turn to the common law, there the rule was that if a party increased his own estate by wrongfully taking another's property an action against him would survive his death, and might be revived against his personal representative. In the case of *United States* v. *Daniel*, 6 How. 11, which was an action against one who had in his lifetime been marshal of a district, to recover damages which the plaintiffs had sustained by reason of false returns made on certain executions by one of defendant's deputies, it was held that the action did not survive, because the decedent had received no benefit and had not increased his estate by means of the wrongful act. The court, referring to the common law, said:

"If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offence, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. . . . If the deputy marshal, in the misfeasance complained of, received money or property, the marshal being responsible for such acts, the cause of action survived against his executors. But this is not the case made in the present action."

Now the gravamen of the plaintiff's complaint is that he was compelled to pay the defendant the sum of $3062.28 to protect his property from unlawful seizure for illegal taxes. In such cases, having paid under protest, he can recover in an action of assumpsit the amount thus wrongfully taken from him.

"Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. Where the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received." *Philadelphia* v. *The Collector*, 5 Wall. 720, 731. See also *Dooley* v. *United States*, 182 U. S. 222.

Opinion of the Court.

It is true there are one or two sentences in the declaration appropriate to an action sounding in tort, such as the one last quoted, in which the pleader alleges that "by all of which acts and doings the plaintiff is damaged $6000, and therefore he sues." But nevertheless the substance of the charge is that the defendant wrongfully took from plaintiff the sum of $3062.28. By virtue thereof there was an implied promise on the part of the defendant to repay the same, and that implied promise lies at the foundation of the action.

In *Schreiber* v. *Sharpless*, 110 U. S. 76, 80, it was said:

"The right to proceed against the representatives of a deceased person depends not on forms and modes of proceedings in a suit, but on the nature of the cause of action for which the suit is brought. . . . Whether an action survives depends on the substance of the cause of action, not on the forms of proceedings to enforce it."

And in *Lee's Adm'r* v. *Hill*, *supra*, the court observed (p. 500):

"The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a *tort* unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander and the like, there the rule *actio personalis*, etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in *tort*, and there it survives."

And also quoted the following from *Booth* v. *Northroy*, 27 Conn. 325:

"In determining whether a cause of action survives to the personal representative, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced."

For these reasons, and under these authorities, we are of opinion that this cause of action survived the death of the defendant, and was rightfully revived in the name of his executrix.

We pass, therefore, to consider the merits of the case, and here the first question is, what is the nature of the tax? Obviously it was intended by Congress as an excise.

In the chapter in the Revised Statutes on internal revenue,

section 3368, it was provided that "upon tobacco and snuff manufactured and sold, or removed for consumption or use, there shall be levied and collected the following taxes:" Then followed statements of the amounts of the prescribed taxes. Section 30 of the Tariff Act of 1890, 26 Stat. 619, reads:

"That on and after the first day of January, eighteen hundred and ninety-one, the internal taxes on smoking and manufactured tobacco shall be six cents per pound, and on snuff six cents per pound."

On June 13, 1898, Congress passed an act to provide ways and means to meet the expenditures of the Spanish-American War, 30 Stat. 448. Section 3, so far as is applicable, is as follows:

"SEC. 3. That there shall, in lieu of the tax now imposed by law, be levied and collected a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured and sold, for consumption or sale. . . .

"And there shall also be assessed and collected, with the exceptions hereinafter in this section provided for, upon all the articles enumerated in this section which were manufactured, imported and removed from factory or customhouse before the passage of this act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, and which articles were at the time of the passage of this act held and intended for sale by any person, a tax equal to one half the difference between the tax already paid on such articles at the time of removal from the factory or customhouse and the tax levied in this act upon such articles.

"Every person having on the day succeeding the date of the passage of this act any of the above described articles on hand for sale in excess of one thousand pounds of manufactured tobacco and twenty thousand cigars or cigarettes, and which have been removed from the factory where produced or the customhouse through which imported, bearing the rate of tax payable thereon at the time of such removal, shall make a full and true return, under oath, in duplicate, of the quantity thereof, in pounds as to the tobacco and snuff and in thousands as to the

cigars and cigarettes so held on that day, in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. . . ."

Ever since the early part of the civil war there has been a body of legislation, gathered in the statutes under the title Internal Revenue, by which, upon goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption. Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the nation, but are among its comforts and luxuries. The first of these acts, passed on July 1, 1862, 12 Stat. 432, in terms provided for "the collection of internal duties, stamp duties, licenses or taxes imposed by this act," and included manufactured tobacco of all descriptions. Subsequent statutes changed the amount of the charge, the act of 1890 reducing it to six cents a pound. Then came the act in question, which, for the purpose of providing means for the expenditures of the Spanish war, increased the charge to 12 cents a pound, specifying distinctly that it was to be "in lieu of the tax now imposed by law." Nothing can be clearer than that in these various statutes, the last included among the number, Congress was intending to keep alive a body of excise charges on tobacco, spirits, etc. It may be that all the taxes enumerated in these various statutes were not excises, but the great body of them, including the tax on tobacco, were plainly excises within any accepted definition of the term.

Turning to Blackstone, vol. 1, p. 318, we find an excise defined: "An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." This definition is accepted by Story in his Constitution of the United States, sec. 953. Cooley in his work on Taxation, page 3, defines it as "an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities." Bouvier and Black, respec-

tively, in their dictionaries give the same definition. If we turn to the general dictionaries, Webster's International calls it "an inland duty or impost operating as an indirect tax on the consumer, levied upon certain specified articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue certain trades and deal in certain commodities." The definition in the Century Dictionary is substantially the same, though in addition this is quoted from Andrews on Rev. Law, sec. 133: "Excises is a word generally used in contradistinction to imposts in its restricted sense, and is applied to internal or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it, and sometimes upon the manufacture of it."

Some of these definitions were quoted with approval by this court in the *Income Tax* cases, and while the phraseology is not the same in all, yet so far as the particular tax before us is concerned, each of them would include it. The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article.

It is practically conceded by one counsel for plaintiff in error that this is an excise tax. After discussing the question at some length he says:

"To determine then what excise means we have for our guidance, first, an enumeration of the articles that it fell on in Great Britain in 1787. We have, second, the nature of the tax as judicially determined; and we have, third, the definition of it, or the common understanding of men about it, as given by the Encyclopedia Britannica and the Century Dictionary. Taking these three sources of information and combining them, it would seem that the leading idea of excise is that it is a tax, laid without rule or principle, upon consumable articles, upon the process of their manufacture and upon licenses to sell them. . . . Since tobacco was supposed to be one of the subjects to which excise was applied in England when the Constitution was framed, I shall assume that the court will hold that the tax in this case is an excise."

It is true other counsel in their brief have advanced a very

elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax* cases, but, as we have seen, it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use. It may be, as Dr. Johnson said, "a hateful tax levied upon commodities;" an opinion evidently shared by Blackstone, who says, after mentioning a number of articles that had been added to the list of those excised, "a list which no friend to his country would wish to see further increased." But these are simply considerations of policy and to be determined by the legislative branch, and not of power, to be determined by the judiciary. We conclude, therefore, that the tax which is levied by this act is an excise, properly so called, and we proceed to consider the further propositions presented by counsel.

It is insisted: "That Congress may excise an article as it pleases so that the excise does not amount to spoliation or confiscation. But that having excised it, it has excised it, and the power is exhausted. It cannot excise a second time." But why should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the government has ceased. They are, as said in Cooley on Taxation, p. 1: "The enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government and for all public needs," and so long as there exists public needs just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order "to provide for the common defence" and "promote the general welfare." Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be, that having made provision for times

of peace and quiet, the government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies.

That which was possible in fact existed. A war had been declared. National expenditures would naturally increase and did increase by reason thereof. Provision by way of loan or taxation for such increased expenditures was necessary. There is in this legislation, if ever such a question could arise, no matter of color or pretence. There was an existing demand, and to meet that demand this statute was enacted. The question, therefore, is whether Congressional provision must reach through an entire year and at the beginning finally determine the extent of the burden of taxes which can be cast upon the citizen during that year, with the result that if exigencies arise during the year calling for extraordinary and unexpected expenses the burden thereof must be provided for by way of loan, temporary or permanent; or whether there inheres in Congress the power to increase taxation during the year if exigencies demand increased expenditures. On this question we can have no doubt. Taxation may run *pari passu* with expenditure. The constituted authorities may rightfully make one equal the other. The fact that action has been taken with regard to conditions of peace does not prevent subsequent action with reference to unexpected demands of war. Courts may not in this respect revise the action of Congress. That body determines the question of war, and it may therefore rightfully prescribe the means necessary for carrying on that war. Loan or tax is possible. It may adopt either, or divide between the two. If it determines in whole or in part on tax, that means an increase in the existing rate or perhaps in the subjects of taxation, and the judgment of Congress in respect thereto is not subject to judicial challenge. Wisely was it said by Mr. Justice Cooley in his work on Taxation, page 34:

"'The legislative makes, the executive executes, and the judiciary construes the laws.' Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 46. The legislature must therefore determine all questions of state necessity, discretion or policy involved in ordering a tax and in apportioning it; must

make all the necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made. 'The judicial tribunals of the State have no concern with the policy of legislation. That is a matter resting altogether in the discretion of another coördinate branch of the government. The judicial power cannot legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the State.' Chief Justice Redfield, in *In re Powers*, 25 Vt. 261, 265. . . . But so long as the legislation is not colorable merely, but is confined to the enactment of what is in its nature strictly a tax law, and so long as none of the constitutional rights of the citizen are violated in the directions prescribed for enforcing the tax, the legislation is of supreme authority. Taxes may be and often are oppressive to the persons and corporations taxed; they may appear to the judicial mind unjust and even unnecessary, but this can constitute no reason for judicial interference."

In a general way these observations on the power of Congress to meet exigencies by increased taxation are not questioned by counsel, but it is specifically insisted that the power of imposing an excise once exercised is gone, even though the property may thereafter remain subject to ordinary taxation upon property as such. We quote the language of counsel:

"Possibly the property is not therefore to go free of taxation thereafter because it has been excised. If a man who has paid an excise upon a thousand boxes of tobacco chooses to stack it up in a warehouse and keep it there ten years, the tobacco is not, possibly, to go tax free because it has borne an excise. It receives the protection of the laws, and it should bear its part of the burdens of the laws. But it is to be taxed thereafter according to the principles of taxation, and not according to the arbitrariness of excise. Taxation upon it thereafter is to be direct taxation imposed according to population, which makes it bear a burden that is proportional to that borne by other property."

Doubtless a general tax may be cast upon property once charged with an excise; and the power to tax it as property,

subject to constitutional limitations as to the mode of taxing property, might not be defeated by the fact that it has already paid an excise. But what is the difference in the nature of an excise and an ordinary property tax which forbids a repetition or increase in the one case and permits it in the other? They are each methods by which the individual is made to contribute out of his property to the support of the government, and if an ordinary property tax may be repeated or increased when the exigencies of the government may demand, no reason is perceived why an excise should not also be repeated or increased under like exigencies. Counsel speaks of the power to impose an excise as an arbitrary, unrestrained power, but the Constitution, art. 1, sec. 8, provides that "all duties, imposts and excises shall be uniform throughout the United States." The exercise of the power is, therefore, limited by the rule of uniformity. The framers of the Constitution, the people who adopted it, thought that limitation sufficient, and courts may not add thereto. That uniformity has been adjudged to be a geographical uniformity. In the *Head-Money Cases*, 112 U. S. 580, 594, it was said:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform, and operates precisely alike in every port of the United States where such passengers can be landed. . . . Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. (*State Railroad Tax cases*, 92 U. S. 575, 612.) Here there is substantial uniformity within the meaning and purpose of the Constitution."

So also in the recent case of *Knowlton* v. *Moore*, 178 U. S. 41, 106:

"By the result, then, of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity. And it also results

that the assertion to which we at the outset referred, that the decision in the *Head-Money Cases*, holding that the word uniform must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated as respected their operation, as one and the same thing, and embodied the same conception."

Geographical uniformity being therefore that only which is prescribed by the Constitution the courts may not add new conditions, and the statute in question fully complies with that requirement. It is not the province of the judiciary to inquire whether the excise is reasonable in amount, or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final.

Neither can it be said that the change in the ownership of the tobacco in the case at bar had placed it beyond the reach of an excise. It is true that it had passed from the manufacturer, but it had not reached the consumer. By section 3 of the statute the charge is placed upon articles which "were at the time of the passage of this act held and intended for sale," and this tobacco was purchased and held for sale by the plaintiff. Within the scope of the various definitions we have quoted there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer.

Our conclusion, then, is that it is within the power of Congress to increase an excise as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; that it is no part of the function of a court to inquire into the reasonableness of the excise either as respects the amount, or the property upon which it is imposed.

The act in controversy, so far as the charge upon this plaintiff is concerned, is constitutional; and the judgment of the Circuit Court is

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE GRAY took no part in the decision of this case.

RELOJ CATTLE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 30. Argued and submitted October 21, 1901.—Decided March 17, 1902.

Ainsa v. *United States*, 161 U. S. 208, reaffirmed.

The grant asked to be confirmed was a grant by quantity according to the laws when it was made.

As the lawful area of the grant was south of the boundary line between the United States and Mexico, there could be no confirmation in this country, and moreover, the owners had obtained full satisfaction thereof from Mexico before this petition was filed, and no legal or equitable claim therefor existed against the United States.

Claims for *demasias* or overplus, in respect of which the conditions were unfulfilled, are imperfect claims, and such a claim as set up in this case was barred by limitation.

THE Reloj Cattle Company, claiming to be the owner in fee of a tract of land in the county of Cochise, Arizona, which it described as the San Pedro grant, filed its petition for confirmation in the Court of Private Land Claims, May 29, 1897. The petition alleged that the grant contained 37,000 acres in the United States, and, by a sketch map attached, 19,000 acres in the Republic of Mexico, or a total of 56,000 acres, within its exterior boundaries. It gave a description of the grant by courses and distances from certain natural objects, and relied on a survey made by one Howe. The petition further alleged that plaintiff was the owner of the tract by virtue of certain instruments in writing, by which it had acquired from Rafael Elias, the original grantee, title to all the property he had therein; that the grant title bore date May 2, 1833, and was duly made, executed and delivered by Don José Maria Mendoza, treasurer general of the State of Sonora, in the name of that State, under and by virtue of article 11 of the general

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sovereign decree No. 70, passed August 4, 1824, by the sovereign constituent congress of the United States of Mexico, which article conceded to all of the States of the Republic the rents or revenues which by said law were not reserved to the general government, one of which revenues was the vacant lands within the States of the Republic, thereby confirming to the States the lands so described.

It was further averred that by law No. 30 of May 20, 1825, and other decrees subsequent thereto, the constituent congress of the State of Sonora and Sinaloa prescribed regulations for the sale of such lands; that the initiatory proceeding to obtain the grant title to the lands in question was by petition dated 1820 or 1821, addressed to the governor intendente, the officer of the Spanish government in charge of and having exclusive jurisdiction in the matter of the sales of public lands in the precinct of Fronteras, in which precinct the lands petitioned for were situated, which petition was made and signed by José Jesus Perez, and proceedings thereon taken as required by the applicable royal ordinances of December 4, 1786; that thereafter, on July 5, 1822, at Arispe, Sonora, the tract petitioned for was sold by the proper officers to Perez for the sum of $190; that on July 6 the intendente ordered Perez to pay into the treasury that sum, together with costs and charges; that on July 7 the sale was approved by the provincial imperial treasury at Arispe, and was referred to the superior board of the treasury for its approval or determination, and that thereafter the $190, together with costs and charges, was paid into the national treasury of the Republic of Mexico; but that the superior board of the treasury was abolished before the sale was approved, and no further action was taken until October 25, 1832, when proceedings were instituted to transfer the rights and title of Perez to Rafael Elias, and to have the formal title to the lands issue to Elias; that in accordance therewith, on May 8, 1833, José Maria Mendoza, the treasurer general of the State of Sonora, issued to Elias the final testimonia or evidence of title to the grant, which was thereupon duly recorded in the proper records of Sonora.

The petition alleged that the claim was presented by certain

grantors of petitioner to the surveyor general of Arizona, and a report made by a duly authorized agent of the United States to the effect that the expediente was among the archives in the State of Sonora, and that all the proceedings were regular, and the certificates showing payment and the record of the transfer between Perez and Elias were properly recorded, and in the proper place, among the archives of Sonora; that there was on file in the office of the surveyor general of Arizona a report of one Wharton, apparently acting under special instructions of the Commissioner of the General Land Office, in which he reported against the land grant, and that the land described therein was situated in the State of Sonora, Mexico, but the petition charged that the report was not made with full knowledge of the facts; and also that there was a report on file by one Borton, apparently acting under instructions of the surveyor general of Arizona, of an indefinite character. And it was alleged that beyond what was so stated the San Pedro grant had not been acted on by Congress, or any other competent authority of the United States, constituted by law for the adjustment of land titles within the Territory of Arizona.

