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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1901

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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.

TULARE IRRIGATION DISTRICT *v.* SHEPARD.

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

No. 508. Submitted January 13, 1902.—Decided March 24, 1902.

The Tulare irrigation district, in California, issued and sold its bonds for the purpose of constructing its irrigation works. The proceeds were used for that purpose by the corporation, and the works were by means thereof constructed. The corporation then refused to pay the bonds, and denied its liability on them upon the ground that it was never legally organized as a corporation, and hence had no legal right to issue any bonds. *Held*, on the authority of *Douglas County Commissioners* v. *Bolles*, 94 U. S. 104, that common honesty demanded that a debt thus incurred should be paid; and that there was nothing in the facts in this case to set aside the application of that principle; that if anything could constitute a *de facto* corporation the defendant is one and that, being thus a *de facto* corporation, none but the State can question its existence.

Under the circumstances stated in the opinion of the court, the landowner is estopped from setting up the defence of the want of notice, as against the plaintiff in this case.

THIS was a writ of error to the Circuit Court of the United States for the Southern District of California, sued out for the purpose of reviewing a judgment of that court in favor of the defendant in error in an action brought by him against the irrigation district only, to recover interest due on certain coupons

attached to bonds issued by the district for the purpose of raising money to build its irrigation works. It appeared from the complaint that the plaintiff was a resident of Michigan, and that the Tulare irrigation district had at all times since September 2, 1889, been a corporation duly incorporated under the laws of the State of California, and since that time had been acting as such corporation; that under the laws of such State the irrigation district duly issued its bonds for the amount of $500,000 with coupons attached; that the plaintiff was a *bona fide* purchaser and holder of certain of those coupons, and that he had paid full value for the same, in the usual course of business and before any of them were due or dishonored, and in good faith and without any notice of any defect or invalidity of the same or any of them. Judgment for $13,185 and interest was demanded. The defendant demurred to the complaint, the demurrer was overruled, 94 Fed. Rep. 1, and the defendant then answered.

The answer, among other things, set up various alleged irregularities and omissions which occurred in the attempted formation of the irrigation district, on account of which, as contended, the corporation never was legally formed and never had power to issue bonds, and whatever bonds may have been issued were for those reasons void. The individual defendants at this stage applied to the court for an order permitting them to intervene in the action as parties therein, and to unite with the defendant corporation in resisting the claims of the plaintiff in this action. The court thereupon ordered that the petitioners' complaint in intervention should be filed without prejudice to the plaintiff's motion to strike out the same. They then filed what they termed their complaint in intervention in this action, (which is nothing more than an answer to the complaint,) in which they set up that the defendant Kelly was a citizen of the United States and a resident of the State of Massachusetts, and that ever since January 1, 1889, he had been and was at the time of the commencement of the suit the owner of the land which he described, and which was situate within the boundaries of the county of Tulare, California, and within the boundaries of the alleged Tulare irrigation district; that Jauchius, the other de-

Statement of the Case.

fendant, was a citizen of the United States and a resident of the State of California, and that he, ever since January 1, 1889, had been the owner of certain other described real property also situate in the district, and they alleged that they were interested in the subject-matter of the action and in the success of the defendant; that if the bonds and coupons mentioned in the plaintiff's complaint were adjudged valid claims against the district, then the property of intervenors in the district would be assessed and taxes levied thereon to pay the claim of the plaintiff. They then set up substantially the same defences that were pleaded by the irrigation district in its answer. Also that to permit the collection of the bonds would take defendants' property without due process of law and in violation of the Federal Constitution.

The chief defect as set up in both pleadings and specially argued here was in regard to the organization of the district, the defect being an alleged insufficiency of the notice of the intended presentation of the petition to the board of supervisors, by reason of which, as averred, no legal notice was given, and, therefore, all subsequent proceedings were void and of no effect. Subsequently to the service of the answer Jauchius died, and his executor was made a party in his place.

The case came to trial upon a stipulation to waive a jury, was submitted upon an agreed statement of facts, and thereafter the court made its general findings in favor of the plaintiff, assessed his damages at the sum of $13,185, and ordered judgment against the irrigation district for that sum.

It was stipulated that any of the facts contained in the statement might be offered in evidence by any party to the action, and when so offered the party not offering the same might object to such facts or any of them upon legal grounds which might exist against their admissibility. The statement of facts contained twenty-one paragraphs. The first twelve were offered in evidence on the part of the plaintiff and received by the court under the defendant's objection and exception. The facts thus admitted showed that under the provisions of the irrigation act of the State of California, approved March 7, 1887, an effort was made in the county of Tulare to form an irrigation district

to be known as "Tulare irrigation district," and such proceedings were had in that behalf that what purported to be a certified copy of an order of the board of supervisors of that county was duly filed with the county recorder on September 14, 1889; that order recited that the board of supervisors of Tulare County, State of California, met as a board of canvassers on Monday, September 2, 1889, for the purpose of determining the result of the special election held in Tulare County on August 24, 1889, to vote upon the subject of the organization of the Tulare irrigation district and officers therefor, by which it appeared that there were 484 votes cast in favor of forming the district and 7 against it. The order then continued as follows: "And we further declare the territory embraced in the following described limits, to wit: (describing territory) an irrigation district duly organized under the name and style of 'Tulare irrigation district,' being situate in the county of Tulare, State of California." This declaration was made in accordance with section 3 of the act to form irrigation districts. The order further declared the election of the directors in the various divisions of the district.

The material sections of the act under which the attempt to form the district was made are to be found set forth in the case of *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 116.

The persons declared by the order of the board of supervisors to have been elected as officers of the district immediately thereafter assumed to organize as such officers, and thereupon entered upon their duties the same as though said district had been legally organized and as though they had been legally elected as such officers, and they and their successors in office have ever since continued to act as such officers and to maintain the name of "Tulare irrigation district," and in its name have caused the defendant to act as though it was in every respect legally organized as an irrigation district under the act of the legislature, and in that behalf it has at all such times had the name "Tulare irrigation district" printed upon a sign above a door in front of an office in which the archives and papers of said defendant are kept; and its board of directors have met from time to time in such room from the time of such purported organization thereof until the present, weekly and sometimes oftener, averag-

ing twice a month. In June, 1890, pursuant to the provisions of the statute, an election was held within the district to determine whether its bonds should be issued, resulting in favor of issuing the same, and in the years 1891, 1892, 1893 its board of directors purported to issue bonds of such Tulare irrigation district in the sum of $500,000, being 1000 bonds of the face value of $500 each, and levied assessments on the property embraced in said district, purporting to act in so doing under the act of the legislature, and previous to July 1, 1896, it assessed, levied and collected taxes upon the lands in such district of over $100,000, and paid the same out through its treasurer as interest upon such bonds; the proceeds arising from the sale of the bonds have been used by the district in constructing a system of canals, ditches and laterals through the lands of the district, by means of which such lands have been irrigated; it has engaged in litigation as plaintiff in suits before the issuing of such bonds, and therein alleged that it was a corporation under the provisions of the act of the legislature, and from the time of its purported organization until the present time, whatever it has done and performed, it has done and performed in the same manner as if it had been legally organized as such district, in full compliance with the law, and so continues to act and hold itself out as a corporation organized under that law. No one ever brought suit or took any action to prevent the issuing of any of the bonds, nor was any suit or action ever brought to annul or cancel or have declared void any of the bonds until after the year 1896. No action in the nature of a *quo warranto* was ever commenced, nor any other proceeding, to test the validity of the organization of the district.

The plaintiff at the commencement of the action was the holder and owner of the coupons upon which action was brought, and became the holder of the coupons on which he brought his action under the circumstances detailed in the agreed statement of facts, showing that he was a *bona fide* holder for value without notice.

The plaintiff also offered, and the same was received in evidence, the judgment roll *In the matter of Tulare Irrigation District*, in the Superior Court of Tulare County, which was a

proceeding under what is called the California confirmation act in regard to irrigation districts, and which is mentioned in *Tregea* v. *Modesto Irrigation District*, 164 U. S. 179, 181. The proceedings under this confirmation act showed a judgment of the court confirming the validity of the organization of the district. This was duly objected to, and received under the exception of the defendants. After some oral evidence had been given in regard to the execution of the bonds by the officers of the district, the plaintiff rested.

The defendants then offered separately each of the remaining paragraphs from 13 to 21, both inclusive, in the agreed statement of facts, and each under the objection of the plaintiff and exception of the defendants was excluded. From the facts thus offered it appears that a petition addressed to the board of supervisors of Tulare County was on July 1, 1889, filed with the board at a regular meeting; that this petition was printed and published prior thereto for two weeks during the month of June, 1889, and in a newspaper printed and published in Tulare County. The petition contained a statement that the petitioners were freeholders owning land within the district which was described in the petition, and that it was all situated within Tulare County, and that the petitioners desired to provide for the irrigation of the same; that the proposed district as described was susceptible of one mode of irrigation from a common source and by the same system of works, by conveying the waters of Kaweah River by means of dams thereon and by main and distributing canals therefrom. The petitioners prayed that the district described in the petition be organized into an irrigation district under the act of the legislature of California approved March 7, 1887. The petition then gave the boundaries of the proposed district, and asked that it be designated as the Tulare irrigation district. This petition was signed at the end thereof, each petitioner stating the number of acres owned by him. Following these signatures was a paper like this:

"NOTICE.

"Pursuant to the statutes in such cases made and provided, notice is hereby given that the above and foregoing petition

will be presented to the board of supervisors in and for the county of Tulare, at their first regular meeting in the month of July, 1889, to wit, on Monday the first day of July, 1889, at which time any person or persons desiring so to do may present their objections, if any they have, why said petition should not be granted."

The signatures to the petition were not repeated at the end of the notice. This notice was in the same type as the petition, and in the newspaper it was enclosed with the petition between two black lines across the column, the first at the head of the petition and the last at the end of the notice.

The alleged defect in this publication consists in the fact that although the petition was printed in full and the names of the signers with the number of acres owned by them follow the petition, yet as the notice of the presentation of the petition follows the signatures to such petition, and the notice is not signed by the petitioners, it lacks those essential signatures, and for that reason is not a valid notice, and becomes in law no notice whatever.

The defendants also offered in evidence a second judgment in the matter of the Tulare irrigation district setting aside the former judgment of confirmation and refusing to confirm the validity of the organization of the district. The judgment was excluded upon the objection of the plaintiff. All these offered facts having been excluded, the court made a general finding in favor of the plaintiff. The individual defendants now contend that the court, in granting judgment for the plaintiff, did in effect permit the taking of their property without due process of law, in violation of the Constitution of the United States.

Mr. George H. Maxwell and *Mr. John Garber* for plaintiff in error. *Mr. Calvin L. Russell*, *Mr. G. W. Zartman* and *Mr. R. M. F. Soto* were on their brief.

Mr. S. F. Leib for defendant in error.

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

It is agreed in the statement of facts in this case that the moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received the full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and, while acting as a corporation, at all times, still sets up that it was never legally organized, and hence had no legal right to issue any bonds.

In the case of *Douglas County Commissioners* v. *Bolles*, 94 U. S. 104, 110, a case involving facts somewhat similar, this court said: "Common honesty demands that a debt thus incurred should be paid." That sentiment has lost no force by the lapse of time, and we think it applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed.

The sole ground of defence which has been urged at the bar has been an alleged defect in the notice of the intended presentation of the petition to form the district, to the board of supervisors, the defect consisting in the omission to add at the end of the notice the names of the signers to the petition which immediately precedes it.

Section two of the act approved March 7, 1887, commonly called the "Wright Act" of the California legislature, provides that the petition for the organization of an irrigation district shall be presented to the board of supervisors of the county in which the lands are situated, signed by the required number of freeholders mentioned in the first section, which petition must describe the proposed boundaries of the district, and pray that the same may be organized under the provisions of the act. The petition must be presented at a regular meeting of the board of supervisors and be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where the petition is to be presented, "together with a notice stating the time of the meeting at which the same will be presented."

In this case a proper petition complying with the provisions of the act was made and signed by the requisite number of freeholders. The petition, with the signatures of such freeholders appended, was published in the proper newspaper, together with a notice as provided for in the act, but the signatures of the freeholders which were appended to the petition were not reproduced at the end of the notice. The petition, signatures and notice were published in the same column and as one entire proceeding, separated from the rest of the contents of the newspaper by a black line across the column immediately preceding the petition and another black line across the column at the end of the notice. In this way it was separated from all other matter in the paper. It is now urged that this failure to reprint the signatures to the petition at the end of the notice rendered it of no effect in law, and that the result was the same as if no notice at all had been published. It is, therefore, argued that the action of the board of supervisors, when the petition was in fact presented and proof taken in regard to the facts stated therein, in accordance with the published notice, was without legal effect, and the determination of the board of supervisors, after a hearing before it, that some of the lands described in the petition would be benefited by irrigation, including those of the individual plaintiffs in error was wholly without validity, because the board acquired no jurisdiction over the subject on account of the absence of notice; the board, having no jurisdiction, could make no valid determination as to the organization of the district; the district could issue no valid bonds; and the fact of the absence of notice could be shown as a defence to bonds that were issued, no matter under what circumstances the defence should arise. It was then contended that to permit a recovery would result in the taking of the property of the individual defendants, by means of an assessment and without due process of law.

It is not urged here that the plaintiff below was not a *bona fide* purchaser for full value without notice of any defective organization or want of power in the corporation to issue the bonds. Upon the stipulation of facts no such defence could prevail. The whole force of the defence rests, therefore, upon

this alleged defective notice because of the failure to reprint the names of the signers to the petition at the end of such notice. Is this such a defect as to practically amount to an absence of notice so that the board of supervisors could acquire no jurisdiction upon presentation of the petition? Certainly the notice could mislead no one. It gave full and detailed information in regard to the time and place at which the petition would be presented to the board of supervisors. It cannot be claimed that the notice itself did not give all the information provided for by the statute, and it warned all persons who might desire so to do to present their objections at the time and place named why the petition should not be granted. Any one on reading the notice obtained thereby all necessary knowledge to enable him to attend at the time and place mentioned and present any objection that he might have against the granting of the petition. The petition which preceded the notice was signed by a sufficient number of landowners, and the notice which followed the signatures to the petition evidently formed part of the proceeding inaugurated by the signers to the petition to take the necessary steps to organize an irrigation district. The whole thing, petition, names of signers thereto, and notice, was published the statutory time and also posted as required. As published, it evidently formed but one proceeding, and the notice was part thereof. Could any one fairly misunderstand the fact that the notice was part of the action of the signers to the petition, and, when precisely in accordance with the terms stated in the notice, the petition was publicly presented to the board of supervisors, was not the statute sufficiently complied with to give jurisdiction to that body to proceed to determine the facts in accordance with the provisions of the statute? Was not the notice fairly and substantially authenticated as a notice given by the signers to the petition?

In the case of *In re Central Irrigation District*, 117 California, 382, the Supreme Court of that State has held that the publication of a notice similar to this, unsigned and unauthenticated, was invalid, and the defect could not be cured by proof of actual notice or knowledge on the part of those to be affected thereby. It is urged that this decision of the Supreme Court

of the State should be followed by us, because it is in effect the construction given by the state court to a statute of the State. We are not entirely persuaded that this claim is well founded. It might, on the contrary, be urged with much force that the decision was based upon principles of general law as to whether a notice presupposes by its very terms, and makes absolutely necessary in all cases, a signature at the end thereof, and it might be claimed that the case came within the principle decided in *Venice* v. *Murdock*, 92 U. S. 494, where this court refused to follow the prior decisions of the Court of Appeals of the State of New York made in cases arising upon a New York statute and under a similar state of facts, on the ground that those decisions did not present a case of statutory construction. See also *Thompson* v. *Perrine*, 103 U. S. 806. And again, the bonds in question here were issued not later than 1893, while the decision of the California state court was not made until June, 1897, and there being no other decision of the state court upon the particular point it might be reasonably maintained that the matter should be regarded as open to be decided in accordance with our own views of the subject.

We do not deem it necessary to decide the question here, because there are other facts upon which we can base our judgment without impugning the decision of the state court. Assuming, therefore, for the purpose of this case, though not deciding, that the notice was insufficient, and did not fully comply with the statute, it will be seen that the case above referred to does not decide that the question of the defective organization could be raised as against *bona fide* holders of bonds issued by the district. The action in that case was commenced under a California statute providing for the taking of proceedings to confirm the validity of the organization of an irrigation district, and although the statute under which an irrigation district is to be formed provides for a determination of the fact of due organization by the board of supervisors, yet the proceedings under the confirmation act are expressly directed to be had to review the determination of that board, so that there is express statutory authority to go behind that determination in that proceeding.

But assuming that the failure to sign the notice resulted in a failure to organize a *de jure* irrigation district, and that in a direct proceeding, such as is provided for by the confirmation act, or in a *quo warranto* action, the determination of the board of supervisors could be reviewed, it does not follow that such determination could be reviewed in a collateral action on the part of a *bona fide* holder of bonds to recover the principal or interest thereon. In the case spoken of the Supreme Court of California, while deciding upon the invalidity of the organization, refused to pass upon the question whether the bonds of the district were void for the reason that proper notice was not given, and the court in refusing to decide the question remarks that, "It is not proper because some of the bonds (it is insisted) had been sold and had passed into the hands of *bona fide* purchasers before the institution of this proceeding. . . . After the issue, and before the sale, of any of the bonds it may well be of advantage to the district and to intending purchasers that the judgment of a court should be invoked to pass upon the regularity of the action of the district officers, but after sale different questions present themselves. The bonds are negotiable; public corporations are estopped from setting up many defences of irregularity against the innocent holders of such negotiable securities. Whether or not the holder be an innocent purchaser and a purchaser without notice, is itself a question which cannot be determined in this proceeding. From all these considerations, and others which will readily suggest themselves, it is proper, in cases where bonds of a district have been actually sold before institution of confirmation proceedings, to refuse consideration to questions of the regularity of such sales, leaving their determination to that forum before which appropriate action may be brought to test the questions, for it is only in such an action before such a court that there will be found full and unquestioned jurisdiction of the subject matter, and of all the necessary parties, as well as power to determine all objections and defences." We may therefore proceed to the inquiry as to the liability of the corporation to a *bona fide* holder of its bonds, without further reference to the above case.

The Supreme Court of the State has held that irrigation districts were public municipal corporations, *Central Irrigation District* v. *De Lappe*, 79 California, 351; *In re Madera Irrigation District*, 92 California, 296; *Quint* v. *Hoffman*, 103 California, 506, and the statute providing for their creation has been held to be one that should be liberally construed. 79 California, *supra*. The Supreme Court of California and this court have also decided that the irrigation act is a valid statute, and that it violates neither the state nor the Federal Constitution. *Fallbrook case*, 164 U. S. 112–159, and cases cited.

Even though the irrigation district failed to become organized as a *de jure* corporation, it may still have been acting as a corporation *de facto*. That there may be such a corporation cannot be doubted. *Baltimore & Potomac Railroad Company* v. *Fifth Baptist Church*, 137 U. S. 568, 571; *Shapleigh* v. *San Angelo*, 167 U. S. 646, 655; see also cases decided by the Federal courts in California, *Miller* v. *Perris Irrigation District*, 85 Fed. Rep. 693, again reported in 99 Fed. Rep. 143; *Herring* v. *Modesto Irrigation District*, 95 Fed. Rep. 705; also *Lamming* v. *Galusha*, 81 Hun, 247, affirmed by the Court of Appeals on the opinion of the court below in 151 N. Y. 648; *Stout* v. *Zulick*, 48 N. J. Law, 599; *Snider's Son's Co.* v. *Troy*, 91 Alabama, 224; *American Salt Co.* v. *Heidenheimer*, 80 Texas, 344; Taylor on Corporations, 4th ed. sec. 146.

From the authorities, some of which are above cited, it appears that the requisites to constitute a corporation *de facto* are three: (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise. The case at bar contains these requisites. There was a general valid law under which a corporation, such as the defendant is claimed to be, could be formed; there was undoubtedly a *bona fide* attempt to organize thereunder, and there has been actual user of the corporate franchise. In the progress of the attempt to organize the district the determination of the board of supervisors was made under the provisions of the statute, declaring the body to be a duly organized irrigation district. Subsequently officers were elected

and took office and have ever since discharged the duties thereof under the statute, and a special election was held to determine the question of issuing bonds, and the bonds were issued pursuant to the result of such election, and suits have been commenced in the name of the corporation. In brief, if anything can constitute a *de facto* corporation, the defendant herein constitutes one.

The case of *Norton* v. *Shelby County*, 118 U. S. 425, contains no doctrine in opposition. In that case the state court of Tennessee had held that the so-called board of commissioners of Shelby County, organized under the act of March 9, 1867, had no lawful existence; that it was an unauthorized and illegal body, and its members were usurpers of the functions and powers of the justices of the peace of the county; that their action in holding a county court was void, and that their acts in subscribing to the stock of the Mississippi Railroad Company and issuing bonds in payment therefor were void. Those acts the bondholders had endeavored to sustain by claiming that they were the acts of *de facto* officers, and that under such circumstances it was not material whether the board of commissioners had a lawful existence or not. This court held there could be no *de facto* officer where the office itself had no legal existence. If there be no office to fill, there can be no officer either *de jure* or *de facto*, and as the act attempting to create the office never became a law, the office itself never came into existence; it was a misapplication of terms to call one an officer who holds no office, and a public office could exist only by force of law.

In the case now before us there was a valid law providing for the creation of just such a corporation as the defendant claimed to be. There was a *bona fide* attempt to organize under it and there had been a user of the franchise, and within the authorities already cited a corporation *de facto* was thereby constituted.

Being a *de facto* corporation, the general rule is that none but the State can call its existence in question. The courts of California agree that such is the rule. *People* v. *Montecito Irrigation Company*, 97 California, 276; *Quint* v. *Hoffman*, 103

California, *supra;* see also, Cooley on Constitutional Limitations, page 312, 4th ed.; *Swartwout* v. *Michigan Air Line Railroad Co.*, 24 Michigan, 389, 393. The rule as stated by Cooley in Constitutional Limitations, 6th edition, 309, is as follows:

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

It was held in *Shapleigh* v. *San Angelo*, 167 U. S. *supra*, that none but the State could impeach the validity of the creation of a municipal organization, and that if it acquiesced therein the corporate existence could not be collaterally attacked. The court, through Mr. Justice Shiras, said:

"The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void *ab initio*, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation, which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody, except the State acting by direct proceedings. Such an organization is merely voidable, and if the State refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the State intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor."

It cannot be said that this corporation was created without warrant of law. There was a valid law and there was a *bona fide* attempt to organize under it, and the most that can be said is that there was a failure to comply with all the directions of the statute by which a corporation *de jure* might be organized.

It is contended, however, that there is an exception to the general rule in such a case as this, because the proceedings of the corporation may result in the levy of an assessment upon lands of private owners within the district, and such owners are therefore permitted to raise at any time the question of the illegality by reason of the want of notice of the organization of the corporation. The case in 117 California, *supra*, also the cases of *Reclamation District* v. *Burger*, 122 California, 442, and *Fallbrook Irrigation Company* v. *Bradley*, 164 U. S. 112, 170, are cited to show the illegality of an organization without notice. On the other hand, *Reclamation District* v. *Gray*, 95 California, 601, holds that the landowner could not collaterally attack the validity of the organization of the district. It is true there was a validating statute passed in that case and the assessment was made after the date of the passage of such act, but the act assumed to cure the irregularities of an organization prior thereto. In *Swamp Land District* v. *Silver*, 98 California, 51, it was again held that no attack upon the organization could collaterally be made, even in an action to recover an assessment. But whatever may be the decisions in California, the plaintiffs in error claim that this court in *Fallbrook Irrigation Company* v. *Bradley*, 164 U. S. *supra*, has held that there must be notice to the landowner and an opportunity to contest the question of alleged benefits to his property by the organization of the irrigation district, or else the organization is invalid and the landowner can show it in a collateral action and at any time the question may arise. It is not denied that the statute provides for a notice and an opportunity to be heard, but the allegation simply is that there was not any notice in fact.

The *Fallbrook case* held that the statute did provide for notice and opportunity to show that the land would not be benefited by being included in the district. It did not hold that under

all circumstances the landowner could, at any time, show the absence of notice even against a *bona fide* purchaser of bonds subsequently issued, and we think that the landowner may be prevented from showing want of notice in such a case as the one presented herein—a *bona fide* holder of bonds for full value without notice, and a landowner sleeping upon his rights.

The case of *New York Cable Company* v. *Mayor*, *&c.*, 104 N. Y. 1, 43, is cited to the point that where it is sought to take the property of an individual under powers granted by the State to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted be strictly pursued and all the prescribed conditions performed, and that hence, if the corporation be simply a *de facto* and not a *de jure* corporation, it cannot take private property *in invitum*. The case simply asserts the principle that the right of eminent domain cannot be exercised by a corporation *de facto*, and that the question of valid organization could be raised when such a corporation sought to condemn lands. That is one of the exceptions to the general rule in regard to a corporation *de facto*. When a corporation seeks to divest title to private property and to take it for the purposes of its incorporation, it must then show that it is a corporation *de jure*, for the law has only given the right to take private property to that kind of a corporation. But even in such case it may happen that a party would be precluded from setting up the defence by matters *in pais* amounting to an estoppel or an admission.

It is enough to say here, however, that this action by an individual plaintiff against a corporation *de facto*, to recover a money judgment for a debt due the plaintiff, bears no similarity to a proceeding by a corporation to condemn land for its own use, in which case it must be a corporation *de jure*.

In this case we have the fact that the plaintiff is a *bona fide* purchaser of the coupons, for value and without notice of any defect in their validity, and an examination of the statute shows provision for the determination by the board of supervisors of the fact that the district has been duly organized. The record shows the entry of an order by the board of supervisors, by

which that board declared the territory embraced in the limits therein described to be an irrigation district, duly organized under the name and style of the Tulare irrigation district, situated in the county of Tulare and State of California. A copy of this order was filed in the office of the county recorder, and after the date of such filing the statute declares the organization shall be complete. Section 15 of the statute provides that when the bonds shall be issued "said bonds shall express on their face that they were issued by authority of this act, stating its title and date of approval."

It thus appears that the statute confided to and imposed upon the board of supervisors the duty of inquiry by proof as to compliance with the statute and required a decision by it in regard thereto, and when the provisions of the statute had been complied with and the corporation organized the duty was imposed upon the board (section 3) to "declare such territory duly organized as an irrigation district under the name and style theretofore designated." All this was done. The board of supervisors made its determination; it was the body provided for and appointed by the statute to make it, and it was to be made by an order duly entered and a copy of it filed with the county recorder, thus making a full and complete record of the fact of the determination by the board of the question of organization confided to the board for decision by the statute itself. The proof shows that officers were duly elected, entered upon the duties of their various offices, and that an election was held and the district determined to issue bonds. The landowners acquiesced in the action of the board of supervisors from the time of the presentation of the petition to that body, so far that none questioned the validity of the organization by *quo warranto* or otherwise, and no suit of any kind was instituted to prevent the issue of the bonds. Not only were no steps taken to prevent their issue or test the right of the district to issue them, but their sale was made after a public election, and the proceeds arising therefrom were used to create and build the irrigation system, which is still in active operation and now in the possession of the company. Interest has been paid on the bonds thus issued (which issue was not later than 1893) up to 1896. Assess-

ments to pay the interest arising during that time have been levied and collected from the owners of lands in the district. Under these circumstances and by reason of the statute and the recitals in the bonds we think the landowner is estopped from setting up the defence of the want of notice, as against the plaintiff in this case, because he is a *bona fide* holder for full value without notice, and because the landowners acquiesced in the issue of the bonds and have received the full benefit of their proceeds.

The bonds in this case contained a recital in accordance with the provisions of the statute, as follows: "This bond is one of a series of bonds amounting in the aggregate to $500,000, caused to be issued by the board of directors of said Tulare irrigation district, by authority and pursuant to the provisions of an act of the legislature of the State of California entitled 'An act to provide for the organization and government of irrigation districts and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes, approved March 7, 1887,' and also by authority of and in accordance with the vote of the qualified electors of said irrigation district at a special election held on the 7th day of June, 1890." The provision in the statute, that the bonds should express on their face that they were issued by authority of the act, stating its title and date of approval, was evidently for the purpose of giving them greater negotiability. A recital as directed by the statute, that the bond was issued by the authority of the statute, and also pursuant to the provisions thereof, and in accordance with the vote of the qualified electors, was a statement upon which a purchaser would have the right to rely, and to assume therefrom that all prior acts necessary to be done to give the bond validity had been done, because otherwise the bond would not be issued under the authority and pursuant to the provisions of an act which provided for certain things to be done when they were not done in the particular case in hand.

But even if the recital were not broad enough to conclude the party who issued the bonds, which we do not at all admit, yet as the statute invested the board of supervisors with power to

decide whether the district had been duly organized, the exercise of that power by the board and its determination that the district had been legally and duly organized, (such determination being evidenced by the order duly recorded as provided for in the statute,) was a finding of fact upon which the purchaser had a right to rely, as it was the record provided by the statute, made by a body directed by it to determine the very fact in question, and in such cases the finding is conclusive in favor of a *bona fide* holder of bonds. *Coloma* v. *Eaves*, 92 U. S. 484; *Venice* v. *Murdock*, 92 U. S. 494.

In *Bissell* v. *Jeffersonville*, 24 How. 287, the common council of the city had authority to subscribe for stock in a railway company and to issue bonds for such subscription upon the petition of three fourths of the legal voters of the city. The common council made a determination that the petition presented contained three fourths of such legal voters, and the bonds were thereupon issued. The bonds having been issued, the city defaulted in the payment of the interest, and an action was brought to recover such installments in the Circuit Court of the United States for the District of Indiana. After the plaintiff had given evidence from the records of the common council that it had determined that three fourths of the legal voters of the city had petitioned for the issuing of such bonds, the defendant offered parol testimony to show that three fourths of the legal voters of the city did not so petition. The evidence was admitted under objection, and under the rulings the jury returned a verdict in favor of the defendants, and the case was brought here for review. This court, upon that question, through Mr. Justice Clifford, said (page 296):

"Unless three fourths of the legal voters had petitioned, it is clear that the bonds were issued without authority, as by the terms of the explanatory act it could only apply to a case where the common council of a city had contracted the obligation or liabilities therein specified upon the petition of three fourths of the legal voters of such city; and if no such petition had been presented, or if it was not signed by the requisite number of the legal voters, the law did not authorize the common council to ratify and affirm the subscription. That fact, however, had

been previously ascertained and determined by the board to which the petition was originally addressed."

The court then considered the effect of the determination by the common council as between the defendant and the holders for value of the bonds without notice of the supposed defects in the proceedings under which they were issued and put upon the market, and stated as follows (p. 299):

"Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition, as described in the explanatory act, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended, constituted three fourths of the legal voters of the city, else the board could not act at all. None other than the common council, to whom the petition was required to be addressed, is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of the *Knox County Commissioners* v. *Aspinwall et al.*, 21 How. 544, we are of the opinion that 'this board was one, from its organization and general duties, fit and competent to be the depositary of the trust confided to it.' Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint. When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value."

The statute in the present case distinctly provides for the determination of the question of fact by the board of supervisors and for the embodying of such determination in an or-

der, to be entered and a certified copy to be filed with the county recorder. It is not left to inference as to which is the body to make the determination.

In *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, the question arose as to whether there had been the requisite length of notice of the election to determine the question whether or not the bonds should be issued. The statute required that at least thirty days' notice of the election should be given, and it was thereby made the duty of the board of county commissioners to subscribe for the stock and issue the bonds after such assent of the majority of the voters had been given. Subsequently in a suit against the board of county commissioners on coupons due on the bonds that had been issued and which had been bought by a *bona fide* purchaser, the record showed an order for the election made thirty-three days before it was to be held, and that subsequently to the election the board canvassed the returns and certified that there was a majority of the voters in favor of the proposition, and that the board had made such vote the basis of their action in subscribing to the stock and issuing the bonds to the company. The bonds recited on their face that they were issued "in pursuance to the vote of the electors of Anderson County, of September 13, 1869." It was held that the statement in the bonds as to the vote was equivalent to a statement that the vote was one lawful and regular in form, such as the law then in force required as to prior notice, and that as respected the plaintiff, evidence by the defendant to show less than thirty days' notice of the election could not avail. At page 238 the court said:

"The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson County, of September 13, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county. The

provision of section 51 is 'that when such assent shall have been given,' it shall be the duty of the county commissioners to make the subscription. What is the meaning of the words 'such assent?' They mean the assent of the prescribed majority, as the result of an election held in pursuance of such notice as the act prescribes. The county commissioners were the persons authorized by the act to ascertain and determine whether 'such assent' had been given; and necessarily so, because, on the ascertainment by them of the fact of 'such assent,' they were charged with 'the duty'—that is the language—of making the subscription, and the duty of issuing the bonds. They were equally charged with the duty of ascertaining the fact of the assent. The record evidence of their proceedings shows that their order for the election was made thirty-three days before the election was to be held; that they met 'pursuant to law for the purpose of canvassing returns of the election;' that they discharged that duty and certified that there was a majority of votes in favor of the proposition; that, in November, 1869, they resolved that, 'in accordance with the vote, heretofore had and taken, of the electors of said county to that effect,' they subscribed for the stock; and that, in July, 1870, in their order authorizing the bonds to be delivered by Joy to the company, they recited that the bonds were issued 'according to the provisions of the vote of the electors of said county.' In view of all this, the statement by the commissioners, in the bond, that it is issued 'in pursuance to the vote of the electors of Anderson County, of September 13, 1869,' is equivalent to a statement that 'the vote' was a vote lawful and regular in form, and such as the law then in force required, in respect to prior notice. The case is, therefore, brought within the cases, of which there is a long line in this court, illustrated by *Town of Coloma* v. *Eaves*, 92 U. S. 484, 491, and which hold, in the language of that case, that 'where legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that

the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' This doctrine is adhered to by this court. *Dixon County* v. *Field*, 111 U. S. 83, 93, 94."

In *Andes* v. *Ely*, 158 U. S. 312, the doctrine was affirmed that where an officer is charged by law with the duty to decide certain facts, his decision thereon is conclusive and takes the form of a judgment, only to be reviewed by a higher court. At page 324 the court said: "Whether the various steps were taken which in this particular case justified the issue of the bonds, was a question of fact; and when the bonds on their face recite that those steps have been taken it is the settled rule of this court that in an action brought by a *bona fide* holder the municipality is estopped from showing the contrary."

In *Provident Life & Trust Company* v. *Mercer County*, 170 U. S. 593, where the fact whether a condition precedent had been performed before the issuing of the bonds was confided for decision to a trustee, it was held that his decision that the condition precedent had been complied with was conclusive in favor of a *bona fide* holder, even though the condition had in fact not been performed.

And in the case of *Waite* v. *Santa Cruz City*, 184 U. S. 302, decided at this term, many authorities upon this question are cited in the opinion by Mr. Justice Harlan. Those authorities need not be repeated here, a reference to them as contained in that opinion being all that is necessary.

The case of *Ogden City* v. *Armstrong*, 168 U. S. 224, had nothing to do with the principles governing the law relating to *bona fide* owners of municipal bonds, or with the effect of recitals contained in such bonds. It was a case of an alleged invalid assessment levied to collect the cost of paving one of the public streets in the city. There was a direct attack made upon the validity of the assessment, founded upon an alleged lack of jurisdiction on the part of the common council. The action was

maintained under a well recognized head of equity jurisdiction, on the ground that the assessment, valid on its face, constituted a cloud upon the plaintiff's title, which required evidence *aliunde* to remove.