The petition averred that all the proceedings in the matter of the grant were regular, complete and legal, and vested a perfect and valid title in fee thereto in the grantee; that the grantee went into actual possession and erected proper monuments, and that the grantee and his descendants and legal representatives and assigns have continued until the present time in the actual possession, use and occupation of the same, and were seized and possessed in fee thereof; that petitioner was entitled to all of the lands embraced within the original survey of the grant lying in the Territory of Arizona, and that they were the lands delineated on the map filed with the petition; and that there was no person in possession of the grant otherwise than by permission of petitioner, except one Roberts, who was made a defendant. On May 13, 1899, plaintiff filed an amended petition in which the description followed an amended map and survey made by one Contzen, and attached to the amended petition, which survey was the one relied on at the trial, and made the contents of the grant within the United States 38,622.06 acres.

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The answer of the United States denied the correctness of the surveys and maps of Howe and of Contzen, and alleged that the tract, whether located according to quantity, or courses and distances, or natural objects, was situated entirely south of the boundary line between the Republics of the United States and Mexico, and without the jurisdiction of the court.

The answer further denied that the claim set forth was at the date of the treaty a complete and perfect title, and pleaded the statute, whereby all imperfect claims not filed within two years from March 3, 1891, became forever barred.

The answer also set up that under and pursuant to proceedings of denouncement, commenced in July, 1880, by the predecessors of the Reloj Cattle Company, the government of Mexico measured off and delineated to said persons the legal area or *cabida legal* of four sitios mentioned in claimant's title papers; and in the same proceedings it was adjudged that the ranch of San Pedro had no known boundary, and thus no surplus or *demasias;* that the four sitios were measured off and delineated to said persons by the Mexican government and located entirely within the Republic of Mexico; and that the claim sued for was thus entirely satisfied and discharged by the location of the said four sitios within the Republic of Mexico.

The case came on for hearing in June, 1899, at which time there was offered in evidence for plaintiff a copy of the original expediente of the San Pedro grant, from which it appeared that in the year 1821 one José Jesus Perez presented the following petition to the governor intendente:

"I, Don José de Jesus Perez, a resident of this capital, before your excellency, in conformity with law, and in accordance with the royal ordinances concerning land, laws, sanctions, and rescripts that treat of the royal and abbatial lands with which His Majesty (God perserve him) protects his vassals, as perquisites of his royal patrimony, appear and state: That, whereas I enjoy some property, acquired in the military service and by my own industry, without owning a place upon which to locate and bring them together (centruarlos), I apply to the superior authority of your excellency (with prior permission of my father) in order that, pursuant to the provisions of the national

laws and the terms of the royal cedula of February 14, 1805, the depopulated place down the San Pedro River, situate in this province, toward the north, on the hostile frontier, close to the adandoned place of Las Nutrias, be considered as registered, in virtue of which I protest that I will enter into composition with His Majesty (God preserve him) and will pay the quota or cost of its purchase, the royal half annate tax, and whatever else may be necessary, for such is rigorous justice with relation to what is stated. In this understanding I pray you to issue commission for the execution of the necessary proceeding, ocular examination, reconnoissance of the ground, survey, appraisement, publication, possession, and final sale of the four sitios, which will be surveyed for me in a square or oblong figure, according to the length or extent of the land and its direction, and in these terms I pray your excellency to defer to my just petition, by which I shall receive grace. I protest costs and whatever is necessary, etc."

March 12, 1821, this petition was referred by the governor intendente for survey, appraisement and other customary proceedings, and for citation to the adjoining owners, with instructions to return the proceedings, when completed, for further action. On May 3, 1821, a promotor fiscal, appraisers and recorder of courses were appointed by the constitutional alcalde of the district and judge surveyor of that registry, who accepted their positions, took the proper oaths, and were duly commissioned. On the same day publication of notice was had to all whose rights might be affected to appear at the house of San Pedro, the place of the proposed purchase; in response to which one Antunes of the place of Terrenate, claiming certain sitios in the vicinity, appeared and objected that if the survey went up the river, or south, (the river ran north,) from the house of San Pedro, it would interfere with his rights, to which Perez's attorney objected, on the ground that if the survey went down the river, or north, it would deprive Perez of the benefit of the water from the marsh, which was the mother of those pastures. The matter was compromised by an agreement to divide the water of the marsh. This part of the expediente is of importance in respect of the contention that the

entire grant was south of the boundary line between the United States and Mexico, and as to the starting point of the primitive survey.

The survey was then proceeded with from the place of San Pedro, and is set forth at length, and, having been concluded, the alcalde May 21, 1821, directed that an appraisement and valuation be made by the appraisers previously appointed, who appraised the first three sitios at $60 each, and the remaining one at $10. Thereupon the alcalde, reciting that the "four sitios of land for live stock" had been appraised and valued, required the proceedings to be forwarded to the promotor fiscal for him to deduce, according to their condition, what he considered proper to the benefit of the public treasury. May 22, the fiscal directed the alcalde to make inquiry as to whether Perez had the qualifications required by law, and whether he had sufficient property to protect these sitios, and finally whether great advantage would result to the public treasury by their protection and settlement. Testimony was taken, and, the result of the inquiry being satisfactory to the fiscal, he directed, May 26, the publication for thirty days consecutively of the appraisement of said lands, and provided for bids thereon, and that the final sale and disposition of the land should be at Arispe, before the provincial board of the royal treasury, presided over by the governor intendente of the province. Publication was thereupon had, the first being as follows:

"On said day, month, and year, I, the judge surveyor, caused Lazaro Quijada, at the sound of the drum and in a clear, loud, and distinct voice, to announce: It is made public and notorious that Don José Jesus Perez has registered the place of San Pedro, and, his petition being admitted, there were measured and located and sold four sitios of land for large stock, which were appraised and valued in the sum of one hundred and ninety dollars, in virtue of which every one who believes he has a well-founded right or desires to make a bid for the land mentioned may apply, as his bid will be admitted and his actions reserved till the day of the disposition and sale, which will be in Arispe on the day designated by the governor intendente of the prov-

ince, to which end his actions and rights are reserved. And no bidder having appeared I entered it as a minute, which I signed, with those in my attendance, according to law, as I certify, and on this paper, without prejudice to the royal revenue."

The proclamations took place for thirty consecutive days, and no one appearing to outbid Perez, the alcalde and judge surveyor, June 26, 1821, transmitted to Antonio Cordero, the governor intendente, "the proceedings of survey, ocular inspection, appraisements, and publications executed on the depopulated tract of San Pedro in favor of Don José Jesú Peréz, for your excellency to make such order as may be just." The proceedings were referred to the promotor fiscal, and June 25, 1822, he reported favorably thereon, and recommended that the celebration of the three customary offers be proceeded with in the capital of the intendency, the city of Arispe, in solicitation of bidders for the final sale of said land. On July 3, 1822, this was ordered, and such offers were made July 3, 4 and 5, 1822, at Arispe. The land described in the first offer was "four sitios of royal land for raising cattle comprised in the place called San Pedro, situate in the particular territory of the presidio of Fronteras, surveyed for Don José Jesú Peréz, of this city, and appraised in the sum of $190 at the rate of $60 for the first three and $10 for the other one."

The final offer of sale was as follows:

"In the city of Arispe, on the 5th day of the month of July, 1822, having assembled as a board of sale in this said capital, the intendente, as president, and the members who compose it, for the purpose of making the third and last offer of the lands to which these proceedings refer, they caused many individuals to assemble, at the sound of the drum and the voice of the public crier, in the office of this intendency and Loreto Salcido to proceed to make in their presence a publication, as he in effect did, similar in all respects to the one set out in the preceding offer, with only the difference of announcing to the public that the final sale is now to be made to the highest and best bidder. In which act appeared Don José Maria Serrano, as attorney of Don José Jesus Perez, again offering the value of the land, and the hour for midday prayer of this day having

already been struck, the public crier finally said: 'Once, twice, three times; sold, sold, sold; may they do good, good, good, to Don José Jesú Peréz.' In these terms this act was concluded, the four sitios of royal land referred to in these proceedings being solemnly sold in favor of this party in interest for the sum of one hundred and ninety dollars, and in due witness thereof this minute was entered with the president and members of this board of sales, signed with the attorney, Don José Maria Serrano."

Thereupon the attorney of Perez prayed that "when the approval of the superior board of the treasury is obtained, there may be issued in favor of my party the corresponding title of grant and confirmation of the four sitios which said land contains, being prompt to appoint in Mexico a person under pay and expenses to be charged with managing the present matter at that court." July 6, 1822, the intendente *ad interim*, Bustamente, admitted Perez to composition with the imperial treasury for said royal land, and ordered that his attorney be notified to pay into the treasury the sum of two hundred and eight dollars, one grain; one hundred and ninety "as the principal value at which there were sold to said party in interest, the four sitios which said tract comprises;" and the remainder taxes and expenses. The provincial board of the imperial treasury approved the sale in favor of Perez the next day, describing the land as being "the four sitios of royal land for raising large stock which the place called San Pedro comprises." July 8, the sum of two hundred and eight dollars, one grain, was paid into the treasury at Arispe. No action appears to have been taken in the matter by the superior board of the treasury, and it remained as it was until October 25, 1832, when Ignacio Perez, on behalf of his brother José Jesú Peréz, presented to the treasurer general of the State of Sonora a petition alleging that on July 5, 1832, there was sold in favor of his brother "the land called San Pedro, situated in the jurisdiction of Fronteras, including four sitios of land," and that he had lawfully exchanged the right he had thereto with citizen Rafael Elias, and requesting that inasmuch as the corresponding title to the land had not yet been issued, he might be pleased to order that title

issue to said citizen Rafael Elias "as the actual owner and proprietor of the land of San Pedro." On that day the treasurer general transmitted to the governor of Sonora the proceedings "comprehensive of the registry, survey, appraisement, publications, and sale of four sitios of land, at the place called down the San Pedro River, in favor of citizen José de Jesus Perez;" that Perez had paid into the treasury "the sum of two hundred and eight dollars, one grain, for the principal value of the land and its corresponding taxes;" and that Perez desired the title to be issued to Rafael Elias, complying at the same time with article 27 of law No. 30 of May 20, 1825; and the treasurer reported that he considered the proceedings sufficient. October 31, 1832, Ignacio Bustamente, governor of Sonora, returned the proceedings with this communication: "Having examined the proceeding on the lands which your excellency transmits with your note of the 25th ultimo, comprehensive of four sitios surveyed at the place called down the San Pedro River, in favor of Don José Jesú Peréz, I returned it to your excellency for your excellency to issue to Don Rafael Elias a corresponding title for the grant, in view of the exchange Don Ignacio Perez of this place has made with him." Mendoza, thereupon, May 8, 1833, issued the grant, reciting: "Whereupon, in the exercise of the powers which the laws confer upon me, by these presents and in the name of the sovereign State of Sonora, I confer the grant in the form of four sitios of land for breeding large cattle and horses, which comprise the place named San Pedro, situate in the jurisdiction of the presidio of Santa Cruz, in favor of the citizen Rafael Elias, to whom I grant, give, and adjudicate these lands by way of sale, with all the privileges, guaranties, and stability which the laws provide, etc." And commanded that the officials "do not permit that the said interested party nor his successors be in any manner disturbed in their peaceful enjoyment, nor molested in the free use, exercise, proprietorship, dominion, and possession of the said four sitios of land which comprise the place named San Pedro."

In the proceeding for the denouncement of the overplus of the ranch of San Pedro subsequently had in Mexico, it is recited that the district judge "has before him the testimonio of

the title of the grant of four sitios of land for raising large stock issued by the citizen treasurer general of the State in the city of Arispe under date of 8th of May of the year 1833, José Manuel Mendoza, in favor of citizen Rafael Elias, and after payment of two hundred and eight dollars, one grain, which said Elias paid into the funds of said treasury as the value of the four sitios, expenses and fees of the title. The land is generally known by the name of ranch of San Pedro, in the jurisdiction of the town of Santa Cruz and near the presidio of Fronteras in the district of Magdalena." Plaintiff also introduced in evidence a copy of the titulo to the San Rafael del Valle grant. Oral evidence was introduced on both sides in respect of the original and subsequent surveys.

The government introduced a petition of the Eliases presented to the surveyor general, together with a map attached to such petition. The government also introduced the expediente of the proceedings of denouncement of the *demasias* of the ranch of San Pedro commenced July 8, 1880, on behalf of the Elias family. On that day Manuel Elias made a formal denouncement "of the overplus that may be in the ranch of San Pedro in the jurisdiction of the town of Santa Cruz in the district of Magdalena," of which ranch he alleged that he was a coöwner. After considerable delays and after securing by appeal a declaration of his right to proceed to such denouncement, Elias on June 1, 1882, secured the appointment of one Pedro Molera, who was directed to "proceed to the resurvey of the ranch of San Pedro, after examination of its titles and citation of adjoining owners, marking on the ground as well as on the respective maps the lawful area (*cabida legal*) of said ranch and the overplus, (*demasias*), it may contain within its monuments, subjecting his operations to the general laws of July 22 and August 2, 1863." Molera accepted the appointment, and, July 19, 1882, appeared at the ranch of San Pedro. His report recited that before proceeding with the survey he found it necessary to make a reconnoissance of the land because the titles were decidedly obscure; and notwithstanding the person who made the ancient survey gave the distances, the courses were incomprehensible, and no description was

given of the places the title cited. He then set forth what he did in respect of the general lines on which the grant should be located, and proceeded to lay off the *cabida total*, or entire area, within the exterior boundaries, so far as he could ascertain them. Having laid off the total area of 28,265.11 hectares running up to the international line on the north, Molera on July 28, 1882, proceeded to segregate the legal area (*cabida legal*), which was for four square leagues. He described the methods he adopted, and from the map and field notes it appeared that the legal area was 7061.61 hectares, which, deducted from the total area, left an overplus or *demasias* of 21,203.47 hectares. Orders were then given for the advertisement of the proceedings, and testimony was taken as to the qualifications of Elias to secure the property. In April, 1884, the district judge at Guaymas recited that it appeared that the ranch of San Pedro belonged to various owners, who under the law had equal rights to the *demasias*, and ordered that Manuel Elias be notified to state whether or not he consented that said *demasias* should be adjudged to him in company with the other owners, and thereupon it was consented that the *demasias* should be adjudged to all the owners. November 18, 1884, the value of the *demasias* was fixed, but no price was fixed for the *cabida legal*, since that part of the survey belonged to the original parties. The order of the district judge recites that having examined the proceedings of survey and the map, both made by the surveyor, Pedro Molera, from which it appears that there is a total area of 28,265.11 hectares, of which 7061.64 hectares are covered by title and 21,203.47 hectares are *demasias*, and, having examined the other proceedings, decreed the adjudication of said overplus to José Maria, Manuel and the heirs of José Juan Elias in third parts, subject to the approval of the department of public works. The proceedings were transmitted to that department at Mexico, and an error having been found in the calculations were returned with orders to the surveyor to repeat the survey and correct the error. Molera again went into the field, and on March 19, 1887, made a recalculation of the *cabida total*, with the result that the overplus was found to be 21,231 hectares and a fraction instead of 21,203 and a fraction.

The correct valuation was thereupon made and the proceedings again sent to Mexico. May 3, 1887, the department of public works recited that they had examined the survey of the so-called *demasias*, and observed that on such survey "no monuments were found that would determine the limits or boundaries of said ranch," and that the courses indicated in the primitive survey were so confusing that in "attempting to follow them one goes and returns repeatedly over the same line without it being possible to circumscribe with this data any perimeter whatever." It was accordingly found and ordered that the ranch of San Pedro had no known boundary or boundaries that could be determined, and consequently had no *demasias*, so that the land denounced was not *demasias*, but vacant public land; and that Molera made an arbitrary survey. The adjudication was therefore not approved, and the office of the chief of the treasury in the State of Sonora was directed to register the land and the public treasurer to enter into possession of it, except that part which had been sold to McManus & Sons, and for which the proper title had already been issued. This order was subsequently revoked as a matter of equity, and the purchase of the property allowed so far as not conflicting with the McManus grant. On July 4, 1887, on the petition of Elias, one Bonillas was appointed surveyor for the purpose of separating the McManus land from the land sought by Elias, and to make a report that would enable the final purchase of the balance by Elias's family to be effected. This survey gave the total area of the San Pedro ranch, after cutting off the McManus land, as 22,058 hectares, 11 ares, 8 centiares, from which subtracting the legal area (*cabida legal*) of 7022 hectares, 44 ares, there remains an overplus of 15,035 hectares, 67 ares, 8 centiares. (Hectare=2.471 acres.) February 24, 1888, the President of the Republic approved the adjudication of this overplus in favor of Elias and associates, and ordered the proper title to issue to them upon payment of the required amount. The proper amount was paid, and on October 15, 1888, Alejandro Elias, for the Elias heirs, receipted for the title of said *demasias*, issued by President Diaz, February 24, 1888.

The government also introduced in evidence the expediente

Counsel for Parties.

of an adverse suit brought by Plutarco Elias respecting himself and his mother and brothers on the denouncement of the overplus of the Agua Priete grant made by Camou Brothers, in which, in deciding the matter, the district judge recited that the fact that the Elias family had already denounced a large area of *demasias* in the Republic of Mexico, and mentioned many other tracts denounced by them besides the overplus of the San Pedro ranch, and called attention to the fact that the Eliases in consequence of such denouncements had secured a larger grant than they were allowed to obtain under the law of July 22, 1863. He quoted from the regulations of the department of public works in which the method of acquiring *demasias* and other vacant lands is set forth, and showed from the order of the department of public works that overplus within a grant rests on exactly the same basis as other public lands, except that under the provisions of the law of July 22, 1863, a preference in its purchase is given the owner of the legal area. The district judge held that the Elias family had no right to be admitted as denouncers since they had already obtained an area greater than that designated by law.

The Reloj Cattle Company was incorporated September 24, 1885, and various quitclaims of the interests of the Elias heirs in eighteen thousand acres in the grant, described as being north of the boundary line, commencing with April 2, 1883, and down to October 13, 1885, were introduced by it as muniments of title. The cause was submitted June 2, 1899, and November 27, 1899, the court entered a decree rejecting the grant and dismissing the petition. The court held that the grant was one of four sitios only, and that the owners had secured full satisfaction from the Mexican government and within its territory of all that they were entitled to. Thereupon this appeal was prosecuted.

Mr. H. H. Cobb for appellant. *Mr. Rochester Ford* filed a brief for same.

Mr. Solicitor General, *Mr. Matthew G. Reynolds* and *Mr. William H. Pope* for the United States, submitted on their brief.

Opinion of the Court.

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

Perez petitioned for the grant "pursuant to the provisions of the national laws and the terms of the royal cedula of February 14, 1805."

That cedula provided that, (for the reason "that the settlement of a *sitio* of a league in extent was very difficult for a person of large means, and that lands of large area were held without this legal obligation having been fulfilled to the prejudice of others,") "there should not be adjudicated nor granted more than three or four tracts (to the wealthy), and two to the poor;" "with the understanding that the lowest estimate was not to be less than ten dollars for lands without water, thirty for lands irrigable by means of wells, and sixty for those capable of regular irrigation." Reynolds, p. 72. Recognizing the limitation, Perez prayed for the sale to him of "*the* four sitios."

The entire proceedings were directed to the acquisition of four sitios. Four sitios were valued; four sitios were put up at the auctions; four sitios were purchased; four sitios were paid for; and four sitios were granted. The intention to convey only so much and no more is plain, and is controlling. The title of the grantee was limited to that quantity. *Ainsa* v. *United States*, 161 U. S. 208; *Ely's Administrator* v. *United States*, 171 U. S. 220; *United States* v. *Maish*, 171 U. S. 277; *Perrin* v. *United States*, 171 U. S. 292.

The *cabida legal*, or lawful area, was, therefore, four sitios or something over seventeen thousand three hundred and fifty acres, and this lawful area, "*the* four sitios," was described by Perez as "the depopulated place down the San Pedro River, situate in this province, toward the north, on the hostile frontier, close to the abandoned place of Las Nutrias."

The primitive survey was at the place of San Pedro, and Las Nutrias was two or three miles to the southwest. It is plain that the old house of San Pedro was in existence at that time. When Antunes appeared from the place of Terrenate, which was a short distance west of the house of San Pedro, he was willing that the survey should proceed "from the house of San Pedro down the river," (the river ran north or somewhat east

of north,) while Perez claimed it should be located up the river to get the benefit of the water of the marsh. This dispute was compromised by agreeing to divide the water of the marsh, which lay some distance above the house of San Pedro. The starting point of the survey was plainly up the river from the house, and then the line ran below it, for the survey states: "I caused a monument to be placed at a rectangular corner, from which, taking the course southwest to northwest, there were measured and counted fifty cords, the last of which terminated down the river from the house, on the edge of the ford, on the bank." That the house of San Pedro was an important call in the location of the grant on the ground is unquestionable. That house was the ancestral home of the Elias family, and on that place some of its members still reside. It was and is in Mexico, several miles south of the boundary line. Accordingly when Manuel Elias made a formal denouncement, July 8, 1880, of the *demasias* there might be in the ranch of San Pedro, and it became necessary to mark the *cabida legal* on the ground, the Mexican authorities laid off the four sitios so as to embrace the San Pedro settlement. The omission of San Pedro from the lawful area of the San Pedro grant would have, indeed, been something remarkable. The owners of the grant thus obtained from Mexico full satisfaction of its *cabida legal*, and no legal or equitable claim therefor existed against the United States when this petition was filed.

In *Ainsa* v. *United States*, 161 U. S. 234, it was said: "We have referred to the proceedings of 1882, 1886, in Mexico, as furnishing persuasive evidence of the proper construction of this grant under Mexican law, and it may be further observed that the adjudication of the overplus required the location of the $7\frac{1}{2}$ sitios, which location Mexico, as the granting government, assumed it had the right to make, and made out of the land within its jurisdiction. In this way the grant was satisfied by the receipt of all the grantees had bought and were entitled to under the Mexican law, the result as to the overplus inuring to Camou's cotenants by the terms of his petition."

In *Ely's Administrator* v. *United States*, 171 U. S. 220, the court, referring to *Ainsa's* case, observed: "In that case it ap-

peared that while the boundaries of the survey extended into the territory ceded by Mexico to the United States, the grantee had taken and was in possession of land still remaining within the limits of Mexico to the full extent which he had purchased and paid for, and therefore no legal or equitable claim existed against the United States in reference to the land within the ceded territory." It is quite impossible to entertain the proposition that the Court of Private Land Claims should have adjudged to appellants another *cabida legal* on this side of the boundary line. According to the doctrine of *Ely's* case no different location could have been recognized if the entire area had been in this country.

Something is said in respect of the right to confirmation of the tract sued for treated as *demasias*. But, apart from other insuperable objections to that suggestion, such a claim would be imperfect for want of fulfillment of conditions, and barred by section 12 of the act of March 3, 1891.

Decree affirmed.

AINSA *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 40. Argued January 29, 1902.—Decided March 17, 1902.

This case is governed by *Reloj Cattle Company* v. *United States*, just decided.

The grant was a grant by quantity, and the lawful area was south of the international boundary line, and had been set off to the owners by Mexico.

The right to acquire *demasias* or overplus was not a vested right, and where the conditions were unfulfilled in accordance with the terms of the grant at the time of the cession, claims to *demasias* cannot be confirmed.

THIS was a petition filed February 28, 1893, by Ainsa, as administrator, against the United States and one Whitney, for confirmation of the Agua Prieta grant, so called, which he represented he owned by virtue of "a grant title," dated De-

cember 28, 1836, made by the Mexican Republic under article eleven of decree No. 70, of August 4, 1824, and a law of the States of Sonora and Sinaloa, No. 30, of May 20, 1825, and other decrees, embodied in sections 3, 4, 5, 6 and 7 of chapter 9 of the organic law of the treasury, No. 26, of July 2, 1834; and that regular and lawful proceedings were had under those laws, by which the Mexican government, December 28, 1836, sold and conveyed the land to Juan, Rafael and Ignacio Elias Gonzales in consideration of $142.50 and other valuable considerations. The proceedings were set out at length in the petition.

The United States answered, denying the ownership and possession of the petitioner, and alleging that the grant by the State of Sonora was void; that the grant was located within the Republic of Mexico; that it was confirmed in 1882 to Camou brothers by the Mexican government, and lay south of the boundary line; that the *demasias* of the grant was also confirmed to Camou brothers; and that a large area remained between the north boundary of the grant and of the *demasias* and the boundary line, which had since been purchased from Mexico by Camou brothers. February 14, 1899, on which day the cause came on for trial, petitioner filed an amended and supplemental petition, averring " that prior to the treaty known as the Gadsden treaty no resurvey of said grant had ever been applied for or ordered by any one, and that neither the grantees nor their successors in interest had, prior to said treaty, any knowledge or notice that within the said monuments there was an excess of land over the area stated in said title papers, and petitioner avers that the grantees under said grant were, under the laws of Mexico and the State of Sonora existing at the date of said treaty, and for a long time prior thereto had been, holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as their own, even after such overplus is shown, without other obligation than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and petitioner further avers that if this honorable court should decide that said sale, as recited in said title papers did not, as petitioner avers it did, convey to the grantees

therein all of the said tract of land to the monuments described in said title papers without further payment therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from him for such overplus, and also the costs for ascertaining the same, as soon as the amount of the same and the sum due therefor is ascertained."

Petitioner tendered the sum of $600 in gold in payment of the overplus and $200 in gold for costs, offered to pay whatever might be adjudged due, and prayed "that upon said payment this honorable court decree that petitioner is entitled to and is the owner of all of said tract of land, as originally surveyed, including said overplus or surplus, and that by said decree he be secured in the possession and ownership of the whole of said tract," etc.

The area delineated on petitioner's maps, as included in the grant claimed, was 163,797.48 acres. The Court of Private Land Claims rejected the claim, and dismissed the petition.

The documents covered three tracts of land called, respectively, Agua Prieta, Naidenibacachi, and Santa Barbara. And it appeared that on July 21, 1831, Juan, Rafael and Ignacio Elias Gonzales petitioned the treasurer general of Sonora, stating that they had cattle and sheep whose numbers they could not feed on the sitios belonging to them, for which reason the stock wandered to the four points of the compass, more particularly toward the waters of the Santa Barbara, Naidenibacachi, Agua Prieta, and Coaguyona, by which they suffered incalculable damage.

They therefore made denouncement of the lands that might be "found to be public lands within the points and waters aforesaid, which are bounded on the north by the Chiricahua Mountains, on the south by the lands of the Sinaloas, on the east by the mountains of Coaguyona, and on the west by the lands of the Saus;" and petitioned that, under the law of May 20, 1825, the denouncement might be admitted, and orders issued for the survey, appraisement, publications, sale and other necessary proceedings. The petition was referred, testimony taken and report made as to the necessities of the case, and in October, 1831, at Hermosillo, Treasurer General Mendoza appointed Joaquin

Vincente Elias, resident of San Ignacio, to proceed to take the legal steps, to "the survey of the said public lands," effecting the measurement, appraisement and publications as is provided, in the decrees No. 30, of May 20, 1825, and No. 175, of November 20, 1830, etc. In August, 1835, Elias proceeded to execute the commission, and on September 28 appointed and qualified his assistant measurers and recorders, and commenced the survey of the Agua Prieta tract. He asked "the attorney of Messrs. Elias to point out the place they wanted as the center; he did so, fixing a lagoon or pool that is in the middle of a valley called by the same name as the place and the center of all the circumference." The survey then followed and is given at length, and closed as to the Agua Prieta tract thus: "The survey being in this manner concluded, and containing in its area, the calculation having been made with entire correctness, six and one half short sitios, the party, who assented to what had been done, was cautioned to inform his parties in due time to have monuments of stone and mortar constructed, as is provided." Then came the survey of the Santa Barbara and Naidenibacachi tracts, and they were found to contain an area of "eleven and one half sitios and twelve and one half caballerias," which made, with the six and one half sitios, a total of eighteen sitios and twelve and one half caballerias. Appraisers were then designated, and the six and one half sitios composing the survey of Agua Prieta, were valued, one at sixty dollars, as it had a limited water course, and the others at fifteen dollars each, as they were absolutely dry, and the eleven and one half sitios and twelve and one half caballerias were appraised, one at eighty dollars, another at sixty, and the rest at fifteen dollars, making a total of four hundred and thirty-two dollars and fifty cents. Thereupon the lands were published for thirty consecutive days at the values fixed, from June 4 until July 3, 1836. The advertisement exposed for sale eighteen sitios and twelve and one half caballerias for raising cattle, comprised in the places of Agua Prieta, Naidenibacachi and Santa Barbara, surveyed in favor of the citizens Elias, and appraised in the sum of four hundred and thirty-two dollars and four reals. Three public auctions were then ordered and had on September 15, 16, 17, 1836. The advertisement was as follows:

Statement of the Case.

"There are going to be sold on account of the public treasury of the department eighteen sitios and twelve and one half caballerias of land for the raising of cattle and horses, comprised in the places called Agua Prieta, Naidenibacachi, and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras, in the district of this capital, surveyed at the request of the citizens Juan, Rafael, and Ignacio Elias Gonzales, of this town, and appraised in the sum of four hundred and thirty-two dollars and four reals, as follows: The six and one half sitios, which compose the survey of Agua Prieta, one in the sum of sixty dollars, on account of having a small spring, and the other five and one half at the rate of fifteen dollars each, on account of their being absolutely dry; and the other eleven and one half sitios, together with the twelve and one half caballerias, of which the other two places consist, one in the sum of eighty dollars, one in the sum of sixty dollars, and the others at fifteen dollars each, all of which sums together go to make up the total amount of four hundred and thirty-two dollars and four reals."

The property was sold to the Messrs. Elias at four hundred and thirty-two dollars and four reals, the record stating: "On these terms this act was concluded, the said eighteen sitios and twelve and one half caballerias of land which compose the said places of Agua Prieta, Naidenibacachi and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras, having been publicly and solemnly sold to these interested parties for the said sum of four hundred and thirty-two dollars and fifty cents, at which said lands had been appraised." September 27, the treasurer general directed the parties to be notified to pay the sum in question into the treasury. The title was issued, December 28, 1836, declaring that the purchase money for said "eighteen sitios and twelve and a half caballerias of land for breeding cattle and horses, which are comprised in the places called Naidenibacachi, Agua Prieta and Santa Barbara" had been paid, and granting in the usual terms, the said eighteen sitios and twelve and one half caballerias contained in those places.

On the trial, Ainsa, administrator, introduced in evidence a

number of deeds made by descendants of the original grantees to Ainsa's intestate, ranging in date from December 24, 1886, to January 24, 1893.

The United States introduced a deed of the Eliases, dated July 25, 1862, conveying to the Messrs. Camou of Hermosillo, Mexico, by way of conditional sale, all of the property forming the subject matter of this suit, and also certain proceedings of March 17, 1869, and of November 15, 1880, showing the extinguishment of the equity of redemption.

May 31, 1899, petitioner asked for an order making Eduardo Camou party defendant, and presented a deed from Juan Pedro Camou to said Eduardo, quitclaiming the grantor's interest in the Agua Prieta grant, north of the international boundary line.

In addition to the documents much oral evidence in reference to the surveys was adduced on both sides.

The government introduced a certified copy of the expediente of the denouncement of the *demasias* of the grant made by Camou brothers before the Mexican tribunals by proceedings initiated April 22, 1880. The lands mentioned were the three places of Agua Prieta, Santa Barbara and Naidenibacachi, and four others. The denouncement was admitted by the district judge of Guaymas, May 31, 1880, and a resurvey ordered of the seven tracts, with direction that special care be taken to make the survey of each of the lands separately, and to designate in the minutes of the survey and on the several maps the *demasias* pertaining to each. The parties in interest were summoned and were satisfied with the survey made. In 1887 Plutarco Elias, for himself and his mother and brothers, brought an adverse suit against the denouncement on the theory that the Eliases, though not entitled to the *cabida legal*, were entitled to the *demasias*, but the contention was rejected. The value of the overplus was fixed, and the judge decreed that the owner was entitled under article 5 of the law of public lands, the law of July 22, 1863, to a reduction of one half the price as fixed, and it was so liquidated. The final result was the issue, January 30, 1888, of the title to the *demasias* in favor of Camou. The government also introduced in evidence the ex-

pediente of denouncement of a tract of public land amounting to 16,920 acres, situated between the north boundary of the Agua Prieta grant and the international boundary line. This proceeding was initiated May 4, 1881 ; the denouncement was admitted and a surveyor appointed, who issued summons to Elias, owner of the ranch of San Pedro, to Camou, owner of the ranches of Agua Prieta and Naidenibacachi, and to Ainsa, representing the lands surveyed to one Rochin, situated east of the Agua Prieta tract. A survey was had and the tract surveyed divided among the three petitioners, Mr. Camou, the owner of the Agua Prieta grant, acting as attorney in fact, giving his receipt for the three titles to the property, and describing it as public land. The government also put in evidence the withdrawal by Mr. Camou from the consideration of the surveyor general of Arizona of the grant now in controversy in July, 1880.

Mr. Frank J. Heney for appellants. *Mr. Rochester Ford* filed a brief for same.

Mr. Matthew G. Reynolds for appellees. *Mr. Solicitor General* and *Mr. William H. Pope* were on his brief.

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

The amount that passed to the grantee was six and one half short sitios, or about 28,200 acres, and the court below properly held that the case was controlled by the decisions of this court in *Ainsa* v. *United States*, 161 U. S. 208, and subsequent cases. It is contended that because a general description by natural objects was given in the original petition this was not a grant by quantity ; but the proceedings leave no doubt that that was nothing more than the designation of the particular territory wherein the quantity purchased was to be located. The measurement of the tract was made with great care and the quantity repeatedly recited. Eighteen sitios and twelve and one half caballerias of land at the three places named were appraised,

sold, purchased, paid for, and granted, and no more. The survey of the Agua Prieta tract placed its contents at six and one half sitios, and of the other tracts, eleven and one half sitios, twelve and one half caballerias, which were separately appraised, and while the advertisement was of eighteen sitios and twelve and one half caballerias comprising the lands of the three places, the valuation of the six and one half sitios composing the Agua Prieta tract, and the valuation of the eleven and one half sitios, twelve and a half caballerias, were given separately, although all were sold, paid for, and granted together. The law then in force authorized the treasurer general to grant to old breeders, "who, from the abundance of their stock, need more," the quantity shown to be needed, but the minimum price was fixed by law, and before sale the land had to be surveyed, appraised and advertised, as was done. The Mexican government construed this grant on the denouncement of Camou as a grant by quantity, and the *cabida legal* was deducted and the *demasias* sold and patented by that government. That lawful area is south of the international boundary line and in Mexico; and as we have just said in the *Reloj Cattle Company* v. *United States*, there was no legal or equitable claim therefor existing against the United States when this petition was filed.