In addition to the strength of the position of the plaintiff in the action as a *bona fide* purchaser and holder of the bonds, the position of the defendants merits due consideration. Regarding the individual defendants, it is scarcely possible to believe that they were not aware of the proceedings above recited, taken to organize the corporation, and thereafter to issue its bonds, even though it should be admitted that the published notice was not legally sufficient to comply with the statute. They were the owners of land within the proposed district. The proceedings were all of a public nature, and two public elections were held within the district before the bonds were issued. Of these facts, already detailed, we say it is impossible to believe that the individual defendants did not have knowledge at the time of their occurrence, and yet they took no action to prevent the issuing of the bonds or to call in question by the slightest hint the validity of the organization of the district as a corporation. On the contrary, they entirely acquiesced in all the proceedings leading up to their issue, in obtaining the moneys therefrom, in the expenditure thereof for the purpose for which the bonds were issued, and in paying during several years the assessments made upon the lands within the district for the purpose of paying the interest on the bonds which had been issued. After all this had been done, we can properly use the language found in the opinion in *Bissell* v. *City of Jeffersonville*, 24 How. *supra*, at page 299: "It was then too late to call in question the fact determined by the common council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value."

Assuming the insufficiency of the notice of the intended presentation of the petition to the board of supervisors, the defendant landowners could have applied to the attorney general for the commencement of an action in the nature of a *quo warranto*, to raise and decide the questions, after the board had decided the organization was duly formed. Or they could have them-

selves commenced an action to restrain the proposed issue of bonds on the ground there was no valid corporation, and therefore no valid body to issue them. Their interest as landowners in the district would be sufficient to permit them to maintain such action. On the contrary, they did nothing, and in view of all the facts above detailed, and giving due effect to the provisions of the statute referred to and the determination of the supervisors, together with the recitals in the bonds, it is clear to us that they waived their right to thereafter object on the ground stated, as against a *bona fide* holder of the bonds for value. As to the defendant corporation, it seems so clear that it cannot be heard to set up the invalidity of the bonds on the ground that it was not legally incorporated, that we do not think it necessary to further discuss the question. Taylor on Corporations, 4th ed. sec. 146, and cases cited in note.

We have given no weight to the two judgments taken under the confirmation act of the California legislature, the first of which was entered before the bonds were issued, and confirmed the validity of the organization while the second was entered years after the bonds were issued, and refused to confirm the organization. In the view we take of this case it is unnecessary, and it is therefore needless for us to here discuss or determine the question of the effect which ought to be given them under other circumstances. The plaintiff below occupies an unassailable position upon the facts of the case as a *bona fide* purchaser, without reference to either judgment.

We are of opinion there is no error in the record, and the judgment of the court below is, therefore,

Affirmed.

STOCKARD *v.* MORGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No 195. Submitted March 19, 1902.—Decided April 7, 1902.

Giving to the statute of Tennessee the same meaning that was given to it by the Supreme Court of that State, which this court is bound to do, it is *held* that it violates the interstate commerce clause of the Constitution of the United States.

All the cases cited in the opinion of the court deny the right of a State to tax people representing owners of property outside the State for the privilege of soliciting orders within it, as agents of such owners, for property to be shipped to persons within the State.

Ficklen v. *Shelby County Taxing District*, 145 U. S. 1, distinguished from this case.

Although a State has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the State.

THIS is a writ of error to the Supreme Court of the State of Tennessee, brought to review a judgment of that court reversing a judgment of the Court of Chancery of Hamilton County in favor of complainants, and dismissing their bill.

The complainants sought to enjoin the collection of a tax imposed upon them under a statute of Tennessee, upon the ground that they were not liable for the tax because they were agents and brokers exclusively for the sale of the property of nonresident principals, and did no business of any kind for residents of the State. They also averred that the state statute, properly construed, did not include their business, but if it did, it was void as contravening the Federal Constitution in its interstate commerce clause.

The defendants by answer averred that they sought to collect the tax under the authority of the statute of the State of Tennessee, providing for the collection of a privilege tax on the occupation of the complainants as merchandise brokers, and that such statute was valid.

Other parties similarly situated commenced suits against the

defendants to obtain like relief. By an agreement, which was approved by the court, all the cases were consolidated under the style of *Stockard & Jones* v. *Morgan and others*, under which title it was agreed that they should thereafter proceed as one case.

The case came to trial in the Chancery Court upon the following agreed statement of facts:

"In this consolidated cause the following agreement is made as to the facts relating to the matters in controversy, viz.:

"It is agreed that the several complainants in the original bills, to wit, J. H. McReynolds, Stockard & Jones, W. G. Oehmig, T. M. Carothers and J. H. Allison are residents of Hamilton County, Tennessee.

"That said J. H. McReynolds has been carrying on business in Chattanooga, said county and State, during the present year, 1900; that said Stockard & Jones, W. G. Oehmig, T. M. Carothers and J. H. Allison have been carrying on business in said city during the years 1897, 1898, 1899 and 1900.

"That the character of said business so carried on by the respective complainants, or the manner of conducting the business of each, is and has been as follows:

"The complainant, as the representative of non-resident parties, firms or corporations, solicits orders for goods from jobbers or wholesale dealers in Chattanooga, Tennessee, and when such orders are obtained sends them to his non-resident principal or principals. If an order is accepted the goods are shipped by such non-resident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale the goods in all instances belong to the non-resident principal or principals, and are shipped to the State of Tennessee from another State.

"In making sales or soliciting orders for the goods the complainant sometimes exhibits samples to the local jobber or wholesale dealer and sometimes takes the orders without showing a sample.

"Unless complainant has been previously authorized by the principal or principals to sell at a fixed price, the orders are taken subject to acceptance or rejection by such non-resident principal or principals, who own the goods.

Statement of the Case.

"At the end of each month, or at stated periods, the complainant is paid a commission by such non-resident principal or principals for goods previously sold on accepted orders. No commission is paid on orders taken but rejected. Complainant does not receive for his services any pay or salary from any local jobber or dealer or resident of Tennessee, nor does he assume to represent, or represent or hold himself out as representing, any resident of Tennessee or negotiate any sales of goods for residents of Tennessee. His principals are all residents of other States of the United States, and the goods sold are shipped from such other State to the State of Tennessee for delivery to buyers who reside in Tennessee.

"The complainant has an office or 'headquarters' in Chattanooga, Tenn., where he keeps samples, stationery and other articles; but he travels around on foot daily or frequently in drumming or soliciting orders for goods, as before stated. His principals are specific parties, firms or corporations, all non-residents of Tennessee and residents of other States in the United States, and he does not represent or hold himself out as representing the public in general, or negotiate or sell for any resident of Tennessee.

"The defendants and solicitors for the State of Tennessee and Hamilton County contend that, under the facts, the complainants are 'merchandise brokers,' and each of them is bound for privilege taxes under the laws of Tennessee.

"That J. H. McReynolds should pay a privilege tax for 1900 to the State of $20.00, and to the county of $20.00.

"That Stockard & Jones should pay to the State $20.00 for each of the years 1897, 1898, 1899 and 1900, and a like sum for each of said years to the county of Hamilton.

"That each of the other complainants owe the same sums as Stockard & Jones.

"That all of the complainants should be held for proper penalties, costs and attorneys' fees if they are held liable for such taxes.

"The complainants contend that they are engaged exclusively in interstate commerce and are not bound for such privilege taxes; further, that the revenue laws of Tennessee appli-

cable to 'merchandise brokers' do not include these complainants, so as make them subject to privilege taxes; but even if such laws do include complainants, yet they are inoperative and void as against complainants, who are engaged solely in interstate commerce."

By agreement of the parties two questions only were argued in the state court: (1) whether or not complainants were merchandise brokers and subject by statute to tax as such; (2) whether or not their business constituted interstate commerce, and therefore was beyond the reach of the State's taxing power.

The chancellor held that the complainants were not liable for the privilege tax and enjoined its collection perpetually, and adjudged the costs against Hamilton County. From the judgment so entered the defendants appealed to the Supreme Court of the State, which, as stated, reversed the judgment and dismissed the bill, holding the complainant's business was covered by the statute, and that it did not violate the Constitution of the United States.

Mr. Robert Pritchard for plaintiffs in error. *Mr. J. B. Sizer* and *Mr. R. P. Woodard* were on his brief.

Mr. George W. Pickle for defendant in error.

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

In this case we are bound to give the same meaning to the state statute that was given to it by the Supreme Court of the State, and the question which remains for us to decide is, whether as so construed the statute violates any provision of the Federal Constitution.

We think it violates the interstate commerce clause of the Constitution of the United States, and that this court has in several cases decided the principle which invalidates the statute so far as it affects the business of the complainants. The principle is contained in the cases of *Brown* v. *Maryland*, 12 Wheat.

419, and *Welton* v. *Missouri*, 91 U. S. 275. Subsequently the case of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, was decided, which is one of the leading cases upon the subject now in hand, and we think that it is decisive of the case before us. That case was tried upon an agreed statement of facts as follows:

"Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the day of , 1884, was engaged in the business of drumming in the taxing district of Shelby County, Tenn.; *i. e.*, soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offence of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force, and carried before the Hon. D. P. Hadden, president of the taxing district, and fined for the offence of drumming without a license. It is admitted the firm of 'Rose, Robbins & Co.' are engaged in the selling of paper, writing materials and such articles as are used in the book stores of the taxing district of Shelby County, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest."

The court held upon these facts that the statute of Tennessee of 1881, enacting that "all drummers and all persons not having a regular licensed house of business in the taxing district 'of Shelby County,' offering for sale, or selling goods, wares or merchandise therein by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege," was void as against Robbins.

The opinion of the court was delivered by Mr. Justice Bradley, in the course of which he said (page 494):

"In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that com-

merce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State to sell his goods in another State, without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business he may adopt it with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and

wait for the people of those States to come to him? This would be a silly and ruinous proceeding. The only way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things."

And again at page 496:

"But it will be said that a denial of this power of taxation will interfere with the rights of the State to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the States themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

Other cases followed the *Robbins* case, among them, *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S.

326; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114; *Crutcher* v. *Kentucky*, 141 U. S. 47. These cases exhibit different phases of the same general principle, but all follow that principle as announced in the *Robbins* case, and deny the right of the State to tax people representing the owners of property outside of the State, for the privilege of soliciting orders within it as agents of such owners for property to be shipped to persons within the State. We think they cover the facts of the case at bar and render the statute as construed by the state court invalid so far as it affects the business of the complainants described in the agreed statement of facts above set forth.

The defendants in error, admitting the finality of the decisions above referred to in regard to the questions therein decided, claim that they do not in truth cover the case before us, and they urge that it is controlled by *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1. A reference to that case shows important and material distinctions of fact which render it unlike the one now before us. The opinion of the court was delivered by the present Chief Justice, who, while recognizing and approving the *Robbins* and other similar cases, distinguished them from the one then under review. In the course of his opinion he said (page 20):

"In the case at bar the complainants were established and did business in the taxing district as general merchandise brokers, and were taxed as such under section nine of chapter ninety-six of the Tennessee laws of 1881, which embraced a different subject-matter from section sixteen of that chapter. For the year 1887 they paid the $50 tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business and became liable to pay the privilege tax in question, which was fixed in part, and in part graduated according to the amount of capital invested in the business, or if no capital were

invested, by the amount of commissions received. Although their principals happened during 1887, as to the one party, to be wholly non-resident, and to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents. In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."

And again (at page 24) it was said:

"We agree with the Supreme Court of the State that the complainants have taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

From these extracts from the opinion it is seen that a material fact in the case was that Ficklen had taken out a general and unrestricted license to do business as a broker, and he was thereby authorized to do any and all kinds of commission business, and therefore became liable to pay the privilege tax exacted. Although Ficklen's principals happened in the year 1887 to be wholly non-residents, the fact might have been otherwise, as was stated by the Chief Justice, because his business was not confined to transactions for non-residents.

In this case the complainants did not represent or assume to represent any residents of the State of Tennessee, and each of the complainants represented only certain specific parties, firms or corporations, all of whom were non-residents of Tennessee. They did no business for a general public. We attach no importance to the fact that in the *Robbins* case the individual

taxed resided outside of the State. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the State affect the question. If while so acting and soliciting orders within the State for the sale of property for one non-resident of the State, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm or corporation, all being non-residents of the State of Tennessee. The fact that the State or the court may call the business of an individual, when employed by more than one person outside of the State, to sell their merchandise upon commission, a "brokerage business," gives no authority to the State to tax such a business as complainants.' The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce. As was said by Mr. Justice Bradley, in the *Robbins* case, *supra*, "The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce?" It is still a carrying on of interstate commerce, whether the party is acting for one or more principals residing outside of the State and selling their goods through his procurement, acting for them as their agent.

We cannot see that the *Ficklen* case rules the one before us. Although it is plain from the opinion of the Chief Justice that there was not the slightest intention of casting any doubt upon the correctness of the decisions in the *Robbins* and other cases above cited, it is subsequently stated in *Brennan* v. *Titusville*, 153 U. S. 289, that the case of *Ficklen* "is no departure from the rule of decision so firmly established by the prior cases." In speaking of the distinguishing features of the *Ficklen* case, Mr. Justice Brewer, in delivering the opinion of the court in *Brennan* v. *Titusville*, said (at page 307): "In other words, the

tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor."

Although it is said in the opinion of the state court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in anywise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.

That such a tax amounts to an invasion of the commerce clause of the Constitution of the United States is held in *Stratford* v. *City Council of Montgomery*, 110 Alabama, 619, in a most satisfactory opinion by Chief Justice Brickell. In speaking of the tax under the Alabama statute, he said (p. 628): "While, as we have shown, the business of the defendant was general, so as to constitute him a broker, it by no means follows that it required he should also take local business. He might, as he did, confine himself to the interstate business and still be a 'broker,' without becoming liable to the tax." The statute of Alabama is similar to the one in Tennessee, and the facts in the above case are almost identical with those agreed upon herein.

Although the State has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the State.

We regard this case as within the *Robbins* and other similar cases above referred to, and it follows that the judgment of the Supreme Court of Tennessee, holding the complainants liable to pay the tax demanded, was erroneous.

The judgment of that court is, therefore, reversed, and the case remanded for further proceedings not inconsistent with the opinion of this court. It is so ordered.

MR. JUSTICE GRAY took no part in the decision of this case.

SWERINGEN *v.* ST. LOUIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 187. Argued March 4, 5, 1902.—Decided April 7, 1902.

The question involved in this case upon the merits is, in substance, whether the plaintiff is entitled to the alluvion caused by the recession of the Mississippi River to the extent of many hundred feet east of the point where it flowed in 1852, at the time when the plaintiff's predecessor took title to the property by virtue of a patent from the United States. The trial court held she was, and the Supreme Court of the State of Missouri held she was not. In the opinion of this court the case involves no Federal question, and it is dismissed on the ground of lack of jurisdiction.

THE plaintiff in error, being the plaintiff below, obtained judgment in the state Circuit Court for the city of St. Louis for the recovery of certain land described in the judgment. Upon appeal to the Supreme Court of the State of Missouri this judgment was reversed, 151 Missouri, 348, and the plaintiff has brought the case here by writ of error.

The action was ejectment for land described in the petition, which also set up a claim for the rents and profits. The answer of the city denied all the allegations of the petition, set up adverse possession for ten years and acquiescence on the part of the plaintiff in the possession and use of the premises by the city as and for a public wharf. The property described in the

petition is situate in the city of St. Louis, and is bounded on the east by the Mississippi River. The parties went to trial before the court, a jury being waived, and after the evidence was in, the issues were found in favor of the plaintiff, although she recovered judgment for but a portion of the property described in her petition, the portion for which she recovered being part of a public wharf of the city running along the west line of the river, and being ninety feet along the line of the wharf from north to south, and running back its whole depth from the east line on the river to its rear or western line.

The question involved in the case upon the merits is in substance whether the plaintiff is entitled to the alluvion caused by the recession of the Mississippi River, to the extent of many hundred feet east of the point where it flowed in 1852, at the time when the plaintiff's predecessor took title to the property by virtue of a patent from the United States called the "Labeaume patent." The trial court held she was and the Supreme Court held she was not.

On the trial the plaintiff offered in evidence as the source of her title a patent from the United States to Labeaume, dated in 1852. It was objected to as not tending to support the issues in the case and as not showing plaintiff's grantor a riparian owner. The objection was overruled and the patent received in evidence. It recites the proceedings which preceded the issuing of the patent, from which recitals it appears a concession was made of the land described, by the lieutenant governor of the Spanish province of Upper Louisiana, July 15, 1799, and a survey thereafter made, and the proceedings confirmed in accordance with the acts of Congress relating to lands in the province named, approved respectively March 2, 1805, and March 3, 1807, and after some other recitals a description of the land conveyed is set forth, which commences as follows:

"Begin at a stake set on the right bank of the Mississippi River between high and low-water mark and on the extension line produced eastwardly from Labeaume's southern ditch, the lower and most eastern corner of this survey, and the upper and most northern corner of the survey of Joseph Brazeau, numbered three thousand three hundred and thirty-two," etc.

Then follow in the patent what amounts to several printed pages, giving in detail the courses and distances of the outboundaries of the land described in the patent, from the southeastern corner along to the western limit, thence towards the north and thence back towards the east until the description is brought to the northeastern corner of the survey, which is also a corner of the city of St. Louis, being the northern termination of the northwestern boundary line thereof. This corner is marked "F" on the plat accompanying the patent, and the description then proceeds to give the eastern line of the grant parallel with the Mississippi River, and commences that line in the following language: "From the corner of 'F' down the right bank of the Mississippi River, with the meanders thereof, between high and low-water mark, south nine degrees east," etc. The description then goes on with six or eight different courses and distances, altering with the meanders of the river, down "to the place of beginning."

It appears that the east boundary line of the land described in this patent was at the time of the execution of the patent, in 1852, several hundred feet west of the waters of the river, and at the present time is about fifteen hundred feet west thereof. Between those waters and the east line of the grant there was then what is termed on the plat accompanying and referred to in the patent a sand beach, which was, as stated, several hundred feet in width, thus separating by that beach the east line of the grant from the river.

Mr. G. A. Finkelnburg, *Mr. Edward S. Robert* and *Mr. Edward P. Johnson* for plaintiff in error.

Mr. Charles Claflin Allen for defendant in error. *Mr. Charles W. Bates* and *Mr. B. Schnurmacher* were on his brief.

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

A motion was made in this case to dismiss the writ of error for lack of jurisdiction, and a decision of the motion was reserved

until after an argument of the case upon the merits. The whole case having been argued, it becomes necessary to dispose of the motion to dismiss.

The motion is based upon the averment that there is no Federal question involved, and that even if there were one, it was not properly raised in the court below. We think that, for the reasons now to be stated, the motion to dismiss must be granted.

In our judgment there is no Federal question arising by reason of plaintiff's claim under the patent put in evidence by her as the source of her title to the land in question. With reference to the first clause of section 709 of the Revised Statutes, it appears plainly that the validity of the patent has never been questioned. Nor has the validity of any treaty or statute of or authority exercised under the United States been drawn in question. It is a pure question of the construction of the language used in the patent, whether the land granted therein reached the waters of the Mississippi River on the east, or whether, according to the courses and distances contained in the patent, the eastern limit of the land conveyed was some hundreds of feet west of the river. It was really a question of fact as to how far east the measurements of the courses and distances carried the boundary. There was no contention made as to the authority of the Government to convey the land to the bank of the river where the water was actually flowing, if it chose so to do. The decision did not touch the question as to how far a grant by the Government, of land bounded by the waters of a navigable stream, would carry the title, whether to high water or low water, or out to the middle of the stream. If the grant from the United States had been bounded by the waters of a navigable river, and the right to make the grant to the extent claimed by the grantee, had been denied by a grantee under a State, the denial of the validity of the authority exercised in making such grant might bring the question of construction within the principle decided in *Packer* v. *Bird*, 137 U. S. 661, and *Shively* v. *Bowlby*, 152 U. S. 1. In *Packer* v. *Bird*, it was a question how far a grant carried the title to land bounded by the margin of the Sacramento River, or, as stated by Mr. Justice Field, who delivered the opinion of the court in

that case, "The question presented is, whether the patent of the United States, describing the eastern boundary of the land as commencing *at a point on the river*, which was on the right and west bank, and running southerly *on its margin*, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption." The opinion then proceeds with an examination of the question of what was the common law upon the subject, and whether that law had been adopted in the State of California where the land was. It was stated that it was "undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark. The title to land below that mark in such cases is vested, in England in the Crown, and in this country in the State within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce."

It was said there was much conflict of opinion in the Western States as to what the true doctrine was, whether it was the common law, which decided the question by the ebb and flow of the tides, or the law of actual navigability of the river, and in the case then before the court it accepted the view of the Supreme Court of California in its opinion as expressing the law of that State, "that the Sacramento River being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream." It was in a case involving such facts that the remark was made, in the course of the opinion, that the courts

of the United States would construe the grants of the General Government without reference to the rules of construction adopted by the States for their grants, but that whatever incidents or rights attached to the ownership of property conveyed by the Government would be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. It was a necessary case for the court to adopt one or the other of these two conflicting rules for the construction of the grants of the General Government, and in making its decision as to the proper construction in such cases the court held that the question of construction became one of a Federal nature.

Shively v. *Bowlby*, *supra*, was much the same case, the controversy being as to the extent of the grant of the United States Government of land bounded by the Columbia River in the State of Oregon. The question was as to how far such a grant extended, (the actual limitations of the boundaries, by the language used, not being disputed,) whether in legal effect it granted lands under the water of the river, and the question was held to be a Federal one. In both cases it was decided that a grant by the Federal Government of land within a State, bounded by a navigable river, did not extend so far as to convey land below ordinary high water, and beyond that point the right of a grantee was governed by the law of the State, and the decisions of those courts were therefore in each instance affirmed.

In this case no such question arises. It is not the case of granting lands bounded by the waters of a navigable river and a claim made to an island in the river in one case and to the lands under water in the other, where the validity of the authority exercised, to the extent claimed, was drawn in question and the right to convey the land denied. Here no question is made as to the authority of the Government to convey the land to the water's edge, if it chose to do so. The validity of its conveyance under the authority of the acts of Congress referred to in the patent was not in any way controverted or drawn in question by defendant, but it was simply maintained that making correct measurements and construing the language of the grant

in the usual and ordinary way applicable to such instruments, (not at all a Federal question) the courses and distances set forth in the patent and its general description of the land conveyed did not as matter of fact bring the eastern boundary to the waters of the river. The issue thus made was not one of "validity," but one of fact as to where by the language of the grant was its eastern boundary line. Where such a question alone is involved there is not drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and there is in fact no question of a Federal nature decided. As was remarked in *Cook County* v. *Calumet &c. Dock Company*, 138 U. S. 635, 653: "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed. The validity of the authority here was not primarily denied, and the denial made the subject of direct inquiry. *United States* v. *Lynch*, 137 U. S. 280; *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210."

In the first of these two cases cited, it was held that to enable this court to entertain jurisdiction under a writ of error upon the ground that the validity of an authority exercised under the United States was drawn in question, the validity of such authority must have been denied directly and not incidentally. In the case before us, there was no denial of the validity of the grant, directly or incidentally. In the *Hopkins* case, *supra*, it was held that the validity of a statute is drawn in question when the power to enact it is fairly open to denial and is denied, but not otherwise.

In *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571, Mr. Justice Shiras, in delivering the opinion of the court dismissing a writ of error, refers to several cases which we think are relevant here. In *Borgmeyer* v. *Idler*, 159 U. S. 408, it was held that the matter in controversy, being money received by one of the parties as an award under a treaty of the United States with a foreign power, providing for the submission of claims against that power to arbitration, did not in any way draw in question the validity or construction of the treaty.

Here there is no question made of the validity of the authority exercised, but only a question of how far in fact it was exercised.

In *Gillis* v. *Stinchfield*, 159 U. S. 658, the dispute arose concerning the ownership of a mining claim. In the course of the opinion in the *Blackburn* case, referring to the *Gillis* case, it was said: "It is true that this court put its judgment on the ground that the judgment of the state Supreme Court was based upon an estoppel, deemed by that court to operate against the plaintiff in error upon general principles of law, irrespective of any Federal question. Still the case is authority for the proposition that controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the state courts, and that to enable the court to review the judgment in such a case it must appear not only that the application of a Federal statute was involved, but that the controversy was *determined by a construction put upon the statute* adverse to the contention of one of the parties."

Here there was no construction put upon any statute, nor upon any authority exercised, but only a construction upon the language used in the patent, admitting the validity of all statutes, and also the validity of any authority actually exercised, and the only and simple question decided was that the language used in the patent, assuming its validity, bounded the land conveyed under it, not by the river on the east, but by a line which was separated from the waters of the river by a sand beach several hundred feet in width.

The *Blackburn* case was followed by *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, which reaffirmed the doctrine.

We conclude that no Federal question arises upon the construction of the language of the patent given it by the state court, under the first clause of section 709 of the Revised Statutes.

Nor was any Federal question raised under the third clause of that section. Under that clause no title, etc., or authority exercised under the United States, was specially set up and claimed by the plaintiff, and there was no decision against any title, etc., specially set up or claimed by the plaintiff. There was no decision of any Federal question whatever. We do not

hold it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Green Bay &c. Co.* v. *Patten Co.*, 172 U. S. 58; *Columbia Water Power Co.* v. *Columbia Railway*, 172 U. S. 475; *Dewey* v. *Des Moines*, 173 U. S. 193, 199. And the decision that the grant did not extend to the river bank was not a denial of any authority claimed, but was only a decision that the grant did not in fact extend to the river, or, in other words, that the authority was not exercised. It was mere interpretation of the authority really exercised and not any denial of authority.

The plaintiff also claims that she obtained title to the land in question, if not under the patent, then by virtue of the provisions of the act of Congress, approved June 6, 1874, 18 Stat. 62, the first section of which is set forth in the margin.[1]

It does not appear in the record that any such claim was made in the trial court or upon appeal in the Supreme Court of the State. There was no denial of the validity of that act by the decision in question, and when the plaintiff introduced the *patent* in evidence there certainly was no claim thereby specially set up under the *act of Congress*. This claim does not seem ever to have been thought of until the case reached this court. At any rate, the record does not show that it was pleaded, proved, referred to, mentioned, or in any manner set

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[1] CHAP. 223. An act obviating the necessity of issuing patents for certain private land claims in the State of Missouri, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the right, title, and interest of the United States in and to all of the lands in the State of Missouri which have at any time heretofore been confirmed to any person or persons by any act of Congress, or by any officer or officers, or board or boards of commissioners, acting under and by authority of any act of Congress, shall be, and the same are hereby, granted, released, and relinquished by the United States, in fee simple, to the respective owners of the equitable titles thereto, and to their respective heirs and assigns forever, as fully and as completely, in every respect whatever, as could be done by patents issued therefor according to law.

up or claimed. The act does not in any event touch the point, as it refers to those cases in which no patents had been given, and does not cover the case where one had been issued and received in entire fulfillment of the obligations of the Government. As in our opinion the case involves no Federal question, the motion to dismiss will be granted on the ground of lack of jurisdiction.

Dismissed.

FRENCH-GLENN LIVE STOCK COMPANY *v.* SPRINGER.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 124. Argued January 20, 21, 1902.—Decided April 7, 1902.

A Federal question was presented by the contentions of the plaintiff in error, and this court is of opinion, that while there was a lake abutting on or to the north of the lots, the plaintiff would take all land between the meander line and the water, and all accretions, it was competent for the defendant to show that there was not, at the time of the survey, nor since, any such lake, and to contend that, in such a state of facts there could be no intervening land, and no accretion by reliction.

This was an action brought, in 1896, in the Circuit Court of Harney County, State of Oregon, by the French-Glenn Live Stock Company, a corporation of the State of California, against Alva Springer, to recover possession of a certain tract of land situated in said county. The action was tried in May, 1897, and resulted in a verdict and judgment in favor of the defendant. The cause was subsequently taken to the Supreme Court of Oregon, and by that court, on August 11, 1899, the judgment of the Circuit Court was affirmed; and thereupon a writ of error was allowed by the Chief Justice of that court, and the cause was brought to this court.

The facts of the case, as developed at the trial, were thus stated by the Supreme Court:

"The plaintiff, to support its contention of ownership of the fee, offered in evidence, (1) the official plat of the United States government survey of fractional township 26 south, range 31 east, of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur Lake, which plat appears to have been approved by the Land Department of the government and filed in the local office on September 17, 1877; the plat shows said lots as bounded on the north by the meander line of Malheur Lake; (2) the field notes of the survey of the exterior boundaries of said township and its subdivisions, and the meander line of Malheur Lake, under the title heading, 'Meanders of the south shore of Malheur Lake, through fractional township, 26,' etc., and indicating that it was run 'with the meander of the lake;' (3) a list of selections of land, made by the agent of the State of Oregon, claimed as swamp and overflowed, with the approval of the Secretary of the Interior, bearing date September 19, 1889; (4) two patents from the United States, for said lots 3 and 4, section 34, and 1 and 2, section 35, 'according to the official plats of the survey of the said lands returned to the General Land Office by the surveyor general.' The patents bear date March 10, 1890, and October 8, 1891, respectively. The lots contain, in the aggregate, 158.53 acres; (5) two conveyances from the State, comprising the above-described lots, bearing date October 7, 1889, and April 30, 1890, respectively, and other mesne conveyances to the plaintiff; and (6) oral evidence, tending to prove that in 1877, and for some years thereafter, Malheur Lake was a continuous body of water up to the meander line of that year; that there was a narrow ridge or reef across the west end thereof, some 12 or 15 miles west of the lands in dispute, which separated its waters from those of Harney Lake; that its waters were from 8 to 12 feet higher than those of Harney Lake; that, in 1881, the waters of Malheur Lake, overflowing the ridge, cut a channel through, which was enlarged from year to year for some time; that, as a result, its surface was lowered, the waters receding from the flat shelving shore, leaving the disputed land bare, except in the spring time, from and after 1884. This constituted the

plaintiff's case. On behalf of the defendant, evidence was introduced tending to show that there never was a lake in front of the said lots; that Malheur Lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of said lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at any time extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake, and no consequent reliction of land in front of the said lots."

Mr. Charles A. Keigwin for plaintiff in error.

Mr. C. E. S. Wood for defendant in error. *Mr. Lionel R. Webster* and *Mr. Thomas D. Rambaut* were on his brief.

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

The parties to this contest both claim under titles derived from the United States—the plaintiff in error under patents granted to the State of Oregon under the swamp land grant; the defendant in error under the homestead laws.

To support its contention the plaintiff in error put in evidence, at the trial, an official plat of the government survey of township 26 south, range 31 east, of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur Lake, which plat appears to have been approved by the Land Department and filed in the local land office on September 17, 1877. The plat shows lots 3 and 4, section 34, and lots 1 and 2, section 35, as bounded on the north by the meander line of Malheur Lake; also, a list of selections of land, made by the agent of the State of Oregon, claimed as swamp and overflowed, with the approval of the Secretary of the Interior, bearing date September 19,

1889; also two patents from the United States for said lots, dated, respectively, March 10, 1890, and October 8, 1891—said lots containing in the aggregate 158.53 acres; also, two conveyances from the State of Oregon, comprising the said lots, bearing date October 7, 1889, and April 30, 1890, respectively, and certain mesne conveyances of said lots, vesting title in the plaintiff in error in 1894; also, oral evidence, tending to prove that in 1877, and for some years thereafter, Malheur Lake was a continuous body of water up to the meander line of that year; that there was a narrow ridge or reef across the west end thereof, some twelve or fifteen miles west of the lands in dispute, which separated its waters from those of Harney Lake; that its waters were from eight to twelve feet higher than those of Harney Lake; that, in 1881, the waters of Malheur Lake, overflowing the ridge between the lakes, cut a channel through, which was enlarged from year to year for some time; that, as a result, the surface of Malheur Lake was lowered, the waters receding from the flat, shelving shore, leaving the disputed land bare, except in the spring time, from and after 1884.

On the part of the defendant, whose possession began in July, 1888, evidence was put in tending to show that there never was a lake in front of the said lots; that Malheur Lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of the lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at any time extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake and a consequent reliction of land in front of the said lots.

The question of fact, raised by this contradictory evidence, was submitted to the jury, whose verdict decided the issue in favor of the defendant in error.

The land in dispute, in the possession of the defendant in error, was not included within the lines of the original survey, nor in the description of the lots contained in the patents and

in the deeds of conveyance under which the plaintiff in error holds, and to add the land in controversy to the lots so described would more than double the area of the land claimed by the plaintiff in error; but the contention of the plaintiff in error was, in the courts below and now is, in this court, that, as the plaintiff in error bought in reliance upon the plats and patents which showed the meander line of the lake, such plats and patents must be deemed to conclusively establish that the lake was the northern boundary of the land, so far as the rights of riparian grantees are concerned.

Respecting this contention, the defendant in error advances two propositions—first, that the grantee of swamps and overflowed lands takes only such lands as are of that special character, and that this land under the water, forming the bed of the lake, not being of that character, could not pass, even under the facts as claimed to exist under the evidence of the plaintiff in error; and, second, that there never existed a lake in front of or bordering on the plaintiff in error's lots; that if such was the fact, the rule as respects accretion by reason of the alleged recession of the water would not apply; and that as this question was submitted to the jury and found against the plaintiff in error, such finding conclusively determines the controversy.

While it may be conceded that the description of the lots contained in the survey, plats and patents are conclusive as against the government and holders of homesteads, so far as the lands actually described and granted are concerned, such conclusive presumption cannot be held to extend to lands not included within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, whose recession has left bare land accruing to the owners of the abutting lots. We agree with the Supreme Court of Oregon in thinking that the question whether the northern boundary of the lots of the plaintiff in error was an existing lake, the recession of whose waters would leave the bed of the lake, thus laid bare, to accrue to the owner of the lots, was a question of fact which was not concluded by a mere call for a meander line. If, indeed, there had been a lake in front of these lots at the time of the survey, which lake had

subsequently receded from the platted meander line, the claim of the owner of the lots to the increment thus occasioned might be conceded to be good, if such were the law of the State in which the lands were situated. But if there never was such a lake—no water forming an actual and visible boundary—on the north end of the lots, it would seem unreasonable, either to prolong the side lines of the survey indefinitely until a lake should be found, or to change the situs of the lots laterally in order to adapt it to a neighboring lake. The jury having found that the facts under this issue were as claimed by the defendant in error, the conclusion must be that the rights of the plaintiff in error must be regarded as existing within the actual lines and distances laid down in the survey and to the extent of the acreage called for in the patents, and that the meander line was intended to be the boundary line of the fractional section.

In *Niles* v. *Cedar Point Club*, 175 U. S. 300, a somewhat similar state of facts existed, and it was claimed that the mere call for a meander line gave riparian rights beyond that line. But this court said:

"It is urged that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered on a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation."

See likewise *Horne* v. *Smith*, 159 U. S. 40, where a similar ruling was made.

Whether, even if the meander line of the survey really ran along and adjacent to Malheur Lake, the doctrine of *Hardin* v. *Jardasa*, 140 U. S. 384, and cognate cases, is applicable, is discussed at some length in the briefs. According to that rule, the extent of the title of a government grantee of lands bounded

on streams and waters, without any reservation or restriction of terms, is to be construed, as to its effect, according to the law of the State in which the lands lie; and the cases cited show that, in some of the States, it is held that the title of a riparian proprietor extends to the middle thread of the stream, while in others it is held to extend only to the water's edge; and in Massachusetts, and perhaps other States, a distinction is recognized between lands bordering on lakes and ponds, and those bounded by running streams.