Assuming that some part of the entire claim lay in the United States, which is not conceded, petitioner on May 16, 1895, by an amended and supplemental petition, prayed the court to award the overplus to him on payment of such amount as might be found due.

The laws of Mexico and of the State of Sonora in respect of *demasias* treated excess over rightful titles as subject to the *jus disponendi* of the government. The possessor did not have title to the overplus, but might acquire it under the circumstances and in the way provided. A possessor does not mean owner. Escriche's Diccionario de Legislacion y Jurisprudencia. "Poseedor; Poseedor de buena fe; Poseedor de mala fe."

The second section of the Sonora law of May 12, 1835, No. 51, is given in *Ainsa* v. *United States*, 161 U. S. 226, though the words "pocedores de buena feé" should have been translated "possessors in good faith" rather than owners; and we there

said: "It thus appears that the resurvey of grants was provided for to ascertain the excess over the quantity intended to be granted, that unless the excess was more than half a sitio it might be disregarded, and that if it exceeded that, the owner of the original grant might be allowed to take it at the valuation. The application of Don José Elias was for a resurvey of the Casita in order that he might obtain the overplus lands therein on an appraisal, whereas if that ranch had been acquired by purchase *ad corpus*, that is to say, all the lands included by certain metes and bounds, possession delivered and monuments set up, it is not apparent how the necessity for having a resurvey could have existed; and so when in 1882 and 1886, the Mexican government was applied to by defendant Camou, under the law of July 22, 1863, his application proceeded upon the theory that the grant under consideration was a grant of a specific quantity within exterior limits, and what he sought and was accorded was an adjudication of the overplus on paying the value thereof 'in conformity with the tariff in force at the time of the denouncement.'

"Certain articles of the law of July 22, 1863, treat of the ascertainment and disposition of excesses where the indicated boundaries are supposed to cover only a certain quantity of land which, when resurveyed, turns out to be much larger than as described in the titles; and such resurveys had been practiced from an early day and were recognized by Don Elias himself in his application in respect of La Casita. Royal Decree, October 15, 1754, sec. 7, Reynolds' Span. & Mex. Land Law, 54; Law of July 11, 1834, chap. 9, sec. 3, Id. 187; Law of July 22, 1863, Hall's Mex. Law, 174."

If the excess did not exceed one half a sitio, it was disregarded. If it did, and the owner did not want it, or it was very great in the opinion of the government, it would be awarded to any one denouncing or soliciting it.

The second and third sections of the law of May 14, 1852, No. 197, were:

"2. *Demasias* are considered to be those that may be found within the true out boundaries of the grant titles, and they shall be excessive when they amount to the third part of the land which said titles may contain.

"3. When the said *demasias* are not excessive, and the possessors apply for them with proof of having sufficient means for stocking them, they shall be adjudicated to them without public auction at the rates in force at the present time. If they should not want them, they shall be adjudicated to denouncers in like manner. Should they be excessive they shall be sold to the highest bidder."

Even when not excessive, the owner of the *cabida legal* was compelled to pay the rates in force at the time of the passage of the law, and by section eleven it was provided that they could not be secured without public auction unless the original expediente was presented to the treasury within one hundred days thereafter. When excessive, they had to be sold to the highest bidder. They were, in short, placed on the same footing as other public lands.

The United States is not subject to suit, except by its consent, and then only within the limits and on the terms prescribed. The act of 1891, in creating the Court of Private Land Claims, did not authorize that court to supervise performance of conditions unperformed, and by subsection eight of section thirteen it was provided that: "No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land."

By section twelve, imperfect claims in respect of which no petition shall have been filed within two years, "shall be deemed and taken, in all courts and elsewhere, to be abandoned and shall be forever barred."

It is obvious that this contention cannot be sustained for the reasons indicated, and we repeat what we said in *Ely's* case, 171 U. S. 239: "This government promised to inviolably respect the property of Mexicans. That means the property as it then was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after. That which was subject to challenge before did not become a vested right after. No duty rests on this

government to recognize the validity of a grant to any area of greater extent than was recognized by the government of Mexico. If that government had a right, as we have seen in *Ainsa* v. *United States* it had, to compel payment for an overplus or resell such overplus to a third party, then this government is under no moral or legal obligations to consider such overplus as granted, but may justly and equitably treat the grant as limited to the area purchased and paid for."

Decree affirmed.

ARIVACA LAND AND CATTLE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 153. Argued January 29, 1902.—Decided March 24, 1902.

The decree of the Court of Private Land Claims denying confirmation of the grant involved in this case, on the ground of uncertainty, affirmed.
Claims to *demasias*, the conditions to acquiring which were unperformed at the time of the date fixed in the Gadsden treaty, are not open to confirmation by the Court of Private Land Claims.

THE statement of facts is contained in the opinion of the court.

The case was argued with No. 40, *Ainsa* v. *United States*, *ante*, 639, and by the same counsel.

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

This was a petition filed March 1, 1893, for the confirmation of a grant situated in Arizona, containing, according to a survey made on petitioner's behalf, 26,508.06 acres. February 13, 1899, an amended and supplemental petition was filed, praying that if there were found to be an overplus, petitioner should be allowed to pay for such excess and costs, which it offered to do as soon as the same were ascertained, and it tendered $300 in

gold as payment for overplus and $200 for costs. The Court of Private Land Claims rejected the grant because there was "such uncertainty as to the land which was intended to be granted that it is impossible now to identify it." Two justices dissented, being of opinion that the claim should be confirmed for two sitios.

A titulo was introduced in evidence, (in the surveyor general's office, produced from private custody,) and this showed that on June 2, 1833, Ygnacio and Tomas Ortiz, asserting themselves to be sons and heirs of one Augustin Ortiz, petitioned the alcalde of Tubac, stating that in 1812 their deceased father paid into the treasury of the capital of Arispe seven hundred and forty-seven dollars and three reals, as the highest bid, for which two sitios of land for raising cattle were sold to him at public auction in the place called Aribac, and that they were "ignorant as to who was the surveyor or where the expediente containing the measurements, appraisement and auctions is now," and asking that the depositions of three witnesses be taken as to the settlement and possession of the land from 1812 and the landmarks and boundary lines. The alcalde proceeded to take the depositions of three witnesses, who deposed in substance that the Aribac ranch had been settled and occupied by Ortiz and his sons from 1812 to that time, and that the landmarks were "the one towards the north on the high pointed hill (devisadero) that rises on this side of the Tagito mine and borders on the Sierra de Buena Vista; the one towards the south standing on this side of the Longorena mine on a low hill next to the cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Calaberas; and the one towards the west standing at the Punta de Agua on a pointed hill (devisadero) opposite the Sierra del Babuquivari." These depositions were taken *ex parte*, no representative of the Government having been notified or participating.

Ygnacio and Tomas then petitioned the treasurer general of Sonora to issue them a grant, "the original expediente containing the measurements having perhaps been lost," transmitting "the documents by which they show their right of property to two

sitios of land for raising cattle, which in the year 1812 were sold at public auction to their deceased father, Don Augustin Ortiz, from whom they inherited the same, which land is situated in the place called Aribac, and that the price at which it was sold and other imposts thereon have been paid." Besides the depositions, the titulo set forth a certificate by the treasurer of Arispe, dated June 18, 1833, to the effect that "on page 85 of the manual book corresponding to the year 1812," an entry was found, under date of October 10, signed by Bustamente, Romo and José Carrillo, that Don Augustin Ortiz by Carrillo, as his attorney, had paid into the royal treasury seven hundred and ninety-nine dollars, five reals, and nine grains, for two sitios of land for raising cattle recently sold to him at auction. The petition of the alcalde, his order to take testimony, the three depositions, the certified entry, and the petition to the treasurer general, were then referred by the latter to the governor of Sonora for action. The governor, reciting that "the possessory right of citizens Tomas and Ygnacio Ortiz has been legally proved," ordered that the grant be made in accordance with the law. June 24, 1833, Mendoza as treasurer general of Sonora directed that the grant for two sitios of land for raising cattle which comprise the place called Aribac, be issued, and that the grantees pay into the treasury the value of the title in conformity with the laws, which was apparently done; and Mendoza issued the grant "of two sitios of land for raising cattle and horses, which comprise the place called Aribac," and declared that the expediente should remain in the archives of the office "as a perpetual record." On the titulo was endorsed: "This title is recorded on page 15 of the proper book which exists in this treasury general;" and also the certificate of the entry in the manual book of July 12, of the receipt of $30 as the value of the land title for two sitios of land. The petitioner also introduced the following entry in the book of Toma de Razon in the office at Hermosillo, Sonora: "On the 12th of July there was issued to Captain Don Ygnacio Gonzales the title granted on the 2d of July, of the corresponding year, to two sitios of land for raising cattle and horses, which comprise the place named Aribac, situated in the juris-

diction of Pimeria Alta, in favor of the citizens Tomas and Ygnacio Ortiz, residents of the presidio of Tubac."

The expediente of 1812 was not in the archives; the alleged entry of October 10, 1812, copied in the titulo, was not there; the expediente of 1833 was not there; no survey was there. The entry of October 10, 1812, stated that the two sitios comprised "the old and depopulated town or settlement called Aribac." The depositions gave as landmarks "the one towards the north on the high pointed hill that rises on this side of the Tagito mine and borders on the Sierra de Buena Vista; the one towards the south standing on this side of the Longorena mine on a low hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Cabaleras; and the one towards the west boundary standing at the Punta de Agua on a pointed hill opposite the Sierra del Babuquivari."

We have carefully examined and considered the testimony in respect of these descriptive calls given on the trial, and concur in the judgment of the court below that the land cannot be so identified as to admit of confirmation. We are constrained to conclude that adequate certainty is lacking. Not only so in respect of the outboundaries, but this was a grant by quantity, a grant of two sitios only, and where situated in the larger area claimed cannot be satisfactorily determined. The record contains no original survey or field notes; and there is no certainty as to an initial point or center.

It appears that a preliminary survey of two sitios was made in 1881 for the surveyor general of Arizona, but we think from the evidence of the surveyor who made it that his location of the tract was essentially arbitrary. Indeed, he admitted that his survey "did not pretend to conform to the natural objects called for," and testified: "I surveyed the two leagues of land. It was left a good deal to me. They wanted it for cattle raising in that valley. I used my own judgment as to where to locate it."

But the court was not called on to speculate on the subject or to accept the theories of the surveyor as to the best place

for cattle raising as controlling. The doctrine of the *Ely case*, 171 U. S. 220, was not that it was within the power of the court to locate grants, but that if a location had been made, and there were facts enough to nail it to the ground, and determine its true boundaries, that might be done. The data did not exist here for the application of that principle.

The Gadsden treaty provided that grants made previously to September 25, 1853, were not to " be respected or be considered as obligatory, which have not been located and duly recorded in the archives of Mexico." We are of opinion that this grant of two sitios is not shown, and cannot be presumed, to have been located within the intent and meaning of the treaty. No question, therefore, could be raised in respect of *demasias*, and, moreover, as just held in *Reloj Cattle Company* v. *United States*, *ante*, 624, under the laws on that subject, the owner of the *cabida legal* did not have a vested property interest in the *demasias*, but, under circumstances, had the preference in acquiring it, if he so desired; and claims to overplus, the conditions to acquiring which were unperformed, were not open to confirmation by the court.

Decree affirmed.

UNITED STATES *v.* BACA.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 170. Argued January 31, 1902.—Decided February 24, 1902.

Under the act of Congress of March 3, 1891, c. 539, the Court of Private Land Claims has no jurisdiction to confirm or reject, or to pass upon the merits of a claim to any land, the right to which has been lawfully acted upon and decided by Congress.

THIS was a petition to the Court of Private Land Claims by Margarito Baca for the confirmation to him, and to all other persons interested, of the title to a tract of land in Valencia county in New Mexico, known as the San Jose del Encinal

tract, alleged to have been granted to Baltazar Baca and his two sons in 1768 by the Spanish Governor and Captain General of New Mexico.

The petition prayed the court to take and exercise jurisdiction of the petition; to hear and determine all questions relative to the tract, its extent, proper location and boundaries, and whether, when properly located, it would in any manner conflict with any neighboring property to which there was superior title; to take cognizance of all other matters connected therewith fit and proper to be heard and determined; and by final decree to settle and determine the questions of the proper location of the tract, the validity of the title, and the boundaries thereof; to finally determine and forever set at rest all other questions properly arising between the petitioner and his coöwners and the United States; to confirm the title of the petitioner and his coöwners to them in fee simple; and for further relief.

The United States, by an amended answer filed by leave of court, alleged, among other things, that the tract demanded lay wholly within the lands granted and confirmed by Congress to the town of Cebolleta, reported as number 30, and to the pueblo of Laguna, reported as number 46, by the acts of June 21, 1860, c. 167, 12 Stat. 71, and March 3, 1869, c. 152, 15 Stat. 454, respectively; and that, the right to this tract having been thus lawfully acted upon and decided by Congress, the Court of Private Land Claims had no jurisdiction to allow the claim of the petitioner.

The Court of Private Land Claims, upon hearing and consideration, suspended proceedings until after the decision of this court in *United States* v. *Conway*, 175 U. S. 60, and then entered the following decree:

"This cause having heretofore come on to be heard upon the pleadings and exhibits on file, and upon full and legal proofs introduced and taken in the cause, both written and oral, and upon the original and other documents regarding said claim from file number 104 in the office of the surveyor-general of the Territory of New Mexico and from other sources in said office; and the court having considered the same, and having

heard counsel for all of the parties to the cause, and being fully advised in the premises, and on due consideration thereof, doth make the following findings of fact and law, that is to say:

"1. That in the year 1768, a valid and perfect title in fee simple to all of the land of the sitio de San Jose del Encinal, situated in what is now Valencia county, New Mexico, was by the proper officers of the Spanish Government, the then sovereign power of what is now the Territory of New Mexico, granted in equal shares unto Baltazar Baca and his two sons, and which said tract of land, situated in said county as aforesaid, was and is described as follows, that is to say: It is bounded on the east by a tableland; thence it extends westward five thousand Castilian varas to a sharp-pointed black hill; on the north it is bounded by the Cebolleta Mountain; on the south it is bounded by some white bluffs, at whose base runs the Zuñi Road—all as the same is known and designated upon the maps, plats and surveys in file number 104 in the office of the surveyor-general of the Territory of New Mexico.

"2. That such title so remained in said grantees and their successors from thence hitherto, and up to and including the time of the cession of the land now comprised in the Territory of New Mexico to the United States, and has so continued from thence to the present time.

"3. That the said grantees and their successors have from the time of the making of said grant complied with all conditions necessary to the validity of the same.

"4. That such title in such grantees and their successors to said tract of land was and is complete, valid and perfect, and so was at the date of the cession of the land now comprised in the Territory of New Mexico to the United States by the treaty of Guadalupe Hidalgo; and the same was and is such a title as the United States is bound to recognize and confirm by virtue of said treaty and otherwise.

"5. That the claimant, Margarito Baca, is a lineal descendant of the said Baltazar Baca, one of the original grantees.

"6. But the court further finds, as a matter of fact, that the land comprised within the tract aforesaid is included within the outboundaries of the town of Cebolleta grant, reported num-

ber 46, and the Paguate purchase tract, reported number 30; the said Cebolleta grant having been confirmed to the claimants thereof by an act of Congress approved March 3, 1869, and thereupon duly patented to said claimants by the proper authorities of the United States; and the said Paguate purchase tract having been confirmed to the Indians of the pueblo of Laguna by an act of Congress, approved June 21, 1860, and thereupon patented to said pueblo by the proper authorities of the United States.

"7. Wherefore it is considered and adjudged by the court that a complete, valid and perfect title in and to the tract of land above described was and is vested in the said Baltazar Baca and his two sons and their successors in interest; but that, notwithstanding such fact, this court is without jurisdiction, because of the patents for the said land so as aforesaid issued by the United States, to decree and confirm the same unto them, or to order a survey thereof for such purpose, and for such reason no other or different relief than the pronouncing upon the character of the claimant's title as aforesaid is or will be granted by this court, and it is so ordered."

The United States appealed to this court.

Mr. Matthew G. Reynolds for the United States.

Mr. B. S. Rodey for Baca.

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

The duty of securing private rights in lands within the territory ceded by Mexico to the United States by the treaties of 1848 and 1853, (whether complete and absolute titles, or merely equitable interests needing some further act of the Government to perfect the legal title,) and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the Government; and might either be discharged by Congress itself, or be delegated by Congress to a strictly judicial tribunal or to a board of commissioners.

Ainsa v. *New Mexico & Arizona Railroad*, 175 U. S. 76, 79, and cases there cited.

The record in this case show that the land demanded under a grant from the Spanish authorities in 1768 had been included in grants confirmed by acts of Congress in 1860 and 1869, and in patents issued accordingly by the proper authorities of the United States; and that the Court of Private Land Claims for that reason held that it was without jurisdiction to decree and confirm the land to the petitioners, or to order a survey thereof for that purpose; and yet undertook to adjudge that a complete, valid and perfect title in fee simple had vested by the Spanish grant in the grantees, and remained in them and their successors to the present time.

This action of the Court of Private Land Claims is sought to be justified by the following provisions of the act of Congress of March 3, 1891, c. 539, creating that court. 26 Stat. 854.

By section 1, "said court shall have and exercise jurisdiction in the hearing and decision of private land claims, according to the provisions of this act."

By section 6, any person or corporation claiming lands within the limits of the territory acquired by the United States from the Republic of Mexico, and since within the territories of New Mexico, Arizona or Utah, or the States of Nevada, Colorado or Wyoming, by virtue of such a Spanish or Mexican grant as the United States are bound by the treaties of cession to recognize and confirm, "which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect," to present a petition stating his case and praying that the validity of the title or claim may be inquired into and decided. "And the said court is hereby authorized and required to take and exercise jurisdiction of all cases or claims presented by petition in conformity with the provisions of this act, and to hear and determine the same, as in this act provided, on the petition and proofs in case no answer or answers be filed after due notice, or on the petition and the answer or answers of any person or persons interested in preventing any claim from being established, and the answer of

the attorney for the United States where he may have filed an answer, and such testimony and proofs as may be taken;" and to "render a final decree according to the provisions of this act."

By section 7, "the said court shall have full power and authority to hear and determine all questions arising in cases before it, relative to the title to the land the subject of such case, the extent, location and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations," the stipulations of the treaties of 1848 and 1853, "and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States, which decree shall in all cases refer to the treaty, law or ordinance under which such claim is confirmed or rejected."

By section 8, "any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try and determine the validity of the same and the right of the claimant thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned. If in any such case a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect

other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby."

But all the powers so conferred upon the Court of Private Land Claims are subject to and controlled by section 13, which enacts 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." Then follow several provisions, the fourth of which is: "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 language of this provision appears to us too clear to be misunderstood or evaded. The manifest intent of Congress appears to have been that with any land, of the right to which Congress, in the exercise of its lawful discretion, had itself assumed the decision, the Court of Private Land Claims should have nothing to do. The whole jurisdiction conferred upon that court is to confirm or reject claims presented to it, coming within the act. All the powers conferred upon it are incident to the exercise of that jurisdiction. When it has no jurisdiction to confirm or reject, it has no authority to inquire into or pass upon the case, beyond the decision of the question of jurisdiction. The peremptory declaration of Congress, that "no claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress," necessarily prohibits the court from passing upon the merits of any such claim.

In *United States* v. *Conway*, 175 U. S. 60, it was accordingly declared by this court that the Court of Private Land Claims had no authority to confirm such a claim; and it necessarily follows that it has no authority to express any opinion upon the merits of it, when the right to all the land claimed has already been decided by Congress. *Las Animas Co.* v. *United States*, 179 U. S. 201. Confusion, rather than certainty, would result from allowing the expression of an opinion to stand, which could not be made the basis of any effectual judgment.

Statement of the Case.

The Court of Private Land Claims having discovered that by the express prohibition of Congress it was without jurisdiction to decree and confirm the land to the petitioner, the merits of the case cannot be decided, either by that court, or by this court on appeal; and the decree below, which undertook to pass upon the merits, must therefore be reversed, and the case remanded with directions to dismiss the petition for want of jurisdiction, without prejudice to the right of the petitioner to assert his title in any court of competent authority. *United States* v. *Roselius*, 15 How. 36, 38.

Decree reversed accordingly.

EMBLEN *v.* LINCOLN LAND COMPANY.

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

No. 147. Submitted January 29, 1902.—Decided March 24, 1902.

While a contest over a preëmption entry was pending, Congress passed an act confirming the entry and directing the patent to issue, which was done. *Held*, That the act was within the power of Congress, and that its operation could not be defeated by a contestant who had never made an entry on the land, nor perfected the right to do so.

This was an appeal from a decree of the Circuit Court of Appeals for the Eighth Circuit, affirming the decree of the Circuit Court of the United States for the District of Nebraska, dismissing a bill filed therein by George F. Emblen against the Lincoln Land Company, George F. Weed, and others. The bill averred that Weed, September 19, 1885, made a cash preëmption entry of the southeast quarter of section twenty-two of township two, north of range forty-eight west, at the land office of the United States in the city of Denver, Colorado; that October 4, 1888, Emblen filed a contest against this entry on the ground that Weed had not complied with the requirements of

the law in respect of residence on the premises, and that the entry was fraudulent, and made for speculative purposes; that Emblen's purpose in making the contest was not only that the laws of the United States should be complied with by Weed, but that by defeating Weed's entry he (Emblen) might be enabled to enter the land under the provisions of section 2 of chapter 89 of the laws of the United States, approved May 14, 1880, 21 Stat. 140, c. 89, which section read as follows:

"SEC. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported."

The bill further averred that on a hearing the register and receiver, on May 21, 1890, recommended the dismissal of the contest; that Emblen appealed to the Commissioner of the General Land Office and his appeal was sustained; that thereupon Weed moved for a rehearing, and the officials and inhabitants of the town of Yuma, which had been located on the premises, intervened for the protection of their rights; the rehearing was granted, but before it was had a new land district was created at Akron, Colorado, which embraced the land in question; and the rehearing was ordered to take place at Akron on September 16, 1890; that Emblen did not appear, but filed objections to the jurisdiction, averring that the receiver at Akron was an interested party. On the rehearing the local officers found in favor of Weed and dismissed the contest, and thereupon Emblen appealed to the Commissioner of the General Land Office, and the Commissioner affirmed the action of the local land office, from which ruling Emblen further appealed to Mr. Secretary Noble, then Secretary of the Interior, who, by a decision rendered January 9, 1893, affirmed the action of the local officers and of the Commissioner.

The bill then averred that Emblen subsequently moved for a

review of the decision before Mr. Secretary Smith, on the ground, among other things, of newly discovered evidence, and that a rehearing of the whole contest was ordered by him to be had before the local officers, in obedience to which the register and receiver at Akron set the case for rehearing on January 2, 1894, at which time Weed and other parties interested obtained a continuance, it being charged that this continuance was obtained for the purpose of procuring the passage of an act of Congress confirming the title of the original entryman, which act was in fact passed and approved December 29, 1894, 28 Stat. 599, c. 15, and was in these words: "That the preëmption cash entry numbered forty-nine hundred and ninety, of George F. Weed, made at the district land office at Denver, Colorado, on the nineteenth of September, eighteen hundred and eighty-five, for the southeast quarter of section twenty-two, township two north, of range forty-eight west, which tract embraces the town of Yuma, Colorado, the county seat of Yuma County, Colorado, be, and the same is hereby, confirmed; and that patent of the United States issue therefor to said Weed."

Complainant alleged that while the bill for that act was pending before both Houses of Congress, full information was furnished them of the exact status of the contest over the land; that when the act was passed, the question of the title thereto was pending in the land department, which, under the Constitution and laws of the United States, is solely charged with the duty of determining the rights of preëmptors and contestants and the right to issue patent therefor to the parties entitled thereto; and that Congress had no right or power to adjudicate on the question of the title to the premises in dispute; and that, moreover, under the provisions of section two of the act of Congress of May 14, 1880, complainant had a vested right to enter the land upon the determination of the contest then pending between himself and Weed; and that if complainant had been permitted to continue the contest to final determination, he would have succeeded in securing the cancellation of the Weed entry; and that the passage of the act of Congress above cited, and the issue of patent thereunder, deprived complainant of a vested right without due process of law. It was also averred

that in January, 1886, the town of Yuma was located on a part of the premises, and the town and a large number of other parties were made defendants, it being charged that they had full knowledge of the facts regarding the Weed entry.

The bill prayed that the several defendants be decreed to hold the title to the property in trust for the use and benefit of complainant, and that it be decreed that the patent issued under the act of Congress to Weed conveyed no property in the premises against the rights of complainant. The principal defendants interposed a demurrer to the bill, which was sustained, and the bill dismissed with costs. 94 Fed. Rep. 710. The case was then carried to the Circuit Court of Appeals for the Eighth Circuit, and the decree of the Circuit Court affirmed. The opinion of Judge Shiras in the Circuit Court was adopted as the opinion of the Circuit Court of Appeals. 102 Fed. Rep. 299. An appeal was then prosecuted to this court.

Mr. Edward R. Duffie and *Mr. T. J. Mahoney* for appellant.

Mr. J. W. Deweese and *Mr. Frank E. Bishop* for appellees.

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

At October term, 1895, appellant filed his petition in this court for a writ of mandamus to the Secretary of the Interior to hear and decide the contest between himself and George F. Weed as to the quarter section of land in Colorado in question. The petition alleged in substance the same matters set up in the bill in this case. The writ of mandamus was denied, and Mr. Justice Gray, speaking for the court, said: "Such being the state of the case, it is quite clear that (even if the act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of preëmption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the land department, and cannot be controlled or restrained by mandamus or

injunction. After the patent has once been issued, the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentee; and cannot be revoked or set aside, except upon judicial proceedings instituted on behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor." *In re Emblen, Petitioner*, 161 U. S. 52.

The bill before us is such a bill, and the question arises whether it was within the power of Congress to exercise control over the land, and direct, as it did, the issue of the patent to Weed; and that depends on whether Emblen had obtained a vested right in the land before the passage of the act of December 29, 1894, as otherwise the power of Congress over its disposition as public land was plenary. *Frisbie* v. *Whitney*, 9 Wall. 187; *Shepley* v. *Cowan*, 91 U. S. 330; *Buxton* v. *Traver*, 130 U. S. 232; *Gonzales* v. *French*, 164 U. S. 345.

The Weed entry had not been cancelled when the act of 1894 took effect, so that Emblen had no right to make entry under the act of May 14, 1880. The jurisdiction of the land department ceased with the issue of the patent, and the power of Congress to direct the patent to issue was unaffected by the possibility that Emblen, if he had been permitted to prosecute his contest, might have succeeded. As Mr. Justice Miller said in *Frisbie* v. *Whitney*, *supra*, the rights of a claimant are to be measured by the acts of Congress, and if they show "that he acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

As Emblen never made an entry on the land, nor perfected a right to do so, it results that he had no vested right or interest which could defeat the operation of the act of 1894.

Decree affirmed.

IRON GATE BANK *v.* BRADY.

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

No. 175. Argued February 28, March 3, 1902.—Decided March 24, 1902.

A tort by which the estate of the defendant was not increased, and the estate of the plaintiff damaged only as an indirect consequence of the alleged wrongful act of the defendant, does not, either at common law or by the statutes of Virginia, survive the death of the wrongdoer.

The plaintiff elected to go into court on an action sounding in tort, and it must abide by its election.

On September 11, 1900, the plaintiff in error as plaintiff commenced this action in the Circuit Court of the United States for the Eastern District of Virginia. The declaration, after stating that both parties were citizens of Virginia, alleged that the plaintiff was a state bank, chartered under the laws of that State, and the defendant, a collector of internal revenue of the United States for the second district of Virginia, and that "between the months of November, 1899, and August, 1900, the plaintiff made, issued and paid out seven hundred dollars of its circulating notes, payable to the bearer and intended to be used for circulation in ordinary business as currency. The Commissioner of the Revenue of the United States assessed upon these notes a tax of ten per cent on their face value, equal to seventy dollars, which said tax is imposed upon them by the nineteenth section of the act of Congress of February 8, 1875, and by section 3412 of the Revised Statutes of the United States, and said defendant, James D. Brady, acting as said collector of internal revenue of the United States, required of plaintiff and demanded of it that it pay said tax; but because said action of said act of February 8, 1875, and said section 3412 of the Revised Statutes of the United States, imposing said tax upon said notes, are repugnant to the Constitution of the United States, the plaintiff refused to pay said unlawful tax; therefore on the — day of September, 1900, the defendant forcibly

entered upon the premises of the plaintiff by virtue of a distress warrant held by him, authorizing and commanding him to collect said unlawful tax, and levied on and seized a large quantity of plaintiff's personal property, and was in the act of removing and carrying away said property to sell the same when the plaintiff, protesting against the illegality of defendant's act, paid him said tax to procure a release of its said property; that defendant well knew said acts of Congress imposing said tax were repugnant to the Constitution of the United States, and he entered upon plaintiff's premises and levied on and seized its property, well knowing that he was doing unlawful acts, and he did the same maliciously and with the purpose and intention of doing a wanton injury to plaintiff and damaging its credit, so as to do it all the harm possible, and said unlawful act has damaged its credit and done it an irreparable injury; that the act of Congress authorizing the issue of said distress warrant to collect said unlawful tax is repugnant to the Constitution of the United States, and because all of said acts of Congress are repugnant to the Constitution of the United States, the plaintiff's case arises under the Constitution of the United States; that said unlawful acts of said defendant have damaged the plaintiff six thousand dollars, and therefore it sues."

A demurrer to this declaration was filed, sustained and judgment entered for the defendant. Thereupon this writ of error was sued out. After the case had reached this court the defendant, James D. Brady, died, and an application was made to revive in the name of his personal representative.

Mr. William L. Royall for plaintiff in error.

Mr. Solicitor General for the United States.

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

We have recently had before us a similar action against the same party, in which also was presented the question of surviv-

orship, (*Patton* v. *Brady*, *ante*, 608,) and to the opinion filed in that case we refer for a discussion of the question. There the amount of property taken by the defendant as collector was over $3000; here it is only $70. So far as a recovery of the tax charged to have been illegally levied and collected is sought, it is practically an action in assumpsit for money had and received. Beyond that nothing is suggested but a tort, and a tort by which the estate of the defendant was not increased and the estate of the plaintiff damaged only as an indirect consequence of the alleged wrongful act of the defendant. Such a tort does not, either at common law or by the statutes of Virginia, survive the death of the wrongdoer. (See authorities referred to in the opinion cited.)

It may be added that it is not easy to see how upon the acts charged against the defendant there could be, even if the tax were declared illegal, any further recovery than the amount of such tax with interest. It is true there is an averment that the defendant knew he was doing unlawful acts, that he did them maliciously and with the purpose and intention of doing a wanton injury to the plaintiff and damaging its credit, but no wrongful act is charged against him except it be in the mere collection of this alleged illegal tax. If the tax is legal then nothing is disclosed which would give any right of recovery to the plaintiff; nothing was done by the collector in making the collection other than was strictly his duty. So, on the other hand, if the tax be adjudged illegal, no act of wrong is shown except in the fact of compelling payment. In other words, he is charged with doing nothing that an officer ought not to have done in attempting to make a collection. An averment that a party has acted maliciously and with the intention of doing a wanton injury does not add to the measure of relief obtainable in an action of implied assumpsit. If it does in any action, it is only in one sounding wholly in tort, in which malice and wantonness may sometimes justify exemplary damages.

The case stands thus: If this is to be treated as an action of assumpsit, then the amount in controversy is not sufficient to give the Circuit Court jurisdiction; if as an action of tort, then it did not survive. But a party cannot unite the two; avail

himself of the large amount claimed on account of a tort in order to vest jurisdiction in the Circuit Court, and then on the death of the alleged wrongdoer prevent an abatement of the action, which would necessarily take place if the action was only for a tort, by reason of an averment of facts from which a contract to pay a small sum, one below the jurisdiction of the court, might be implied. In other words, he cannot call it tort to acquire jurisdiction, and contract to prevent abatement. The plaintiff elected to go into court on an action sounding in tort. It could not get in in any other way. It must abide by its election and cannot be permitted to transform its action thereafter into one of contract. Abatement must therefore follow.

No judgment was entered in favor of the plaintiff. There has been no adjudication in its favor either on the contract or the tort. What disposition ought now to be made of the case? In *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, where the action sounded wholly in tort, it was said (p. 703):

"The result is, that by the law of Virginia the administrator has no right to maintain this action, and that by the statutes of the United States regulating the proceedings in this court he is not authorized to come in to prosecute this writ of error. The only verdict and judgment below were in favor of the defendant, who is not moving to have that judgment affirmed or set aside. The original plaintiff never recovered a verdict, judgment upon which might be entered or affirmed *nunc pro tunc* in his favor. If the judgment below against him should now, upon the application of his administrator, be reversed and the verdict set aside for error in the instructions to the jury, or, according to the old phrase, a *venire de novo* be awarded, no new trial could be had, because the action has abated by his death. *Hemming* v. *Batchelor*, above cited; *Bowker* v. *Evans*, 15 Q. B. D. 565; *Spalding* v. *Congdon*, 18 Wend. 543; *Corbett* v. *Twenty-third Street Railway*, 114 N. Y. 579; *Harris* v. *Crenshaw*, 3 Rand. 14, 24; *Cummings* v. *Bird*, 115 Mass. 346.

"The necessary conclusion is that, the action having abated by the plaintiff's death, the entry must be writ of error dismissed."

We are inclined to think that such is not exactly the proper

disposition to be made of this case, because in the plaintiff's cause of action is stated a claim for the recovery of a tax, which, as alleged, it has been wrongfully compelled to pay. While the Circuit Court may not have jurisdiction of an action for that claim on account of the small amount thereof, it would not be right to leave the present judgment as a bar to an action in a court that could take jurisdiction. The proper judgment is, and it is so ordered, that the case be remanded to the Circuit Court, with instructions to set aside its judgment and enter one, abating the action by reason of the death of the defendant.