But we are not called upon to enter into that discussion in the present case, for the Supreme Court of Oregon reached its conclusion apart from any such question, and expressed itself as follows:

"If there never was a lake in front of plaintiff's lots, or if one did not exist there at the time of the survey, then there was no natural object or monument marking the north boundary of the lots; hence resort must be had to the secondary evidence, viz., the courses and distances which are ascertainable from the plats and surveys, and they must prevail. The result is natural, and the land conveyed would be just what a mathematical calculation would produce from the field notes of the survey of the fractional sections and the supposed meander line. . . . The plaintiff sought to sustain the fact of the actual existence of the lake in front of its lots and upon which they abutted at the time of the survey, and then to show a gradual subsidence of the water of the lake, due to the cutting of the channel from natural causes, through a narrow ridge or reef extending across between Malheur and Harney Lakes, by which the water of the former was drawn off into the latter, and a consequent reliction of the land bordering on said lots, which constitutes the land in dispute, and to which plaintiff claims title. The defendant controverted this position, and sought and introduced evidence tending to show the non-existence of such a lake at the time of the survey, and at all times since; in short, there was support for the whole of his contention. The fact of the existence of Malheur Lake, a non-navigable body of water, was admitted, but there was evidence to show that it lies to the northeast of the lots of the plaintiff, and that no part of it now, or at the

time of the survey, extended westward, in front or to the north of them. . . . The issues of fact were clear and distinct, and having been submitted to the jury, there is no reason why their verdict should not preclude the plaintiff, as in other cases when a jury has passed upon a submitted question of fact."

As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of Federal law is left open for our revision. However, as the plaintiff in error contended, in the courts below and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a Federal question is thus presented.

For the reasons already given, we think that, while the plats are conclusive as to the meander line, and while if there was a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, and all accretions, it was competent for the defendant to show that there was not, at the time of the survey nor since, any such lake, and to contend that, in such a state of facts, there could be no intervening land and no accretion by reliction.

The judgment of the Supreme Court of Oregon is

Affirmed.

MR. JUSTICE HARLAN took no part in the decision of this case.

FRENCH-GLENN LIVE STOCK COMPANY *v.* COLWELL.

ERROR TO THE SUPREME COURT OF OREGON.

No. 125. Argued January 20, 21, 1902.—Decided April 7, 1902.

French-Glenn Live Stock Company v. *Springer*, *ante*, p. 47, affirmed and followed.

Syllabus.

THIS case was argued at the same time with *French-Glenn Live Stock Company* v. *Springer*, and by the same counsel.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The French-Glenn Live Stock Company, a corporation of the State of California, brought an action in the Circuit Court of Harney County, State of Oregon, against James Colwell, to to recover lands in possession of the latter, under the homestead laws of the United States. There was a verdict and judgment in favor of the defendant, and that judgment was affirmed by the Supreme Court of Oregon. A writ of error was sued out to this court.

The questions of fact and law in this case are similar to those in the case of *French-Glenn Live Stock Company* v. *Alva Springer*, just decided, and, for the reasons expressed in the opinion in that case the judgment of the Supreme Court of Oregon is

Affirmed.

MR. JUSTICE HARLAN took no part in this decision.

WILSON *v.* ISEMINGER.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 193. Argued March 19, 1902.—Decided April 7, 1902.

The seventh section of the act of Pennsylvania of April 27, 1855, is as follows: "That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable: *Provided*, That the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county the duplicate of

any receipt therefor, proved by oath or affirmation to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity, or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed: *Provided*, That this section shall not go into effect until three years from the passage of this act." *Held*, that this was not an act or law impairing the obligation of contracts within the meaning of the Constitution of the United States.

This was an action of assumpsit brought December, 1896, in the Court of Common Pleas, No. 1, of Philadelphia County, by Harvey G. Clay, administrator of the estate of Alexander Osbourne, deceased, against Adam Iseminger, for recovery of arrears of ground rent due on a ground-rent deed between Alexander Osbourne and Jennie M., his wife, and the said Adam Iseminger, dated January 4, 1854. The statement of particulars claimed arrears of ground rent due, under the stipulations of said deed, for the years 1887 to 1896, both inclusive, with interest on each arrear.

On January 27, 1897, one Elmer H. Rogers, having been permitted, as terre-tenant and owner in fee of the lot of ground described in the ground-rent deed, to intervene and defend *pro interesse suo*, filed, under the rules of the court, an affidavit of defence to the whole of the plaintiff's claim, averring that no payment, claim or demand had been made by any one on account of or for any ground rent on the premises described in the said deed, or from any owner of said premises, or any part thereof, for more than twenty-one years prior to the bringing of the suit; that no declaration or acknowledgment of the existence thereof, or of the right to collect said ground rent thereon, had been made within that period by or for any owner of said premises, or any part thereof, and that neither he nor they nor any of them within that period ever executed any declaration of no set-off in reference to said ground rent, or recognized its existence in any way, manner, shape or form.

This defence was based on the seventh section of an act of the

Commonwealth of Pennsylvania of April 27, 1855, page 368, No. 387, in terms as follows:

"That in all cases where no payment, claim or demand shall have been made on account of or for any ground rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable: *Provided*, That the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county the duplicate of any receipt therefor, proved by oath or affirmation, to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof, shall be evidence until disproved, and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which records and judgments shall be duly indexed: *Provided*, That this section shall not go into effect until three years from the passage of this act."

Thereupon the plaintiff took out a rule on the defendant to show cause why judgment should not be entered against him for want of a sufficient affidavit of defence, assigning as a reason why such rule should be made absolute that the said seventh section of the act of April 27, 1855, was unconstitutional within the tenth section of article 1 of the Constitution of the United States, forbidding any State from passing any law impairing the obligation of contracts.

After a hearing the court discharged the said rule for judgment; a bill of exceptions was signed and sealed, and the cause was then taken to the Supreme Court of Pennsylvania, where the judgment of the Court of Common Pleas was affirmed. 187 Penn. St. 108.

Thereafter the case came on for trial before the court and a

jury. The plaintiff offered evidence tending to show that the ground rent in question had never been paid off and extinguished. This offer was objected to as immaterial and irrelevant. The objection was sustained, and an exception was taken by the plaintiff. The court was asked to instruct the jury that the seventh section of the act of April 27, 1855, was unconstitutional, because it impairs the contract reserving the rent, and was inhibited by the tenth section of article 1 of the Constitution of the United States, which forbids the States from passing any law impairing the obligation of contracts. The request so to charge was refused by the trial judge. The defendants asked the court to charge that the verdict should be for the defendants. This request was granted. A bill of exceptions to the action of the court in rejecting the plaintiff's offer of evidence, in declining to charge as requested by the plaintiff, and in charging as requested by the defendant, was signed and sealed by the trial court. A verdict and judgment in favor of the defendants were then entered. The cause was then taken a second time to the Supreme Court of Pennsylvania, where on April 3, 1899, the judgment of the Court of Common Pleas was affirmed.

Mr. George Henderson for plaintiff in error.

Mr. Ira Jewell Williams for defendant in error. *Mr. Alexander Simpson, Jr.*, was on his brief.

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

The question for determination in this case is whether the seventh section of the act of assembly of the Commonwealth of Pennsylvania of April 27, 1855, the terms of which appear in the foregoing statement, is an act or law impairing the obligation of contracts within the meaning of the Constitution of the United States.

The peculiar character, under the laws of the State of Penn-

sylvania, of irredeemable ground rents, must first receive our notice.

It is defined to be a rent reserved to himself and his heirs by the grantor of land, out of the land itself. It is not granted like an annuity or rent charge, but is reserved out of a conveyance of the land in fee. It is a separate estate from the ownership of the ground, and is held to be real estate, with the usual characteristics of an estate in fee simple, descendible, devisable, alienable. *Bosler* v. *Kuhn*, 8 W. & S. 183, 185; *Wallace* v. *Harmstad*, 44 Penn. St. 492, 495; *McQuigg* v. *Morton*, 3 Wright, 31.

It may be well to quote the language of the deed reserving the ground rent in question, which is that usually employed in the creation of such estates. The *tenendum* clause is in the usual form: "To have and to hold the said described lot or piece of ground, hereditaments and premises hereby granted with the appurtenances unto the said Adam Iseminger, his heir and assigns, to the only proper use and behoof of the said Adam Iseminger, his heirs and assigns forever." Then comes the reservation, as follows:

"Yielding and paying therefor and thereout unto the said Alexander Osbourne, his heirs and assigns, the yearly rent or sum of seventy-two dollars, lawful money of the United States, in half-yearly payments on the first day of April and October every year hereafter forever, without any deduction, defalcation or abatement for any taxes, charges or assessments whatsoever to be assessed as well on the said hereby granted premises as on the said yearly rent hereby and thereout reserved. The first half-yearly payment thereof to be made on the first day of October, one thousand eight hundred and fifty-four, and, on default of paying the said yearly rent on the days and time and in manner aforesaid, it shall and may be lawful for the said Alexander Osbourne, his heirs and assigns, to enter into and upon the said hereby granted premises or any part thereof, and into the buildings thereon to be erected, and to distrain for the said yearly rent so in arrears and unpaid, without any exemption whatsoever, any law to the contrary thereof in anywise notwithstanding, and to proceed with and sell such distrained goods

and effects, according to the usual course of distresses, for rent charges. But if sufficient distress cannot be found upon the said hereby granted premises to satisfy the said yearly rent in arrear and the charges of levying the same, then and in such case it shall and may be lawful for the said Alexander Osbourne, his heirs and assigns, into and upon the said hereby-granted lot and improvements wholly to reënter, and the same to have again, repossess and enjoy as in his and their first and former estate and title in the same and as though this indenture had never been made," etc.

It appears in the Pennsylvania cases, hereinbefore and hereafter cited, that this form of estate was, in the early history of the Commonwealth, a favorite form of investment; but that eventually great inconveniences arose from the existence of ancient ground rents, which the owners and occupants of the land never heard of, but of whose extinguishment the records of title made no mention. Indeed, the records disclosed the reservation of such ground rents unpaid and unextinguished, going back more than a century. In *Korn* v. *Browne*, 64 Penn. St. 55, there is a quotation in the opinion from a tract by Mr. Eli K. Price, a distinguished real estate lawyer of Philadelphia, as follows:

"Those only who are accustomed to make or read briefs of title in Philadelphia, going back to the times of the first settlement, know how frequently occur ancient rent charges and ground rents, which the landowners of the present day never heard of, and which generally have no doubt been honestly extinguished; while making this note the writer has such a single brief before him for an opinion, in which no less than three such charges occur as blemishes, grants or reservations more than a century ago, which no person living has any knowledge of."

These evils led to the passage of the act of the 27th of April, 1855, entitled "An act to amend certain defects of the law for the more just and safe transmission, and secure enjoyment of real and personal estate."

The theory of this remedial act is that upon which all statutes of limitation are based—a presumption that, after a long

lapse of time without assertion, a claim, whether for money or for an interest in land, is presumed to have been paid or released. This is a rule of convenience and policy, the result of a necessary regard to the peace and security of society.

Bonds, even when secured by mortgages upon land, mortgages themselves, merchants' accounts, legacies, judgments, promissory notes, and all evidences of debt, have universally been treated as lawfully within the reach of legislative power exercised by the passage of statutes of limitation. Such statutes, like those forbidding perpetuities and the statute of frauds, do not, in one sense, destroy the obligation of contracts as between the parties thereto, but they remove the remedies which otherwise would be furnished by the courts. Are not the powers of government adequate for this?

"Laws for the preservation and promotion of peace, good order, health, wealth, education, and even general convenience, are supported under the police power of the State. Under these laws, personal rights, rights of property, and freedom of action, may be directly affected, and men may be fined, imprisoned and restrained, and property taken, converted and sold away from its owner. The principle of such laws is most easily perceived and recognized when men are held liable for nuisances and negligences affecting the health and safety of society, when the marriage contract is dissolved, and when property is subjected to charges and sales for matters affecting the public interest and welfare. Beyond this is a wide domain of general convenience where the power is likewise exercised. Thus estates held in joint tenancy and in common may be divided among the tenants, even by conversion and sale; life estates and remainders may be separated from each other; qualified inheritances expanded into absolute fee, and contingent and executory interests extinguished. What greater reason has the owner of an irredeemable ground rent, coming down from a former generation, to complain, than the owner of a remainder or reversion, or of some contingent or executory interest?" C. J. Agnew in *Palairet's Appeal*, 17 P. F. Smith, 479.

"Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the

right to assert the same in the courts by his own negligence or laches. If one who is dispossessed be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect, and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no legal rights in the premises. Such a statute is a statute of repose. Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time." Cooley on Limitations, 6th ed. 44; *Bell* v. *Morrison*, 1 Pet. 351; *Leffingwell* v. *Warren* 2 Black, 606.

We are unable to perceive any sound distinction between claims arising out of ground-rent deeds and other kinds of debts and claims, which would exempt the former from the same legislative control that is conceded to lawfully extend to the latter.

But, assuming that there is nothing peculiar in ground rents that withdraw them from the reach of statutes of limitation, it is further contended, in the present case, that the act of April 27, 1855, can have no valid application to a ground rent reserved before the passage of that statute. It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though

what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. Cooley on Limitations, 451.

Thus in *Terry* v. *Anderson*, 95 U. S. 628, it was said by Chief Justice Waite:

"This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins* v. *Barney*, 5 Pet. 451; *Sohn* v. *Waterson*, 17 Wall. 596.

"It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.

"In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge, and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts." *Tanner* v. *New York*, 168 U. S. 90; *Saranac Land Co.* v. *Roberts*, 177 U. S. 44.

In *Korn* v. *Browne*, 64 Penn. St. 57, this question was considered, and it was said, per Read, J.:

"The seventh section did not go into effect for three years, and gave ample time to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute. This prospective commencement makes the retrospective bar not only reasonable but strictly constitutional." Citing *Smith* v. *Morrison*, 22 Pick. 430, and *Ross* v. *Duval*, 13 Pet. 64.

In *Biddle* v. *Hooven*, 120 Penn. St. 225, it was said, referring to *Korn* v. *Browne*, 64 Penn. St. 55, 57, "an examination of it shows that the only question there argued was whether the section of the act referred to has a retrospective as well as a prospective operation with respect to ground rents. This appears in the first sentence of the opinion of Judge Read. He very properly held that as the seventh section did not go into effect for three years, and gave ample time to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute, that this prospective commencement made the retrospective bar not only reasonable but constitutional. In other words, the act gave ample time to preserve all existing rights. . . . The only ground upon which this kind of legislation can be justified is that after the lapse of the statutory period the mortgage or other security is presumed to have been paid, or the ground rent extinguished. The payment of a mortgage and the extinguishment of a ground rent mean substantially the same thing. The act was not intended to destroy the ground landlord's ownership in the rent; it does not impair his title thereto; nor can it be said to impair the contract by which the rent was reserved, but from well-grounded reasons of public policy it declares that when the owner of such rent makes no claim or demand therefor for twenty-one years it presumes it has been extinguished, which means nothing more than that it has been paid. The language cited, as before observed, affects only the remedy; if it meant more it would be void for the excess."

The same conclusion was reached by the Supreme Court of Pennsylvania in *Wallace* v. *Fourth U. P. Church*, 152 Penn. St. 258, where it was said that "the purpose of the act of 1855 was to relieve titles and facilitate the sale of real estate. It

fixes upon an arbitrary period of twenty-one years as that over which the search of a purchaser or other person must extend, and beyond which it shall not be necessary for him to look. If for twenty-one years no payment upon or acknowledgment of the ground rent can be shown, and no demand for payment has been made, the act conclusively presumes a release and extinguishment of the incumbrance by the act of the parties, and declares that the rent shall be thereafter irrecoverable." In that case the ground rent had been reserved long before the passage of the act of April 27, 1855, and it was held that as twenty-one years and ten months had elapsed without the payment of rent, or demand for the same, the right to demand it was extinguished.

So, in the present case, where no payment or demand was shown to have been made for more than twenty-one years, it was held that, in view of the numerous and repeated decisions, the question must be considered at rest. *Clay* v. *Iseminger*, 187 Penn. St. 108.

We are, therefore, of opinion that the Supreme Court of Pennsylvania did not err in holding that the seventh section of the act of April 27, 1855, *was constitutionally applicable, and its judgment is affirmed.*

VICKSBURG WATERWORKS COMPANY *v.* VICKSBURG.

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

No. 392. Submitted December 4, 1901.—Decided April 7, 1902.

By the act of March 18, 1886, the city of Vicksburg was authorized to provide for the erection and maintenance of a system of waterworks and the contract made in accordance with its provision was within the power of the city to make, and the subsequent legislation, state and municipal, set forth in the bill, impair the contract rights of the water company, within the protection of the Constitution of the United States unless the city can point to some inherent want of legal validity in the contract.

Statement of the Case.

It is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable; and the exercise of such jurisdiction is for the benefit of both parties, in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.

This cause presents a controversy so arising under the laws and Constitution of the United States as to give the Circuit Court jurisdiction.

The Vicksburg Waterworks Company, a corporation of the State of Mississippi, filed, in February, 1901, in the Circuit Court of the United States for the Southern District of Mississippi, a bill of complaint against the mayor and aldermen of the city of Vicksburg, a municipal corporation of Mississippi. To this bill the city filed a demurrer and certain special pleas, and subsequently moved the court for leave to withdraw the demurrer and pleas, and for leave to file an answer alleging that said answer embodied all the matters of defence which were set forth in said pleas and demurrer, and also a motion to dissolve a temporary injunction which had been theretofore granted.

On July 1, 1901, the court entered the following order:

"Coming on to be heard the motion to dissolve the injunction herein, and the defendant now having moved the court for leave to file the answer herewith presented and marked by the clerk as filed June 21, 1901, and to withdraw the pleas and demurrers filed April 30, 1901, it is ordered that leave be granted to file said answer and withdraw said pleas and demurrers, but that the question of the jurisdiction of this court to hear the matter in controversy, raised by said answer, shall be first presented and argued."

On July 3, 1901, the complainant moved the court to "require defendant to elect on which plea it will stand, whether on demurrer to the whole bill or on the answer." This motion was overruled, and on July 3, 1901, the court entered the following order and decree:

"This cause coming on to be heard upon the motion to dissolve the injunction heretofore issued in this cause, and the court now being advised in the premises, and it appearing that there is no Federal question involved in the controversy presented

by the pleading, it is therefore ordered, adjudged and decreed that said injunction be, and the same is hereby, dissolved, and that the bill of the complainant be, and the same is hereby, dismissed, and that execution issue therefor for the cost in the case."

Thereupon the complainant moved the court to "continue the restraining order in force as granted until the appeal in this cause is heard by the Supreme Court of the United States or until the further order is granted by said court."

The following order was then entered by the court:

"Upon the appeal being allowed herein it is ordered that the temporary restraining order herein be continued until the 1st day of January, 1902, or if before then, until the decision of the appeal herein by the Supreme Court, upon condition, however, that the complainant diligently prosecute its appeal and file a motion at or before the next term of the Supreme Court to advance the appeal in this cause upon the docket of the Supreme Court of the United States, and upon the further condition that the injunction bond heretofore given in this case shall stand and continue in force for any additional liability which may be incurred by reason of this order, the principal and sureties upon said bond, now in open court consenting thereto. Ordered, adjudged and decreed this 3d July, 1901."

On the same day an appeal was allowed to this court, and on July 4, 1901, the following certificate was signed by the trial judge and filed:

"The final decree having been entered herein on the 3d day of July, 1901, dismissing this suit and the bill, and amended and supplemental bill therein, now, therefore, this court in pursuance of the second paragraph of the fifth section of the act of Congress, approved March 3, 1891, and entitled 'An act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this cause, whether this cause presents a controversy which involves a Federal question under the laws or Constitution of the United States.

"The only question which I considered and decided in dis-

missing this suit and the bills of complaint is whether a Federal question was involved upon the pleadings."

Mr. James A. Carr for appellant. *Mr. S. S. Hudson* and *Mr. A. N. Edwards* were on his brief.

Mr. L. W. Magruder for appellees.

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

The sole question for our consideration is whether the bill, as originally filed and as amended, presented a Federal question. As the party plaintiff and the party defendant were both corporations and citizens of the same State, the Circuit Court of the United States could not take jurisdiction of the controversy between them, unless the complainant laid grounds for that jurisdiction by asserting rights arising under the Constitution or laws of the United States, and such assertion must appear in the complainant's statement of its own claim. *Metcalf* v. *Watertown*, 128 U. S. 586; *State of Tennessee* v. *Planters' Bank*, 152 U. S. 454; *Blackburn* v. *Portland Mining Co.*, 175 U. S. 571.

It is true that the learned judge, in his certificate to this court, inquires "whether a Federal question was involved upon the *pleadings*." And it is also true that the counsel for the respective parties have gone, in their briefs, into a discussion of questions of fact and law, as if the case were here on appeal from a final decree on the merits.

But our function, in the case before us on this certificate, is restricted to the inquiry whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a Federal question is disclosed so as to give the Circuit Court jurisdiction in a suit between citizens of the same State. If we conclude, after an inspection of the bill, that a Federal question is thereby presented, we must reverse the decree of the Circuit Court below dismissing the bill, and direct that court to proceed in the orderly exercise of its jurisdiction to determine the con-

troversy; if we fail to find such a question, the decree of the Circuit Court must be affirmed.

Addressing ourselves, then, to a consideration of the contents of the bill, original and supplemental, we encounter a very long and somewhat confusing narrative of the facts of the case. We do not think it necessary to state those facts in full in this opinion, but shall confine our attention to the allegations in which questions arising under the laws or Constitution of the United States are claimed to arise.

By an act of the legislature of the State of Mississippi, approved on the 18th day of March, 1886, the city of Vicksburg was authorized "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks."

The city received competitive bids for the construction and maintenance of said waterworks, and on November 18, 1886, at a special meeting of the board of mayor and aldermen, a committee reported that the bid made by Samuel R. Bullock & Company, of New York was the best bid, and submitted the draft of an ordinance, entitled "An ordinance to provide for a supply of water to the city of Vicksburg, in Warren County, Mississippi, and to its inhabitants, contracting with Samuel R. Bullock & Company, their associates, successors and assigns, for a supply of water for public use, and giving the city of Vicksburg an option to purchase said works." This ordinance was then adopted, in terms as follows:

"SEC. 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be extended and within such

other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the city of Vicksburg, Mississippi, and to its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

"The said Samuel R. Bullock & Company, their associates, successors and assigns, shall exercise the greatest care and diligence in the use of the said streets, alleys, public squares and other public places, and shall cause no unnecessary obstruction of, or interruption to, the public travel over or upon the same, or any injury to or interference with any pipes, mains, sewers, which may now be lawfully located beneath the surface thereof.

"The said Samuel R. Bullock & Company, their associates, successors and assigns, shall take every precaution to provide against danger to property, life and limb by reason of the exercise of the rights and privileges hereby granted, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purposes for which the said streets, alleys, public squares and other public places may be used, they shall be restored to their former condition as near as may be without unnecessary delay, and they shall at their own cost and expense relay their mains and pipes when made necessary by a change of grade in any street ordered by the board of mayor and aldermen of said city if there was no established grade for such street at the time said mains and pipe were laid. On failure to restore said streets, alleys, public squares and other public places as aforesaid, the mayor and aldermen of the city of Vicksburg may, on reasonable notice to them by any city officer, cause the same to be restored and recover the costs and expenses thereof from the said Samuel R. Bullock & Co., their associates, successors and assigns, in any court having jurisdiction of the amount.

"The said Samuel R. Bullock & Company, their associates, successors and assigns, hereby agree to hold the mayor and aldermen of the city of Vicksburg harmless from any liability

which may result to it by reason of any violation of this section.

"Sec. 2. The general plan of the said system of waterworks shall be as follows:

"Mains.—The pipe system shall consist of not less than twelve (12) miles of mains of sizes varying from sixteen inches (16) to six (6) inches in diameter. The pipe used shall be of the best quality of cast iron pipe and each pipe shall be tested at its place of manufacture to a pressure of three hundred (300) pounds to the square inch. All pipe shall be coated with Dr. Angus Smith's preservative varnish, and shall be laid and jointed by competent mechanics and in the best possible manner.

"The streets along which and at what points said mains shall be laid shall be first designated by the board of mayor and aldermen of the city of Vicksburg.

"Hydrants.—The hydrants shall be double-nozzle fire hydrants with nozzles fitted to connect with the hose couplings now in use by the fire department of said city of Vicksburg.

"The board of mayor and aldermen of the city of Vicksburg shall within thirty (30) days from the date of the final passage of this ordinance designate the points on the line of distributing mains at which the hydrants shall be erected.

"Gates and valves.—All the necessary gates and valves shall be provided and located at such points on the lines of mains as will enable certain districts to be cut off and isolated when repairs are needed without depriving other districts of their full supply.

"Pumps.—The pumping plant shall consist of two pumping engines each capable of pumping two millions (2,000,000) of gallons of water per day of twenty-four (24) hours against the pressure needed to supply all parts of the pipe system with an abundant supply of water. They shall be so arranged as to be operated separately or together.

"Boilers.—The boilers shall be of ample capacity to operate the pumping engines and shall be so arranged as to be operated separately or together as may be required.

"Stand-pipe.—There shall be a stand-pipe or a reservoir of

sufficient capacity and height or elevation to furnish an ample supply of water for consumption at the highest points along the line of the mains.

"Pump-house.—The pumps and boilers house shall be a substantial stone or brick building of ample size for the pumps and batteries of boilers. The smokestack will be of brick of the size needed to operate the boilers.

"Source of supply.—The water shall be taken from such point as may be free from all sewerage contamination, and shall be good, wholesome water fit for all purposes of domestic or manufacturing consumption.

"SEC. 3. In consideration of the public benefit and the protection to property resulting from the construction of the said system of waterworks the mayor and aldermen of the city of Vicksburg hereby rent to the said Samuel R. Bullock & Company, their associates, successors and assigns, not less than eighty (80) double-nozzle frost-proof fire hydrants for the aforesaid period of thirty (30) years at the annual rate of sixty-five ($65) dollars for each hydrant, to be payable semi-annually on the 15th days of January and July. After the first year of the operation of said waterworks the said city hereby rents not less than ten (10) hydrants in addition to said eighty (80) for the unexpired period of said thirty years; the first one hundred (100) hydrants shall be located on the original twelve (12) miles of mains at said annual rental of sixty-five ($65) dollars, payable as aforesaid and for the remainder of said period of thirty years unexpired at the time of placing each of said hydrants.

"The rental of all hydrants in excess of said one hundred hydrants hereafter erected on the line of distributing mains or on the extensions thereof as hereinafter provided at the request of the said mayor and aldermen of the city of Vicksburg shall be at the annual rate of fifty (50) dollars for each hydrant, payable as aforesaid, during the unexpired period of the said original term of thirty (30) years. Water shall be used from the said hydrants for the extinguishment of fires and necessary fire practice and for flushing sewers and gutters only, provided that for fire practice and flushing sewers no more than two hydrants shall be opened at one time and not more than once in each week.

"SEC. 4. Water shall be furnished free of charge to the public schools, and all other public buildings used exclusively for city purposes, and for filling public cisterns, and the city hospital shall also be supplied with water free by a supply pipe whenever the mains shall be laid within seven hundred and fifty (750) feet of said hospital. And water shall also be supplied free for six (6) drinking fountains with openings for man and beast and one public fountain to be erected by the said Samuel R. Bullock & Co., in such place on the line of mains as the board of mayor and aldermen of the city of Vicksburg may direct.

"SEC. 5. That said Samuel R. Bullock & Company, their associates, successors or assigns, may procure the organization of a waterworks corporation under the laws of any State and may assign to it all the rights and privileges acquired hereunder. Provided, that such assignment shall not invalidate or affect the bond required by section (7) seven hereof and no assignment thereof shall be valid unless such assignee shall in writing to said board of mayor and aldermen accept this ordinance and become bound by its terms and obligations. And the said board of mayor and aldermen shall pass and enact such further and other ordinance and do and perform such other acts, including the repassage of this ordinance, in favor of the said corporation as may be necessary to vest in the said corporation the rights and privileges hereby granted.

"SEC. 6. Upon the completion of the construction of the said system of waterworks the said Samuel R. Bullock & Company, their associates, successors and assigns, shall notify the mayor and aldermen of the city of Vicksburg to that effect in writing and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw four (4) fire streams through one hundred feet of two and one half inch hose and one-inch nozzle from four (4) different hydrants a stream not less than fifty (50) feet high at the highest location on which any of such hydrants are located. On the satisfactory performance of this test the said board of mayor and aldermen shall formally accept said system if constructed in accordance with the terms of this ordinance.

"SEC. 7. Within fifteen days after the day that this ordinance takes effect the said Samuel R. Bullock & Company, their associates, successors or assigns, shall file their written acceptance thereof, binding themselves to its terms and obligations, in the office of the city clerk accompanied by their bond in the penal sum of ten thousand ($10,000) dollars with two or more sufficient sureties to be approved by said board of mayor and aldermen executed to the mayor and aldermen of the city of Vicksburg and conditioned for the faithful compliance with the terms of this section. On failure to file such bond within said time this ordinance shall become null and void. But if said board shall not approve a bond so filed, said board may in its discretion grant additional reasonable time within which to file another bond.

"The construction of the said system shall be commenced within sixty days after this ordinance takes effect, and said system shall be completed within eighteen (18) months after the commencement of the construction thereof; provided however, that the time during which the said Samuel R. Bullock & Company, their associates, successors or assigns, are delayed by floods, act of God or the public enemy, legal proceedings for the maintenance or defence of their legal rights or in the acquisition of property or right of way, or by reason of any other causes whatever beyond their control, shall form no part of the time limited in this ordinance for the performance of any act required by the terms hereof to be done by them, but they shall use all due diligence to remove any such obstructions or delays.

"SEC. 8. The said board of mayor and aldermen of the city of Vicksburg shall from time to time pass and enact ordinances under suitable penalties providing for the protection of said works from damage, fraud or imposition.

"SEC. 9. At the expiration of each period of ten years after this ordinance takes effect, the mayor and aldermen of the city of Vicksburg shall have the right and privilege to purchase the said system of waterworks, provided they notify the said Samuel R. Bullock & Company, their associates, successors or assigns, of their intention to do so, at least one year before the expiration of the said period of ten years.

"The value of the said system shall be ascertained as follows: The said Samuel R. Bullock & Company, their successors, associates and assigns, and the board of mayor and aldermen of the city of Vicksburg shall severally appoint one person, the two appointees shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of waterworks. None of the board shall be residents of the said Warren County. The said mayor and aldermen of the city of Vicksburg shall within sixty days after the said board have rendered its decision, pay the amount awarded in cash. A failure to so pay the award or to give notice of intention to purchase as above provided shall operate as a waiver of the right to purchase until the expiration of the next succeeding period of ten years.

"SEC. 10. The said Samuel R. Bullock & Company, their associates, successors and assigns, shall make extensions to their line of mains whenever called upon so to do by the mayor and aldermen of the city of Vicksburg. Provided, however, that said extensions shall be not less than five hundred feet in length and that one public hydrant shall be located on each five hundred feet or major portion thereof; and further provided, that two thirds of the residents on the line of such extension shall agree to take water at the established rates for a period of at least two years, but the said Samuel R. Bullock & Company, their associates, successors and assigns, may voluntarily make such extensions from time to time as they may deem necessary.

"SEC. 11. After the works are put in operation, if at any time the pressure gauges located at the points hereinbefore named should indicate a pressure of less than twenty pounds (20) on the distributing mains at the highest point of elevation for the period of two weeks in succession then the rentals for the use and employment of the hydrants for the purposes aforesaid shall cease until the standard of pressure in this section provided shall be attained; provided however, if the pressure indicated as aforesaid should be less than twenty pounds for two calendar months in succession then all the rights, and privileges

of the said Samuel R. Bullock & Company, their associates, successors and assigns, acquired by virtue of this ordinance shall at the option of said board of mayor and aldermen made in writing cease, determine and be null and void. But nothing herein contained shall be so construed as to prevent the said Samuel R. Bullock & Company, their associates or assigns, from temporarily shutting off the water from its said system or any portion thereof, for the purpose of making repairs or extensions to the same; and no liability shall attach to the said Samuel R. Bullock & Company, their associates, successors and assigns, for the suspension of the supply of water; provided, the repairs or extensions are made and the water turned on again without unnecessary delay. But the city shall not be liable to pay the rental for any hydrant during such time as the proper supply of water cannot be procured therefrom.

"SEC. 12. Be it further ordained, That as part of the consideration for the performance of the duties and obligations hereby imposed on the said Bullock & Co., their associates, successors and assigns, the said waterworks and the property and business pertaining thereto and employed in and about said system shall be exempt from all municipal taxation during the first five years of their operation, and all of the property and business pertaining to and employed in and about said system of waterworks shall thereafter during each year for the balance of the period of this contract be assessed for taxation by said city at a valuation not to exceed the sum of fifty thousand dollars ($50,000).

"SEC. 13. The said Samuel R. Bullock & Company, their associates, successors or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water as they may determine; provided, that said rates and charges shall not exceed fifty cents for each one thousand gallons of water.

"SEC. 14. Be it further ordained, That for the purpose of paying the obligations and liabilities of the said mayor and aldermen of the city of Vicksburg, which shall accrue to the

said Samuel R. Bullock & Company, their associates, successors or assigns, by virtue of the terms and conditions of this ordinance, the said mayor and aldermen of the city of Vicksburg or other duly constituted municipal authorities shall annually levy and cause to be collected upon the taxable property of said city a special tax, to be known and designated as the waterworks tax, sufficient to meet and pay all of said obligations and liabilities during the continuance of this contract and until all of said obligations and liabilities shall be paid and discharged.

"SEC. 15. Be it further ordained, That this ordinance shall take effect from and after its approval by the mayor. Ordained this 18th day of November, 1886."

On March 1, 1887, Samuel R. Bullock & Company assigned and transferred, under and by virtue of the fifth section of the aforesaid ordinance, all their rights and privileges acquired under the ordinance to the Vicksburg Water Supply Company, incorporated under the laws of the State of Mississippi, and the said company accepted in writing the said ordinance.

The bill further alleges the construction of the said water plant, in accordance with the specifications contained in the ordinance, and the city accepted the same; that since the completion and acceptance of said waterworks, during a period of fourteen years up to about July, 1900, the said company fully complied with all the terms of the ordinance, and no complaint was made by the city with respect to the execution of the company's part of the contract, and the city, without question, paid to the water company the semi-annual payments stipulated for in the ordinance; that on the 8th day of August, 1900, a mortgage that the said company had previously made, and which had fallen into default, was foreclosed, and all the franchises, ordinances, contracts and property described and conveyed in said mortgage deed were sold to the Vicksburg Waterworks Company, a corporation under the laws of the State of Mississippi, doing business in the city of Vicksburg, and which became the owner of said waterworks property and entered into the operation of the same; that on October 18, 1900, the said The Vicksburg Water Supply Company executed a quitclaim deed to the said The Vicksburg Waterworks Company, convey-

ing and assigning all rights, titles and interest it might have or might thereafter acquire in said waterworks property, franchises, ordinances and contracts; that the Vicksburg Waterworks Company gave the city notice in writing of the said purchase and assignment, with a written acceptance of the terms and provisions of the said ordinance; that since the completion and acceptance of the said waterworks the city continuously received and used the water furnished by said waterworks, during a period of about fourteen years; and said water has at all times been and now is good and wholesome for public and private use, and adequate in supply for the needs of the city and its inhabitants; that said water so furnished from the time the city first received and accepted the same up to the present time is and has at all times been the same character and supply of water, and is and at all times has been in accordance with the said ordinance and contract entered into with said city by said S. R. Bullock & Company, the said Vicksburg Water Supply Company, and the said Vicksburg Waterworks Company, and that the pressure maintained has at all times been and is now greater than required by said ordinance and contract.