Case No. 194, between the same parties, involves the same question, and will be disposed of in the same way.

MR. JUSTICE GRAY took no part in the decision of this case.

GWIN *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 172. Argued February 26, 28, 1902 —Decided March 24, 1902.

A decree of the District Court of the United States for the Northern District of California, rendered in 1855, was affirmed by this court, and remanded to the District Court, where a final decree was entered in 1859. Subsequently in 1899, after a large amount of intermediate litigation, a petition of intervention was filed in the District Court in the original case, praying that the decree of 1859 might be ordered to be executed, the proceedings having been originally begun in 1852 before the board of land commissioners of California. A demurrer was filed to this petition, which was sustained and the petition dismissed. This was followed by another similar petition filed in 1900 which was also dismissed, and an appeal taken to this court. *Held:* that the appeal originally allowed to this court by the act of 1851 was repealed in 1864, and an appeal allowed to the Circuit Court of the United States; that this act was repealed by the act of 1891, which provided for an appeal to the Circuit Court of Appeals, and that the appeal to this court must therefore be dismissed.

Statement of the Case.

THIS is an appeal from an order of the District Court of the United States for the Northern District of California sustaining a demurrer to, and dismissing the petition of, the appellants, intervenors, who prayed that a certain decree of the above-named District Court, made on November 30, 1859, be ordered to be executed.

It appears that on January 31, 1852, certain persons by the name of Peralta presented to and filed with the board of land commissioners, under the act of Congress "to ascertain and settle the private land claims in the State of California," passed March 3, 1851, 9 Stat. 631, a petition for the confirmation of the rancho of San Antonio. Subsequently the four claimants divided the lands among themselves in severalty, and the board, proceeding to examine the claim upon the evidence, decided in favor of its validity, but restricted the area of the grant by fixing the northern boundary line at San Antonio Creek, which included about one half of the claim. Both parties appealed from this decision, and the claim was certified to the District Court for the Northern District of California, in which court a transcript of the proceeding was filed September 23, 1854. The District Court upon the trial reversed the decree of the land commissioners, and declared the claim as set forth in the petition to be valid, by decree entered January 26, 1855.

From this decree the United States appealed to this court, which affirmed the decree of the District Court (1857). *United States* v. *Peralta*, 19 How. 343. Two controversies were decided: first, that the officers issuing the grant had power to make grants of land; and, second, that the northern boundary of the land extended beyond San Antonio Creek, according to the claim of the petitioners. Upon the mandate of this court being filed in the District Court a final decree was entered therein on November 30, 1859, slightly amending its former decree in substantial compliance with such mandate. This decree is still in force.

Afterwards, and on August 10, 1860, the surveyor general returned into court a corrected plat of a survey, purporting to be in conformity with the decree of November 30, 1859. Thereupon, and on October 8, 1860, one Carpentier and others filed

a petition of intervention, in which they claimed adversely so much land as lay under the waters of the estuary of San Antonio, up to the highest tide lands, through mesne conveyances from the State of California, and afterwards filed in court their exceptions to the survey. The United States also filed exceptions thereto. The litigation thus inaugurated continued for more than ten years, and finally resulted in a decree of the District Court, August 4, 1871, approving a modified survey of the tract, a certified plat of which had been filed in the clerk's office. An appeal was taken from this decree by the United States to the Circuit Court for the Ninth Judicial Circuit, by which court the appeal was dismissed July 31, 1874, and a decree entered that the claimants have leave to proceed under the decree confirming the survey as a final decree. The Commissioner of the General Land Office thereupon caused to be prepared and recorded a patent of the United States for that portion of the lands included in the survey.

Thirty-seven years after the entry of the decree of November 30, 1859, and twenty-two years after the dismissal of the above appeal in the Circuit Court, the successors in title of one of the Peraltas presented to the Commissioner of the General Land Office, September 2, 1896, a plat of a survey of the rancho San Antonio made by the surveyor general of California, November 25, 1895, under the act of Congress of July 23, 1866, 14 Stat. 218, with certified copies of the decree of November 30, 1859, with a request that he issue to the petitioners a patent in accordance with such plat of survey, which the Commissioner declined to do, September 22, 1896, and the Secretary of the Interior affirmed his decision. The appellants thereupon and on July 27, 1899, filed in the District Court for the Northern District of California a petition of intervention in the original case of the *United States* v. *Peralta*, praying that the decree of November 30, 1859, might be ordered to be executed; that the government be required to issue to the appellants its patent for so much of the lands of the rancho as had not theretofore been patented to them, or any of them. The United States demurred to the petition, which, on January 29, 1900, was dismissed.

This was followed by another similar petition, filed March 29, 1900, based upon the survey of 1895, which was also demurred to, and resulted in a decree, rendered May 28, 1900, sustaining the demurrer and dismissing the petition. Whereupon petitioners appealed to this court.

Mr. James T. Boyd for appellants. *Mr. George A. King* was on his brief.

Mr. Matthew G. Reynolds for the United States. *Mr. Solicitor General* was on his brief.

Mr. Justice Brown delivered the opinion of the court.

The appeal in this case is taken from the decree of May 28, 1900, sustaining the demurrer to, and dismissing the petition of, the appellants, which was filed March 29, 1900.

Our jurisdiction of this appeal depends upon certain statutes, which it becomes necessary to consider. By the original act of March 3, 1851, 9 Stat. 631, to ascertain and settle the private land claims in the State of California, a commission of three persons was constituted (sec. 1) to settle such claims, whose duty it was (sec. 8) to decide upon their validity and to certify the same, with their reasons, to the district attorney of the United States. By sec. 9, an appeal was given to the District Court, which was empowered to review the decision of the commissioners, and to decide upon the validity of such claim. By sec. 10, the District Court was required, on application of the party against whom judgment was rendered, to grant an appeal to the Supreme Court of the United States. It was held in *United States* v. *Fossatt*, 21 How. 445, that the jurisdiction of the board of commissioners extended not only to the adjudication of questions relating to the genuineness and authenticity of the grant, but also to all questions relating to its location and boundaries; and that it did not terminate until the issue of a patent conformable to the decree.

The law remained in this condition until 1864, when on July 1 an act was passed, 13 Stat. 332, "to expedite the settlement

of titles to lands in the State of California," the second section which provided "that where proceedings for the correction or confirmation of a survey are pending . . . it shall be lawful for such District Court to proceed and complete its examination and determination of the matter, and its decree thereon shall be subject to appeal to the Circuit Court of the United States for the district, in like manner, and with like effect, as hereafter provided for in appeals in other cases to the Circuit Court." By section three it was enacted "that where a plat and survey have already been approved or corrected by one of the District Courts, . . . and an appeal from the decree of approval or correction, has already been taken to the Supreme Court of the United States, the said Supreme Court shall have jurisdiction to hear and determine the appeal. But where from such decree of approval or correction no appeal has been taken to the Supreme Court, no appeal to that court shall be allowed, but an appeal may be taken within twelve months after this act shall take effect, to the Circuit Court of the United States for California, and said Circuit Court shall proceed to fully determine the matter."

It appears perfectly clear from section three that the appellate jurisdiction of the Supreme Court was taken away, except as to cases where an appeal had already been taken. With this exception appeals must be taken under that act to the Circuit Court. The law remained in that condition until the passage of the Court of Appeals Act of March 3, 1891, 26 Stat. 826, by the fifth section of which appeals can only be taken directly from the District Court to this court in cases where the jurisdiction of the District Court is in issue, in prize cases, criminal cases, constitutional cases, or cases involving the validity or construction of a treaty. As to all other cases, by section six, appeal must be taken to the Circuit Court of Appeals. As we said in *McLish* v. *Roff*, 141 U. S. 661, this act provides for the distribution of the *entire* appellate jurisdiction of our national judicial system between the Supreme Court and the Circuit Court of Appeals. As this case does not fall within any of the classes excepted by section five, it is clear that if any appeal will lie at all, it should have been taken to the Circuit Court

of Appeals, and that we have no jurisdiction to enforce the execution of this decree by appeal from the District Court. If the decree of November 30, 1859, rendered by the District Court in pursuance of the mandate of this court, were not a final decree, it became final either August 4, 1871, when the modified survey was approved, and an appeal was taken to the Circuit Court and the appeal dismissed by Mr. Justice Field, July 31, 1874, or upon May 28, 1900, from which the appeal was taken in this case.

It is clear that, so far as concerns appeals from final decrees, they must be taken under laws then in existence, and to the court provided by such laws. To say that a decree rendered in 1900 may be appealed to a court, whose jurisdiction to review it was taken away in 1864, is beyond belief. Even if the Court of Appeals Act do not apply to this case, the jurisdiction of this court was clearly taken away by the act of 1864, and transferred to the Circuit Court of the United States for California, except as to appeals which had already been taken. If there had been no reservation of pending cases, even such cases would have fallen within the law. *Railroad Co.* v. *Grant*, 98 U. S. 389, 401. In that case a writ of error had been sued out on December 6, 1875, to reverse a judgment of $2250 by the Supreme Court of the District of Columbia. At that time the appeal was properly taken to this court, but on February 25, 1879, Congress passed an act limiting writs of error from this court to judgments exceeding the value of $2500, and it was held that the writ of error must be dismissed. Said the Chief Justice: "The act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove

their cases to this court by writ of error and appeal, and gave us the authority to reëxamine, reverse or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or a writ of error already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit because our jurisdiction is gone."

Similar cases are by no means infrequent in this court. Thus in *Yeaton* v. *United States*, 5 Cranch, 281, it was held that if the law, under which a sentence of forfeiture was inflicted, expired or was absolutely repealed after an appeal and before sentence by the appellate court, the sentence must be reversed. See also *The Schooner Rachel*, 6 Cranch, 329; *United States* v. *Preston*, 3 Pet. 57; *Norris* v. *Crocker*, 13 How. 429. In *Insurance Co.* v. *Ritchie*, 5 Wall. 541, it was held that the jurisdiction of the Circuit Courts between citizens of the same State in internal revenue cases, conferred by the act of 1864, was taken away by the act of 1866, and that cases pending at the passage of the act fell with its repeal. *Ex parte McCardle*, 7 Wall. 506. These cases fully establish the proposition that a repealing statute which contains no saving clause operates as well upon pending cases as upon those thereafter commenced.

In the case under consideration there was a saving of suits already begun, but there was an express proviso that, where no appeal had been taken to the Supreme Court, no appeal to that court should be allowed. That law remained unchanged until the Court of Appeals Act of 1891, to which all appeals from Circuit or District Court must now be taken, with a few specified exceptions.

The appeal must be

Dismissed.

HOWARD *v.* UNITED STATES.

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

No. 121. Argued January 20, 1902.—Decided March 24, 1902.

This suit was upon a bond taken by a Circuit Court of the United States from its clerk, to secure the proper performance of his duties, and the Circuit Court could take cognizance of it, independently of the citizenship of the real parties in interest, as it was a suit arising under the laws of the United States, of which the Circuit Court was entitled to take original cognizance, concurrently with the courts of the State, even if the parties had been citizens of the same State; and, although the petition shows a case of diverse citizenship, jurisdiction was not dependent upon such citizenship.

That the clerk of the court was authorized, with the sanction or by order of the court, to receive money paid into court in a pending cause, is clearly to be implied from the legislation of Congress referred to in the opinion of the court.

Congress, by the statutes referred to in the opinion of the court, intended the bond of a clerk of a Circuit Court should be for the protection of all suitors, public or private.

As the clerk had the right to receive the money in question; as he failed, to the injury of the suitor from whom he received it, with the sanction of the court in a pending cause, to deposit it as required by law, and appropriated it to his own use; and as his bond was for the protection of private suitors as well as for the Government, there is no sound reason why the plaintiff could not enforce his rights by a suit in the name of the United States for his benefit.

THE case is stated in the opinion of the court.

Mr. John C. Gage for plaintiffs in error. *Mr. Sanford B. Ladd* and *Mr. Frank Hagerman* filed a brief for same.

Mr. Edwin A. Krauthoff for defendant in error. *Mr. J. V. C. Karnes*, *Mr. Alexander New* and *Mr. David D. Stewart* were on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

Were the appellants entitled, of right, to bring this case here

from the Circuit Court of Appeals? Has a clerk of a Circuit Court of the United States authority to receive money brought into court by a private suitor, and is he responsible upon his bond if he does not deposit it as required by statute and appropriates it to his own use? Is the bond of the clerk for the protection of private suitors as well as of the United States? Has a private suitor the right without express statutory authority to sue on the bond of the clerk in the name of the United States for his benefit?

These questions are presented by the record, and will be examined after we shall have stated the facts set out in the special findings made by the Circuit Court.

On the 3d day of March, 1887, Warren Watson was duly appointed clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri; and on the same day he executed and the court approved his bond to the United States in the penalty of twenty thousand dollars.

He died March 24, 1892, while acting as clerk, and an administrator of his estate was appointed April 2, 1892. Notices, as required by the local law, having been previously given for the presentation of claims, the administration of the estate was closed and the administrator discharged on the 11th day of September, 1894. At no time did the United States or the relator Stewart exhibit or present any claim against Watson's estate.

Stewart instituted, February 6, 1891, in the Circuit Court of the United States a suit at law against Henry County, Missouri, upon three bonds of the county, two for $1000 each and one for $500. His petition contained three counts. In the first count he asked for judgment for $1010 with interest from September 1, 1887, as the amount due on the first bond of $1000. The second count was upon the other bond for $1000; the third, upon the $500 bond.

On the 3d day of March, 1891, the county filed its answer alleging as to the first count that on September 6 [1], 1887, there was due on the bond therein referred to $1010, and on that date it had deposited that sum in the National Bank of Commerce of New York for the payment of the bond and interest,

and tendered the same to the plaintiff as full payment thereof, but that the plaintiff had refused to accept such payment. The answer further alleged that the defendant had "at all times been ready and willing to pay plaintiff said sum of $1010 in full payment of said bond and unpaid interest, and now here again tenders to plaintiff said sum of $1010 in full payment of said bond and unpaid interest due thereon, on September 6, [1], 1887, and *now brings the said sum into court.*" The answer to the second and third counts was exactly the same, except that as to the third count the amount named was $505 instead of $1010.

On the same day, March 3, 1891, there was entered on the records of the court in said cause the following order: "This day comes defendant by its attorney and files answer and tenders to the plaintiff and *deposits with the clerk* the sum of $2525 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein."

It was found as a fact that Henry County did hand to Watson the sum of $2525 as recited in that order.

On June 27, 1891, Stewart, the plaintiff in that suit, filed a reply, which was a general denial of the facts alleged in the answer.

On July 2, 1894, more than two years after Watson's death, there was entered on the records of the court in the cause the following: "This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement with leave to the parties to file briefs."

On the 11th day of February, 1895, the following order was made in that case: "A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the

issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court, and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of $1010." The findings on the other counts differed only as to amounts.

The order in the same case then proceeded: "It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars ($2525), the aggregate amount found to be owing to him under the three counts of the petition, and that plaintiff pay the costs of this action and that execution issue therefor. And it further appearing to the court that the said sum of $2525, so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk, or otherwise: It is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid."

No appeal was taken from this judgment, and the same became final and remained in full force and effect and unpaid.

No order or direction as to this money was ever made except as indicated in the order of February 11, 1895.

When the $2525 was paid by Henry County to Watson, he deposited it the same day in a bank *to his individual credit*, and it was not at any time treated by him as in the depository of the court. He never presented to the court any account of the money, nor paid it either to Henry County or to Stewart. During the pendency of the Stewart suit against the county

neither party took any steps for an order in relation to the money, other than was actually made as above stated, nor made any objection to the method in which the money was received. Stewart, however, had no knowledge of the acts of Watson.

It was further found that no demand was ever made on the defendants or on Watson for the money other than is to be inferred from the institution of the suit.

The present action was brought October 19, 1895, against the sureties in Watson's bond, in the name of the United States, at the relation and to the use of David D. Stewart. One of the sureties, McDonald, pleaded his discharge in bankruptcy, and that plea was sustained. Judgment was entered against the sureties (except McDonald) for the sum of $2525 with interest at six per cent from the commencement of this suit, making total of $3057.77. 93 Fed. Rep. 719. That judgment was affirmed in the Circuit Court of Appeals. 102 Fed. Rep. 77.

1. The first question is one of the jurisdiction of this court. The defendant in error insists that the judgment of the Circuit Court of Appeals was final, and that therefore no writ of error lay to this court.

Is this a correct interpretation of the statutes defining and regulating the jurisdiction of the courts of the United States?

In all cases in which the judgments of a Circuit Court of Appeals are not made final by the act of March 3, 1891, c. 517, there is of right an appeal or writ of error to this court where the matter in controversy exceeds one thousand dollars in value besides costs. 26 Stat. 826, 828.

Among the cases in which the judgments or decrees of the Circuit Courts of Appeals are made final are those in which the jurisdiction of the Circuit Court "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." 26 Stat. 828, § 6.

The opposite parties here are Stewart, the relator, a citizen of Maine, for whose benefit the suit was brought, and the sureties on the bond of Watson, who are all citizens of Missouri. The Government is the nominal, while Stewart is the real, plaintiff. His citizenship is to be regarded in any inquiry as to

jurisdiction. *Browne* v. *Strode*, 5 Cranch, 303; *McNutt* v. *Bland*, 2 How. 9; *Maryland* v. *Baldwin*, 112 U. S. 490.