Upon these allegations, the appellants claim that a contract was entered into between the city and S. R. Bullock & Company and their assigns, the Vicksburg Water Supply Company and the Vicksburg Waterworks Company, which contract still exists and is within the protection of the Constitution of the United States.

The matters and things which are alleged by the appellants to impair the obligation of said contract and to destroy their property rights are mainly as follows:

On March 9, 1900, the legislature of Mississippi passed an act entitled "An act to authorize the mayor and aldermen of the city of Vicksburg to issue bonds to the amount of $375,000, to purchase or construct, equip and maintain, a waterworks system; construct and establish a sewerage system; to purchase grounds for, erect and equip a city hall; construct the necessary buildings for a medical college, and for other purposes;" by which act, the bill alleges, the legislature assumed to annul and abrogate the aforesaid ordinance and contract the

city entered into with said Bullock & Company and their assigns in this, that, by reason of said ordinance and contract, said city has no right within the said period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock & Company or their assigns, notwithstanding which said act authorizes and permits said city to construct and maintain waterworks for said purpose, if unable to buy the waterworks of said Vicksburg Water Company at the arbitrary and inadequate price fixed by the said legislative act. The bill further alleges that, in pursuance of said act, and as required by its terms and conditions, an election was held in said city on the 3d day of July, 1900, at which it was voted, by a majority of the votes cast, that said city should issue its bonds in the sum of $150,000, to buy or construct waterworks for said city; that, on the 7th day of November, 1900, the city passed a resolution and ordinance as follows: "Resolved, that the mayor be and is hereby instructed to notify the Vicksburg Waterworks Company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; that the city attorney take such action as shall be necessary to determine the rights of the city in the premises." The bill further alleges that on December 7, 1900, the city filed a bill in the Chancery Court of the county of Warren, State of Mississippi, against the Vicksburg Water Supply Company and the Vicksburg Waterworks Company, averring, among other things, that the contract entered into with Samuel R. Bullock & Company was null and void, and the attempt by said mayor and aldermen was a gross abuse of their rights and powers; that the said mayor and aldermen had no right to make a contract for so long a period as thirty years, and beyond their official terms to bind the constituted authorities to pay rents for the said hydrants as therein stipulated; that the rates prescribed in said contract for the use of said hydrants and the rates charged by said company against domestic consumers are exorbitant and illegal, and said board exceeded its power and authority in making a contract stipulating during the

period aforesaid for said rates; that the said mayor and aldermen, at a meeting held on the 5th day of November, 1900, resolved and declared that "the said board no longer recognized any liability, under said contract, to said company, by reason whereof said complainants say that said contract no longer exists; that they are entitled, as against the Vicksburg Water Supply Company, to have said contract canceled and annuled, and as against the Vicksburg Waterworks Company to a decree that said company have never acquired any rights in or to said contract, or if mistaken in this, by reason of the matters and things stated, they are entitled to have the same annuled and cancelled; praying that the said city may have said relief and such other and further relief as may appear just and proper."

The present bill further alleges that said suit in the chancery court was brought on petition to the Circuit Court as involving a Federal question, and that the same is now pending in that court upon a motion to remand.

The bill prays for an injunction to restrain the defendant from assuming to abrogate and take away the franchises and contract rights of the complainant, and from attempting to coerce the company to sell its works to the defendant for an inadequate price, and that said act of the legislature of Mississippi, adopted on March 9, 1900, and said resolution and ordinance adopted and passed by said city on the 7th day of November, 1900, be declared to impair the obligations of said contract between said city and said Bullock & Company and their assigns, and to cast a cloud upon the title, franchises and rights of complainant, and said act, ordinance and resolution, and each of them, are alleged to be in contravention of the Constitution of the United States in this, that they impair the obligations of said contract between said city and said Bullock & Company and their assigns.

It cannot be seriously contended that, under the act of March 18, 1886, authorizing the city to provide for the erection and maintenance of a system of waterworks, and to contract with a party or parties to build and operate waterworks, and under the ordinance of the city of November 18, 1896, providing for a supply of water to the city and its inhabitants by con-

tracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years.

After the lapse of that long period and the continuous acquiescence of the city in the contract as a valid and subsisting one, the city, according to the allegations of the bill, now insists that the said contract was invalid because in excess of its powers to contract, and is proposing to borrow money to erect and maintain waterworks of its own, and become a competitor with the complainant for the custom of the consumers of water. And the question for our consideration is whether the subsequent legislation, state and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States.

As respects the act of March 9, 1900, it is contended by the complainant that it is unconstitutional for several reasons, chiefly because it places an arbitrary valuation on the property of the complainant, and because it purports to authorize the city to build and operate waterworks of its own in derogation of the contract rights of the complainant.

Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the waterworks company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordi-

nance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question.

The objections urged in the brief of the appellee to the validity of the contract, because it undertakes to bind the city for a period of thirty years, because an attempt to barter away the legislative power of the city authorities, and because creating an indebtedness in excess of the charter limits, are those that were considered at length in the similar cases of *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1, and *Los Angeles* v. *Los Angeles City Water Company*, 177 U. S. 558, and were in those cases held to be untenable. However, we do not wish to be understood as now determining such questions in the present case, for we are only considering whether or not the Circuit Court had jurisdiction to consider them.

It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.

It may be said that the action of the Circuit Court in dismissing the bill may have been based on the fact that the city had proceeded by a bill filed in the Chancery Court of Mississippi against the waterworks company before the present suit was instituted. But the learned judge does not, in his certificate, suggest such a question, and the bill avers that the record in the city's suit is still pending in the Circuit Court on a motion to remand. Whether the city's complaint in the state court disclosed a Federal question, and what, if properly removed to the Circuit Court for that reason, the course of the Circuit Court ought to be in respect to the formal disposition of the cases, are matters not before us for determination.

Nor can we consider allegations made in behalf of the city in its answer as to misconduct of the waterworks company, in respect to which no issue was found nor proofs taken in the court below. They must be determined by the proper tribunals, which will pass upon the merits of the case.

We think this cause presents a controversy so arising under the laws and Constitution of the United States as to give the Circuit Court jurisdiction, and therefore the judgment of the Circuit Court is

Reversed, and the cause remanded to that court to take proceedings therein according to law.

RODGERS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 317. Argued February 26, 1902.—Decided April 7, 1902.

Where there are two statutes, the earlier special and the later general, (the terms of the general being broad enough to include the matter provided for in the special,) the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.

Statement of the Case.

Section 7 of the act of March 3, 1899, c. 413, 30 Stat. 1004, in effect abolishes the rank of Commodore, at least as far as respects the active list of the line of the Navy, and lifts those in that rank to that of Rear Admiral. Clearly that was a special provision in respect to which the attention of Congress was at the time directed, and when in section 13 Congress prescribed a general rule for the salaries of naval officers, such general rule cannot be understood as repealing that special provision.

That section fixed the amount of the salary but did not affect any general provisions of law affecting a difference between salary while at sea and while on shore.

THIS is an appeal from the Court of Claims. The claimant, Frederick Rodgers, a Rear Admiral of the line of the Navy, brought suit to recover the sum of $3358.13, which he claims as the balance due him on account of pay and allowances for the period between March 3, 1899, and March 2, 1901. The claim is founded upon the law of Congress, known as the "Navy Personnel Act," which was approved on March 3, 1899, c. 413, and entitled "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States." 30 Stat. 1004.

The applicable sections are seven and thirteen, which, omitting irrelevant portions, read:

"SEC. 7. That the active list of the line of the Navy, as constituted by section one of this act, shall be composed of eighteen rear admirals, seventy captains, one hundred and twelve commanders, one hundred and seventy lieutenant commanders, three hundred lieutenants, and not more than a total of three hundred and fifty lieutenants (junior grade) and ensigns: *Provided*, That each rear admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier general in the Army. Officers, after performing three years' service in the grade of ensign, shall, after passing the examinations now required by law, be eligible to promotion to the grade of lieutenant (junior grade): *Provided*, That when the office of chief of bureau is filled by an officer below the rank of rear admiral, said officer shall, while holding said office, have the rank of rear admiral and receive the same pay and allowance as are now allowed a brigadier general in the Army: *And provided further*, That nothing

contained in this section shall be construed to prevent the retirement of officers who now have the rank or relative rank of commodore with the rank and pay of that grade.

"SEC. 13. That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: *Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this act: *Provided, further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places. . . . *And provided further*, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law: *And provided further*, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy."

By section 1466 of the Revised Statutes of the United States it was, among other things, provided:

"SEC. 1466. The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered:

* * * * * * * *

"Rear admirals with major generals.

"Commodores with brigadier generals."

"Captains with colonels."

The findings show that the claimant was appointed and commissioned a rear admiral on March 3, 1899. From that date until March 2, 1901, he was one of the rear admirals "embraced in the nine lower numbers of that grade." He served on shore from March 3, 1899, to February 13, 1901, and for the rest of the time at sea. While at sea he received the same pay as was

"allowed a brigadier general in the army," and while on shore he received pay at the same rate less fifteen per centum, together with commutation in lieu of allowance of quarters. Judgment was rendered in favor of the United States, 36 C. Cl. 266, from which judgment the claimant took this appeal.

Mr. James H. Hayden for appellant. *Mr. Joseph K. McCammon* was on his brief.

Mr. Assistant Attorney General Pradt for appellee. *Mr. John Q. Thompson* was on his brief.

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

This case involves a mere question of statutory construction. The matter of military and naval salaries is one exclusively within the control of Congress. The courts may neither increase nor decrease them, correct any supposed inequalities, nor in any manner set aside or modify the action of the legislative branch of the Government in respect thereto. If there be inequality, injustice, it can be corrected alone by Congress, and the courts may not interfere.

The primary rule of statutory construction is, of course, to give effect to the intention of the legislature. Whenever that is apparent it dominates and interprets the language used. But when the intent is a debatable question, and there is nothing on the face of the statute which clearly indicates such intent, there are certain minor and subsidiary rules by which courts are guided in determining the true construction.

In the case at bar neither the words of the statute nor the circumstances and conditions of this legislation make perfectly clear the intent of Congress. If we look alone upon section 13, we may well conclude that Congress had one thought in its mind, while if we turn to section 7 another and somewhat different intent is apparent. Section 13 suggests a complete parallel in the matter of pay between all the officers of the Navy and those of the Army according to their several ranks. Sec-

tion 7, on the other hand, points to a special exception in respect to one half the officers of a certain rank in the Navy. The ingenious and plausible arguments made by counsel on the respective sides clearly show that it is a debatable question whether Congress intended that after the first of July, 1899, there should be only one uniform rule controlling the pay of all the respective officers of the Army and the Navy, or whether as to one half of the rear admirals a different rule was contemplated. Under those circumstances of doubt we turn to other rules of statutory construction.

Before noticing them it is well to understand exactly the contentions of the parties. The claimant insists that the first proviso in section 7 establishes a complete but temporary rule for the payment of the nine lower members of the grade of rear admiral; that no provisions of other sections of this statute, or of any other statute, limit or qualify the right of the nine junior rear admirals to the full pay given by statute to a brigadier general. On the other hand, the Government contends that the proviso is subject to the general rule which obtains in respect to all other naval officers, of a fifteen per cent difference between the pay when on shore duty and that when at sea. Again, the claimant insists that by section 13, after the 30th day of June, 1899, all rear admirals became entitled to the pay and allowances of major generals in the army, and that the proviso in section 7, in respect to the nine junior rear admirals, was temporary in its nature, and expired on the 30th of June, 1899; while the Government contends that the distinction between the nine senior and the nine junior rear admirals is a permanent provision, and did not cease to have force on the 30th of June, 1899.

It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as re-

maining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. In *Ex parte Crow Dog*, 109 U. S. 556, 570, this court said:

"The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *generalia specialibus non derogant*. 'The general principle to be applied,' said Bovill, C. J., in *Thorpe* v. *Adams*, (L. R. 6 C. P. 135,) 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald* v. *Champenys*, (30 L. J. N. S. Eq. 782; 2 Johns. & Hem. 31, 54,) 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'"

In Black on Interpretation of Laws, 116, the proposition is thus stated:

"As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all."

So, in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly

contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

And in *Crane* v. *Reeder*, 22 Michigan, 322, 334, Mr. Justice Christiancy, speaking for the Supreme Court of that State, said:

"Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict."

Both the text books and the opinion just quoted cite many supporting authorities.

In the light of this canon, how should these two sections be construed? Section 7 in effect abolishes the rank of commodore, at least so far as respects the active list of the line of the Navy, and lifts those in that rank to that of rear admiral. The attention of Congress was thus directed to such change, and the proper accompanying provisions in respect to salary and otherwise, and it declared that the lower nine rear admirals, they who were by the section lifted to that rank, should receive a particular salary. Clearly that was a special provision in respect to a matter to which the attention of Congress was at the time directed. If another statute had been passed at a subsequent or on the same day making general provision for the salaries of naval officers, clearly the canon to which we have referred would apply. *A fortiori*, when the subsequent general provision is in the same statute it should be held applicable. So, when in section 13, Congress prescribed a general rule for the salaries of naval officers, such general rule cannot within the scope of this canon be understood as repealing the special provision in the prior section, but the special provision must be taken as an exception to and limitation of the general rule.

But it is said that harmony between the two may be obtained by limiting the operation of the special provision to the period between the passage of the act and the 30th of June following. But that necessitates adding something to the words of the special provision, so that it shall read that from the date of the act until the 30th of June following such should be the rule in respect to the salaries of the recently promoted commodores. But the same harmony can be obtained by adding to the general provision a clause like this: Except in respect to the nine lower numbers of the grade of rear admiral. In either case the harmony is secured by adding some words of qualification, and the rule, as we have seen, is to the effect that the additional words of qualification are to be put to the general provision rather than to the special.

It is urged that the provision in section 7 was intended to merely fill out the present fiscal year, and that Congress meant by this legislation to start the new fiscal year, July 1, 1899, with one general rule of equality between the pay of officers of the Navy and that of officers of the Army. There might have been some force in this suggestion if the pay of the nine lower rear admirals had been continued through the balance of the year the same as it was at the date of the passage of the act. But all of them, whether commodores or captains, were by this special provision given an increase of pay. So Congress was not simply continuing salaries, but was making special provision for the nine lower numbers of the grade of rear admirals, giving them an increase of pay over that which they had previously received.

Another matter worthy of notice is this: Prior to the act of March 3, 1899, the corresponding ranks of officers of the Navy and the Army were rear admiral and major general, commodore and brigadier general, captain and colonel. By that act the rank of commodore was abolished, although that of brigadier general was undisturbed. No change was made in the relative rank of captain and colonel, or of rear admiral and major general, but the legislation left one rank in the Army to which there was no corresponding rank in the Navy. The statute in effect lifted the rank in the Navy which was corresponding to

that of brigadier general in the Army to that of rear admiral, and corresponding with that of major general in the Army. The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear admiral, as it had stood in the past) all the benefits of such position? Would it be unnatural for Congress to bear in mind those who by length of service or by personal distinction had already earned the position, and provide that in, at least, the matter of pay there should be some recognition of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the Army, should not by a mere change of statute be given a benefit in salary which was not at the same time accorded to brigadier generals in the Army? May not this explain its action in so dividing the rear admirals into two classes—one composed substantially of former rear admirals, equal both in rank and pay with major generals in the Army, and the other of those who in the past were only commodores, to whom was given the rank of rear admirals, but the pay of brigadier generals in the Army?

Still another matter may be mentioned. The second proviso of section 7 reads:

"*Provided*, That when the office of chief of bureau is filled by an officer below the rank of rear admiral, said officer shall, while holding said office, have the rank of rear admiral and receive the same pay and allowance as are now allowed a brigadier general in the army."

There is no similar clause in section 13. Why should Congress in section 7 make provision for the rank and pay of certain officers who during the ensuing four months might be charged with certain duties, and omit any such provision in prescribing salaries generally and permanently? Is it not reasonable to believe that Congress intended this as a special pro-

vision which should continue after the 30th of June, 1899, and as a permanent rule for the cases named?

These considerations certainly tend to support the conclusion which follows from enforcing the well-recognized canon of construction in respect to special and general statutes. We think the Court of Claims was correct when it said:

"Section 13 is in general terms, and the language there used does not indicate that it was the intention of the Congress to abrogate the special provision made in section 7 for the rear admirals 'embraced in the nine lower numbers of that grade;' and special provision having been made for them it cannot be held that a subsequent general statute, much less in the same act, was intended to alter or repeal the special provision so made."

The further question is whether the provision in section 7, that the rear admirals embraced in the nine lower numbers of that grade should receive such pay and allowances as were given to brigadier generals, was intended to be absolute and exclusive, practically ignoring the general rule in respect to naval service of a difference between the pay of officers doing shore duty and that of those at sea? When there has been a long-established rule of difference in the compensation for the two kinds of services; when that rule is expressly recognized and continued in this same statute, as it is in section 13, when it is not in terms excluded in section 7, it would be going too far to hold it inapplicable to the salary provided for by section 7. In other words, it is not to be believed that Congress by that section carved out a salary which in all respects ignored the general rules pertaining to salaries of naval officers. It is rather to be believed that only the amount was fixed, and that otherwise it was to be in harmony with and subordinate to any and all general provisions. We are of opinion that the Court of Claims was right in its conclusions in this respect.

It may be conceded that the questions we have been considering are not free from doubt, and much may be said in favor of the view opposed to that we have taken. Inasmuch as Congress has full control over the matter of salaries it can at any time appropriate to these officers such a sum as will make their

salaries that which they contend was intended by the act of March 3, 1899. It is not a case in which the judicial decision must necessarily be a finality, but one in which there is full power on the part of Congress to correct any mistake which may have been made.

The judgment of the Court of Claims is

Affirmed.

MR. JUSTICE GRAY took no part in the decision of this case.

NEW YORK CITY *v.* PINE.

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

No. 491. Argued February 25, 26, 1902.—Decided April 7, 1902.

The time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted.

A failure to pursue statutory remedies is not always fatal to the rights of a party in possession, and if full and adequate compensation is made to the plaintiff, sometimes the possession of the defendant will not be disturbed.

A court of equity may take possession and finally end a controversy like the present by securing the payment of adequate compensation in lieu of a cessation of the trespass.

THIS was a suit commenced in the Circuit Court of the United States for the Southern District of New York by the appellees, as plaintiffs, for an injunction, restraining the city of New York from maintaining a dam on the West Branch of Byram River and diverting the waters thereof from their natural flow through the farms of plaintiffs.

The facts are these: Byram River is a non-navigable stream of fresh water flowing into Long Island Sound. Tracing its source up stream from the Sound, for a short distance it forms the boundary between New York and Connecticut, then deflects to the east, and for some five or six miles is within the

State of Connecticut. It there divides into two branches, the east branch being entirely within the limits of that State. The west branch, which is the longer of the two, extends into the State of New York. A few hundred feet from the state line the city of New York, under legislative sanction, commenced the construction of a dam, with a view of appropriating part or all of the waters of this west branch and using the same for the supply of the city. The watershed of this west branch above the dam, the territory from which the water sought to be appropriated is all drawn, is wholly within the limits of the State of New York. The plaintiffs own farms situated on Byram River in Connecticut, below the junction of the two branches. In their bill they alleged, among other things:

"Fourth. Your orators further aver that the defendant began about two years ago the building of a dam across the said West Branch of said Byram River, about five hundred feet north of the Connecticut line, and is now building said dam and it is now near completion, and your orators are informed and believe that the said defendant intends to divert or cause to be diverted the water of said West Branch or some of it from the natural channel thereof, and intends to divert or cause the same to be diverted from flowing through its natural channel into and through the State of Connecticut, and by, through and over land owned by your orators.

"Fifth. Your orators further aver that they as riparian owners of land in the State of Connecticut, on said Byram River or on the West Branch thereof, are each of them accustomed to use the water of said river, . . . and that the flow of said river would be materially lessened by the diversion of the water of the said West Branch or any part thereof, and that they, your orators, and each of them, would be damaged in the sum of twenty-four hundred dollars ($2400) and more."

The answer of the city admitted the building of the dam, although averring that it was not near completion, and would not prevent the natural flow of the West Branch for at least a year; admitted its intention to appropriate some or all of the water; alleged that such appropriation would cause little or no injury or damage to the plaintiffs, and denied on information

and belief that the premises of either would be damaged in the sum of twenty-four hundred dollars; averred that the building of the dam was of great and permanent benefit to the citizens and residents of New York, and that it was and always had been able and willing to pay any damages that the complainants might suffer from being deprived of the natural flow of the water. Testimony was taken and the case submitted to the court upon pleadings and proofs. That the dam as completed, and it was completed when the testimony was taken, would work a diversion of a considerable portion of the water in its natural flow, and that the property of plaintiffs was damaged by such diversion, was shown by the testimony and found by the court, although whether such damage amounted to more than twenty-four hundred dollars each was perhaps not established by the testimony, and certainly was not found by the court. The cost of the dam proper was about $45,000, though the city had expended for land and damages several hundred thousand dollars. It also appeared that several thousand people in the city of New York were dependent upon this water supply. The Circuit Court, after finding the fact of damage, held that a court of equity had no power to ascertain and order the payment of damages, but that it might delay the issue of an injunction so as to give the parties an opportunity to agree in respect to the amount of compensation, and in an opinion, filed on June 27, 1900, ruled that a decree would be entered on November 1, 1900, if the parties had not come to an agreement. Thereafter, no agreement having been made, a decree was entered as follows:

"That the complainants in this suit and each of them are entitled to the injunction order of this court restraining the defendant, its successors and assigns, their and its officers, agents and employés, each, all and any of them, from diverting the water or any part of the water of the West Branch of the Byram River or any part of the water of the Byram River, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and

"It is further ordered, adjudged and decreed that the defend-

ant, its successors and assigns, their and its officers, agents and employés, each, any and all of them, be and they and each of them are hereby perpetually enjoined from diverting the water or any part of the water of the West Branch of the Byram River, or any part of the water of the Byram River, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river."

On appeal to the Circuit Court of Appeals for the Second Circuit this decree was, on October 30, 1901, affirmed by a divided court. Thereupon the case was brought here by certiorari. 183 U. S. 700.

Mr. George L. Rives for New York. *Mr. George L. Sterling* was on his brief.

Mr. Charles C. Marshall for Pine. *Mr. Stephan G. Williams* was on his brief.

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

Many interesting questions are involved in this case, but we think it unnecessary for the present at least to decide more than one. We assume, without deciding, that, as found by the Circuit Court, the plaintiffs will suffer substantial damage by the proposed diversion of the water of the West Branch. Also, without deciding, we assume that, although the West Branch above the dam and all the sources of supply of water to that branch are within the limits of the State of New York, it has no power to appropriate such water or prevent its natural flow through its accustomed channel into the State of Connecticut; that the plaintiffs have a legal right to the natural flow of the water through their farms in the State of Connecticut and cannot be deprived of that right by and for the benefit of the city of New York by any legal proceedings either in Connecticut or New York; and that a court of equity, at the instance of the plaintiffs, at the inception and before any action had been

taken by the city of New York, would have restrained all interference with such natural flow of the water.

Notwithstanding these assumptions we are of opinion that the decree ought not to stand, and for these reasons: This is not a case between two individuals in which is involved simply the pecuniary interests of the respective parties. On the one side are two individuals claiming that their property rights are infringed—rights which can be measured in money, and that not a large sum; on the other, a municipality undertaking a large work with a view of supplying many of its citizens with one of the necessities of life. According to the averments in the bill the city had been engaged in this work for two years and had nearly completed the dam. While the near completion is denied in the answer there is no denial of the time during which the city had been engaged in the work, and it stands as an admitted fact that for two years prior to the commencement of this suit the work had been under way. It is true the testimony discloses that the plaintiffs and the city had been trying to agree upon the amount of compensation, but that shows that the plaintiffs were seeking compensation for the injuries they would sustain, and were not insisting upon their alleged right to an abandonment of the work. It is one thing to state a right and proffer a waiver thereof for compensation and an entirely different thing to state the same right and demand that it should be respected. In the latter case the defendant acts at his peril. In the former he may well assume that payment of a just compensation will be accepted in lieu of the right. In the latter the plaintiff holds out the single question of the validity and extent of the right; in the former he presents the right as the foundation of a claim for compensation, and his threat to enforce the right if compensation is not made is simply a club to compel payment of the sum he deems the measure of his damages. Further, the testimony shows that the city was settling with other parties similarly situated, and paying out large sums of money for the damages such parties would sustain. So, it is not strange that the city acted on the assumption that the only matter to be determined was the amount of the compensation.

If the plaintiffs had intended to insist upon the strict legal rights (which for the purposes of this case we assume they possessed), they should have commenced at once, and before the city had gone to expense, to restrain any work by it. It would be inequitable to permit them to carry on negotiations with a view to compensation until the city had gone to such great expense, and then, failing to agree upon the compensation, fall back upon the alleged absolute right to prevent the work. If they had intended to rest upon such right and had commenced proceedings at once, the city might have concluded to abandon the proposed undertaking and seek its water supplies in some other direction. If this injunction is permitted to stand the city must pay whatever the plaintiffs see fit to demand, however extortionate that demand may be, or else abandon the work and lose the money it has expended. While we do not mean to intimate that the plaintiffs would make an extortionate demand, we do hold that equity will not place them in a position where they can enforce one.

The time at which parties invoke the aid of a court of equity is often a significant factor in determining the extent of their rights. *Vigilantibus non dormientibus æquitas subvenit* is a maxim of equity. As said by Pomeroy, in his work on Equity Jurisprudence, vol. 1, sec. 418, the principle embodied in this maxim "operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of relief, than as being the source of any particular and distinctive doctrines of the jurisprudence. . . . The principle thus used as a practical rule controlling and restricting the award of reliefs is designed to promote diligence on the part of suitors."

In *Smith* v. *Clay*, 3 Brown Ch. 639, note, Lord Camden said: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and *reasonable diligence*."

Opinion of the Court.

It was said by Circuit Judge Shipman, in deciding this case:

"If a court of equity has power in any case by decree to ascertain and order the payment of damages by decree of injunction in the alternative, a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law and without pretense of right to take and retain the property."

However true that proposition may be generally when invoked at the inception and before any work has been done, we think it not applicable when the plaintiffs have waited until the work has been progressing for two years and the defendant has expended a large sum of money thereon. As declared by Lord Camden, in the quotation just made, a court of equity is never active in relief against public convenience.

It may be not amiss to notice some of the cases in which the effect of time upon a suit in equity has been the subject of discussion. In *Galliher* v. *Cadwell*, 145 U. S. 368, was considered the general subject of laches. Many authorities were cited and reviewed, and it was said (p. 373):

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

In *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, it appeared that Douglas County, Wisconsin, had agreed with the Northern Pacific Railroad Company to deed to it certain lands, held by the county under tax titles, in consideration of the construction by the company of its railroad through the county. The company constructed the road and the county made the deed. Thereafter the validity of such deed was questioned, and the county made a conveyance of the lands to Roberts *et al.*, whereupon the railroad company brought suit against them to quiet its title. The line of the road was constructed through some of these lands, and Mr. Justice Shiras, speaking for the court, observed (pp. 9, 10, 11):

"So far as those portions of the lands, described in the bill

of complaint, consist of parcels held and used by the railway company for the necessary and useful purposes of their road as a public highway, it is obvious that the title and possession thereof cannot be successfully assailed by the appellants. The latter became purchasers long after the railroad company had entered into visible and notorious possession of these portions of the lands and had constructed the roads, wharves and other improvements called for by their contract with the county.

"It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession. . . . So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with the statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages. *Lexington & Ohio Railroad* v. *Ormsby*, 7 Dana, 276; *Harlow* v. *Marquette &c. Railroad*, 41 Mich. 336; *Cairo & Fulton Railroad* v. *Turner*, 31 Ark. 494; *Pettibone* v. *La Crosse & Milwaukee Railroad*, 14 Wis. 443; *Chicago & Alton Railroad* v. *Goodwin*, 111 Ill. 273."

Again, *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, was a suit to perpetually restrain the city of Austin from completing a system of waterworks, and from levying on the property of the Austin Water, Light and Power Company any taxes to pay therefor, and it was held that by reason of the delay in pressing their claim, the plaintiffs were not entitled to the relief, and many authorities were cited in the opinion in support thereof.

Opinion of the Court.

In *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260, was presented a question similar to that in *Roberts* v. *Northern Pacific Railroad*, *supra*, and the same conclusion was reached. In the course of the opinion, *Provolt* v. *Chicago, Rock Island & Pacific Railroad*, 57 Missouri, 256, 264, was cited. That was a case in which the conduct of a landowner in standing by while a railroad company constructed its road precluded him from recovering physical possession of the land covered thereby, and this quotation was made from the opinion of that court:

"If, from negotiation in regard to the price of the land, or for any other reason, there is just ground of inference that the works have been constructed with the express or implied assent of the landowner, it would seem wholly at variance with the expectations of the parties and the reason of the case, that the landowner should retain the right to enter upon the land, or to maintain ejectment. There are other effective and sufficient remedies. A court of equity would unquestionably interfere, if necessary, and place the road in the hands of a receiver until the damages were paid from the earnings. 2 Redf. Am. Railw. Cas. 2d ed. 353. But the only question we are called upon to decide is whether under all the facts and circumstances of this case ejectment will lie, and we think it will not."

This question was also considered in *Charleston Railway Co.* v. *Hughes*, 105 Georgia, 1, and in the course of the opinion on page 15 are these pertinent observations by Mr. Justice Cobb:

"When a railroad company, without warrant or authority, enters upon the land of another, it is as a general rule no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a necessary component part of its railroad that to surrender its possession would interfere seriously with the interests of the company, the landowner, although entitled to compensation for his property, might by his conduct in allowing the entry upon his land and permitting the company to so use it as that it could not be abandoned without great prejudice to its rights,

estop himself from asserting against the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law which govern in all transactions of the character above referred to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether the corporation be public or private. A railroad corporation, being one charged by the law with the performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line or railway, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy. That a railroad corporation has a right to deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land and constructs its road without lawful authority, and the landowner acquiesces in the wrongful act and the consequent appropriation of the property to a great

public use until the same has become a necessary component part of the property required by the railroad to perform its public duties, such landowner will be held to have waived his right to retake the property, and will be remitted to such other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated."

See also *Atlanta, Knoxville & Northern Railway Company* v. *Barker*, 105 Georgia, 534; *Chicago, Burlington & Quincy Railroad Company* v. *Englehart*, 57 Neb. 444.

From these authorities it is apparent that the time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. If one, aware of the situation, believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to enforce those rights, and, in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal.

These views do not justify the conclusion that a court of equity assumes a general right to ignore or supersede statutory provisions for the ascertainment of the amount of compensation in cases of condemnation. They simply mean that a failure to pursue statutory remedies is not always fatal to the rights of a party in possession, and that sometimes if full and adequate compensation is made to the plaintiff the possession of the defendant will not be disturbed.

It is true the cases cited were mainly those of actual physical possession by railroad companies of real estate belonging to other parties, but the same doctrine applies when there is only an invasion of some easement or other incorporeal right, and its preservation can alone be secured in a court of equity. The

action of the court does not depend upon the character of the property or right involved but upon the conduct of the plaintiff in respect to his claim. *Pappenheim* v. *Metropolitan Elevated Railway Co.*, 128 N. Y. 436, was a suit brought by the owner of premises on Second avenue, in New York city, to restrain the defendants from operating their elevated railway in front of plaintiff's premises. The trial court found the amount of the damage to the premises, and provided by its decree that an injunction should not issue in case the defendants paid the amount of the damage upon the execution by plaintiff of a deed conveying her interest in the easement taken. This decree was affirmed by the Court of Appeals, and in the opinion by Mr. Justice Peckham, then a member of that court, it was said, after referring to the rule controlling actions at law:

"But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuses to pay, the injunction issues." p. 444.

It is true in that case the plaintiff sought in her petition the very relief that was granted, and so the case is not authority on the question of the effect of delay in asserting one's legal rights, but it is authority for the proposition that a court of equity may take full possession and finally end the controversy by securing the payment of adequate compensation in lieu of a cessation of the trespass. See, also, *Jackson* v. *Stevenson*, 156 Mass. 496, 502.

It is, however, urged that in all the cases referred to the one party could have appropriated the property or right of the other by condemnation proceedings, and that as he could have done

so he should not be disturbed for lack of those proceedings, but either given time to carry them through, or else in the pending equitable suit have the compensation or damages estimated and then, upon payment, be protected in his possession. In other words, as he could have obtained the rightful possession by legal proceedings and payment, equity will do what the law could have done, and on payment of the ascertained compensation or damages affirm the possession. Whatever may be true of those cases, we start in this with the assumption that there was no power in the city of New York, by any proceedings in the States of New York or Connecticut, to acquire the right of appropriating this water and thus depriving the plaintiffs of its continued flow. It was suggested in the *Pappenheim* case, *supra*, that "in cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be inserted, and an injunction would issue upon the right of the owner being determined. *Henderson* v. *Central Railroad Co.*, 78 N. Y. 423."

But the ruling of this court has been to the contrary, at least in cases where there has been delay on the part of the plaintiff in commencing suit. In *Osborne* v. *Missouri Pacific Railway Company*, 147 U. S. 248, the plaintiff, owning lots on Gratiot street, in St. Louis, filed a bill in the United States Circuit Court for the Eastern District of Missouri, to restrain the defendants from constructing a steam railroad along such street. The fee of the street was in the public, but it was alleged that the construction and operation of the railroad would work a damage to the property of the plaintiff's, and the facts tending to show such damage were set forth. It appeared that the road had been constructed before the bill was filed. Section 21 of article 2 of the Missouri constitution of 1875 reads "that private property shall not be taken, or damaged, for public use without just compensation." The statutes of Missouri provided means for condemning a right of way and assessing the value of property taken, but contained no provision for assessing the damages to property not taken, so that neither the railroad company nor the plaintiff could at the time have taken any legal proceedings for ascertaining the amount of the damage

to plaintiff's property by the construction of the railroad. The Circuit Court, finding that the plaintiff's property was damaged, and assuming that the damages came within the protecting clause of the constitution, held that nevertheless the plaintiff was not entitled to an injunction, saying (35 Fed. Rep. 84, 85):

"The question at issue is whether a complainant, who claims damages resulting incidentally to his property from the laying of a railroad track in a public street under a legislative and municipal license, can wait until the work is done, and then enjoin its operation, although none of his property is actually taken, or whether he should in such case be left to his remedy at law for the damage inflicted? Unless the wrongdoer is insolvent, or unless some other cause exists to render the legal remedy of no avail, it appears to me that on general principles he should be left to his legal remedy, and it was so held in the cases first above cited. The rule does not deprive the complainant of the protection intended to be afforded by the constitution, nor does it work any hardship. It simply requires the complainant to be diligent in applying for such relief as equity may afford."

That decision was affirmed by this court, and in the opinion it was said (p. 259):

"But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the inflicting of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work."

Reference was made in the opinion to *McElroy* v. *Kansas City*, 21 Fed. Rep. 257, a case in the Circuit Court of the United States for the Western District of Missouri, in which the same constitutional provision was in question, and an application made to restrain the grading of a street in front of the complainant's lot, and in which, as stated, "it was ruled that, if the injury which the complainant would sustain from the act sought to be enjoined could be fully and easily compensated, at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer

large inconvenience if the contemplated act were restrained, the injunction should be refused, and the complainant be remitted to his action for damages. If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainant the substantial benefit of the condition, while not restraining defendant from the exercise of its ultimate rights."

These propositions do not, as counsel for appellees suggest, necessitate some legislation like the act of Parliament known as Lord Cairn's act, 21 and 22 Victoria, June 28, 1858, chap. 27, by which it was provided that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act or for the specific performance of any covenant, contract or agreement it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct."

Nor do they justify the conclusion that under their application one man is at liberty to wrong another upon payment of damages. There is no thought of creating a new rule or of substituting a judicial opinion for an act of Congress. All that can be fairly said in reference to them is that they are an application of the ancient maxim that he who seeks equity must do equity. Limiting them, as we have limited them in the present case, to conditions which exist after defendant has proceeded in the completion of its proposed work and has expended a large sum of money therein, they can never be considered as inviting a party to do a wrong with the expectation of escaping every penalty save a pecuniary one.

On that ground alone, and without deciding whether plain-

tiffs have a legal right to recover damages, the decrees of the Circuit Court of Appeals and the Circuit Court will be reversed and the case remanded to the latter court, with instructions to set aside its decree and to enter one providing for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam and the appriopriation of the water, and for which the defendant is legally responsible, a proposition upon which we express no opinion, and fixing a time within which the defendant will be required to pay such sum, and that upon the failure to make such payment an injunction will issue as prayed for; and, on the other hand, that upon payment a decree will be entered in favor of the defendant. If the plaintiffs shall prefer to have their damages assessed by a jury, leave may be given to dismiss the bill without prejudice to an action at law.

Reversed.

MR. JUSTICE GRAY did not hear the argument and took no part in the decision of this case.

FILHIOL *v.* MAURICE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 50. Argued March 5, 6, 1902.—Decided April 7, 1902.

In an action of ejectment against private individuals, the jurisdiction of the Circuit Court cannot be maintained on the ground that by averments that plaintiffs were ousted in violation of the treaty of October 21, 1803, and of the Fifth Amendment, the provisions of which it was the duty of the Federal Government to observe, it appeared that the case arose under the Constitution, or laws, or treaties of the United States.

THIS was an action of ejectment brought by Hippolite Filhiol and others, in the Circuit Court of the United States for the Eastern District of Arkansas, against Charles E. Maurice, Charles G. Convers and William G. Maurice, for the recovery of a parcel of land in the city of Hot Springs, Garland County, Arkansas, on the permanent reservation at Hot Springs, de-

Counsel for Parties.

scribed as Bath house site No. 8, and for rent thereof as damages. Plaintiffs deraigned title as heirs at law of Don Juan Filhiol, to whom it was alleged the lands were granted February 22, 1788, by the then Spanish governor of the province of Louisiana, by virtue of which grant said Filhiol became the owner of a tract of "about three miles square, embracing all the hot springs in the city of Hot Springs, Garland County, Arkansas," and including the parcel of land for which plaintiffs brought suit. The complaint did not aver the citizenship of plaintiffs or defendants, although the caption described plaintiffs as residents of several States other than Arkansas, but it was averred as follows: "And for cause of action say that by the Fifth Amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France, which was ratified on the 21st day of October, 1803, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy and their full enjoyment of the same, but, in violation of the provisions of said treaty and without due process of law and in violation of the Fifth Amendment of the Constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the second day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land in controversy, and for more than two years last past have held possession and they now hold possession of the land in controversy wrongfully and without right, and they refuse to surrender possession of the same to plaintiffs." Defendants demurred to the complaint, on the ground that its allegations did not "constitute a cause of action."

The Circuit Court sustained the demurrer, and plaintiffs electing to stand on their complaint and declining to amend, the complaint was dismissed with costs. A writ of error directly from this court was then allowed.

Mr. William F. Vilas and *Mr. Clifford S. Walton* for plaintiffs in error. *Mr. J. H. McGowan* was on their brief. *Mr. Branch K. Miller* filed a brief for same.

Mr. Assistant Attorney General Pradt for defendants in error. *Mr. George H. Gorman* was on his brief.

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

Writs of error may be sued out directly from this court to the Circuit Courts in cases in which the construction or application of the Constitution of the United States is involved; or in which the validity or construction of any treaty made under the authority of the United States is drawn in question. Act of March 3, 1891, c. 517, § 5, 26 Stat. 826.

And we repeat, as has often been said before, that a case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of the validity or construction in disposing of the right asserted. *Muse* v. *Arlington Hotel Company*, 168 U. S. 430, and cases cited.

The jurisdiction of the Circuit Court was not invoked in this case on the ground of diverse citizenship, but on the ground that the case arose "under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." And it is settled that in order to give the Circuit Court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim.

As the Circuit Court took jurisdiction, which could only have been on the latter ground, and decided the case upon the merits, the writ of error was properly taken directly to this court, the jurisdiction of which is exclusive in such cases. *Huguley Manufacturing Company* v. *Galeton Cotton Mills*, 184 U. S. 290; *American Sugar Company* v. *New Orleans*, 181 U. S. 277.

We are met, however, on the threshold with the question whether the jurisdiction of the Circuit Court could be main-

tained on that ground. It does not appear that this question was raised below, and, on the contrary, the Circuit Court disposed of the case on the merits, that is, assuming jurisdiction, the Circuit Court decided that the complaint failed to set up a cause of action.

Did it appear from plaintiffs' own statement that the case arose under the Constitution or a treaty of the United States? We do not think it did.

The Fifth Amendment prohibits the exercise of Federal power to deprive any person of property without due process of law, or to take private property for public use without just compensation; and the treaty of October 21, 1803, provided for the protection of the inhabitants of the territory ceded in the enjoyment of their property. Public Treaties, 200.

But no right, title, privilege or immunity was here asserted as derived from the Constitution or the treaty, as against these private individuals, who were impleaded as defendants, either specifically, or through averments that plaintiffs were ousted in violation of the treaty and of the Fifth Amendment, the provisions of which it was the duty of the Federal Government to observe.

The gravamen of the complaint was that plaintiffs' ancestor had a perfect title, to which they had succeeded, and the appropriate remedy for illegal invasion of the right of possession was sought, but it was not made to appear that the Circuit Court had jurisdiction, for the action was not against the United States, nor could it have been, as the United States had not consented to be so sued, and so far as defendants were concerned, it was not charged that they took possession by direction of the Government, and plaintiffs set up no more than a wrongful ouster by merely private persons, remediable in the ordinary course, and in the proper tribunals. And see *Arkansas* v. *Coal Company*, 183 U. S. 185; *Muse* v. *Arlington Hotel Company*, 168 U. S. 430.

The particular grounds of the decision of the Circuit Court on the merits do not appear, nor is it material, as that court manifestly had no jurisdiction.

Judgment reversed and cause remanded with a direction to dismiss the complaint for want of jurisdiction with costs.

MICHIGAN SUGAR COMPANY *v.* MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 199. Argued March 20, 21, 1902.—Decided April 7, 1902.

The rule reiterated that this court has no jurisdiction under the third division of section 709 of the Revised Statutes unless the party seeking the writ of error has unmistakably invoked for the protection of an asserted right, title, privilege or immunity, the Constitution, or some treaty, statute, commission, or authority, of the United States.

THE case is stated in the opinion of the court.

Mr. Thomas A. E. Weadock for plaintiff in error. *Mr. John C. Weadock* was on his brief.

Mr. Charles D. Joslyn and *Mr. Horace M. Oren* for defendant in error.

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

This was a petition for mandamus filed in the Supreme Court of the State of Michigan by the Michigan Sugar Company against the Auditor General of that State, praying that he might be commanded to draw his warrant or warrants on the treasury of the State in favor of petitioner, for certain amounts alleged to be due to it for bounty earned for beet sugar manufactured from sugar beets raised in the year 1898, in accordance with the provisions of an act of the legislature of Michigan of 1897. Reliance was also placed on an act of 1899 asserted to have made appropriations to pay such bounties. The Auditor General in response to a rule to show cause insisted that the act of 1897 was in contravention of the state constitution, and also that no appropriations had been made out of which the alleged bounties could be paid.

The Supreme Court of Michigan held that the act of 1897

was unconstitutional, and that it could not be and was not helped out by the act of 1899, which made no specific appropriations "by which the sugar bounties could be paid;" and denied the application. 124 Mich. 674. Thereupon this writ of error was allowed; and errors were assigned to the effect that the judgment of the Supreme Court was in conflict with the prohibitions of the Constitution of the United States in respect of "impairing the obligation of contracts;" deprivation of property without due process of law; and denial of the equal protection of the laws.

The petition for mandamus nowhere set up that the State of Michigan had passed any law impairing the obligation of a contract with relator, and nowhere invoked the protection of any provision of the Federal Constitution, nor was any issue in relation thereto raised upon the record.

It is clear that the case did not fall within either the first or second of the classes of cases in which the judgment of a state court may be reëxamined under section 709 of the Revised Statutes. The validity of no treaty or statute of, or authority exercised under, the United States was drawn in question; nor was the validity of a statute of, or an authority exercised under, the State drawn in question on the ground of repugnancy to the Constitution, treaties or laws of the United States, and its validity sustained. And as to the third class, no right, title, privilege or immunity was specially set up or claimed as belonging to relator under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States; and denied.

The Supreme Court of the State did not refer to the Federal Constitution or consider and decide any Federal question. For aught that appears, the court proceeded in its determination of the cause without any thought that it was disposing of such a question.

The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to reëxamine the final judgment of a state court, under the third division of section 709, cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question

that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes for the protection of his rights, the Constitution, or some treaty, statute, commission or authority, of the United States. Applying this rule to the case before us, the writ of error cannot be maintained.

Writ of error dismissed.

MR. JUSTICE BROWN took no part in the decision.

EASTERN BUILDING AND LOAN ASSOCIATION *v.* EBAUGH.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 177. Argued March 3, 1902.—Decided April 7, 1902.

This case was presented to the court below with the facts found by the trial court, among which were that under the circumstances it was the law of New York that the plaintiff in error could not be heard to say that its promise was *ultra vires;* and it was decided that such findings of fact were conclusive upon it. This court holds that the law of New York was a necessary element in the propositions and in it was involved not only what the statutory law is, but what its application is under the courts of that State, both of which were facts to be proved, and the finding upon which was binding on this court.

THE plaintiff in error is a building and loan association incorporated under the laws of the State of New York, and has its principal place of business in the city of Syracuse in that State. The defendant in error is a shareholder in said corporation, and brought this action in the Court of Common Pleas of the county of Greenville, State of South Carolina, for the par value of his stock, to wit, the sum of $1000, or, failing in that, for the sum of $580, the money paid in by him.

By agreement of counsel all issues of law and fact were referred to a referee. The referee took testimony, and reported

to the court "that the plaintiff is entitled to recover judgment against the defendant for the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent per annum, and for the costs of this action."

The report of the referee was confirmed, and judgment was entered for the plaintiff (defendant in error) in accordance with the report. The judgment was affirmed by the Supreme Court of the State, and the case was then brought here.

The facts as recited in the opinion of the Court of Common Pleas are as follows (58 S. Carolina, 83):

"The defendant is a corporation organized under the laws of New York, with its principal place of business in the city of Syracuse. In the early part of the year 1892, it began business in the State of South Carolina, and organized in the city of Greenville, a local branch of said association. The plaintiff is a resident of the city of Greenville, in said State. The defendant's agent approached the plaintiff for the purpose of inducing him to become a stockholder in the defendant company. The agent exhibited to the plaintiff a form of the certificate of stock, which contained, among other things, this promise:

"'Eastern Building and Loan Association of Syracuse, New York, agrees to pay said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares, at the end of seventy-eight months.'

"At the same time the agent exhibited to him certain printed circulars, or literature, of the defendant company. One of these circulars was entitled 'The definite contract plan.' This circular stated:

"'Q. What amount is deposited monthly? A. Seventy-five cents per share. . . .

"'Q. When will the shares reach their par value? A. Shares mature in exactly six and one half years.

"'How much will a member have to pay in altogether? A. On a basis of ten shares (one thousand dollars maturity value) he will have paid in five hundred and ninety-five dollars ($595) and receives one thousand dollars. . . .'

"'All shares on which payments are made are regularly ma-

tured at the expiration of seventy-eight months (six and one-half years) from date of certificate. . . .

"'*Illustration.*

"'Showing cost and profits to the investor of ten shares of $1000 six and a half years, at time of maturity.

He pays a membership fee of $1.00 per share...	$ 10 00
He pays monthly instalments of $7.50 per month for 78 months, $7.50 × 78.....	585 00
Total amount invested.....	$ 595 00
He receives in cash at maturity.....	1000 00'

". . . 'The only association making a contract definite in every particular. . . . Stock matures in seventy-eight months.'

"On reading the circulars and after listening to the persuasive talk of the agent, the plaintiff was induced to become a subscriber for ten shares of stock. Thereupon the certificate sued upon was issued to him. This certificate is dated on April 1, 1892. It certifies that 'D. W. Ebaugh, of Greenville, county of Greenville, and State of South Carolina, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of New York, and holds ten shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract; and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay to said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof.

"Ebaugh paid the entrance fees, and continued to pay the monthly instalments until seventy-eight months had elapsed. The last payment was made on October 1, 1898. In subscribing to this stock and in making these payments, Ebaugh trusted to

the statements contained in the circular and to the promise made in the certificate. About one month before the last payment was made, the association wrote to Ebaugh stating that they could not carry out the contract, and stating that they could not pay him one hundred dollars upon the end of seventy-eight months, but that he would have to continue making payments. In reply to this, Ebaugh wrote that he had made a definite contract with the association, and expected them to comply with its terms. A short time after making the last remittance he signed a blank receipt upon the back of the certificate, and sent the same to the association, with the request that they forward him a check for the money due him. The association refused to make payment, and on January 17, 1899, this action was commenced to recover from the association the sum of one thousand dollars, with interest thereon from October 1, 1898. Certain property of the defendant company in this State was attached in said action.

"The defendant made answer, alleging that there was no contract to mature the stock at a definite period, but that it was only estimated that the stock would be matured in seventy-eight months. It also claims that any promise to mature the stock within a definite time would be contrary to their by-laws and charter, and contrary to the laws of New York.

"By agreement of counsel, all issues of law and fact were referred to Oscar Hodges, a member of the bar at Greenville, as special referee. Mr. Hodges took testimony, and heard argument, and filed his report, wherein he concludes 'that the plaintiff is entitled to recover judgment against the defendant for the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent per annum, and for the costs of this action.'

"To this report the defendant filed certain exceptions. After hearing argument, I am satisfied that the report of the referee is correct in every particular, and the exceptions are hereby overruled. The defendant certainly made definite assurances in those circulars, and a definite promise as to the maturity of stock; that if the plaintiff would pay the entrance fees, and his monthly dues for seventy-eight months, that at the end of that

time it would pay to him one hundred dollars for each share of stock taken by him. These assurances and this promise were made for the purpose of procuring the plaintiff as a stockholder. This promise was definite. The plaintiff relied upon it, and made the payment of his entrance fees, and his monthly dues. The association knew that the plaintiff was relying upon its promise, and allowed him to make all these payments and to incur the liability of a stockholder. It received the full benefit of this transaction, and it cannot now be heard to say that the contract was contrary to its by-laws, or its charter. Even if this contract were in excess of its charter powers, the association would, nevertheless, be bound by it, inasmuch as it received the full benefit thereof."

Mr. William Hepburn Russell for plaintiff in error. *Mr. William Beverly Winslow* was on his brief.

Mr. H. J. Haynsworth for defendant in error. *Mr. W. H. Lyles*, *Mr. L. W. Parker* and *Mr. L. O. Patterson* were on his brief.

Mr. Justice McKenna delivered the opinion of the court.

Plaintiff in error invokes against the judgment, to quote from the brief of counsel, "those provisions of the Constitution of the United States which declare that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State;' that no State shall 'pass . . . any law impairing the obligation of contracts,' and that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'"

The protection of those constitutional provisions is claimed because it is asserted the courts of South Carolina disregarded the law of New York as expounded by the courts of that State.

Certain decisions of New York were introduced in evidence

by plaintiff in error, and from them it is deduced that the law of the State was and is that the contract between the association and its stockholders is constituted not only of the certificate of stock and its indorsement, but as well of the articles of association and by-laws of the corporation, and therefore the period of maturity was an estimate, not an assurance. And further, that it was established as the law of New York, in *O'Malley* v. *Loan & Savings Association*, 92 Hun, 572, p. 577, "that the authority to issue a certificate with a fixed period of maturity is not expressly given either by the statute or by articles of association or by-laws of the association." And that the association "did not possess the power or authority to issue a certificate specifying a fixed maturity period, and that the clause in the certificate should be construed as an estimated period of maturity."

To the first proposition the courts of South Carolina answer with a finding of fact that the plaintiff in error had given the defendant in error a definite promise that his stock would mature in seventy-eight months—not a promise only by the certificate, but assurances in circulars and positive representations by an agent.

The Supreme Court of South Carolina did not find it necessary to concur with or dissent from the second proposition advanced by plaintiff in error. The court said (58 South Carolina, 83, p. 87):

"The appellant contends that the contract must be construed with reference to the laws of New York, and attempts to differentiate this case from those just mentioned (prior cases were cited) on the ground that the answer alleges, and the testimony establishes, the fact, that under the laws of the State, the by-laws of the association and not its express agreement, must prevail in the interpretation of the contract between the parties.

"Both the master and Circuit Judge found as a matter of fact that the laws of New York did not forbid the defendant from entering into an agreement by which the shares of stock would mature in a definite time.

"In his report the master says:

"'The question as to whether this promise was in excess of the charter powers, was not expressly decided by the Supreme Court, but that court did decide that even though it were in excess of its charter powers (in the language of *B. B. R. R. Co.* v. *McDonald*, 60 Am. St. Rep. 172): "The general rule is that where a private corporation has entered into a contract, not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of *ultra vires*."

"'This proposition is fully sustained by the decisions of New York. The plaintiff introduced in evidence the following decisions of that court: *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62; *De Grand* v. *American Linen Thread Co.*, 21 N. Y. 124; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473.

"'This constituted the only evidence before me as to what was the law of New York touching this point. I find as a matter of fact that the law of New York is that where a corporation enters into a contract, that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as contained in the contract, if it suffers the other party to perform his agreement and receives the benefits and retains them.

"'This being the law of New York, it is conclusive of the case at issue.'

"The report of the master was confirmed in all respects by the Circuit Judge.

"As this is an action at law, the foregoing findings of fact are not subject to review but are conclusive on this court.

"As the laws of New York are not in conflict with the construction which this court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

It will be observed, therefore, that the case was presented to the Supreme Court of South Carolina with the facts found by the trial court as follows: (1) that the plaintiff in error had made a positive promise that the stock of defendant in error would mature in seventy-eight months; (2) under the assurance

of that promise the defendant had subscribed for the stock and had performed in good faith all obligations on his part; (3) under such circumstances it was the law of New York that plaintiff in error could not be heard to say that its promise was *ultra vires*. And the court decided that such findings of fact were conclusive upon it.

The case is presented here under like conditions. This is a writ of error to the state court, and whatever was a question of fact there is a question of fact here. This court said, speaking by Chief Justice Waite, in *Chicago & Alton Railroad Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615, where, as in the case at bar, was invoked that provision of the Constitution of the United States which requires the courts of one State to give full faith and credit to the public acts of another:

"Whenever it becomes necessary under this requirement of the Constitution for a court of one State, in order to give faith and credit to a public act of another State, to ascertain what effect it has in that State, the law of that State must be proved as a fact. No court of a State is charged with knowledge of the laws of another State; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in *Hanley* v. *Donoghue*, 116 U. S. 1, in respect to the faith and credit to be given by the courts of one State to the judgments of the courts of another State, and it is equally applicable to the faith and credit due in one State to the public acts of another."

We are not called upon, therefore, to review or reply to the very able argument of counsel for plaintiff in error, advanced to show that the situs of the contract between the parties was New York, and that the words "public acts," in article IV, sec. 1, of the Constitution of the United States, mean the public statutes of the State.

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A necessary element in both propositions (if they may be regarded as independent) is the law of New York; and in the latter is involved not only what the statutory law is, but what its application is under the decisions of the courts of that State. Both, as we have seen, were facts to be proved, and the finding upon which is binding upon us.

Judgment affirmed.

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

McINTOSH *v.* AUBREY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 107. Submitted January 16, 1902.—Decided April 7, 1902.

Section 4747 of the Revised Statutes, which provides that no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner, protects the fund only while in the course of transmission to the pensioner; but, when the money has been paid to him, it has enured wholly to his benefit, and is liable to seizure as opportunity presents itself.

THIS action presents the question of the liability of real estate purchased with pension money, to be taken on execution to satisfy a claim of a creditor. The action is ejectment based on a title derived from a sale under such an execution, and was brought in the Court of Common Pleas of Fayette County, State of Pennsylvania. The case was submitted upon the following statement of facts:

"It is agreed that title to the premises in dispute was in Samuel B. G. Jobes on the 5th day of September, A. D. 1882. That on that date the said Jobes conveyed the same to the defendant, Sarah J. McIntosh, by deed duly executed and delivered,

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under which deed she now claims the said property. That Sarah J. McIntosh's husband, —— McIntosh, was a soldier in the volunteer service of the United States, and that after his death the government granted a pension to the said Sarah J. McIntosh, widow as aforesaid, and transmitted to her the money, which she herself received and retained in her own possession for several months, after which the said pension money was paid to said Jobes as the purchase money for the said property by the said Sarah J. McIntosh, defendant. The said property was sold to the plaintiff at sheriff's sale, under regular process of execution, on the 28th day of August, 1897, and a sheriff's deed for the same was acknowledged and delivered to the plaintiff by Fred. S. Chalfant, Esq., high sheriff of Fayette County, Pa., on September 8, 1897.

"That this process was issued on the following judgments, viz: L. T. Claybaugh, for use of R. L. Aubrey, surviving partner of Aubrey & Son *vs.* the said Sarah J. McIntosh, at No. 427, March Term of 1892; judgment of R. L. Aubrey, surviving partner of Aubrey & Son *vs.* J. B. Swogger and Mrs. Sarah J. McIntosh aforesaid, at No. 118, June term, 1896, and judgment of R. L. Aubrey, surviving partner of Aubrey & Son *vs.* Sarah Jane McIntosh aforesaid at No. 278, December term, 1892, of the Common Pleas Court of Fayette County aforesaid.

"That this action of ejectment is brought by the plaintiff to recover the said property from the defendants, under the said deed of the said sheriff to him.

"That the first knowledge of the plaintiff that the said property was purchased with pension money was after the said executions were in the hands of the said sheriff, and had been duly levied upon the said real estate.

"That the said R. L. Aubrey, surviving partner of the said Aubrey & Son, plaintiff in the said judgments and executions, is the plaintiff in this action.

"If under the facts as hereinbefore stated, the court shall be of opinion that the said property was not liable to the said executions and sale, by reason of the same having been bought with pension money, judgment shall be entered upon this case stated, in favor of the defendants.

"But if the court shall be of opinion that the said property was not so exempt, then judgment shall be entered for the plaintiff, with leave to both parties to take exceptions and appeals."

Judgment passed for the plaintiff in the action, defendant in error here, and was affirmed by the Superior Court of the State. From the judgment of the latter court the Supreme Court refused to allow an appeal. This writ of error was then sued out.

Mr. Edward Campbell for appellant.

Mr. A. F. Cooper and *Mr. J. Q. Van Swearingen* for appellee.

Mr. Justice McKenna delivered the opinion of the court.

The plaintiff in error claims that the property having been purchased with pension money it was exempt from seizure and sale on execution under section 4747 of the Revised Statutes of the United States. The section is as follows:

"No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

The language of the section of itself seems to present no difficulty, and if doubt arises at all it is only on account of the decisions of courts whose opinions are always entitled to respect. *Crow* v. *Brown*, 81 Iowa, 344; *Yates Co. National Bank* v. *Carpenter*, 119 N. Y. 550. But notwithstanding, we think the purpose of Congress is clearly expressed. It is not that pension money shall be exempt from attachment in all of its situations and transmutations. It is only to be exempt in one situation, to wit, when "due or to become due." From that situation the pension money of plaintiff in error had departed.

The simplicity and directness of the statute are impaired by

attempts to explain it by the use of other terms than its own. That money received is not money due; and that real estate is not money at all would seem, if real distinctions be regarded, as obvious enough without explanation. Nor are legal fictions applicable. Undoubtedly the law often regards money as land and land as money, and, through all the forms in which property may be put, will, if possible, trace and establish the original ownership. But these are special instances depending on special principles, and cannot be made a test of the purpose of Congress in enacting section 4747.

We concur, therefore, with the learned judge of the Court of Common Pleas of Pennsylvania, that "the exemption provided by the act protects the fund only while in the course of transmission to the pensioner. When the money has been paid to him it has 'inured wholly to his benefit,' and is liable to seizure as opportunity presents itself. The pensioner, however, may use the money in any manner, for his own benefit and to secure the comfort of his family, free from the attacks of creditors, and his action in so doing will not be a fraud upon them."

Judgment affirmed.

MR. JUSTICE SHIRAS, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissented.

KANSAS *v.* COLORADO.

ORIGINAL.

No. 10. Original. Argued February 24, 25, 1902.—Decided April 7, 1902.

As the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.

Where a State on behalf of her citizens and in vindication of her alleged rights as an individual owner files a bill against another State to obtain

relief in respect of being wholly deprived by the direct action of the latter of the water of a river accustomed to flow through and across her territory, and the consequent destruction of her property, and of the property of her citizens and injury to their health and comfort, the original jurisdiction of this court may be exercised.

If it is a case of circumstances in which a variation between them as stated by the bill and those established by the evidence, might either incline the court to modify the relief or to grant no relief at all, the court, even though it sees that the granting of modified relief would be attended with considerable difficulty, will not support a demurrer.

The general rule is that the truth of material and relevant matters, set forth with requisite precision, are admitted by demurrer, but in a case of great magnitude, involving questions of grave and far-reaching importance, that rule will not be applied, and the case will be sent to issue and proofs.

THE State of Kansas, by leave of court, filed her bill of complaint against the State of Colorado on May 20, 1901, which, after stating that Kansas was admitted into the Union, January 29, 1861, and Colorado, August 1, 1876, averred:

That the Arkansas River rises in the Rocky Mountains in the State of Colorado and flows through certain counties of that State, and thence across the line into the State of Kansas; its tributaries in Colorado have their rise and entire flow in that State; the length of the river therein is approximately two hundred and eighty miles, and the drainage area of the river and its tributaries approximately twenty-two thousand square miles. All of the drainage area is east of the summit of the Rocky Mountains and a large portion thereof in the mountains, where the accumulation of snow in the winter season is very great, the waters from the melting of which flow into the river directly and in great volume from early spring until August in each year. The river, after leaving the mountains of Colorado, proceeds in an easterly course for approximately two hundred miles to the west line of Kansas, and "is a navigable stream under the laws and departmental rules and regulations of the United States." The volume of water in the bed of the river flowing from Colorado into Kansas formerly was and should now be, and would be, very large, but for the wrongful diversion of the same; said volume at its normal height in the river at the mean average flow for about ten months in the year being upwards of two thousand cubic feet per second, while it

is much less for about two months in the autumn in each year. The tributaries of the river in Kansas are comparatively few in number, and cannot furnish water to cause a continuous stream to flow in the bed of the river, except near the south line of the State, where the river passes into the Territory of Oklahoma. The river after entering Kansas proceeds through certain enumerated counties thereof, and then through the Territory of Oklahoma, the Indian Territory and the State of Arkansas, and empties into the Mississippi River at the eastern boundary of that State. From Fort Gibson, in the Indian Territory, to the mouth of the river it is a large, navigable stream, and is used for the purposes of trade and commerce by vessels plying thereon.

The length of the river in Kansas is about three hundred and ten miles; its course is through a broad valley, and along its entire length in Kansas are alluvial deposits of great depth, amounting in the aggregate to about two million five hundred thousand acres, the greater part of which acreage and the greater part of the course of the river lying in the western part of the State. The elevation of the bed of the river through the State of Kansas is from three thousand three hundred and fifty feet above the level of the sea at the Colorado line to one thousand feet above that level at the point where it enters Oklahoma. The rainfall in the drainage area in the western half of the State of Kansas is very light, and, by reason of the porous nature of the soil throughout that area, the greater portion of the water so falling sinks into the earth, and but a small portion thereof finds its way to the river except in the event of severe and unusual storms. The ordinary and usual rainfall in the major portion of the valley of the river in Kansas is utterly inadequate to the growing and maturing of cultivated crops of any kind, because the precipitation is very scanty, and does not fall during the growing season of the year.

The river in its entire course through the State of Kansas has a natural fall of about seven and three tenths feet per mile. Its valley is composed of sand covered with alluvial soil, and the river and the surface soil of the bottom lands in Kansas are all underlaid with sand and gravel, through which the waters of

the river have flowed from time immemorial, extending in width under the entire valley for its whole length throughout the State, the natural course and flow of the river being in and beneath the bed thereof and beneath the surface of the bottom lands of the entire valley of the river, that portion which flows beneath the surface being called the "underflow." The "underflow" is confined to and is co-extensive with the valley, and varies in volume with the amount of water in discharge in the river. The water which flows in the river from Colorado into Kansas furnishes the principal and almost the entire supply of water for the underflow of the valley, and at its normal height the underflow is of great and lasting benefit to the bottom lands, both as to those which abut on the river and as to those which do not; and is of great benefit to the people owning and occupying such lands, "for that it furnishes moisture sufficient to grow ordinary farming crops in the absence of rainfall, and furnishes water at a moderate depth below the surface, for domestic use and for the watering of animals. The flow of the water in the riverbed is also of great value to the people in the vicinity by reason of the fact that the evaporation therefrom tends to cool and moisten the surrounding atmosphere, thereby greatly promoting the growth of all vegetation, enhancing the value of the lands in that vicinity, and conducing directly and materially to the public health and making the locality habitable. Owing to the dryness of the climate, the cloudlessness of the sky, the high elevation, and the prevailing winds, evaporation is rapid and great, being about sixty inches per annum at the east end of the river valley in Kansas, and ninety inches at the west line of the State. Outside of the valley in the western half of the State of Kansas are several million acres of arid upland and plateau upon which grows a sparse but valuable grass upon which cattle may feed, and upon which they have, in times past, in vast numbers, been fed and fattened, but the cattle so fed must have watering places and such watering places must be in the river valley. And the availability and use of said arid lands and the prosperity of the business of cattle feeding thereon depends entirely upon the water, its convenience, depth, and supply, and if the surface flow of water in

the bed of said river be wholly cut off from the State of Kansas, then the under flow will gradually diminish and run out, and the valley of the Arkansas River will become as arid and uninhabitable as is the upland and plateau along its course, since without said underflow the valley land will be unfit for cultivation, and the arid lands unavailable for grazing."

The bottom lands in the valley of the Arkansas River in Kansas "are practically level and rise from six to fifteen feet above the water bed of the river," and are such as are ordinarily termed "bottom lands." Nearly all of the bottom lands, including those which are adjacent to the bed of the river, are fertile and productive, valuable for farming purposes, and well adapted to the growing of corn, wheat, alfalfa, rye, etc., and "all like crops, grains and grasses usually grown in that latitude of the United States. In addition thereto, all of said lands are valuable for grazing purposes and well adapted to the support of vast numbers of cattle, horses, sheep, and hogs."

More than three fourths of these Kansas bottom lands were and are occupied by persons owning or leasing them, and residing thereon with their families; and more than two fifths, including more than two fifths of those on the river bank, are and have been for years in actual cultivation, with an agricultural population of more than fifty thousand, raising all products "common to the latitude and climate," while numerous cities, towns and villages are situated on the bank of the river, including ten county seats, with an aggregate population of over fifty thousand. The actual value of the Arkansas bottom lands averages not less than twenty-five dollars an acre, provided they receive the benefits arising from the natural and normal flow of the water of the river, but that by reason of the wrongful acts of the State of Colorado the value of the lands "has shrunk many millions of dollars, which has been a direct loss to the citizens of the State of Kansas, and to the taxable wealth, and to the revenues of the State of Kansas and to the school system of the State as hereinafter set forth."

The bill further averred that all of the bottom lands were originally part of the public domain of the United States, and that the State became entitled, on admission, for school purposes, to

sections sixteen and thirty-six of each township, some of which sections were situated within the valley, and a number of them adjoined the bed of the stream. That under the act of Congress of March 3, 1863, there was granted to the State practically all of the odd-numbered sections of land in the valley lying north of a line four miles south of the north line of township twenty-six, and the grant included all the territory of the Arkansas valley west of Wichita, being four fifths of the valley; that all the requirements of the act of Congress were complied with prior to 1874 by the State and by the Atchison, Topeka and Santa Fé Railroad Company, and the title in fee simple had been conveyed to the State and by the State to the railroad company and others, being not less than nine hundred thousand acres, a large portion of which abutted upon the river; that the even-numbered sections had been at all times subject to entry and have been taken and occupied by settlers under the land laws.

Prior to the admission of Kansas there were many settlers and residents in the valley, occupying and holding lands there, more particularly along the line of the Santa Fé trail, which followed the river from the present site of the city of Hutchinson to the west line of the State, and during the years 1869, 1870 and 1871, the entire Arkansas valley, from the south line of the State to the city of Great Bend, was taken and occupied by actual settlers, who subsequently acquired title to the lands under the United States, the State, and the railroad company; while the other valley lands from Great Bend to the west line of Kansas were taken up between 1872 and 1884, and have been since occupied by settlers and purchasers from the State and company. All of the lands of the valley have been thus occupied, held and owned by the original settlers and their grantees, who have continuously held and owned all riparian and other rights in any way appertaining in or belonging to the lands.

The bill further averred that under an act of Congress of March 2, 1889, certain lots were transferred to the State of Kansas, and had been since used for the maintenance of a soldiers' home thereon, in accordance with the provisions of the

act; that these lands consisted of one hundred and twenty-six and fifty-six one hundredths acres of bottom lands of the valley, adjoining and abutting on the bed of the river, and were fertile and well adapted to the raising of fruits, grains and vegetables when supplied with moisture, but that the value thereof depended entirely on the flow of water in the bed of the river and on the underflow beneath the land. That the State was and had been during its entire ownership of the tract using a large portion of the same for raising grains, fruits, vegetables and grasses thereon for the needs of the institution, and as the owner was and had been since 1889 "entitled to the full, free and natural flow of all waters which naturally would flow in said river and beneath said land; and the rights of the State thereto are prior and superior to any right or claim of the State of Colorado accruing, acquired or established subsequent to said date."

It was also alleged that since 1885 the State of Kansas had been the owner of six hundred and forty acres situated in Reno County, on which it had erected a large institution for the purposes of an industrial reformatory, and that the greater portion of the lands were used for farming purposes in connection with the institution, and the production of grain, vegetables, etc., for its needs; that the lands are bottom lands in the valley of the Arkansas, furnished with moisture sufficient for the growing of crops thereon solely from the underflow of the river, the rainfall in ordinary seasons being entirely inadequate; and that the title of the State's grantors dated from 1873. And "by reason of the foregoing, the State of Kansas is entitled to the full natural flow of the water of the Arkansas River in its accustomed place and at its normal height and in its natural volume underneath all of the said reformatory lands. The rights of the State thereto relate back to May 19, 1873, and are prior and superior to any right or claim of the State of Colorado accruing, acquired or established subsequent to said date."