But does it not appear from the petition itself that the case was one of which the Circuit Court could take cognizance independently of the citizenship of the real parties in interest? This question must receive an affirmative answer. The suit was directly upon a bond taken by the Circuit Court in conformity with the statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those statutes. It was therefore a suit arising under the laws of the United States, of which the Circuit Court (concurrently with the courts of the State) was entitled to take original cognizance, even if the parties had been citizens of the same State. Act of August 13, 1888, 25 Stat. 434, c. 866. This court has heretofore decided that a suit upon a bond of a marshal of the United States was one arising under the laws of the United States. *Feibelman* v. *Packard*, 109 U. S. 421, 423; *Bachrack* v. *Norton*, 132 U. S. 337; *Reagan* v. *Aiken*, 138 U. S. 109; *Bock* v. *Perkins*, 139 U. S. 628, 630. The same principle must be held to be applicable to suits upon the bond of a clerk of a court of the United States. It could not be that a suit upon the bond of a marshal was one arising under the laws of the United States, and that a suit upon the bond of a clerk of a court of the United States was not of that class.

It results that although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon Federal grounds. And as the case was one which could not have been brought here directly from the Circuit Court, the final judgment of the Circuit Court of Appeals could be reviewed in this court upon writ of error sued out by the defendants.

2. We now come to the merits of the case. The bond in suit was taken under the authority of section 795 of the Revised Statutes as amended by the act of February 22, 1875, c. 95, 18 Stat. 333. That section reads: "§ 795. The clerk of every court shall give bond, in a sum to be fixed and with sureties to be approved by the court which appoints him, faithfully to dis-

charge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk; and a new bond may be required whenever the court deems it proper that such bond should be given. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safekeeping as the court may direct. A certified copy of such entry shall be *prima facie* proof of the execution of such bond and of the contents thereof."

The conditions of the bond, as set forth in this section, were the same as those prescribed by the Judiciary Act of 1789. 1 Stat. 73, 76.

It will be observed that section 795 does not name the obligee in the bond, and leaves its amount to be fixed by the court. But the third section of the act of 1875 provided, as did the Judiciary Act of 1789, that the clerks should give bond to the United States. The act of 1875 also required bond "in the sum of not less than five nor more than twenty thousand dollars, to be determined and regulated by the Attorney General of the United States." And the same act authorized the Attorney General to require a bond in a sum not to exceed forty thousand dollars whenever the business of the court should make it necessary.

It must be taken as indisputable that the money in question was paid by Henry County in satisfaction of Stewart's claim or cause of action. It must also be taken as indisputable, upon this record, that the deposit was made with Watson as clerk in the presence and with the assent of the court, although no order was entered expressly requiring the money to be paid to the clerk or expressly directing him to receive it. But all this is necessarily to be implied from the terms of the order of March 3, 1891, which states that Henry County—presumably in the presence of the court—*deposited the money with the clerk.* It would be a very narrow interpretation of the words of that order to hold that the money was paid to Watson without the knowledge, approval or sanction of the court, or that it was paid to him as an individual and not in his capacity as clerk. The

order was equivalent to one expressly stating that the money was paid by direction of the court to Watson as clerk.

But it is suggested that in the absence of a statute distinctly so providing, the clerk was not entitled to receive the money deposited in payment and satisfaction of Stewart's claim. It is true that no statute declares in words that a clerk may receive money brought into court for the purposes of a pending suit. But it is clear that Henry County was entitled to bring into court and tender to its adversary the amount it was willing to pay in satisfaction of his claim. It cannot be that it was the duty of the judge of the court himself to have received the money and personally deposited it as required by law. No one has ever supposed that a judge was under obligation to perform such services. Who, then, was to receive the money? Plainly it was the duty of the clerk, who was the arm of the court, kept its records showing money paid in by suitors or officers, and was under bond conditioned that he would faithfully perform all the duties of his office. He was allowed by statute a commission "for *receiving*, keeping and paying out money in pursuance of any statute or order of court." Rev. Stat. § 828. It was well said by Judge Caldwell, delivering the unanimous judgment of the Circuit Court of Appeals, that "for more than a century the clerks of the Circuit Courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and ordinary manner, and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such clerks."

That the clerk was authorized, with the sanction or by order of court, to receive money paid into court in a pending cause, is clearly to be implied from the legislation of Congress. It will be well to trace the history of this question through the statutes enacted from time to time.

By the act of March 1, 1793, c. 20, clerks of District Courts were allowed one and a quarter per cent commission on "all money deposited in court." 1 Stat. 332–3; 1 Stat. 625, c. 19, § 3. Money received by a marshal in a prize cause was held by

Mr. Justice Story to be properly paid over to the *clerk*, and that he was entitled to commissions under the statute. That practice, he held, was of great importance for the "security of suitors." *The Avery*, (1814), 2 Gall. 308, 311. See also *Blake* v. *Hawkins*, 19 Fed. Rep. 204; *In re Goodrich*, 4 Dill. 230; *Smith* v. *Morgan City*, 39 Fed. Rep. 572. In *Fagan* v. *Cullen*, 28 Fed. Rep. 843, 844, Mr. Justice Brown held that moneys received by the marshal should, under sections 995 and 996 of the Revised Statutes, either be immediately deposited by him "*or paid to the clerk* and by him deposited."

By an act approved April 18, 1814, c. 62, it was provided that upon the payment of money into a District or Circuit Court to abide the order of the court, the same should be deposited in an incorporated bank to be designated by the court, there to remain until it was decided to whom it of right belonged. If there was no such bank, then the court could "direct" the money to be deposited according to its discretion. 3 Stat. 127. Could not such direction have been given to the clerk?

The act of 1814 was supplemented by one approved March 3, 1817, c. 108, making it the duty of Circuit and District Courts "to cause and direct" all moneys remaining in such courts, and all moneys subject to their order, to be deposited in a branch of the Bank of the United States in the name and to the credit of the court. § 1. The same direction was given by the act as to all moneys thereafter paid into said courts, "or received by the officers thereof." § 2. All payments out of such moneys were to be entered of record by the clerk. § 3. It was further provided that if any "clerk of such court," or other officer thereof, "receiving any such moneys," should refuse or neglect to obey the order of the court for depositing the same, such clerk or other officer was liable to be forthwith proceeded against by attachment for contempt. § 4. The same act imposed upon the clerk the duty of presenting an account at each session of court of all moneys remaining therein. § 5. 3 Stat. 395.

The acts of 1814 and 1817 were technically repealed by the act of March 24, 1871, entitled "An act relating to moneys paid into the courts of the United States. 17 Stat. 1, c. 2. But

the act of 1871 retained substantially all the provisions of the two former acts and added others. That act provided, among other things, that all moneys in the registry of any court of the United States, or "in the hands or under the control of an officer of such court, which were received in any cause pending or adjudicated in such court," should within thirty days after the passage of the act be deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court; that all such moneys which were thereafter paid into such courts, "or received by the officers thereof," should be forthwith deposited in like manner; that if any *clerk* or other officer of a court of the United States deposited any money belonging in the registry of the court in violation of that act, or should retain or convert it to his own use, or to the use of any other person, he should be deemed guilty of embezzlement, and on conviction be punished by a fine of not less than five hundred dollars and not more than the amount embezzled, or by imprisonment for a term of not less than one year nor more than ten years, or both, at the discretion of the court; and that if any person should knowingly receive from a *clerk* or other officer of a court of the United States any money belonging in the registry of the court as a deposit, loan or otherwise, in violation of the act, he should be deemed guilty of embezzlement, and be punished as therein provided.

These provisions of the act of 1871 have been substantially reproduced in the following sections of Revised Statutes:

"§ 798. At each regular session of any court of the United States the *clerk* shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court."

"§ 995. All moneys paid into any court of the United States, *or received by the officers thereof, in any cause pending or adjudicated in such court*, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: *Provided*, That nothing herein shall be construed to prevent

the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

"§ 996. No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by *the clerk;* and every such order shall state the cause in or on account of which it is drawn."

"§ 5504. Every *clerk* or other officer of a court of the United States who fails forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court *or received by the officers thereof*, with the Treasurer and assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court, or who retains or converts to his own use or to the use of another any such money, is guilty of embezzlement, and shall be punished by a fine not less than five hundred dollars, and not more than the amount embezzled, or by imprisonment not less than one year nor more than ten years, or by both such fine and imprisonment; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement, of parties under the direction of the court.

"§ 5505. Every person who knowingly receives, *from a clerk* or other officer of a court of the United States, any money belonging in the registry of such court as a deposit, loan or otherwise, is guilty of embezzlement, and shall be punished as prescribed in the preceding section."

The statutory provisions to which we have referred—taken in connection with section 828 of the Revised Statutes, giving commissions to clerks for *receiving*, keeping and paying out money in pursuance of any statute or order of court—show the relation in which clerks of District and Circuit Courts have always stood to moneys paid into court in pending causes. They manifestly proceed on the ground that money paid into court, under its sanction, may be received by a clerk, his duty upon receiving it being forthwith to deposit the amount with the Treasurer, assistant treasurer, or designated depositary of the United States, in the name and to the credit of the court.

As soon as he receives the money he becomes responsible for it under his bond, and that responsibility does not cease until he deposits it as required by law. If after receiving the money he appropriates it to his own use, or, which is the same thing, if he deposits it in bank to his individual credit, he becomes liable on his bond for the amount so misappropriated.

3. But it is said that the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the Government, and therefore no suit can be maintained on it for the benefit of an individual suitor, although such suitor may have been damaged by the failure of the clerk to discharge his duty. This results, it is supposed, from the fact that there is no statute expressly authorizing such a suit. If this position be well taken, it would follow that the bonds required to be given by clerks of the Federal courts are not in any case for the protection of private suitors. We are of opinion that Congress never intended that any such condition of things should exist, but intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to forty thousand dollars. It is impossible to suppose that, when requiring a clerk to give bond to the United States "faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court," Congress had in mind the interests of the United States alone, and purposely refrained from making any provision whatever for the security of private suitors in the Federal courts. Such a conclusion would be inconsistent with the practice of a century, and would greatly surprise the profession. As may well have been anticipated when those courts were first established, the great mass of litigation in the District and Circuit Courts of the United States has always been between individuals, and consequently the words above quoted, it must be assumed, had reference to individual suitors as well as to the United States. In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge his duties or seasonably to record the decrees, judgments and determinations of the court. It must have been so understood

when the courts of the United States were established and provision made for the appointment of clerks who should be entitled to receive the moneys of suitors when paid into court under its sanction or pursuant to any statute.

A well considered case upon this general subject is that of *McDonald* v. *Atkins*, 13 Neb. 568. That was an action on a clerk's bond to recover the amount received by him from a sheriff who had collected it on an execution. The point was made that the clerk was not authorized by statute to accept payment of a judgment, and so the court of original jurisdiction held in that case. The Supreme Court of the State said: "No one can doubt, we think, that this ruling was in direct conflict with the general understanding of the legal profession of this State as to the duty of court clerks in the receipt and disbursement of money paid upon judgments, from the first organization of our judicial system, through all its changes, down to the present time. Indeed, we doubt exceedingly that any one, especially a practicing lawyer, has ever supposed that upon the rendition of a money judgment, the defendant could not prevent a further accumulation of costs and interests, and have a satisfaction legally entered of record, by at once paying to the clerk of the court the amount which it calls for. If he could not—if clerks are really without authority to receive money on judgments in their custody, then to whom, in the absence of the plaintiff and his attorney, could payment be legally made? . . . While it is true that we have no statute which in express terms declares that the clerks of the several courts shall accept payment of judgments in their custody, it is very evident that the legislature contemplated and intended that they should do so. . . . And even in the absence of such provision, can it be doubted that a party against whom a money judgment is sought by action may, upon being summoned, pay the amount demanded 'into court,' and thereby prevent the making of any further costs? But how is it to be effected? In the case of inferior courts—those not of record, and unprovided with clerks—the payment can, of course, only be made to the judge or magistrate in person; but in courts of record, where all the steps taken in the progress of the case, from the commencement to

the satisfaction of final judgment, are recorded and preserved, and where a clerk for the performance of this duty is specially provided, it is otherwise. In these courts payments of money are never made to the judge, but the uniform practice in this State has always been to make them to his clerk, to whose custody and care the files, records, and whatsoever else relates to cases in courts, are confided. And this practice, so universal, although not positively directed by any act of the legislature, conflicts with none, and, as we have shown, is recognized by and in perfect harmony with several." These observations are strikingly applicable in the present case.

Two cases often cited in support of the contrary view are *Commonwealth* v. *Hatch*, 5 Mass. 191, and *Crocker, Treasurer &c.*, v. *Fales*, 13 Mass. 260. These cases will be found, upon examination, to rest upon grounds not applicable here.

Commonwealth v. *Hatch* was a suit upon a bond given by an inspector of beef for the faithful performance of his duties. The suit was brought in the name of the Commonwealth for the benefit of one alleged to have been injured by the unfaithfulness of the inspector in his office. It was held that the action could not be sustained—the decision being placed, in part, upon the ground that it appeared "by the statute directing the bond, and by the bond, that it was given for the *sole* use of the Commonwealth." Surely, it cannot be said that it appears by the statutes and by the bond in the present case that it was given for the sole use of the United States.

Crocker, Treasurer &c., v. *Fales* was an action upon a bond of a clerk in the penalty of $1000, the obligee being a county treasurer, and the action being in his name for the use of one claiming to be injured by his neglect to pay certain moneys that came to his hands. The court held that the action could not be maintained, assigning as reasons for that conclusion that there was "nothing in the act" under which the bond was taken showing "a design to protect individual sufferers against the negligence of the clerk to pay over moneys which may come into his hands;" that the penalty—between fifty and three hundred pounds—was discretionary with the court, "the largest of these sums being wholly inadequate if it was intended

to cover all possible delinquencies of a clerk;" that the damages recovered by one plaintiff "might consume the whole penalty, and the public be left without any of the security which was intended for the preservation of the records;" and that, in addition, "the statute makes such an appropriation of the sum which may be recovered by the treasurer on a suit as is *wholly inconsistent with the supposition that an individual has an interest in the bond.*" Of course, these things cannot be predicated of the statutory provisions relating to the bonds of clerks of Federal courts, and therefore the case cited is not in point here.

The suggestion that the amount of the bond was insufficient to protect both the United States and private suitors is not controlling; for, by the act of March 3, 1863, c. 93, 12 Stat. 768, reproduced in section 795 of the Revised Statutes, the court could fix the amount of the bond, and require a new one whenever it deemed proper, and by the act of February 22, 1875, the Attorney General could require a bond for as much as forty thousand dollars.

4. A further contention is, that even if the bond was for the protection of individual litigants, it could not be put in suit by a private person, unless with the consent of the United States expressed in an act of Congress.

It is supposed that the case of *Corporation of Washington* v. *Young*, 10 Wheat. 406, 409, is authority for this position. That was an action brought in the name of the Corporation of Washington for the use of one McCue and others, to recover from a manager of a lottery scheme the prize drawn by the purchasers of a certain ticket. The lottery was drawn in pursuance of an ordinance of the Corporation, and the bond of the manager, in the penalty of ten thousand dollars, was conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance." The suit was brought in the name of the Corporation without its previous assent. Upon examination of the record in that case it will be found that the lottery was drawn under an act of Congress, approved May 4, 1812, c. 75, amending the charter of the city of Washington, and which gave the Corporation of Washington power "to author-

ize the drawing of lotteries for effecting any important public improvement in the city which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of ten thousand dollars; and provided also, that the object for which the money is intended shall be first submitted to the President of the United States, and shall be approved by him." Act of May 4, 1812, c. 75, 2 Stat. 721, 726, § 6. Chief Justice Marshall, speaking for the court, said: "They [the proprietors of the ticket] had undoubtedly 'a right to apply to the Corporation to direct the suit, and the Corporation could not, consistently with their duty, have refused such application,' if the purpose of the bond was to secure the fortunate adventurers in the lottery, not to protect the Corporation itself. But the propriety of bringing such a suit was a subject on which the obligees had themselves a right to judge. If the proprietors of one prize ticket had an interest in this bond, the proprietors of every other prize ticket had the same interest; and it could not be in the power of the first bold adventurer who should seize upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs against their own will. No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the Legislature; and no person can be authorized to use the name of another, without his assent given in fact, *or by legal intendment.*"

That case undoubtedly is authority for the proposition that, generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent. But it also sustains the proposition that consent may, under some circumstances, be assumed to have been given; that is, may arise by legal intendment. In the case just cited it was deemed plain from the ordinance of the Corporation that the bond was taken, primarily at least, for its protection and not for the benefit of ticket holders. The object for which the Corporation was empowered to establish lotteries was in its nature temporary and local, namely, to aid in

making important public improvements. It was to secure the accomplishment of that object that the managers were required to execute a bond. It was not unreasonable to suppose that in taking such a bond the Corporation had in mind to protect itself in making the public improvements which it was authorized to undertake. In the present case, courts of the United States were established in order that its jurisdiction might be invoked by all entitled to do so, and the requirement that the clerk should execute a bond for the faithful discharge of his duties and for the seasonable recording of the judgments, decrees, and determinations of the court—no distinction being made between public and private suitors—was an assurance to all suitors that, within the limit of the penalty of any bond taken from him by the Government, their rights would be protected against any act or omission on his part resulting to their injury. By the terms of the statute a clerk's bond remained in the custody or subject to the order of the court. In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be held to be the legal intendment of existing statutory provisions. The United States, or rather the court which had custody of the bond, is to be regarded as a trustee for any party injured by a breach of its conditions.