The bill further averred that the constitution of the State of Colorado provided in sections five and six of article sixteen as follows:

"SEC. 5. The water of every natural stream not heretofore

appropriated within the State of Colorado is hereby declared to be the property of the public, and the same is dedicated to the uses of the people of the State subject to appropriation as hereinafter provided.

"SEC. 6. The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

That the legislature of Colorado has from time to time passed numerous laws purporting to authorize the diversion of water from the Arkansas River and its tributaries, in that State, for uses and purposes other than domestic; "more particularly for the purpose of irrigating arid and waste lands for agricultural purposes in said State." That in and by its laws and through its officers and courts Colorado has assumed "to grant to divers persons, firms and corporations the right and authority to divert the waters of the Arkansas River and its tributaries in Colorado from their natural channels, and to cause said waters to flow into and through canals and ditches constructed for the purpose, extending great distances away from the natural channels of said streams, and to store said waters and to empty the same upon high arid lands, not riparian to said streams, where large portions of such waters are lost from evaporation, and the remainder sinks into the earth, as a result of which, all of said waters are forever lost to such streams and are thus and thereby prevented from flowing into or through the State of Kansas."

That in pursuance of the constitutional provisions and the statutes of Colorado, many persons, firms and corporations claim to have acquired rights to divert water from the river and its tributaries for the purpose of irrigating arid, non-riparian lands in that State, each of them owning one or more ditches or canals, some being of great capacity and many miles in length.

And many of these persons, firms and corporations "have constructed great reservoirs within which to store, and in which are stored for use, vast quantities of the water of said streams before using it for the purpose of irrigation."

That these ditch owners and the State of Colorado are now diverting the waters flowing in the bed of the Arkansas River and its tributaries, and carrying them to great distances from their natural courses, and discharging them for agricultural purposes on "arid and non-riparian lands, where such waters are wholly lost to such streams and to the State of Kansas and its inhabitants. That such diversion is carried to such an extent that no water flows in the bed of said river from the State of Colorado into the State of Kansas during the annual growing season, and the underflow of said river in Kansas is diminishing and continuing to diminish, and if the said diversion continues to increase, the bottom lands of said valley will be injured to an enormous extent, and a large portion thereof will be utterly ruined and will become deserted and be a part of an arid desert."

That the State of Colorado, through its laws, legislatures, officers and agents, assumes to authorize canal and ditch owners to take, carry away, and so use the waters of the streams, and to regulate and control the distribution thereof to landowners for irrigation purposes; that other canals and ditches for the irrigation of arid, non-riparian lands are contemplated, and the extension of branches and laterals; that this system is being continuously carried on in the drainage area of the Arkansas valley, and that unless restrained therefrom Colorado will grant additional rights for the construction of other canals and ditches sufficient to divert all the water in the river so that none will flow into Kansas.

That Colorado has since 1890 constructed and owns and manages a great canal for diverting water of the Arkansas River from its channel, and using it on arid, non-riparian lands, so that it will not return to or again flow in the river; and the State permits its agents to divert into said canal water to the amount of seven hundred and fifty-six and twenty-eight one

hundredths cubic feet per second, which is approximately the natural flow of the river at the place of the diversion.

That the water so diverted is sold by the State of Colorado to persons owning lands in the vicinity and is used by such owners in irrigating arid, non-riparian lands, when but for the diversion it would flow into Kansas and through said valley.

That the State of Colorado is threatening to build, and will build unless restrained, other similar canals with the intention of diverting other large quantities of water from the river, and irrigating other arid, non-riparian lands, and the legislature of that State has authorized their construction; and the State of Colorado also intends to, and will, unless restrained, extend its existing canal and build branches and laterals.

That Colorado has by legislation appropriated large sums of money for the construction of reservoirs for the storage of water from the streams tributary to the Arkansas River, and provided for the control thereof, and the sale of the waters so stored for the irrigation of arid lands, non-riparian to the streams from which the waters are taken. That the State has constructed and is using four of such reservoirs holding vast quantities of water which would otherwise flow into the State of Kansas; and by reason of the use of those waters no portion thereof is permitted to return to its natural channel or flow in the river. That the State of Colorado is now preparing to construct, and intends to construct, and, unless restrained, will construct, at various points along the river and its tributaries, vast reservoirs in which to further store and hold the natural and flood waters of said stream; "and it is the intention and expectation of said State so to store and withhold and divert from the channel of said river all of the water thereof." That surveys for these reservoirs had been made and plans and specifications were being prepared for their construction, and the State is preparing to enter on the construction thereof. That if these reservoirs are so constructed by Colorado vast and enormous quantities of water which would otherwise flow into the State of Kansas will be taken and held and sold and used for the irrigation of arid and non-riparian lands not now irrigated, and will be forever lost to the river and the State of Kansas, which will cause in

Kansas in said valley a vast and ruinous decline in agriculture, and great diminution of the wealth and revenues of the State, and in its population and prosperity.

Complainant charged the facts to be "that it is the intention of the State of Colorado to divert absolutely all of the water that does, can or might flow down the Arkansas River into the State of Kansas, so that all of the water shall be used in the State of Colorado, and none whatever, either above or below the surface, that may by any possibility be utilized, shall cross the line into the State of Kansas, all to the great profit and advantage of the State of Colorado; and to the great damage and injury of the State of Kansas."

It was further stated that when the Territory of Kansas was organized in 1854 it extended from its present eastern boundary to the summit of the Rocky Mountains, and all of the present drainage area of the Arkansas River in Colorado was then included therein, and during all of the period from then to the organization of the State of Kansas the water of the river was wholly unappropriated, and the common law and the riparian rights herein claimed extended over the whole of the Arkansas valley and to the summits of the Rocky Mountains, and had for many years prior thereto. That by reason of the prior settlement, occupation and title of the inhabitants of Kansas upon and to the lands situated in the valley of said river, including those upon its banks, Kansas and the owners of land in the valley acquired, and now have the right to the uninterrupted and unimpeded flow of all the waters of the river into and across the State of Kansas; which rights accrued prior to any of the diversions by or in Colorado, and prior to the accruing of any of the rights claimed by that State, or by persons, firms or corporations therein now taking water from the river or its tributaries.

The bill further averred that the State of Colorado and the various persons, firms and corporations engaged in taking waters from the river and its tributaries under and in pursuance of authority granted by the State of Colorado, have by so doing wrongfully, illegally and unlawfully diverted the water from the accustomed channel across the State of Kansas, and have

greatly damaged and irreparably injured the State of Kansas and its inhabitants. That by reason of such diversion the fertility of all the valley lands in Kansas, including those on the river banks as well as others, has been greatly diminished, and the crops, trees and vegetation have languished and declined, and in many places perished, and wells which should furnish water for domestic use and animals have become dry. That these damages are the proximate and necessary result of the diversion of the waters, and that such damage amounts to vast sums annually, which damages have increased year by year for the past ten years, substantially in proportion as the diversion of the waters in the State of Colorado has increased.

It was also stated that by reason of the diversion of the waters as described, during the summer season and the dry portion of the year, the bed of the river in Kansas above the city of Wichita becomes practically, and oftentimes wholly dry, and because of the natural features of the territory through which the stream passes, which are set forth, the channel becomes filled up and great damage is inflicted at times of sudden and excessive rainfall in Kansas or sudden and excessive melting of snows in Colorado.

That the property of complainant, situated on the banks of the river and used for the purposes of a soldiers' home, has been greatly damaged and specially injured by reason of the diversion of the water, which would otherwise flow by and underneath the said tract of land, and unless the natural and normal flow is restored the value of the property will be entirely destroyed. And that the same is true of complainant's property used for the purposes of a state industrial reformatory.

The bill further averred that a large number of irrigation canals and ditches, now wrongfully used in diverting the waters of the Arkansas River and its tributaries from their accustomed channels in Colorado, are owned and operated by domestic corporations organized for that purpose under the laws of Colorado, with limited periods of existence, and that if Colorado be not restrained from doing so, she will grant extensions of the charters now held, and also grant other and new charters to corporations organized for the purpose of unlawfully and wrongfully

diverting and using said waters for irrigation purposes, all to the irreparable injury of the State of Kansas and its inhabitants.

The bill then prayed "that a decree may be entered probibiting, enjoining and restraining the State of Colorado from granting, issuing, or permitting to be granted or issued hereafter, any charter, license, permit or authority to any person, firm or corporation for the diversion of any of the waters of the Arkansas River or of any of its tributaries from their natural beds, courses and channels within the State of Colorado, except for domestic use; and from granting to any person, firm or corporation any right to extend or enlarge any of the canals or ditches now existing; or to construct and operate any other canals, ditches, branches, laterals or reservoirs in addition to those heretofore constructed and now in use in said State."

"That the said State of Colorado may be prohibited, enjoined, and restrained, as a State, from itself constructing, owning, or operating, either directly or indirectly, any canal or ditch whereby the waters of said river, or any of its tributaries, shall be diverted from their natural courses and channels; and from constructing, owning, operating or using any reservoir for the storage of the waters of said river, or any of its tributaries, for purposes of irrigation."

"That the said State of Colorado may be prohibited, enjoined and restrained from granting to any person, firm or corporation any extension of any charter, license, permit, or authority, of any kind or nature whatsoever, for the diversion of any of said waters from said river or its tributaries for irrigation purposes, or for the continuance of such diversion thereof after the charter, license, permit or authority theretofore granted for that purpose shall have expired."

And for general relief.

Thereupon, October 15, 1901, the State of Colorado, by leave, filed its demurrer to the bill of complaint, assigning the following causes:

"First. That this court has no jurisdiction of either the parties to or the subject matter of this suit because it appears on the face of said bill of complaint that the matters set forth

therein do not constitute, within the meaning of the Constitution of the United States, any controversy between the State of Kansas and the State of Colorado.

"Second. Because the allegations of said bill show that the issues presented by said bill arise, if at all, between the State of Kansas and certain private corporations and certain persons in the State of Colorado who are not made parties herein and which matters so stated, if true, do not concern the State of Colorado as a corporate body or State.

"Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals who reside in the said State of Kansas on the banks of the Arkansas River and that although the said suit is attempted to be prosecuted for and in the name of the State of Kansas, said State is in fact loaning its name to said individuals and is only a nominal party to said suit and that the real parties in interest are the said private parties and persons residing in said State.

"Fourth. Because it appears from the face of said bill that the State of Kansas in her right of sovereignty is seeking to maintain this suit for the redress of the supposed wrongs of certain private citizens of said State while under the Constitution of the United States and the laws enacted thereunder, said State possesses no such sovereignty as empowers it to bring an original suit in this court for such purposes.

"Fifth. Because it appears upon the face of said bill of complaint that no property rights of the State of Kansas are in any manner affected by the matters alleged in said bill of complaint; nor is there any such property right involved in this suit as would give this court original jurisdiction of this cause.

"Sixth. Because it appears from the face of said bill of complaint that the acts complained of are not done by the State of Colorado or under its authority, but by certain private corporations and individuals against whom relief is sought and who are not made parties herein.

"Seventh. The bill is multifarious in this, to wit: that thereby the State of Kansas seeks to determine the claims of the State of Kansas as a riparian owner against the claims of the State of Colorado as an appropriator of water; the claims of the State

of Kansas as a riparian owner against the separate and severable claims of numerous undisclosed Colorado appropriators of water; the separate and severable claims of various disclosed and undisclosed riparian claimants in Kansas against the claims of the State of Colorado as an appropriator of water; and the separate and severable claims of various disclosed and undisclosed riparian claimants in Kansas against the separate and severable claims of numerous undisclosed Colorado appropriators; and otherwise, as is apparent from the bill.

"Eighth. Because the acts and injuries complained of consist of the exercise of rights and the appropriation of water upon the national domain in conformity with and by virtue of divers acts of Congress in relation thereto.

"Ninth. Because the constitution of the State of Colorado declaring public property in the waters of its natural streams and sanctioning the right of appropriation was enacted pursuant to national authority and ratified thereby at the time of admission of the State into the Union.

"Tenth. Said bill of complaint is in other respects uncertain, informal and insufficient and does not state facts sufficient to entitle the State of Kansas to the equitable relief prayed for."

The demurrer was set down for argument, and duly argued February 24 and 25, 1902.

Mr. A. A. Godard and *Mr. Eugene F. Ware* for the State of Kansas. *Mr. S. S. Ashbaugh* was on their brief.

Mr. Luther M. Goddard, *Mr. Platt Rogers* and *Mr. Charles S. Thomas* for the State of Colorado. *Mr. Charles C. Post* and *Mr. Henry A. Dubbs* were on their brief.

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

The original jurisdiction of this court over "controversies between two or more States" was declared by the judiciary act of 1789 to be exclusive, as in its nature it necessarily must be.

Reference to the language of the Constitution providing for

its exercise, to its historical origin, to the decisions of this court in which the subject has received consideration, which was made at length in *Missouri* v. *Illinois*, 180 U. S. 208, demonstrates the comprehensiveness, the importance and the gravity of this grant of power, and the sagacious foresight of those by whom it was framed. By the first clause of section 10 of article I of the Constitution it was provided that "No State shall enter into any treaty, alliance, or confederation;" and by the third clause that "No State shall, without the consent of Congress, . . . keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Treaties, alliances and confederations were thus wholly prohibited, and Judge Tucker in his Appendix to Blackstone (vol. 1, p. 310) found the distinction between them and "agreements or compacts" mentioned in the third clause, in the fact that the former related "ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time," but agreements or compacts concerned "transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties." But Mr. Justice Story thought this an unsatisfactory exposition, and that the language of the first clause might be more plausibly interpreted "to apply to treaties of a political character, such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;" while compacts and agreements might be very properly applied "to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundaries; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other." 2 Story, Const. §§ 1402, 1403; *Louisiana* v. *Texas*, 176 U. S. 1.

Undoubtedly as remarked by Mr. Justice Bradley in *Hans*

v. *Louisiana*, 134 U. S. 1, 15, the Constitution made some things justiciable, "which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution." And as the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.

In *Missouri* v. *Illinois and The Sanitary District of Chicago*, 180 U. S. 208, it was alleged that an artificial channel or drain constructed by the sanitary district for purposes of sewerage under authority derived from the State of Illinois, created a continuing nuisance dangerous to the health of the people of the State of Missouri, and the bill charged that the acts of defendants, if not restrained, would result in poisoning the water supply of the inhabitants of Missouri, and in injuriously affecting that portion of the bed of the Mississippi River lying within its territory. In disposing of a demurrer to the bill, numerous cases involving the exercise of original jurisdiction by this court were examined, and the court, speaking through Mr. Justice Shiras, said: "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court. An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State, but it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the

State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering. The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State. That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

As will be perceived, the court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriæ*, trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

In the case before us, the State of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the State, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action and not the action of state officers in abuse or excess of their powers.

Opinion of the Court.

The State of Colorado contends that, as a sovereign and independent State, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that as the sources of the Arkansas River are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the State of Kansas the same position that foreign States occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences, power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent States in their relations to each other; that by the law of Nations the primary and absolute right of a State is self-preservation; that the improvement of her revenues, arts, agriculture and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a State to observe the demands of comity cannot be made the subject of controversy between States; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining State, and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld.

But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The States of this Union cannot make war upon each other. They cannot "grant letters of marque and reprisal." They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.

As Mr. Justice Baldwin remarked in *Rhode Island* v. *Mas-*

sachusetts: "Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary, without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a State which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact." 12 Pet. 657, 726.

"War," said Mr. Justice Johnson, "is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails, can only derive validity from treaty stipulations." *Harcourt* v. *Gaillard*, 12 Wheat. 523, 528.

The publicists suggest as just causes of war, defence; recovery of one's own; and punishment of an enemy. But as between States of this Union, who can determine what would be a just cause of war?

Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by treaty; but if a State of this Union deprives another State of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted?

Applying the principles settled in previous cases, we have no special difficulty with the bare question whether facts might not exist which would justify our interposition, while the manifest importance of the case and the necessity of the ascertainment of all the facts before the propositions of law can be satisfactorily dealt with, lead us to the conclusion that the cause should go to issue and proofs before final decision.

The pursuit of this course, on occasion, is thus referred to by Mr. Daniell (p. 542): "The court sometimes declines to decide a doubtful question of title on demurrer; in which case, the demurrer will be overruled, without prejudice to any question.

A demurrer may also be overruled, with liberty to the defendant to insist upon the same defence by answer, if the allegations of the bill are such that the case ought not to be decided without an answer being put in. . . . A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer."

Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one State of the Union to wholly deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter, and that, therefore, this court, speaking broadly, has jurisdiction.

We do not pause to consider the scope of the relief which it might be possible to accord on such a bill. Doubtless the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that, such appropriate decree as the facts might be found to justify, could be entered, if consistent with the case made by the bill, and not inconsistent with the specific prayers in whole or in part, if that were also essential. *Tayloe* v. *Merchants' Insurance Company*, 9 How. 390, 406; Daniell, Ch. Pr. (4th Am. ed.) 380.

Advancing from the preliminary inquiry, other propositions of law are urged as fatal to relief, most of which, perhaps all, are dependent on the actual facts. The general rule is that the truth of material and relevant matters, set forth with requisite precision, are admitted by demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule, and we must decline to do so.

The gravamen of the bill is that the State of Colorado, act-

ing directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the State of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas River through its channel on the surface, and through a subterranean course, across the State of Kansas; that this is threatened not only by the impounding, and the use of the water at the river's source, but as it flows after reaching the river. Injury, it is averred, is being, and would be, thereby inflicted on the State of Kansas as an individual owner, and on all the inhabitants of the State, and especially on the inhabitants of that part of the State lying in the Arkansas valley. The injury is asserted to be threatened, and as being wrought, in respect of lands located on the banks of the river; lands lying on the line of a subterranean flow; and lands lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that Colorado in doing this is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

The State of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream, and while she concedes that this rule has been modified in the Western States so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other States and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

Sitting, as it were, as an international, as well as a domestic

tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas River in Kansas; whether what is described in the bill as the "underflow" is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas River; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof.

The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence.

Demurrer overruled, without prejudice to any question, and leave to answer.

Mr. Justice Gray did not hear the argument, and took no part in the decision.

ERIE RAILROAD COMPANY *v.* PURDY.

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

No. 171. Argued and submitted March 6, 1902.—Decided April 7, 1902.

Where a party, drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a State denied to him a right or immunity under the Constitution of the United States, did not raise such question or specially set up or claim such right or immunity in the trial court, this court cannot review such final judgment and hold that the state judgment was unconstitutional, or that the right or immunity so claimed had been denied by the highest court of the State, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court, as required by the state practice.

If, upon examining the record, this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed in the trial court, then the jurisdiction of this court would not have been defeated by the mere failure of the highest court of the State to dispose of the question so raised, or to pass upon the right or immunity so claimed.

THE case is stated in the opinion of the court.

Mr. Adelbert Moot for plaintiff in error.

Mr. Clarence A. Farnum, for defendant in error submitted on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

Twenty-one actions were brought by Purdy against the Erie Railroad Company, a corporation of New York, to recover penalties under what is known as the Mileage Book Act of that State, being chapter 1027 of the Laws of 1895 which took effect June 15, 1895, as amended by chapter 835 of the Laws of 1896 which took effect May 22, 1896.

The complaint and answer in each case were the same.

Each answer alleged "upon information and belief that the

said act known as chapter 835 of the Laws of 1896, is unconstitutional and void, because it is in violation of the provisions of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of *various other provisions* of the Constitution of the United States and of the constitution of the State of New York."

This was the only reference, special or general, in the answers, to the Constitution of the United States.

The twenty-one actions were consolidated into one action subject to the plaintiff's right to recover in each one as if they had been separately tried.

At the conclusion of the evidence in behalf of the plaintiff the railroad company moved for a non-suit in each action upon various grounds, the only one that can be regarded as specially setting up or claiming a Federal right or immunity being the fifth, which stated that if the state legislation under which the defendant sought to recover penalties was intended to apply to the railway lines of defendant the acts of the legislature were void, "because they undertake to interfere with or regulate commerce among the States and the acts of Congress in such case made and provided."

It was not assigned as a ground of nonsuit that the statute in question was in violation "of various other provisions" of the Constitution of the United States. Apparently, that ground of defence was abandoned at the trial.

The trial court granted the motion for nonsuit in the last eleven cases, and directed a verdict in favor of the plaintiff for $50 each in the first ten cases; and ordered that the exceptions of each party be heard in the Appellate Division in the first instance, all proceedings in the meantime being stayed.

In the Appellate Division the exceptions of the railroad company were overruled and judgment was ordered for the plaintiff with costs, and that judgment was affirmed in the Court of Appeals of New York. *Purdy* v. *Erie R. R. Co.*, 162 N. Y. 42, 50, 51.

That court, speaking by Judge Cullen, said: "At the opening of the trial the defendant moved to dismiss the complaint

because it failed to state facts sufficient to constitute a cause of action for a penalty. No particular ground for the attack on the complaint is stated. At the close of the evidence, the defendant renewed its motion to dismiss the complaint, but the sole ground on which it assailed the validity of the statute itself was that it constituted an interference with the regulation of interstate commerce, and hence was in violation of the Constitution of the United States. The objection that the statute was an invasion of the defendant's property rights, and contravened, for that reason, either the Constitution of the United States or the constitution of this State, does not anywhere appear in the record, and the rule seems settled that such an objection, to be available here, must have been raised in the courts below. *Vose* v. *Cockcroft*, 44 N. Y. 415; *Delaney* v. *Brett*, 51 N. Y. 78."

Again: "The objection that the statutes of 1895 and 1896 are regulations of interstate commerce, and hence, in conflict with the Federal Constitution, is satisfactorily dealt with in the very clear opinion of Mr. Justice Merwin, of the Appellate Division, delivered in the *Beardsley* case, 15 App. Div. 251. That such a statute, if limited in its scope to transportation wholly within the limits of the State, is a valid exercise of state authority is settled by the decision of the Supreme Court of the United States in *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, where it was said: 'It (the State) may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State.' This doctrine has never been overruled or limited; on the contrary, it is fully recognized in the later cases. *Hennington* v. *Georgia*, 163 U. S. 299; *W. U. Tel. Co.* v. *James*, 162 U. S. 650; *L. S. & M. S. R. Co.* v. *Ohio*, 173 U. S. 285. In *Wabash &c. R'y Co.* v. *Illinois*, 118 U. S. 557, a statute of Illinois regulating fares was held void solely on the ground that the act, as interpreted by the Supreme Court of the State, included cases of transportation partly within and partly without the State. It was there stated: 'If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transpor-

tation through or into other States, there does not seem to be any difficulty in holding it to be valid.' There is nothing in the language of the statutes now before us that shows they were intended to affect any but interstate transportation; but if their interpretation is doubtful 'the courts must so construe a statute as to bring it within the constitutional limits, if it is susceptible of such construction.' *Sage* v. *City of Brooklyn*, 89 N. Y. 189; *People* v. *Terry*, 108 N. Y. 1. Within this principle these statutes must be construed as applying to transportation wholly within the State, and as so construed they do not infringe upon the Constitution of the United States."

In a petition for the allowance of a writ of error from this court, the railroad company for the first time expressly referred to the Fourteenth Amendment of the Constitution of the United States as affording it protection against the statute of New York. The same ground was repeated in the assignments of error for this court.

We are asked to determine whether the judgment of the Court of Appeals of New York affirming the judgment of the Supreme Court of the State did not deny to the railroad company a right or immunity secured to it by that clause of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

This question cannot be determined by this court unless it has jurisdiction to review such final judgment of the Court of Appeals of the State.

The statute defining the authority of this court to reëxamine the final judgment of the highest court of a State, gives it jurisdiction "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially

set up or claimed by either party under such Constitution, treaty, statute, commission or authority." Rev. Stat., § 709.

By its answer and its motion for a nonsuit at the close of the plaintiff's evidence, the defendant did distinctly claim that the statute of New York in question was inconsistent with the power of Congress to regulate commerce among the several States. But the Court of Appeals held that the statute was intended to apply and applied only to domestic transportation. We accept this view as to the scope and operation of the statute, and assume that it does not require the railroad company to issue mileage tickets covering the transportation of passengers from one State to another State. So that no Federal question arising under the commerce clause of the Constitution is here for determination.

But the defendant insists that the general allegation in each of its answers, namely, that the statute, besides being void as a regulation of interstate commerce, was in violation "of various other provisions" of the Constitution of the United States, was sufficient to have enabled him, at the trial, to insist that the statute, upon which the actions were based, was repugnant to the Fourteenth Amendment of the Federal Constitution. If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for nonsuit, or in some other way, distinctly claimed that the statute, on which the actions were based, was inconsistent with that Amendment, then it would have been the duty of the Court of Appeals to determine the question so raised, unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground of local or general law adequate to dispose of the case. We state the matter in this way because, as said in *Carter* v. *Texas*, 177 U. S. 442, 447, "the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State. *Neal* v. *Delaware*, 103 U. S. 370, 396, 397;

Mitchell v. *Clark*, 110 U. S. 633, 645; *Boyd* v. *Thayer*, 143 U. S. 135, 180."

So, if the highest court of the State, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties or laws of the United States, or denies a right, privilege or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute or authority exercised under the United States, this court could review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court.

In the present case the statute was not drawn in question in the trial court as invalid under any clause of the Constitution except the one relating to commerce. It was not even asserted there to be invalid under "various other provisions" of that instrument. The statements in the motion for nonsuit, that "the cause of action alleged in such action has not been proved," and that "no cause of action has been proved in either of the actions consolidated in the action on trial," were too vague and general to indicate that the defendant claimed anything under that Amendment. The record before us is consistent with the idea that the defendant did not claim, in the trial court, in any form, generally or specially, that the statute deprived it of its property without due process of law or denied to it the equal protection of the laws.

We therefore cannot hold that the Court of Appeals, by its final judgment, sustained the validity under the Constitution of the United States of the statute drawn in question by the defendant or that it denied any right or immunity now claimed by it under the Fourteenth Amendment; for that court simply declined to consider any Federal question except that made under the commerce clause of the Federal Constitution, assigning as the reason therefor that no point was made at the trial in respect of any other clause of that instrument. In so holding, the court followed the settled rule of practice in that State. On that practice alone was based its refusal to consider a Federal question not brought to the attention of the trial court. *Vose* v. *Cockcroft*, 44 N. Y. 415; *Delaney* v. *Brett*, 51 N. Y. 78.

Now, where a party—drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a State denied to him a right or immunity under the Constitution of the United States—did not raise such question or specially set up or claim such right or immunity in the trial court, this court cannot review such final judgment and hold that the state enactment was unconstitutional or that the right or immunity so claimed had been *denied* by the highest court of the State, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the state practice. *Spies* v. *Illinois*, 123 U. S. 131, 181; *Miller* v. *Texas*, 153 U. S. 535, 538; *Morrison* v. *Watson*, 154 U. S. 111, 115. Of course, if upon examining the record this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, then our jurisdiction would not have been defeated by the mere failure of the highest court of the State to dispose of the question so raised or to pass upon the right or immunity so claimed.

It results from what has been said that no Federal question is sufficiently presented by the record for our determination; consequently, the writ of error must be

Dismissed for want of jurisdiction in this court. It is so ordered.

Mr. Justice Gray did not hear the argument or take part in the decision of this case.

HITZ *v.* JENKS.

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

No. 99. Argued January 14, 15, 1902.—Decided April 7, 1902.

The property involved in this suit is improved real estate in the city of Washington; and the controlling question presented is, whether the sale of it under a deed of trust stands in the way of its redemption by Mrs. Hitz upon her paying the debt secured by the deed of trust.

As between the parties to the original cause the title to the real estate in question was bound for the filing of the cross-bill by Mrs. Hitz.

The deeds which Mrs. Hitz sought to have set aside are valid and enforceable instruments.

The sale by Tyler as trustee conferred no title as against Mrs. Hitz.

Mrs. Hitz is entitled in this suit to redeem the property by paying such sum as may be due on account of the debt to secure which the deed to Tyler was made.

THE case is stated in the opinion of the court.

Mr. A. S. Worthington and *Mr. Wayne Mc Veagh* for appellant. *Mr. J. S. Flannery* was on their brief.

Mr. Walter D. Davidge and *Mr. J. J. Darlington* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

The property involved in this suit is certain improved real estate on the northeast corner of Ninth and G streets in the city of Washington, of which the appellant, who was the plaintiff below, asserts ownership subject to the lien created by a deed of trust to which reference will be presently made; but of which property the heirs at law and devisees of the late William P. Jenks also assert ownership in virtue of a conveyance to him by the purchaser at a sale had under that deed by the trustee therein named while he held the property as receiver—such purchase having been in fact for the benefit of Jenks in whose favor the deed of trust was executed.

This land had been inherited by Mrs. Hitz from her father after her marriage to John Hitz in 1856. There were several children of that marriage, and, as stated by the Court of Appeals, the husband became entitled to an inchoate tenancy by the curtesy in the wife's estate which remained unaffected by the married woman's act of 1869.

The controlling question presented on this appeal is whether the sale under the deed of trust stands in the way of the redemption of the property by Mrs. Hitz upon her paying the debt secured by the above deed of trust.

The facts necessary to be stated in order to bring out clearly the views of the respective parties touching that question are as follows:

By a deed of trust dated January 26, 1876, John Hitz and his wife Jane C. Hitz conveyed this real estate to R. B. Donaldson and Charles E. Prentiss, trustees, to secure the payment of two promissory notes of $10,000 each executed January 5, 1876, by William R. Chipley to E. P. Halstead and by the latter endorsed to the German-American Savings Bank.

Subsequently the above notes passed to and became the property of the German-American National Bank, which succeeded the German-American Savings Bank.

On the 16th day of June, 1877 (the deed to Donaldson and Prentiss having been released of record) Hitz and wife by deed conveyed the property to Sarah L. Crane, who on June 18, 1877, conveyed to Richard W. Tyler as trustee, to secure the payment of a promissory note for $20,000 executed by the grantor and made payable to John Hitz or order three years after date, with interest at the rate of eight per cent per annum until paid; which note was endorsed by the payee to William P. Jenks. Sarah L. Crane had no interest in the transaction with Jenks—the real consideration for the note being a loan of money by Jenks to the German-American National Bank, of which John Hitz was President and Charles E. Prentiss, a brother of Sarah L. Crane, was Cashier. The title was put in her name in order that she might execute the above note to Jenks and make a deed of trust to secure its payment, which should be a first lien on the property.

Opinion of the Court.

The deed to Tyler as trustee authorized him upon default in the payment of the note or any quarterly instalment of interest thereon at the rate aforesaid, or of any sums advanced for taxes and insurance when demanded, or of any cost, charge or commission, to sell the land and premises, or as much thereof as might be necessary, at public auction to the highest bidder, upon such terms and at such time and place as the trustee deemed best for the interest of the parties concerned.

In October, 1878, the German-American National Bank failed, and by appointment of the Comptroller of the Currency, Benjamin U. Keyser became its receiver. The latter (having first procured from Sarah L. Crane a conveyance of such interest as she had after satisfying the deed of trust to Tyler) obtained possession of the property from Hitz, and proceeded, in his capacity as receiver of the bank, to collect the rents.

Default having occurred in the payment of taxes and interest on the Jenks note, Tyler as trustee gave notice by publication in a newspaper that he would sell the property at public auction, on the 20th day of January, 1879.

Thereupon, on the 10th day of January, 1879, Keyser as receiver commenced his suit in equity in the Supreme Court of the District of Columbia against John Hitz, Jane C. Hitz, Sarah L. Crane, William P. Jenks, Richard W. Tyler, E. P. Halstead, R. P. Donaldson, Charles E. Prentiss and William R. Chipley. Part of the relief asked was that pending the cause the defendants Jenks and Tyler and each of them be restrained from advertising and selling the property in question or in any manner interfering with it.

On the 21st of February, 1879, an order was entered restraining the sale by Tyler.

All of the defendants filed answers—Jenks and Tyler resisting the relief asked. Sarah L. Crane by cross-bill asked that the conveyance from her to Keyser be vacated. Mrs. Hitz by cross-bill *claimed the property as hers*, and prayed, upon various grounds, *for the cancellation of the deed to Sarah L. Crane, as well as the deed of the latter to Tyler*, and for an accounting in respect of rents and profits. She also charged that there had been *a fraudulent alteration of the deed from her to*

Sarah L. Crane. Answers to the various cross-bills were also filed.

The cause having been heard at special term the court, on the 28th of November, 1881, rendered a decree adjudging that the two Chipley notes of $10,000 each had been paid; that the deed of release by Donaldson and Prentiss was a valid instrument; that the deed by Hitz and wife to Crane was null and void as to Mrs. Hitz; that the deed to Tyler, trustee, was valid as to any interest in the property which John Hitz had in virtue of his marital relation, but was null and void as to Mrs. Hitz; and that the deed to Keyser, as receiver, was null and void from its delivery.

That decree also provided that Keyser, receiver, be directed to account to the court for whatever sums of money he might have collected arising out of the property in question after the same came into his possession, and that he immediately surrender possession "to Richard W. Tyler, *who is hereby appointed receiver*, to take possession of and rent and manage the same and to collect the rents and profits thereof and apply the same, so far as may be necessary, to the payment of taxes, insurance and other expenses needed to keep the said property in tenantable condition until the further order of the court."

Keyser, Mrs. Hitz and Jenks severally appealed to the General Term and their appeals were allowed.

On the 5th day of December, 1881, Tyler gave a bond as receiver of the court in the penalty of five thousand dollars. But he did not take immediate possession.

On the 15th day of December, 1881, an order was made at special term that Keyser bring the rents and profits of the property accruing after December 1, 1881, from month to month into court, and give bond as receiver of the German-American National Bank in the penalty of five thousand dollars, and the execution of the decree so far as it transferred the property to the receiver therein named was stayed until final decision. Keyser executed, December 16, 1881, the required bond.

On the 11th day of December, 1883, the General Term, upon final hearing, rendered a decree in which among other things it was stated that the court was of opinion "that the complainant,

Opinion of the Court.

Benjamin U. Keyser, receiver, as the holder of the notes made by William R. Chipley, is not entitled to any relief, and that the deed of conveyance, dated the 16th of June, 1877, made by Jane C. Hitz and John Hitz to Sarah L. Crane, in fee simple, conveyed as well the right, title, interest and estate of the said Jane C. Hitz as of the said John Hitz in and to the real estate and premises in said deed mentioned and referred to, and that there is no equity shown in this cause to prevent or delay the execution [or] enforcement of the deed of trust dated the 18th day of June, 1877, whereby the said Sarah L. Crane conveyed the said real estate and premises to Richard W. Tyler in trust to secure the payment of the debt to William P. Jenks, with interest and costs, as in and by the said deed of trust mentioned and provided." It was therefore adjudged that "the injunction granted on the 21st of February, 1879, enjoining the sale by the said Richard W. Tyler of the said real estate and premises conveyed to him in trust, [be,] and the same is hereby, dissolved, and that the decree in special term, so far as the same holds that the said deed of conveyance from Jane C. Hitz and John Hitz did not convey the right, title, interest and estate of the said Jane C. Hitz in and to the said real estate and premises, and so far as the same retains the said injunction in respect of such right, title, interest and estate of the said Jane C. Hitz, be, and the same is hereby, reversed."

The court adjudged that the deed from Crane to Keyser was void; and directed that Keyser, as receiver, account for the rents and profits received or which should have been received by him before and after the decree in special term, the cause to be retained for the purposes of such accounting.

The decree of the general term also provided:

"Fourth. That the order passed in special term on the 15th of December, 1881, authorizing the collection of said rents and profits by the complainant, be, and the same is hereby, revoked, and that the said Richard W. Tyler be, and he is hereby, appointed *receiver*, with power, *until a sale shall be made under the said deed of trust*, to take and hold possession of said real estate and premises and to rent and manage the same, and to collect the rents and profits and apply the same to the pay-

ments of the taxes, insurance and any proper expenses, and it shall be the duty of the said receiver, after such application, to pay from time to time the said rents and profits into court and from time to time to make report to the court of the manner in which he has discharged his trust, and before entering upon the performance of his office as receiver the said Richard W. Tyler shall give bond in the penal sum of five thousand dollars and with a surety or sureties to be approved by this court or one of the justices thereof, conditioned for the faithful discharge of the trust hereby reposed in him."

"Seventh. That this decree is without prejudice to the right of any party entitled to the reversion of the said real estate and premises, or any interest in such reversion, to redeem or to make claim, as such party may be advised, to any balance or portion thereof which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of sale, may remain in the hands of the trustee.

"Eighth. That, save so far as this cause is retained, as above mentioned and decreed, the bill of the complainant, with the amendment and supplement thereto, and the cross-bill of Jane C. Hitz, with the amendment thereto, be, and the same are hereby, dismissed."

Mrs. Hitz appealed from the above decree to this court. The appeal was allowed, and such allowance was recited in the decree. On December 31, 1883, Mrs. Hitz executed and the court approved a *supersedeas* bond in the penalty of $3000.

In January, 1884, Keyser, in conformity with the decree of the General Term, surrendered possession of the property to Tyler, who thereafter held it *as receiver* appointed by the court. But notwithstanding the allowance of Mrs. Hitz's appeal, and the approval of the *supersedeas* bond executed by her, Tyler, upon his own motion or by direction of Jenks, and in his capacity only *as trustee* under the Crane deed, published, on March 3, 1884, a notice in a newspaper that he would, on the 26th day of March, 1884, sell *for cash* the property in question, together with the improvements thereon, by virtue of the deed of trust executed to him June 18, 1877. The notice did not

mention the fact that the property was in Tyler's hands as receiver appointed by the court. But he was immediately notified in writing by the attorney of Mrs. Hitz of the fact that she had executed, and that the court in December, 1883, had approved, her *supersedeas* bond. Tyler ignored that notice and sold the property at public auction on the day named to one Seth Caldwell for the sum of $29,200—the latter, it is conceded, making the purchase *in behalf of Jenks.* On the next day Tyler executed a conveyance to Caldwell, who on April 9, 1884, conveyed to Jenks. The proceeds of the sale lacked upwards of four thousand dollars of discharging the debt due to Jenks.

It should be stated that after the cause was removed to this court by appeal an accounting was had below as to the rents and profits collected or which should have been collected by Tyler as receiver; and on July 13, 1885, a claim of Mrs. Hitz was disallowed, and the money in the registry of the court was ordered to be paid to Tyler to be applied by him in discharge of taxes and assessments accruing prior to January 1, 1884. From that order Mrs. Hitz also appealed and executed a bond for costs.

The two appeals were heard in this court, and each decree or order appealed from was affirmed November 14, 1887. *Hitz* v. *Jenks*, 123 U. S. 297. Pending the cause here William P. Jenks died, and, the record states, John Story Jenks, William Henry Jenks and Evan Randolph, executors, were made appellees.

The present suit was brought by Mrs. Hitz on the 6th day of November, 1890—the defendants being the sole heirs at law and devisees of Jenks, and Richard W. Tyler, Sarah L. Crane and Enoch Totten. Its object was to have the sale to Caldwell and the conveyance by him to Jenks set aside and annulled. It is not necessary, in view of the grounds upon which we will dispose of the cause, to set forth all the allegations of the bill. It is sufficient to say that it asked that the sale be set aside for the following reasons:

"1. The property was in the possession and custody of a receiver appointed by the court to take and keep possession

thereof and to collect the rents, and an approved *supersedeas* bond in due form of law had been given on her appeal to the Supreme Court of the United States from the decree of the General Term, and all proceedings were stopped, and no action could be legally taken under said decree while said appeal remained pending.

"2. Said sale was void because the terms of sale were unreasonable; because there were no bids, the bidders there, if any, having been discouraged from bidding; because the pretended sale was made pending an appeal in the cause to the Supreme Court of the United States; because it was given out, stated, and understood at the time of sale that it was intended to make the sale in the face of said appeal for the purpose only of transferring the title to the creditors; because the price bid and accepted at said sale was so grossly inadequate as to amount to a fraud upon the complainant, and because said pretended sale was conceived and carried through solely in the interest of the creditor, and in total disregard and in violation of the rights of the complainant as the owner of the equity of redemption. She therefore submits to the court that said pretended sale should be set aside, and that she ought to be allowed to redeem said property. She is willing and hereby offers to pay for the said heirs at law of said Jenks whatsoever sum may be found justly due to them for principal and interest on the said loan, and also for all expenditures in and upon said property, after charging them with the rents actually received, a fair accounting to be had under the direction of this court to ascertain the true balance due."

The relief prayed for was that the plaintiff be decreed to be the owner of the above property, *subject to the debt* to secure the payment of which the deed to Tyler as trustee was given; that the deed from Tyler to Caldwell be declared void, and that she be allowed to redeem the property *by paying to the heirs of Jenks what might be found due upon a proper accounting in reference to the property;* that Tyler be held chargeable, as receiver, and that he be compelled to account for the rents that had been or should have been collected by him; that the heirs of Jenks be restrained from selling or encumbering the prop-

erty; that a receiver be appointed to take charge of it and to collect the rents; and that the plaintiff might have such other and further relief as was just and equitable.

The answers were such as to meet all the material issues made by the bill. Upon final hearing the bill was dismissed with costs, and that decree was affirmed in the Court of Appeals of the District.

We have seen that the relief asked by Mrs. Hitz in her cross-bill in the original suit was a decree declaring that the deed to Donaldson and Prentiss, the deed from herself and husband to Sarah L. Crane, the deed from the latter to Tyler as trustee, and the deed from Sarah L. Crane to Keyser, as receiver, were null and void as to her. She asked to be put in possession of the property and that it might be conveyed to trustees for her sole and separate benefit, so that it could not be interfered with by her husband or his creditors. We have also seen that the Special Term declared void as to Mrs. Hitz the deed to Sarah L. Crane, as well as the deed to Tyler, trustee, and the deed to Keyser as receiver. The General Term reversed that decree, dissolved the injunction restraining Tyler from selling the property under the trust deed and dismissed the suit. But Mrs. Hitz appealed to this court, and the decree of the General Term reciting the allowance of her appeal was superseded.

It is now said that the appeal from the Special to the General Term in the *Keyser* case was only a step in the progress of the cause during its pendency in the same court, and that the decree of the General Term took the place of the decree and orders in the Special Term and was the final decision in the cause; consequently, it is argued, an appeal to this court from the decree of the General Term, with *supersedeas*, could not have the effect to reinstate or revive the decree of the Special Term, particularly that part of it enjoining Tyler from selling under the trust deed. Treating the decree of the General Term as the final decision in the original suit, and the only one that could have been reviewed on the appeal in that cause to this court, it is further contended that such decree, although appealed from, was not in law superseded, *so far as it dissolved the injunction*—no special order having been made by the Gen-

eral Term or by this court staying the execution of that part of the decree pending the cause here. In other words—and such was the holding of the Court of Appeals—the force of the decree dissolving the injunction was not at all affected by the appeal with *supersedeas*.

In the view we take of the case, it is unnecessary to discuss these questions, and it may be assumed for the purposes of the present examination that the positions just referred to are correct. But does it follow that the decree of the General Term in the *Keyser* case was not superseded so far as it ordered the dismissal of Mrs. Hitz's cross-bill with costs, and declared that she was not entitled to have the deed of her husband and herself to Sarah L. Crane, as well as the deed to Tyler, trustee, annulled and set aside, so far as her interests in the property were concerned? We think not. The mere dissolution of the injunction did not conclusively determine the merits of the cause as disclosed by the pleadings. Notwithstanding such dissolution, the way was open for Mrs. Hitz, by her appeal in the original cause, to obtain a decision by this court as to the validity of the deed from herself and husband to Crane and of the deed from Crane to Tyler, trustee. If this court had adjudged, upon that appeal, that those deeds were void as to Mrs. Hitz, and had remanded the cause for further proceedings, can it be doubted that the court below could have granted the relief asked in her cross-bill by setting aside not only the above deeds, but the sale made by Tyler as trustee under the deed from Crane to him? If the order dissolving the injunction was not affected by the appeal with *supersedeas*, and if a stranger to the suit had purchased the property at the sale by Tyler pending the *Keyser* case here, a different question would have been presented. But all difficulty on that ground is avoided by the fact that the purchase was in fact by the agent and representative of Jenks and for his benefit. As between the plaintiff and Jenks, the title to the property was bound from the filing of the bill. By the pleadings in the cause the parties had joined issue as to the validity of the deed to Tyler, trustee, and as to the right of Jenks to have the property sold under that deed. Jenks and Tyler, being parties to the cause, could not avoid the final determina-

tion of that issue in this court by any direction from the former to Tyler to sell the property under the deed of trust and by becoming the purchaser through an agent.

We have made these observations for the purpose of showing that the mere dissolution of the injunction by the General Term, and the subsequent sale at public auction under the trust deed, by Tyler—whether acting upon his own motion or by direction of Jenks is immaterial—do not preclude an inquiry in the present suit as to the validity of the sale made by Tyler in his capacity as trustee, pending the *Keyser* cause here upon appeal by Mrs. Hitz with *supersedeas*. This question will now be examined.

Tyler, as trustee under the Crane deed, advertised and sold the property, while in his possession as receiver appointed by the court. This was done by him after the removal of the cause to this court, and without any special order of court allowing him to take that course. As receiver, he held the property for the court and for the benefit of all the parties asserting an interest in it, including Mrs. Hitz. While in his hands as receiver the property was in the custody of the law. As a party to the cause he, as well as Jenks, whom he represented as trustee, knew that Mrs. Hitz by her cross-bill sought to have the deed under which he proceeded set aside as void. What he did as trustee tended to defeat the rendition here of any effective decree in favor of Mrs. Hitz, even if this court, upon her appeal, had directed such a decree to be entered. That this court affirmed the decree appealed from did not change the fact that the title to property in the custody of the law, by a receiver, was attempted to be changed by that receiver, acting without special leave of court and under a private deed of trust, the validity of which was in issue in the very case in which the receiver was appointed. If this court had decided that Mrs. Hitz was entitled on her cross-bill to have the deed made by herself and husband to Crane, and the deed by the latter to Tyler, set aside, and had remanded the cause with directions to enter a decree to that effect, the court below would have been confronted with the fact that its own receiver, in his capacity as private trustee and without leave or direction to that end, had sold the property at public auction for cash to the party in whose interest he had been made trustee,

and who was the principal adversary of Mrs. Hitz, one of the parties for whom he held possession as receiver. Let us look at some of the authorities on this general subject.

In *Wiswall* v. *Sampson*, 14 How. 52, 65, it was said: "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel* v. *Smith*, 9 Ves. 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. 1 J. & W. 176, *Brooks* v. *Greathed*; 3 Daniel's Pr. 1984. And the doctrine that a receiver is not to be disturbed, extends even to cases in which he has been appointed expressly without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interesse suo;* and this, though their right to the possession is clear. 1 Cox, 422; 6 Ves. 287. The proper course to be pursued, says Mr. Daniel, in his valuable treatise on Pleading and Practice in Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such examination may be obtained by a party interested, as well where the property consists of goods and chattels, or personalty, as where it is real estate. And in the mode of proceeding is the same in the case of the receiver. 6 Ves. 287; 9 Id. 336; 1 J. & W. 178; 3 Daniel's Pr. 1984."

Again: "The settled rule also appears to be that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court pending the litigation, by the appointment of a receiver, or by sequestration, *the title is*

bound from the filing of the bill; and *any* purchaser, *pendente lite*, even if for a valuable consideration, comes in at his peril. 3 Swanst. 278, *n.* 298; 2 Daniel's Pr. 1267; 6 Ves. 287; 9 Id. 336; 1 J. & W. 178; Daniel's Pr. 1984."

It was contended in that case that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale therefore, in such a case, should be upheld. But this court—in words that are strikingly applicable in the present case—thus disposed of that contention: "Conceding [that] the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. *The property is a fund in court, to abide the event of the litigation*, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired *by third persons, pending the litigation. Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation become fruitless.* It is true, in administering the fund, the court will take care that the rights of prior liens or encumbrances shall not be destroyed; and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand? . . . But it is not necessary to go this length in the case before us, as it is sufficient to say, that the *sale* under the judgment, *pending the equity suit*, and *while the court was in possession of the estate, without the leave of the court*, was *illegal and void.* We do not doubt but that it would be competent for the court, in case the judgment creditor holding the prior lien had not come in and claimed his interest in the equity suit, to decree a sale in the final disposition of the fund subject to his judgment. The purchaser would then be bound to pay it off.

But this disposition of the legal prior encumbrance is a very different matter, and comes to a very different result from that of permitting the enforcement of it, *pendente lite*, without the leave of the court. The rights of the several claimants to the state or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject."

So, in *Heidritter* v. *Elizabeth Oilcloth Co.*, 112 U. S. 294, which was the case of a sale of property under process from a state court while it was in the actual possession of a District Court of the United States. When the sale took place the property *had passed out of the possession of the Federal court* and there was no actual disturbance of such possession. Nevertheless this court held the sale to be void, under the doctrine of *Wiswall* v. *Sampson*, saying: "The same conclusion must prevail here; for, although the sale under the judgments in the state court was not made until after the property had passed from the possession of the District Court by delivery to the purchaser at the sale under the decree yet the initial step on which the sheriff's sale depended—*the commencement of the proceedings to enforce the mechanics' lien*, asserting the jurisdiction and control of the state court over the property sold—took place when that property was in the exclusive custody and control of the District Court; and by reason of its prosecution to a sale, was an invasion of the jurisdiction of that court. No stress is laid on the fact that notice of the proceeding, by affixing a copy of the summons upon the building, which was required by the statute, could only be made by an actual entry by the sheriff upon the property, to that extent disturbing the possession of the marshal, because the same result, in our opinion, would have followed if no such notice had been required or given. The substantial violation of the juridisction of the District Court consisted in the control over the property in its possession, assumed and asserted, in commencing the proceedings to enforce against it the lien claimed by the plaintiffs in those actions, prosecuting them to judgment and consummating them by a sale. The principle applied as in *Wiswall* v. *Sampson*, *ubi supra*, must be regarded as firmly established in the decisions of this court. It

has been often approved and confirmed. *Peale* v. *Phipps*, 14 How. 367; *Hagan* v. *Lucas*, 10 Pet. 400; *Williams* v. *Benedict*, 8 How. 107; *Pulliam* v. *Osborne*, 17 How. 471; *Taylor* v. *Carryl*, 20 How. 583; *Yonley* v. *Lavender*, 21 Wall. 276; *Peoples' Bank* v. *Calhoun*, 102 U. S. 256; *Barton* v. *Barbour*, 104 U. S. 126; *Covell* v. *Heyman*, 111 U. S. 176."

We are not aware of any decision of this court modifying the rule laid down in these cases.

To the same effect are *Walling* v. *Miller*, 108 N. Y. 173; *Porter* v. *Kingman*, 126 Mass. 141; *Dugger* v. *Collins*, 69 Ala. 324; *Thompson* v. *McCleary*, 159 Penn. St. 189; *Ellis* v. *Vernon Ice, Light and Water Co.*, 86 Tex. 109; High on Receivers, 3d ed. 141; Kerr on Receivers, 2d ed. 177.

In view of what has been said in the adjudged cases, it is clear that *as between the parties to the original cause* the title to the real estate in question was bound from the filing of the cross-bill of Mrs. Hitz; and that her appeal, with *supersedeas*, from the decree of the General Term preserved her right to have this court determine the whole cause upon the merits, as from the commencement of her suit and as between her and the parties hostile to her claim. It is also clear, under the authorities, that if Tyler while holding as receiver had, in a separate suit against Sarah L. Crane, obtained a decree for its sale under the deed of trust, no title would have been acquired by the purchaser at such a sale. Still less could any title be acquired under a sale at public auction by Tyler, acting in his capacity as private trustee—the property being at the time in his possession as receiver in another cause *to which he was a party*, and which had, at the time, been removed to this court by appeal with *supersedeas*. As receiver he held the property for Mrs. Hitz as well as for Jenks, and he could not throw off the responsibility attaching to him in that capacity, and act, pending the appeal, simply as a private trustee under the deed from Sarah L. Crane.

But it is said that the decree of the General Term must be construed as authorizing Tyler as trustee, in his discretion, to sell the property while in his possession as receiver after the appeal from that decree by Mrs. Hitz had been perfected and

a *supersedeas* bond executed and approved. A complete answer to this suggestion is that Tyler sought no such relief at the hands of the court. He asked no affirmative relief. He only desired that the court should not restrain him by injunction from acting under the deed of trust.

The words in the decree, "and he [Tyler] is hereby appointed receiver with power, *until a sale shall be made under the said deed of trust*, to take and hold possession of said real estate and premises, and to rent and manage the same, and to collect the rents and profits and apply the same to the payment of taxes, insurance and any proper expenses" did not confer any direct authority on Tyler, as trustee, to sell the property.

The court, having recited in the decree the allowance to Mrs. Hitz of an appeal, knew that such allowance removed the whole cause to this court, *Ridings* v. *Johnson*, 128 U. S. 212, 218; *United States* v. *Rio Grande Dam and Irrigation Co.*, 184 U. S. 416, and that this court could determine, at least *as between the parties*, whether the deed of trust to Tyler was a valid instrument so far as it affected the rights of Mrs. Hitz. It knew that one of the questions to be determined upon her appeal was as to Tyler's right to proceed under that deed. We should not, therefore, interpret the words referred to as intended to authorize, much less direct, Tyler, the receiver for all the parties and the representative of the court, to proceed in his private capacity as trustee for one of the parties to sell the property outright without any special order or direction to that effect. Neither Tyler nor Jenks, by their pleadings, asked for any such direction or authority from the court. The words "until a sale shall be made under said deed of trust," reasonably interpreted, meant no more than that the *power* of Tyler as receiver to take and hold possession of the property, *for the purposes designated*, should continue until there had been such a sale under the deed of trust as could properly and legally be made, and such as would give the purchaser a good title. By dissolving the injunction—which was a matter of judicial discretion—the court, in effect, declared nothing more than that it would not, by injunction, restrain the trustee from doing what he might rightfully do under the deed to him. It did not, we must assume,

intend to direct or authorize a sale by the trustee, whereby the right of Mrs. Hitz to have a final determination, upon her appeal in the original cause, as to the binding force, as between the parties, of the deeds purporting to pass her interest in the property, would be overreached or defeated.

Other questions were discussed at the bar, but they do not require to be specially noticed.

In our judgment it must be held: 1. That the deeds which Mrs. Hitz sought by her cross-bill to have set aside are to be deemed valid and enforceable instruments, it having been so adjudged in *Hitz* v. *Jenks*, 123 U. S. 297. 2. That the sale by Tyler as trustee, on the 26th day of March, 1884, while holding possession of the property as receiver, and when the suit to which he was a party was pending here upon appeal with *supersedeas*, conferred no title upon Jenks as against Mrs. Hitz. 3. That as no sale has been made under the deed from Sarah L. Crane to Tyler, trustee, which would bind Mrs. Hitz, she is entitled in this suit to redeem the property by paying such sum as may be due on account of the debt to secure which that deed was executed—that sum to be ascertained by an accounting in the court of original jurisdiction, and the amount of all rents collected and all sums expended in the preservation or protection of the property to be taken into consideration.

It results that the decree of the Supreme Court of the District of Columbia dismissing the bill in the present suit, and the decree of the Court of Appeals affirming that decree, were both erroneous.

The decree of the Court of Appeals of the District is reversed, and the cause remanded to that court, with directions to reverse the decree of the Supreme Court of the District, and for such further orders in each court as will be in conformity with the principles of this opinion.

Mr. Justice Brewer dissented.

TALBOT *v.* SIOUX CITY FIRST NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 164. Argued March 17, 18, 1902.—Decided April 14, 1902.

The defendant in error moved to dismiss the action on the ground that no Federal question was decided by the Supreme Court of Iowa. *Held*, that the motion should be overruled, as the plaintiff explicitly based his right of action on Rev. Stat. §§ 5197, 5198, and as the judgment of the trial court, and that of the Supreme Court of the State, denied such right, and this court therefore has jurisdiction.

In these statutes relating to illegal interest, it is the interest charged, and not the interest to which a forfeiture might be enforced that the statute regards as illegal, and if interest greater than the legal rate is charged, it may be relinquished, and recovery had of the legal rate.

This action was brought by the plaintiff in error in the District Court of Iowa, in and for Woodbury County, under section 5198 of the Revised Statutes of the United States, to recover twice the amount of interest alleged to have been due the defendant by the plaintiff on account of certain transactions had between it and the plaintiff. The District Court gave judgment against the plaintiff, and the Supreme Court of the State affirmed the judgment. The Chief Justice of the State allowed this writ of error.

The defendant in error was at the time of the transactions between it and the plaintiff a national bank. Plaintiff did business with it from January 1, 1886, until March, 1890, the instances of which are detailed in a pleading which occupies fifty-six pages of the record. During that time deposits were made by plaintiff with the bank, drafts were drawn by him, and his own and the promissory notes of others were given to the bank. Finally the transactions culminated according to the petition as follows:

"That on or about the 15th day of March, 1890, all of the indebtedness evidenced by said charges, account and notes then claimed by defendant against plaintiff was incorporated into

certain bonds of that date made and executed and delivered by plaintiff to the Union Loan and Trust Company of Sioux City, Iowa, as trustee for defendant, which said bonds were in the sum of $1000 each, in all one hundred bonds, into which at that time and subsequently all of said indebtedness, except that represented by said note for $3040.38, executed and delivered to the defendant on the 17th day of June, 1890, was merged. That said bonds were secured by mortgage on certain lands situated in the counties of Woodbury and Plymouth, in the State of Iowa. On or about the 3d day of March, 1892, a suit in equity was commenced in the District Court of Woodbury County, Iowa, and a judgment and decree was entered against plaintiff on or about the 23d day of December, 1893, for the sum of $94,578.90, being the entire indebtedness due from plaintiff to defendant as entered by said court upon the said bonds and said note for $3040.38. And on the 19th day of March, 1894, upon the execution sale of the premises mortgaged to secure said indebtedness, the defendant knowingly took and received the entire sum of said judgment, including all the usurious interest before that time, knowingly charged in the said account for overdrafts upon all of the said notes and bonds, in all the sum of $47,020.37. That the items of interest upon the overdrafts aforesaid, charged upon account against plaintiff, were so charged without any contract therefor, at the time of such charging were each and all at a higher rate of interest than that allowed by law of Iowa, corrupt and usurious, and in violation of sections 5197 and 5198 of the Revised Statutes of the United States. The items of interest upon overdrafts aforesaid, charged by defendant and carried into the notes aforesaid, were knowingly charged, contracted for by their incorporation in said notes, reserved, taken and received by the defendant as a part of the entire amount of interest paid by the plaintiff and knowingly received by defendant, in the total amount of money collected upon said judgment and decree, and knowingly charging, contracting, reserving, taking and receiving of which was a corrupt and usurious transaction, in violation of sections 5197 and 5198 of the Revised Statutes of the United States, and occurred within two years prior to the commencement of this ac-

tion. That the entire amount of interest as aforesaid, knowingly charged, contracted for, taken and received was in amount the sum of $47,020.37, whereby defendant became indebted to plaintiff in the sum of $94,040.74, no part of which has been paid."

The answer of the defendant admitted substantially the allegations of the petition detailing the transactions between it and the plaintiff, but alleged that it charged plaintiff only the interest permitted by the laws of Iowa, "and that if at times, through the inadvertence or mistake of the clerks and accountants of the bank, the bank charged more than such proper rate, at other times, through similar inadvertence and mistake, a less amount was charged, so that during the course of its business with the plaintiff, the total amount charged to him as interest upon overdrafts was two thousand seventy-eight dollars and eighty cents ($2078.80), while at the legal rate under the laws of Iowa, and according to the custom of bankers, there was due from the plaintiff to the defendant the sum of two thousand ninety-six dollars and sixty cents ($2096.60), and there was no intention to charge usurious interest at any time."

The answer also admitted that all the unpaid indebtedness of plaintiff remaining was included in the bonds of plaintiff, which was secured by a mortgage upon his real estate as alleged, and that the mortgage was foreclosed and the property sold, but denied that any interest upon the overdrafts was paid by the sale, but averred "that before the rendition of the judgment and decree in the said foreclosure proceedings, the court ordered deducted from the amount found due all sums charged as interest upon overdrafts, which was in fact deducted, and such sums were not included in the judgment and decree, and the defendant denies that on the sale of the property of the plaintiff on the said judgment foreclosure, any of the sums of interest upon overdrafts were thereby paid, but on the contrary alleges that there is still a large deficit on the said judgment, amounting to about the sum of ten thousand dollars ($10,000), which was not paid by the sale of the said property, and has not since been paid."

Statement of the Case.

The answer also alleged that if usurious interest was paid by the plaintiff "it was so paid more than two years prior to the time of the commencement of this suit, and therefore said suit is barred by lapse of time."

The answer also alleged a settlement between defendant and the plaintiff on the 17th of June, 1890, in pursuance of which the plaintiff delivered to the defendant $61,000 in the bonds already mentioned, and his promissory note for $3048.38, and "that the said bonds and note were received by the defendant in full payment and settlement of all existing liability and indebtedness on the part of the plaintiff to the defendant, and thereby the plaintiff paid to this defendant all sums charged for interest or otherwise, and that the said settlement took place more than two years prior to the bringing of this suit, and this suit is therefore barred by limitation."

The answer also pleaded the foreclosure suit in bar.

The plaintiff filed a reply traversing the allegations of the answer.

The case was referred to a referee to report the facts. It is not necessary to give the report of the referee in full. He found that defendant had charged interest on plaintiff's overdrafts to the amount of $2064, and that the average rate of interest charged was 10.22 per cent, and the total amount of interest charged in excess of 10 per cent was $72. That the interest on the overdrafts was included in the various notes given by the plaintiff prior to March 15, 1890; "and all of the indebtedness of plaintiff to defendant, arising or growing out of said bank account from January 1, 1886, to March 15, 1890, was evidenced by said notes, but said notes were not given in payment of said indebtedness."

The referee also found the execution of the negotiable bonds by plaintiff, and the mortgage to secure the same as alleged in the proceedings, the foreclosure of the mortgage, and that plaintiff, "in his answer and amendments in said case set up that excessive interest had been charged on overdrafts by the First National Bank, and said interest had been included in the notes afterwards given, and said notes were merged in the bonds in suit, and asked that an accounting be had of the amount of ex-

cessive interest charged on said overdrafts, and that the amount so found be deducted from the amount due on the bonds; and said D. H. Talbot, in support of his allegation, introduced evidence showing the amount of interest charged on said overdrafts; and in the determination of the case the court found that excessive interest on overdrafts to the amount of two thousand and sixty-four dollars ($2064.00) had been charged the plaintiff, and ordered that said two thousand and sixty-four dollars ($2064.00), with interest at the rate named in the bonds, amounting to five hundred ninety-five dollars and forty-six cents ($595.46), making a total of two thousand six hundred nine dollars and forty-six cents ($2609.46), be deducted from the amount due on the bonds, and a decree was entered in said case for the amount due on said bonds, less said sum of two thousand six hundred nine dollars and forty-six cents ($2609.46).

"Ninth. That in said cause a decree for ninety-four thousand five hundred seventy-eight dollars and ninety cents ($94,578.90) was rendered, of which forty-nine thousand seventy dollars and forty-seven cents ($49,070.47) was principal, thirty thousand nine hundred eighty-eight dollars and fifty-two cents ($30,988.52) was interest and fourteen thousand five hundred nineteen dollars and ninety-one cents ($14,519.91) was the amount paid on prior liens, taxes and interest on same by plaintiff in that action.

"Tenth. That the sheriff, under an execution issued on said decree, sold March 19, 1894, plaintiff's property, amounting to thirty-six thousand four hundred thirty-nine dollars and fifteen cents, ($36,439.15); and on May 19, 1894, under said execution sold property amounting to fifty thousand and sixty dollars ($50,060), and on July 2, 1894, sold under said execution property amounting to twelve hundred dollars ($1200.00), making a total of eighty-seven thousand six hundred ninety-nine dollars and fifteen cents ($87,699.15) realized from sheriff's sale of said land under said decree, and leaving a balance, including the interest to date of sale, of eleven thousand one hundred forty-one dollars and five cents ($11,141.05) unpaid on said judgment and decree, which balance, with interest, has not been paid.

"Eleventh. That the interest on overdrafts, not having been

included in said decree, was not paid by the sale of plaintiff's land under said execution.

"Twelfth. That plaintiff's overdrafts, including interest thereon, was paid June 17, 1890, more than four (4) years before the commencement of this action."

As conclusions of law the referee found as follows:

"First. That interest on overdraft was excessive, but not illegal, or usurious, and did not taint the subsequent debt, notes and bonds, of which it formed a part of the consideration.

"Second. That the custom of bankers to compute interest on a commercial basis of thirty days to the month, making three hundred and sixty days to the year, under the tables, is legal.

"Third. That plaintiff's cause of action occurred June 17th, and this suit is barred under section 5198 of the Revised Statutes of the United States, on which this action is based.

"Fourth. That the matter in this suit was adjudicated between the same parties in the case of the *Union Loan & Trust Company* v. *D. H. Talbot*, and that relief could have been granted, and plaintiff is now estopped from maintaining this suit.

"Fifth. That interest charged plaintiff on overdraft was not included in and did not form a part of the decree in the case of the *Union Loan & Trust Company* v. *D. H. Talbot*, and was not paid by said sheriff's sale of plaintiff's property under execution issued on that decree."

He recommended that judgment be entered dismissing plaintiff's petition, and that defendant have judgment for costs.

That plaintiff filed exceptions to the report, and the matter came on to be heard March 19, 1896, and the court adjudged that the conclusions of the referee were correct; that the matters in the suit had been adjudicated in the former action; that plaintiff's cause of action had accrued June 17, 1890, and that his suit was barred by the statute of the United States upon which the action was based, and plaintiff's petition was dismissed.

The Supreme Court of the State, in passing on the case, affirmed the findings of fact of the referee, but said "that it was

entirely clear under the evidence that all interest charged on overdrafts in excess of six per cent was a greater rate of interest than was allowed by the laws of this State."

The court further said:

"We have seen that unless the plaintiff has paid the illegal interest he is not entitled to recover it in this action. If it may be said that the delivery of the sixty-one bonds on June 17, 1890, was a payment, this action is barred, as it was not commenced 'within two years from the time the usurious transactions occurred,' having been commenced March 8, 1895.

"The interest on overdrafts was surely not paid by the sale of the land, for, as we have seen, it was not included in the decree. As we view the case, we think the illegal charges of interest have never been paid, and therefore the plaintiff is not entitled to recover in this action.

"IV. There is some dispute as whether plaintiff set up these charges of illegal interest in the action to foreclose the trust deed so as to constitute a former adjudication. That he set it up and that it was adjudicated we have no doubt. True, it was not set up with the same fullness and elaboration as in this case. Unquestionably it is matter which might have been plead in that case, and under a familiar rule the plaintiff must be held to have asserted all available defences to that action.

"V. Said section 5198 provides that actions to recover back illegal interest paid must be commenced 'within two years from the time the usurious transactions occurred.' Now, whether or not we call the delivery of the bonds a payment, it is evident that the usurious transaction occurred on and before June 17, 1890, and it follows that this action is barred. These questions are so largely questions of fact and rest upon familiar and undisputed principles of law that we do not find it necessary to refer to any of the many authorities cited.

"The lower court was fully warranted in affirming the findings of fact as reported by the referee. While we do not concur in the conclusions of law that the interest on overdrafts was excessive, but not illegal or usurious, and that the custom of banks to compute interest on the commercial basis of thirty

days to the month is legal, still it does not follow that the judgment of the District Court is erroneous.

"It is correct, notwithstanding the charge of illegal interest, because the plaintiff has never paid that interest, but has been allowed the full benefit of the facts in the foreclosure case and because this action was not brought within two years of the time the usurious transaction occurred."

The assignments of error present the following contentions: That the agreement of June 17, 1890, in pursuance of which the negotiable bonds of plaintiff were delivered to the defendant, did not constitute a payment of the interest on the overdrafts theretofore charged, but that the sales in the foreclosure suit May 19 and July 2, 1894, constituted such payment, and as the action was brought within two years from the latter dates, it was not barred; that the foreclosure suit was not *res judicata* because the defence of illegal interest was based upon the law of the State of Iowa, and not upon the Revised Statutes of the United States; that illegal interest was embraced in the judgment in the foreclosure suit; that the deduction which was made was only of the illegal interest on the overdrafts, and of no other interest; that the Revised Statutes direct "a forfeiture of the entire interest," not merely of the amount of interest paid in excess of that allowed by law; that section 5198 provides that in case the greater rate of interest has been paid, the person so paying the sum "may recover back . . . the amount of interest so paid."

Mr. A. A. Hoehling, Jr., and *Mr. James K. Redington* for plaintiff in error.

Mr. Asa F. Call for defendants in error.

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

1. We are first confronted by a motion to dismiss the action on the ground that no Federal question was decided by the Supreme Court of Iowa. We think the motion should be over-

ruled. The plaintiff explicitly based his right of action upon sections 5197 and 5198 of the Revised Statutes of the United States. The judgment of the trial court and that of the Supreme Court of the State denied such right. Sec. 709, Revised Statutes. This court, therefore, has jurisdiction.

2. Section 5197 authorizes a national bank to charge the rate of interest fixed by the laws of the State in which the bank is doing business. The consequences of a charge in excess of such rate are expressed in section 5198 to be as follows:

"The taking, receiving 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."

Two cases are provided for (1) where illegal interest has been taken, received or charged; (2) where illegal interest has been paid. In the first case the entire interest which the "evidence of debt carries with it" shall be deemed forfeited. In the second case the person who has paid "the greater rate of interest may recover twice the amount of interest thus paid."

In what way is the statute available to plaintiff? Or, rather, in what way was it available when the foreclosure suit was brought and in what way is it yet available? Had illegal interest been paid by plaintiff at that time or had illegal interest been only charged by defendant? The latter is the contention of the plaintiff, and he controverts the position taken by the Supreme Court of Iowa, that the agreement of June 17, 1890, constituted a payment, and that the action was barred because not commenced within two years from that date. We may yield, *arguendo*, to plaintiff's contention, and thereby eliminate the statute of limitations from consideration. But nevertheless the judgment must be affirmed.