Murfree in his Treatise on Official Bonds says: "§ 323. It is usually provided in statutes authorizing official bonds to be required of state, county or municipal officers, that suits may be brought upon them in the name of the official obligee 'upon the relation' or 'to the use' of the party injured by the breach of the bond or interested in its enforcement. Whenever, however, this express provision is omitted in the statute itself the deficiency is supplied by the construction given to such statutes by the courts whenever a proper case for such a ruling is presented. In a Maryland case (1858), *State, use, etc.* v. *Norwood,* 12 Md. 177, 194, the court held that it was not necessary for a plaintiff before instituting a suit upon an official bond payable to the State, to obtain the State's permission to do so; and this

although there was in the statute which prescribed the bond no specific provision for making the bond payable to the State, or for giving the party interested the right to sue upon it. The court adds, however, that 'there is no doubt that it is incumbent on the party suing on the bond, to show that he has an interest in it, before he could recover in a regular trial prosecuted to verdict.' The *rationale* of official bonds is well expressed by the court in this case: 'The laws which provide for the execution of bonds similar to the one before us, do not require them for the purpose of protecting the rights of the State alone. They are also designed to secure the faithful performance of official duties, in the discharge of which individuals and corporations have a deep interest, and, therefore, they should have the privilege of suing [on] such bonds for injuries sustained by them, through the negligence and malconduct of the officers.'" The same author: "Many bonds of a strictly official character are executed by persons in places of public trust, prescribed by statute, and made payable to the 'State,' 'people,' or 'Commonwealth,' or else to the governor, president or other chief officer, which are designed not only to secure public interests, but to redress wrongs to individuals. Actions on such bonds must, of course, be brought in the name of the obligee, whether the object of the suit be to enforce the rights of the State or to protect private interests. In the latter case it is usual to bring the suit as by the obligee, 'at the relation' or 'for the use' of the real party in interest."

Stress is laid upon the fact that in the case of a marshal of the United States the statute expressly gives a right of action upon his bond to any one injured by his neglect of duty—the suit to be in the name of the party injured and for his sole use. Act of April 10, 1806; Rev. Stat. § 784; 2 Stat. 372, 374, c. 21. A similar provision is made in the case of consular officers who are required to give bond for the faithful performance of their duties—such suit to be in the name of the United States for the use of the person injured. Rev. Stat. § 1735. These provisions in relation to marshals and consular officers undoubtedly furnish some ground for the contention that Congress, having made no such express provision in the case of the bonds of

clerks, did not intend that private suits should be maintained upon their bonds. We are of opinion that this argument, although not without force, ought not to prevail against the legal intendment of the statutory provisions relating to clerks, who hold a peculiar relation to the courts appointing them, as well as to the public.

As the clerk had the right to receive the money in question; as he failed, to the injury of the suitor from whom he received it, with the sanction of the court in a pending cause, to deposit it as required by law, and appropriated it to his own use; and as his bond was for the protection of private suitors as well as for the Government, there is no sound reason why the plaintiff could not enforce his rights by a suit in the name of the United States for his benefit.

Perceiving no error in the record the judgment is

Affirmed.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 92. MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* ELLIOTT. Error to the United States Circuit Court of Appeals for the Eighth Circuit. Argued and submitted January 13, 1902. Decided January 20, 1902. Judgment affirmed with costs, by a divided court, and cause remanded to the United States Court for the Northern District of the Indian Territory. *Mr. James Hagerman*, *Mr. C. L. Jackson* and *Mr. J. M. Bryson* for the plaintiffs in error. *Mr. William T. Hutchings* and *Mr. Preston C. West* for the defendants in error.

No. 104. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* DINGLEY, ADMINISTRATOR. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. Argued for petitioner January 15, 1902. Decided January 20, 1902. *Per Curiam.* Judgment of the United States Circuit Court of Appeals and of the Circuit Court of the United States for the District of Washington reversed, with costs, on the authority of *Mutual Life Insurance Company* v. *Cohen*, 179 U. S. 262, and cause remanded to said Circuit Court for further proceedings in conformity to law. *Mr. Frederic D. McKenney*, *Mr. Julien T. Davies*, *Mr. E. L. Short* and *Mr. John B. Allen* for the petitioner. No counsel appeared for the respondent.

No. 102. TOWN OF WESTON *v.* TIERNEY. Appeal from the Circuit Court of the United States for the District of West Virginia. Submitted January 15, 1902. Decided January 27, 1902. *Per Curiam.* Decree reversed, with costs, and cause remanded to the Circuit Court of the United States for the Northern District of West Virginia with directions to dismiss

the bill for want of jurisdiction, on the authority of *United States* v. *Sayward*, 160 U. S. 497; *Holt* v. *Indiana Manufacturing Company*, 176 U. S. 68–73. *Mr. E. A. Brannon* for the appellant. *Mr. W. W. Brannon* for the appellee.

No. 241. BOGY *v.* DAUGHERTY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted January 27, 1902. Decided February 3, 1902. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Rice* v. *Sanger*, 144 U. S. 197; *Haseltine* v. *Central National Bank*, 183 U. S. 130. *Mr. William M. Mellette* and *Mr. Edgar Smith* for the motion. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden* opposing.

No. 364. BIGGER *v.* RYKER, COUNTY TREASURER OF RENO COUNTY, KANSAS. Error to the Supreme Court of the State of Kansas. Submitted January 27, 1902. Decided February 3, 1902. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Giles* v. *Little*, 134 U. S. 645; *Tyler* v. *Judges of the Court of Registration*, 179 U. S. 405. *Mr. George A. Vandeveer* for the plaintiff in error. *Mr. Thomas T. Taylor* for the defendants in error.

No. 306. BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT *v.* STATE NATIONAL BANK OF FRANKFORT. Appeal from the Circuit Court of the United States for the District of Kentucky. Argued March 6 and 7, 1902. Decided March 17, 1902. *Per Curiam.* Decree reversed, with costs, and cause remanded to the Circuit Court of the United States for the Eastern District of Kentucky with directions to remand to the state court, on authority of *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454; *Arkansas* v. *Kansas & Texas Coal Company*, 183 U. S. 185, and cases cited. *Mr. Ira Julian* and *Mr. W. H. Julian* for the appellant. *Mr. T. L. Edelen* for the appellee.

Decisions announced without Opinions.

No. 409. BERNARD *v.* PEOPLE OF THE STATE OF MICHIGAN. Error to the Supreme Court of the State of Michigan. Argued March 12, 1902. Decided March 17, 1902. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Railway Company* v. *Fitzgerald*, 160 U. S. 556; *Railroad Company* v. *Woodruff*, 153 U. S. 689, and cases cited. *Mr. M. C. Burch*, *Mr. Dwight Goss* and *Mr. John L. Lott* for the plaintiff in error. *Mr. David Anderson* and *Mr. Horace M. Oren* for the defendants in error.

No. 486. DOBBS AND NEW *v.* STATE OF KANSAS. Error to the Supreme Court of the State of Kansas. Argued March 12 and 13, 1902. Decided March 17, 1902. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Brown* v. *New Jersey*, 175 U. S. 174; *Hamblin* v. *Western Land Company*, 147 U. S. 531; *Railway Company* v. *Fitzgerald*, 160 U. S. 576. *Mr. John Stowell* for the plaintiffs in error. *Mr. T. C. Turner* (by special leave), *Mr. A. A. Godard* and *Mr. J. S. West* for the defendant in error.

No. 535. STATE OF MISSOURI AT THE RELATION OF THE DELMAR JOCKEY CLUB *v.* ZACHRITZ, JUDGE, ETC. Error to the Supreme Court of the State of Missouri. Motions to dismiss or affirm submitted March 10, 1902. Decided March 17, 1902. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Hamblin* v. *Western Land Company*, 147 U. S. 531; *Wilson* v. *North Carolina*, 169 U. S. 595. *Mr. Edward C. Crow* for the motions.

No. 204. AMERICAN ARISTOTYPE COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. Argued March 21, 1902. Decided March 24, 1902. *Per Curiam.* Judgment affirmed on the authority of *Dunlap* v. *United States*, 173 U. S. 65. *Mr. William B. Hornblower*, *Mr. George A. King* and *Mr. William B. King* for the appellant. *Mr. Attorney General*,

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

Decisions on Petitions for Writs of Certiorari.

No. 479. LAKELAND TRANSPORTATION COMPANY *v.* MILLER. Sixth Circuit. Second petition denied January 20, 1902. *Mr. Harvey D. Goulder*, *Mr. Frank S. Masten* and *Mr. Frank S. Bright* for petitioner. *Mr. F. H. Canfield* opposing.

No. 462. DAVEY PEGGING MACHINE COMPANY *v.* ISAAC PROUTY & Co., INCORPORATED. First Circuit. Denied January 20, 1902. *Mr. W. K. Richardson* and *Mr. F. P. Fish* for petitioner. *Mr. Louis W. Southgate* opposing.

No. 514. PRESIDENT &C. OF THE INSURANCE COMPANY OF NORTH AMERICA *v.* STEAMSHIP "HARROGATE." Second Circuit. Denied January 20, 1902. *Mr. Robert D. Benedict* and *Mr. Lawrence Kneeland* for petitioners. *Mr. Harrington Putnam* opposing.

No. 507. SINGER MANUFACTURING COMPANY *v.* CRAMER. Ninth Circuit. Granted January 20, 1902. *Mr. Charles K. Offield* for petitioner. *Mr. John H. Miller* opposing.

No. 513. FIDELITY AND DEPOSIT COMPANY OF MARYLAND *v.* THE L. BUCKI & SON LUMBER COMPANY. Fifth Circuit. Granted January 20, 1902. *Mr. R. H. Liggett* for petitioner. *Mr. H. Bisbee* and *Mr. George C. Bedell* opposing.

No. 451. MARTIN *v.* STEAMSHIP "SOUTHWARK." Third Cir-

cuit. Granted January 20, 1902. *Mr. John F. Lewis* and *Mr. Horace L. Cheyney* for petitioners. *Mr. J. Rodman Paul* opposing.

No. 505. SWAIN *v.* HOLYOKE MACHINE COMPANY. First Circuit. Denied January 27, 1902. *Mr. Charles F. Perkins*, *Mr. Causten Browne* and *Mr. Charles H. Drew* for petitioner. *Mr. Elmer P. Howe* opposing.

No. 515. CONSIDINE *v.* UNITED STATES. Sixth Circuit. Denied January 27, 1902. *Mr. Thomas F. Shay*, for petitioner. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

No. 520. MARTIN *v.* PEOPLE'S BANK OF BUFFALO, NEW YORK. Fourth Circuit. Denied February 24, 1902. *Mr. F. H. Busbee* and *Mr. N. T. M. Melliss* for petitioners. *Mr. Norris Morey* and *Mr. James E. Shepherd* opposing.

No. 531. PROVIDENCE SAVINGS ASSURANCE SOCIETY OF NEW YORK *v.* MCCLAIN. Third Circuit. Denied February 24, 1902. *Mr. Francis Rawle* for petitioner. *Mr. Joseph Hill Brinton* opposing.

No. 536. MILLIKEN *v.* SULLIVAN. Fifth Circuit. Denied February 24, 1902. *Mr. William W. Howe* and *Mr. W. A. Blount* for petitioner. *Mr. Thomas H. Watts*, *Mr. Alexander Troy* and *Mr. Francis G. Caffey* opposing.

No. 537. MILLER *v.* LAKELAND TRANSPORTATION COMPANY. Sixth Circuit. Denied February 24, 1902. *Mr. John C. Shaw* and *Mr. Harrington Putnam* for petitioner. *Mr. Frank H. Canfield* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 528. NATIONAL NICKEL COMPANY *v.* NEVADA NICKEL SYNDICATE. Ninth Circuit. Denied March 3, 1902. *Mr. Joseph C. Campbell* for petitioner. *Mr. W. E. F. Deal* and *Mr. Edmund Tauszky* opposing.

No. 555. SOUTHERN RAILWAY COMPANY *v.* ATLANTA NATIONAL BANK. Fifth Circuit. Denied March 3, 1902. *Mr. Fairfax Harrison* for petitioner. *Mr. Benjamin F. Abbott* opposing.

No. 560. GRAY *v.* UNITED STATES. Second Circuit. Denied March 3, 1902. *Mr. W. Wickham Smith* for petitioner. *Mr. Attorney General, Mr. Solicitor General Richards* and *Mr. Assistant Attorney General Hoyt* opposing.

No. 561. BALDWIN *v.* UNITED STATES. Second Circuit. Denied March 3, 1902. *Mr. W. Wickham Smith* and *Mr. Frank C. Avery* for petitioner. *Mr. Attorney General, Mr. Solicitor General Richards* and *Mr. Assistant Attorney General Hoyt* opposing.

No. 530. HURD, ADMINISTRATOR, *v.* BOSTON AND MAINE RAILROAD. First Circuit. Denied March 10, 1902. *Mr. Walter D. Davidge, Jr.*, for petitioner. *Mr. John S. H. Frink* opposing.

No. 542. C. & A. POTTS & Co. *v.* ANDERSON FOUNDRY AND MACHINE WORKS. Seventh Circuit. Denied March 10, 1902. *Mr. Charles Martindale* for petitioner. *Mr. E. E. Wood* opposing.

No. 553. MCFADDEN *v.* HENDERSON. Fifth Circuit. Denied March 10, 1902. *Mr. Thomas H. Clark* for petitioner. *Mr. Warren S. Reese* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 577. ERIE RAILROAD COMPANY *v.* MOORE. Sixth Circuit. Denied March 10, 1902. *Mr. M. E. Olmsted* and *Mr. Cecil D. Hine* for petitioner. *Mr. A. W. Jones* opposing.

No. 580. UNION BANK OF RICHMOND, VIRGINIA, *v.* BOARD OF COMMISSIONERS OF THE TOWN OF OXFORD. Fourth Circuit. Denied March 10, 1902. *Mr. James E. Shepherd* and *Mr. C. M. Busbee* for petitioner. *Mr. A. A. Hicks* opposing.

No. 594. CROMWELL *v.* GEDGE. Court of Appeals of the District of Columbia. Denied March 24, 1902. *Mr. Philip Mauro* for petitioner. *Mr. George B. Parkinson* opposing.

No. 527. BLYTHE COMPANY *v.* HINCKLEY. Ninth Circuit. Denied March 24, 1902. *Mr. Thomas B. Reed*, *Mr. John F. Dillon* and *Mr. George W. Towle, Jr.*, for petitioner. *Mr. Frederic D. McKenney*, *Mr. Wayne MacVeagh*, *Mr. E. S. Heller*, *Mr. W. H. H. Hart* and *Mr. Robert Y. Hayne* opposing.

INDEX.

BOND OF A CLERK OF A CIRCUIT COURT.

PROHIBITION.

See JURISDICTION OF THIS COURT, 12, 13.

PRACTICE.

1. It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous; and in this case, after examining the evidence, it seems to this court that the findings of the court below were justified by it. *Brainard* v. *Buck*, 99.
2. It is contended by appellants that the decree in the Circuit Court against them ought to be set aside because they have not had the hearing in that court to which they were entitled by law; that they were not served with process; that counsel unauthorized by them entered their appearance, and after having wrongfully entered their appearance failed to take the proper steps for the protection of their rights. It is also contended by other parties than the appellants, that there was no real controversy between the parties nominally opposed to each other, and that the litigation was in fact carried on under the direction and control of the plaintiff. *Held*, that questions of this kind may be examined, upon motion supported by affidavits, and that it is the duty of a court to make such inquiry. *Hatfield* v. *King*, 162.
3. Before any proceedings could rightfully be taken against the defendants, it was essential that they be brought into court by service of process, or that a lawful appearance be made in their behalf; and, in this case, it is quite clear that the counsel was not authorized to appear for Mr. Browning. *Ib.*
4. It is fitting that this investigation should be had, in the first place, in the court where the wrong is charged to have been done, and before the judge who, if the charges are correct, has been imposed upon by counsel; and it may be wise that both examination and cross-examination be had in his presence. *Ib.*
5. The motion made in the court below on behalf of the United States for a continuance of this cause and the application for a rehearing were addressed to the discretion of the trial court, and this court cannot reverse the decree below merely upon the ground that the trial court erred in its denial of those motions; but, as it is quite clear that the record does not contain evidence of a material character, and that the absence of such evidence is due to the action of the trial court in not giving sufficient time to the Government to prepare its case, this court cannot resist the conviction that if it proceeds to a final decree upon the present record great wrong may be done; and it reverses the decree below, without considering the merits, and remands the case with orders that leave should be granted to both sides to adduce further evidence. *United States* v. *Rio Grande Irrigation Company*, 416.

See TAXATION, 3.

PUBLIC LAND.

1. This case is a continuation of *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, brought to quiet the title of the Government

TAXATION.