The plaintiff's situation, then, at the time of the foreclosure suit was that he was sued for illegal interest charged but not paid, and he entered a defence to avoid its payment. He was successful. The court found that he had been charged illegal interest, and deducted its amount from the sum for which he was sued. In other words, judgment was rendered against him for the principal sum and legal interest. But he insists that such judgment was not the full relief to which he was entitled. To that judgment, he claims, he was entitled under the state law which he pleaded, but that under the statutes of the United States, which he could not plead, as he contends, he was entitled to a forfeiture of the entire interest, and as such forfeited interest was included in the judgment it was paid by the sale under the judgment of the property mortgaged, and a cause of action immediately arose to recover twice the amount of that interest so paid. We cannot assent to the contention. It is the interest charged, not the interest to which a forfeiture might be enforced, that the statute regards as illegal. And a forfeiture may or may not occur. Interest greater than the legal rate may be charged, but it may be relinquished and recovery be had of the legal rate. This was decided in *McBrown* v. *Scottish Investment Company*, 153 U. S. 318, and repeated in *Savings Society* v. *Multnomah County*, 169 U. S. 421. Those cases also decided that illegal interest ("the greater rate" the statute calls it) must be paid, to be recovered back. Indeed, it is a contradiction to say that interest may be recovered back which has not been paid, and whether it is relinquished before suit or deducted by order of the court before judgment, it is in neither case paid by the judgment nor by the satisfaction of the judgment. The fact of payment of the illegal interest, the statute makes a condition of the recovery of its penalty. If there can be a substitute for such payment it cannot be found in the insufficiency of the pleading or the deficiency of the relief, in another action.

Judgment affirmed.

Mr. Justice Gray took no part in the decision.

TALBOT *v.* SIOUX NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 190. Argued March 17, 1902.—Decided April 14, 1902.

A motion was made to dismiss on the ground that the record presented no Federal question, which was overruled.

This suit was not commenced within the time prescribed by the statute of limitations.

On the face of the petition in this case, the action was barred, and against its allegations, and the circumstances detailed in it, the court cannot indulge the supposition that the plaintiff's consciousness of the wrong was not aroused until some time within two years from the commencement of this action.

THIS is an action brought in the District Court of Woodbury County, Iowa, under sections 5197 and 5198 of the Revised Statutes of the United States, relating to national banks, to recover the sum of $16,250, the amount of interest alleged to have been unlawfully charged and collected by the defendant bank. It was argued with No. 164, *ante*, 171.

The original petition alleged as follows:

"The plaintiff claims of the defendants, and each of them, the sum of $16,000, as money justly due plaintiff from defendants, on account of unlawful and usurious interest, knowingly and unlawfully taken from the plaintiff within the seven years last passed.

"The plaintiff further alleges that during said time he had various and numerous business transactions with the defendant bank; in all said transactions defendant charged and exacted a greater rate of interest for the use of moneys had and received by plaintiff from the defendants than the law recognizes or permits a national bank to charge for the use of money."

The petition also alleged that the books and accounts wherein said transactions were kept were in the possession of the defendant, and "that the plaintiff has no itemized statement of the account between him and the defendant," and that, therefore,

he was unable to incorporate in the petition a statement of the accounts or bill of particulars.

The petition also alleged that there was due plaintiff the sum of $250, deposited by him with the defendant, which had never been drawn out or paid to him.

Upon demurrer to the petition the court ordered it to be more specific, "so far as to require the plaintiff to state his cause of action for usury in one count, and also to state his cause of action for a deposit in a separate count, and also to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action." The petition was thereupon amended.

We are only concerned with the first and second counts, which alleged the usury. It was alleged in the first count that on or about the 27th of May, 1889, the plaintiff commenced doing business with the bank in the ordinary way between the bank and its patrons, and continued to so do business with it until it closed its doors on or about the 27th of August, 1896. That during that time the bank knowingly charged him with a greater rate of interest than allowed by the laws of Iowa, which amounted to more than one dollar, but the exact amount of which he was unable to state, because the books containing the transactions were in the possession of the bank.

That on the 24th of February, 1890, the bank added the amount of usurious interest charged by it to the legitimate indebtedness of plaintiff, and included both and the sum of $2000 advanced to plaintiff, making a total of $10,000, in a promissory note bearing interest at the rate of ten per cent per annum, and as collateral security for said note plaintiff assigned to the bank all of his equity in eighty-one contracts, covering 3290.57 acres of land in Plymouth County, Iowa.

That on the 4th of March, 1890, plaintiff executed to the bank a non-negotiable promissory note for $28,000, to cover all of his indebtedness to the bank, to wit, "fourteen thousand five hundred dollars, in a draft, to pay on certain railroad lands; the ten thousand dollar note herein mentioned before, and the unlawful and usurious interest knowingly reserved and charged prior thereto, and continued in said ten thousand dollar note

aforesaid and continued and renewed in the twenty-eight thousand dollar note."

To secure said note plaintiff executed a mortgage of the land aforesaid.

"That the above note and mortgage, which were made upon the 4th day of March, 1890, did include the $10,000 illegal and unearned note, and interest to the amount of $17.10; and which said note and mortgage were made to date back and to bear date of March 1, 1890, thereby increasing the rate of interest on the $10,000 note to about 14 per cent per annum; and which said illegal, unlawful and usurious interest was knowingly reserved and charged by the defendant and included in and is a part of the $28,000 note aforesaid.

* * * * * * * *

"That the unlawful and usurious interest knowingly reserved and charged by said defendant bank against the plaintiff herein, together with the interest which in law and in fact was and is forfeited, but was unlawfully and wrongfully put in a pretended judgment against plaintiff herein in a certain case entitled *J. W. White* v. *D. H. Talbot et al.*, in the District Court of Plymouth County, Iowa, and the forfeited interest which has since accrued, amounts in all to about nine thousand dollars; the exact amount plaintiff cannot state for the reason the accounts, books, papers and records of said business between plaintiff and defendant bank is in the custody and possession of said defendant and to which plaintiff has no access; and which amount of nine thousand dollars is due and owing to the plaintiff from the defendant."

The second count alleged the transactions between the plaintiff and the bank, substantially as in the first count, though in somewhat different order and form, and not so much in detail, and that the charges and reservations of usurious interest and its additions and continuations through the various forms of his indebtedness were without his knowledge or consent.

That the bank without the knowledge or consent of plaintiff delivered the $28,000 note and the mortgage which was executed to secure the same, to one J. W. White, a stockholder in the bank, "who afterwards unlawfully and before said note

was due and payable, commenced a foreclosure proceedings in the District Court of Plymouth County, Iowa."

That said White with certain officers of the bank "did conspire with a view to the bringing about a foreclosure, and by this means adjudicate the liabilities which they would bear under the provisions of section 5329, Revised Statutes, because of the knowingly reserving and charging of unlawful and illegal interest as heretofore set out in this amended petition. And that said interested parties as officers or agents of the said bank, unlawfully and with the intent to impose upon the court, by fraudulent representations to the honorable judge of the District Court in Plymouth County, Iowa, set out in their petition for said foreclosure the right and justice of foreclosure upon the sole ground of non-payment of interest, which interest they, individually and collectively, had full knowledge of having been reserved and charged, and of which the defendant in said proceedings was without knowledge at that time, and the said interest was forfeited under the provisions of sections 5197 and 5198 of the Revised Statutes.

"Par. 6. That the said J. W. White, in pursuance of the conspiracy formed with the said A. S. Garretson and W. L. Joy as aforesaid, and for the purpose of misleading and deceiving said District Court and causing it to assume jurisdiction in said case, wrongfully and unlawfully suppressed the fact that said twenty-eight-thousand-dollar note contained unlawful and usurious interest and that all of the interest in said note and the indebtedness of the plaintiff to defendant and said Garretson had been forfeited, and suppressed the fact that said note had lost its interest-bearing power and was not due, and that no right of action then existed, and suppressed the fact that the court had no jurisdiction to try or hear said cause or render judgment therein.

"Par. 7. The plaintiff further states that on or about the 9th day of April, 1891, the said J. W. White, A. S. Garretson, W. L. Joy and the firm of Joy, Hudson, Call & Joy, and the defendant bank, did wrongfully and unlawfully combine, conspire and confederate together to and did cause an action to be commenced and proceedings to be instituted against the plain-

tiff herein, and the land described in said Exhibit 'B,' in the District Court of Plymouth County, Iowa, in the name of said J. W. White, instead of the name of the defendant herein, The Sioux National Bank, the real party in interest. That said action was so commenced in the name of said J. W. White for the purpose of avoiding and evading the force and effect of the sections of the Revised Statutes of the United States hereinbefore set forth and referred to in this amendment."

That on the 6th of May, 1891, judgment was obtained in the foreclosure suit for the sum of $31,086.50, which included "the unlawful and usurious interest and the forfeited interest." The land mortgaged was sold "on special execution" to satisfy the judgment, and, except three forty-acre pieces, was purchased by C. L. Joy, a director of the bank, for White. Sheriff's deeds were subsequently executed to the purchasers and recorded in Plymouth County.

That the court in the foreclosure suit relied on the statements of counsel and the allegation of the petition, and did not know that usurious interest was charged, and, "deceived and misled by the fraud practiced upon it," rendered judgment "for the sum of $13,125.40, more than would be actually due at maturity of said note and mortgage, to wit, March 1, 1895."

That the District Court of Plymouth County did not have jurisdiction of plaintiff or the lands mortgaged because by reason of the circumstances set out, and that the note was not due, and the judgment, decree and the execution were void.

That the said White and the defendant bank on or about the 31st of May, 1894, took possession of the lands and property described in the mortgage, and have forcibly held possession ever since.

The defendant demurred to the petition, and stated as grounds of demurrer to the first count, among others, that it did not appear that any usurious interest had been paid by plaintiff, and that it did not state a cause of action within the provisions of sections 5197 and 5198 of the Revised Statutes of the United States. As grounds of demurrer to the second count it was stated: "1st. That said action is barred by the limitations pre-

scribed in section 5198, Revised Statutes of the United States, under which said action purports to be brought."

The demurrer was sustained, and the plaintiff, not pleading further, the action was dismissed. The Supreme Court of the State affirmed the judgment. Thereupon this writ of error was allowed.

The Supreme Court of the State, passing on the case, said:

"The defendant demurred to the two counts of the petition alleging the cause of action herein stated. Several grounds were stated in the demurrer, among others that the statute of limitations had run against the plaintiff's claim. The demurrer was sustained generally, and, the plaintiff electing to stand on his pleadings, the cause as to the claim made in counts one and two of the petition was dismissed.

"The twenty-eight thousand dollar note was never paid by the plaintiff. A land mortgage was given to secure it, and that was foreclosed in Plymouth County, Iowa, and a decree rendered against the plaintiff thereon May 6, 1891. The land covered by this mortgage was sold some time thereafter, just when does not certainly appear, but it was more than two years prior to the commencement of this action.

"Section 5198 of the Revised Statutes of the United States provides for the recovery back of twice the amount of unlawful interest paid if the action therefor be commenced within two years from the time the usurious transaction occurred.

"This action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred and the demurrer for that reason was properly sustained. There was no error in striking a part of the prayer from the third count of the petition.

"The judgment is affirmed."

The assignments of error assert in various ways plaintiff's claim of rights under sections 5197 and 5198 of the Revised Statutes of the United States.

Mr. Jeremiah M. Wilson, *Mr. James K. Redington* and *Mr. A. A. Hoehling, Jr.*, for plaintiff in error.

Mr. Francis F. Oldham, *Mr. Asa F. Call* and *Mr. Henry J. Taylor* for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

1. A motion is made to dismiss on the ground that the record presents no Federal question. The motion is overruled. Plaintiff claimed a right under sections 5197 and 5198 of the Revised Statutes, and the decisions of the courts of the State were adverse to such right. Sec. 709, Revised Statutes.

2. The demurrer of defendant in error was sustained because the action was not "commenced within two years from the time the usurious transaction occurred." This ruling was indubitably right if *any* date mentioned in the petition be that of the usurious transaction or transactions relied on. The latest date mentioned in the petition is the 31st of May, 1894, when, it is alleged, "J. W. White and the defendant herein (plaintiff in error) . . . took possession of the lands and property described," in the mortgage which Talbot gave to the bank March 4, 1890. The present suit was commenced October 7, 1896, hence not within two years from the 31st of May, 1894, and not within six years from the date of the judgment upon which the property was sold.

But it is contended that the bank fraudulently concealed from the plaintiff that it had charged him with usurious interest, and that, therefore, the period of limitation of the statute did not begin "until the discovery of the wrong." A disputable proposition. Besides, it is not available to the plaintiff. The petition does not disclose when the wrong was discovered. On the face of the petition the action was barred, and against its allegations and the circumstances detailed in it we cannot indulge the supposition that plaintiff's consciousness of the wrong was not aroused until some time within two years before the commencement of this action.

Judgment affirmed.

Mr. Justice Gray took no part in the decision.

UNITED STATES *v.* PENDELL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 211. Submitted March 20, 1902.—Decided April 21, 1902.

This was an appeal from a decree of the Court of Private Land Claims, confirming the title of the appellees to a tract of land in New Mexico. *Held*, that in the absence of any sufficient attack upon the record, or of any evidence on the part of the Government going to disprove or discredit the averments therein, it formed enough of a basis for the finding of the court below that there was a grant made as stated in its findings, and that such grant and the record thereof in the archives had been destroyed under the circumstances stated.

The treaty of December 30, 1853, between the United States and Mexico, and the act of Congress in support of it, were not intended to debar parol proof of the existence and of the contents of a grant which had been destroyed under the circumstances detailed, or that, under such circumstances, a presumption that the grant had been recorded could not be indulged.

In this case the evidence of possession was sufficient, in connection with the other evidence, upon which to base a presumption that the petitioner had a title to the land, which should be confirmed.

THE case is stated in the opinion of the court.

Mr. Solicitor General, *Mr. Matthew G. Reynolds* and *Mr. William H. Pope* for appellant.

Mr. T. B. Catron for appellees.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The Government appeals in this case from a decree of the Court of Private Land Claims in favor of the appellees, confirming their title to a certain tract of land in the county of Dona Ana, Territory of New Mexico, alleged in the petition to contain four square leagues. The petition of the appellees alleged the making of a grant to their predecessors prior to the year 1790 of a tract of land known as Santa Teresa; that the grant

was a good and valid one, and the grantee entered upon and took possession of the same, and that he and his heirs and assigns continued in peaceable possession up to and after the ratification of the treaty of December 30, 1853, between the governments of Mexico and the United States, by the terms of which treaty territory, including the Santa Teresa grant, was transferred to the sovereignty of the United States. The petition then alleged that in the year 1846, while the original documents of title were in existence in the town of Paso del Norte, in the State of Chihuahua, where the heir resided, the place was occupied by the military forces of the United States, and the original documents of title and the official registry where they were recorded were destroyed by the American forces; that proceedings had been taken on January 7, 1853, for the purpose of perpetuating evidence of the title, and in accordance with which the judicial authorities reëstablished the boundaries and monuments of the grant, and placed the heir in formal and legal possession of the same on January 16, 1853. A certified record of these proceedings was alleged to be on file in the office of the United States surveyor general for the Territory of New Mexico, a duplicate copy of the same in the Spanish language, with a translation also in duplicate, being filed with the petition. The boundaries of the grant were stated, and the petitioners averred that they were the owners in fee of the land contained in the grant by inheritance and purchase from the original grantee, Francisco Garcia, and that the title of the original grantee, his heirs and assigns, in and to the grant was complete and perfect at the date when the United States acquired sovereignty over the Territory of New Mexico, and also at the time of the ratification of the treaty between the United States and the Mexican Republic, known as the Gadsden purchase, on December 30, 1853; and it was averred that the land had been in the peaceable and undisturbed possession of the original grantee, his heirs, etc., from the date of the making of the grant to the present time; and that there was no person in possession of the land claiming the same adversely to the petitioners or otherwise than by lease or permission from them.

The answer of the United States denied all the material

averments of the petition, and denied that the petitioners were entitled to the relief or any part thereof prayed for, and asked that the petition should be dismissed. Subsequently certain persons, claiming adversely to the petitioners, entered their appearance by their solicitor as defendants.

The principal issue in the case in regard to the boundaries of the alleged grant related to the southern line, the petitioners claiming that it was located at the international boundary line, while the Government claimed it was above the Southern Pacific Railroad bridge, a considerable distance north of that line. The interests of the individual defendants, who were co-defendants with the Government, were upon the tract of land lying between the international boundary and the line of the Southern Pacific Railroad bridge. The decree of the court fixed the south boundary at the point contended for by the Government, thus leaving the lands in which the individual defendants were interested untouched, and as this location of the line has been acquiesced in by the petitioners, the case no longer has any bearing upon the interests of those defendants.

The decree of the court was in favor of the petitioners, establishing their grant, with the southern line thereof as stated, and found that the petitioners were the grantees or assignees of the title of the original grantee, Garcia. Two of the judges dissented from the opinion and judgment of the court upon grounds stated in their opinions. The court made the following findings of fact:

"That prior to the year 1790, in accordance with the petition of Francisco Garcia, a citizen of the province of New Mexico and Kingdom of Spain, then and there duly made and presented to the duly authorized representatives of the King of Spain in and for New Biscay, which is now the State of Chihuahua of the Mexican Republic, the said authorities and representatives of the Crown and the King of Spain, by virtue of the power and authority in them vested as such, and in accordance with the laws, usages and customs of the said Kingdom of Spain, made to the said Francisco Garcia a grant of a certain piece and parcel of land situate in the county of Dona Ana, in the Territory of New Mexico, as at present constituted,

the same then being a dependency and province of the said Kingdom of Spain, said piece and parcel of land so granted as aforesaid being bounded, described, located and designated as follows:

"The tract of land known as the 'Santa Teresa:' Bounded on the north by that bend known as the 'Cobrena;' on the south by the bend of the Piedras Paradise, the same being somewhat to the north of the present location of the Southern Pacific Railroad bridge, where the same crosses the Rio Grande del Norte; on the east the old bed of the said Rio Grande del Norte, as the same ran and existed in the year 1853; and on the west the brow of the ridge running parallel with the said river.

"2. That thereupon then and there the said Francisco Garcia was duly placed in legal possession of the said grant by officials to that end duly authorized by the laws, usages and customs of the said Kingdom of Spain, according to the laws, usages and customs then in force.

"3. That the land included in the said outboundaries continued in the possession of the said grantee, his heirs, legal representatives and assigns, from the time of the making thereof, prior to the year 1790, as aforesaid, down to the present time, and that the petitioners herein have succeeded in part to the rights of the said original grantee.

"And the court thereupon finds, as matter of law, that by reason of the facts aforesaid an imperfect or equitable title and right such as the United States under the stipulations of the treaty of Guadalupe Hidalgo ought to recognize and confirm to, the said land was vested in the said original grantee aforesaid, which right and title existed at the date when the United States acquired sovereignty over the country now embraced within the Territory of New Mexico, within which the said grant is situated, and that the petitioners herein are entitled to have the same confirmed to the heirs, representatives and assigns of the said original grantee.

"It is therefore adjudged, decreed and specified that the said private land claim, the subject of this suit, is a valid claim against the United States of America for the land included within

the natural boundaries above set forth, and the claim to the said land grant as designated, located, bounded and described herein be, and the same hereby is, confirmed to the heirs, legal representatives and assigns of the said original grantee, excepting, however, from this confirmation any right or title to any gold, silver or quicksilver mines or minerals of the same, the same remaining the property of the United States."

The Government now raises several objections to these findings, and it is stated: (1) that there was no evidence that any grant by an officer authorized to make it had ever been made to the original grantees from whom the petitioners derived title; (2) that there is no evidence that the grant, even if one were made, was ever recorded as required by the treaty with Mexico, dated December 30, 1853, concluding the Gadsden purchase, (10 Stat. 1031, 1035,) the sixth article of which provides that no grant made prior to September 25, 1853, will be respected or considered as obligatory which has not been located and duly recorded in the archives of Mexico; (3) that there was no sufficient evidence of possession upon which to base a presumption that a grant had ever been made.

1. For the purpose of proving that a grant had once been made of the land in question, the petitioners introduced in evidence a correct copy of the original documents showing the proceedings taken before the second civil judge of the canton, the original of which was on file in the office of the judge at Paso del Norte. From these proceedings it appears that on January 7, 1853, José Maria Garcia, residing in the then town of El Paso del Norte, presented to the second civil judge, etc., a petition, in which he alleged that he was the testamentary executor under the will of his deceased mother, the widow of Garcia, and that among the property of that estate was a ranch called Santa Teresa, the document of which he had lost when the American forces took possession of the town, and he prayed that in order to supply in some manner the lack of the original document there be taken the testimony of certain reputable persons existing in the town, who knew that these documents were the title to the land in question, which prior the year 1790 had been possessed by his father and thereafter occupied by his family until the In-

dians caused them to leave the premises. Pursuant to the petition the judge cited the witnesses named therein to appear before him, which they did, and some of them testified to the existence of certain documents relating to the ranch Santa Teresa; that they had seen those documents relating to that ranch and had seen them on file in the archives, and that they were authenticated by one of the lieutenant governors that came into the district about the close of the last century, and that by reason of the father of one of the witnesses being an employé of the town after 1821, such witness saw the original documents as to said ranch on file in the archives of his father's office, and which documents were lost when the Americans took possession of the archives of the town; that the town had been occupied by the American forces, and it was a notorious fact that those forces took a part of the public archives, and also occupied José Maria Garcia's house, taking therefrom documents relating to his property and papers of importance, among them the documents of such ranch. Possession of the ranch from the time of the alleged grant was also proved. Upon evidence of this nature, testified to by several witnesses, the judge made a finding in favor of Garcia as follows:

"In view of the foregoing judicial inquiry with which the executor, José Maria Garcia, has proved legally the possession that for many years they have had of the ranch called Santa Teresa, above the dam of the town and the Muleros bend, and it appearing that they have ever had titles to said property, and these have been lost, and from what appears from the testament and judicial inquiry there is given to the executor José Maria Garcia, for himself and in the name of the co-heirs, *without prejudice to any third party proving a better right*, the real, actual, personal, corporal possession, or that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch, with the enjoyment and benefits of the lands, woods and pastures, and all other products to be found on said premises, and it is ordered that he be protected and defended therein, warning all not to interrupt or molest him in said possession and free use that he may deem fit to make

thereof, without he being first heard and judgment rendered against him in court after a trial."

The judge also ordered that Garcia should at a certain day named attend with the judge and witnesses, in order that he might be placed in possession, and it is afterwards recited that Garcia went to the place named with the witnesses and was placed in possession of the land described in the petition. This record of all the proceedings thus taken formed part of the archives of the office of the judge, and was an official public document belonging to such archives, as testified to by the successor of the judge. It was not the record of the original grant, such as is referred to in the treaty of 1853, but only a record of the proceedings just mentioned, and was contained in a book or collection of papers, endorsed 1853. The record was received in evidence under the objection of the Government, one of the objections being that the whole proceeding was *ex parte*, and therefore incompetent as evidence for any of the parties. The court below regarded the proceeding as in the nature of one to perpetuate evidence, and held that the testimony had been taken under the provisions of the law of the Republic of Mexico of May 23, 1837, and in the judgment of the court the record was therefore admissible in evidence. The law is said to be a reënactment of article 14 of the decree of July 22, 1833. Reynolds, p. 173. As translated the law reads: "Art. 14. The district judges, with respect to the towns where they live, shall have cognizance, by way of precaution, with the alcaldes of the same, in the making of inventories, evidence *ad perpetuam*, and other judicial proceedings of like nature, in which there is yet no opposition of parties."

We are not prepared to say that the record thus put in evidence was void or irregular under the law just quoted. The judgment by its terms does not assume to be conclusive. It was a judicial inquiry made according to law, before a judicial officer of the State, and while the judgment gives to the petitioner, on account of the grant proved, the lands described in his petition, yet such judgment is by its terms "without prejudice to any third party proving a better right," and it gives subject to such proof "the real, actual, personal, corporal pos-

session, or that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch, with the enjoyments and benefits of the lands, woods and pastures, and all other products to be found on such premises," etc. In other words, the judgment recognizes his possession and reaffirms the title of Garcia.

In the absence of any sufficient attack upon the record or of any evidence on the part of the Government going to disprove or discredit the averments contained therein, we think it formed enough of a basis for the finding of the court below that there was a grant made as stated in its findings, and that such grant and the record thereof in the archives had been destroyed under the circumstances mentioned. While this evidence, as to the existence of a grant, possibly might not be sufficient of itself upon which to found a decree confirming a title under it, yet taken in connection with the proof, which will be hereafter referred to, of possession under a grant, since 1790 up to the time of the filing of the petition in the court below, it was sufficient upon which to base a presumption of the existence of all papers necessary to constitute a title to the land possessed under it.

2. The objection of a lack of evidence that the alleged grant had ever been recorded may be considered with the one averring there was no sufficient evidence of possession upon which to base a presumption of a grant. It is claimed by the appellee that under the facts a presumption of a record, as well as of the grant, may be made. In regard to the matter of possession, it was stated in the opinion of the court below as follows:

"Our view of the evidence is that this tract of land was in the possession of Francisco Garcia exclusively during his lifetime from the beginning of this century, and that upon his death it passed to the hands of his children and remained in their possession until long after the transfer of sovereignty of the country to the United States, and is now in the possession of their grantees and their families. There have been very few claims based upon long possession more satisfactorily made out, in our minds, than is made out by the evidence in this case. These being the facts as we find them, we feel absolutely bound by

the doctrine established in the case of *The United States* v. *Chaves*, 175 U. S. 509."

There are no adverse claimants to the land in question, and the proof of possession, exclusive in its nature, has been satisfactory to the court below. What constitutes such possession of a large tract of land depends to some extent upon circumstances, the fact varying with different conditions, such as the general state of the surrounding country, whether similar land is customarily devoted to pasturage or to the raising of crops; to the growth of timber or to mining, or other purposes. That which might show substantial possession, exclusive in its character, where the land was devoted to the grazing of numerous cattle, might be insufficient to show the same kind of possession where the land was situated in the midst of a large population and the country devoted, for instance, to manufacturing purposes. Personal familiarity with the general character of the country and of its lands, and also knowledge of the nature and manner of the use to which most of the lands in the same vicinity are put, have given the judges of the court below unusual readiness for correctly judging and appreciating the weight and value to be accorded evidence upon the subject of possession of such lands as are here involved.

Those judges will also be presumed to have been familiar with the cases involving possession decided here, such as *Whitney* v. *United States*, 167 U. S. 529, 546, and *Bergere* v. *United States*, 168 U. S. 66, 77. When, therefore, a majority of the court decides that the evidence of possession given in the case is most satisfactory, we are inclined to concur in that view unless it is clear that the court fell into a plain error, which we think is not the case. A majority of the court has held that, "There have been very few claims based upon long possession more satisfactorily made out, in our minds, than is made out by the evidence in this case." That the dissenting justices came to a different conclusion merely shows that the evidence was such that different inferences might be drawn therefrom, and under such circumstances we are indisposed to review and reverse the decision of the court upon such a question of fact.

In this case we therefore take the fact to be that there was a

possession under a grant of some kind, starting before 1790 and continuing, uninterrupted, until the filing of the petition. There was also evidence of the existence of a grant covering the land so possessed, together with evidence of the destruction of the documents constituting the grant, and also evidence of the destruction of the archives where the record of the grant had been, and the question arises whether such possession under these circumstances is not sufficient to presume not alone the existence of a proper and valid grant, but its proper record in the archives of Mexico, within the provisions of the treaty of 1853 with that country? We think it is, and that the evidence is sufficient not only to presume a grant but to presume any other matter which would have occurred in order to render the grant a perfectly valid one and the evidence of it sufficient within the requirements of the treaty. The treaty of 1853 did not require a record, in all cases, to be made at the seat of government of Mexico as a condition of the recognition of the grant by the Government of the United States. If the record had been made in the place where records of that nature were customarily made for lands granted in the vicinity, it was, as we think, within the provisions of the treaty. It appears sufficiently, in our opinion, that Paso del Norte was the place where the archives of Mexico were kept in regard to grants of land in that neighborhood, and there is some evidence of the destruction of those archives, or of part of them, including the record of the grant in question here, by the American troops.

The appellants further claim that a lieutenant governor had no authority to grant public lands unless he was a subdelegate or had been authorized by the governor to make the grant, and that there is here no evidence of either fact. But possession under a grant, so long continued and so complete as is the case here, may well authorize, if necessary, the presumption that the lieutenant governor was either a subdelegate or that he had been authorized or his act ratified by the governor and the grant duly recorded. It is not the case of basing a presumption of authority to make a grant upon the mere fact that the officer made it, and must therefore be presumed to have had authority. Lieutenant governors in the province of Louisiana

were, by virtue of their office, subdelegates, and as such had power to grant what is termed incomplete titles, and such grants might be confirmed. *Chouteau's Heirs* v. *The United States*, 9 Pet. 137, 144. There is no evidence that lieutenant governors in Mexico did not have the same powers, and a presumption of confirmation might be made in cases of long continued, exclusive and uninterrupted possession under such a grant. It is the long continued, uninterrupted and exclusive character of the possession here proved which is so important, and when supported, as it has been by the evidence of a grant, and of possession in accordance with and under it, the presumption of validity may safely be made.

A record may in a case like this be presumed to have been made, just as well as the existence of a grant may be presumed. Where the exclusive character of the possession is so long, so uninterrupted and so satisfactorily made out as in this case, and where other proof exists of the actual making of a grant of some kind of the land in controversy, the papers constituting such grant having been seen among the archives of Mexico, although the papers themselves have been destroyed, we think a case is made out showing not only that a grant had been made, but that it was duly located and recorded. The record was to be in the archives of Mexico, under the provisions of the treaty, and those archives, according to the evidence, may be presumed in fact to have existed at the place where the documents and their record were in truth destroyed. Taking all the evidence, there is room for the presumption of a record of the grant as well as that for the existence of the grant itself.

In *United States* v. *Chaves*, 159 U. S. 452, Mr. Justice Shiras, after speaking of the fact that there was ample evidence to show that the claimants had been put in juridical possession of the land covered by the grant from the government of New Mexico, which had authority to make it, continued, page 463:

"However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American

law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law. 1 Greenleaf Ev. 12th ed. sec. 17; *Ricard* v. *Williams*, 7 Wheat, 59, 109; *Coolidge* v. *Learned*, 8 Pick. 503. Nothing, it is true, can be claimed by prescription which owes its origin to and can only be had by matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not, of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *nullum tempus occurrit regi*; yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev. sec. 45. The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon, Best's Principles of Evidence, sec. 366, and was therefore a feature of the Mexican law at the time of the cession."

In the still later case of *United States* v. *Chaves*, 175 U. S. 509, long continued and uninterrupted possession of lands in Mexico, beginning long prior to the transfer of the territory to this country and continuing after that transfer, was held sufficient upon which to base presumptions enough for a legal judgment in favor of such possession in the absence of rebutting circumstances. It is true there was an original grant to one of the occupants, Antonio Gutierrez, but the claimant was unable to present any direct conveyance from the original grantee or from his heirs with which he was in any way connected. He relied in fact upon evidence of possession by himself and his predecessors in title. Mr. Justice McKenna, in delivering the opinion of the court, made an extended examination of the law in regard to presumptions from possession, and it was held

that proof of possession may be sufficient to admit of a presumption that everything had been done that was necessary to be done by way of a grant or conveyance of the title to the individual in possession or his predecessors.

But the court below has not acted in this case upon evidence of mere possession, unaccompanied by any written evidence conferring, or professing to confer, a title of some description.

In *United States* v. *Power's Heirs*, 11 How. 570, 580, the grant actually proved was held to have no force, and it was alleged that those under whom plaintiff claimed possession held by some verbal permission from the government for many years under France and Great Britain. But no proof, even of that fact, was made, and as said in the opinion of the court, "if there had been such proof, it would be of no value, as the District Court did not possess power to act on evidence of naked possession unaccompanied by written evidence conferring, or professing to confer, a title of some description."

To the same effect is *United States* v. *Heirs of Rillieux*, 14 How. 189, where it was said that under the acts of Congress no decree could be founded upon mere possession.

In this case proof was given of a grant of some nature to petitioner's predecessor, which covered the land in question, accompanied by proof that such grant had been actually destroyed by the American troops, so that it could not be produced. Proof of the grant tended to characterize the possession which was also proved, and to render it of an adverse and exclusive nature. The lower court found as a fact the exclusive possession of such land by Garcia during his lifetime, from the beginning of the century, and then by his children, until long after the transfer of the sovereignty of the country to the United States, and that such possession continued in the hands of their grantees and their families. Evidence of the actual existence of the grant, together with evidence of this kind of exclusive possession under a claim of title, is more than mere proof of naked possession given solely for the purpose of therefrom inferring, in the absence of all other evidence of its existence, that a grant had once been made. It does not come within the principle of the above cited cases nor violate the act of 1891, establishing the court.

We do not understand that the treaty or that act made it absolutely necessary that a grant should actually be produced upon the trial, and that if one had been executed and by some accident destroyed, no proof could be given of its contents, or any proof of possession of the lands in accordance with the grant be received. Nor do we understand that it was requisite that a record of the grant should be produced, in all cases, or that in its absence the petitioner must inevitably fail.

The contents of written instruments may be proved by parol, when it is shown that the instrument itself has been lost or destroyed under such circumstances as to show the loss or destruction was not the voluntary and intentional act of the party claiming a benefit under its provisions. And in such case as this we do not think the treaty or the act of Congress was intended to debar parol proof of the existence and of the contents of a grant which had been destroyed under the circumstances detailed, or that under such circumstances a presumption that the grant had been recorded could not be indulged. *United States* v. *Sutter*, 21 How. 170–174; *United States* v. *Castro*, 24 How. 346, 350; *Peralta* v. *United States*, 3 Wall. 434.

Within the cases heretofore cited, we are of opinion that the evidence of possession was sufficient, in connection with the other evidence referred to, upon which to base a presumption that the petitioner had a title to the land which should be confirmed, within the treaty of 1853 and the provisions of the act of 1891, establishing the Court of Private Land Claims, and the judgment should, therefore, be

Affirmed.

Mr. Justice Gray and Mr. Justice White took no part in the decision of this case.

ST. LOUIS CONSOLIDATED COAL COMPANY *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 197. Submitted March 19, 1902.—Decided April 14, 1902.

It is within the power of a state legislature to provide for the appointment of inspectors of mines and the payment of their fees by the owners of the mines.

A law providing for the inspection of coal mines is not unconstitutional by reason of its limitation to mines where more than five men are employed at any one time.

Where the law provided for an inspection of coal mines at least four times a year, it was held not to be objectionable by reason of the fact that a discretion was invested in the inspectors to cause the mines to be inspected more than four times a year, and as often as they might deem it necessary and proper.

A law providing that the fees for each inspection shall not be less than six nor more than ten dollars is not rendered unconstitutional by the fact that, within these limits, the fees for each inspection are fixed by the inspector.

THIS was an action of assumpsit originally brought in the Circuit Court of St. Clair County by the people of the State of Illinois against the Consolidated Coal Company of St. Louis, a corporation of Illinois, to recover the sum of $1818 for the fees of state mine inspectors for the inspection of certain coal mines located in Illinois, owned and operated by the defendant under "An act providing for the health and safety of persons employed in coal mines," originally enacted May 28, 1879, and the amendments thereto.

The case was submitted to the court without a jury upon a stipulation of facts, in which it was agreed that the mines of the defendant, thirty-one in number, had been inspected between November 2, 1895, and June 26, 1899, by a state inspector, whole aggregate fees were $1818; that the Secretary of the Bureau of Labor Statistics presented the defendant with the inspection bills and demanded payment therefor, which defendant refused to pay.

It was further stipulated that the charge for the recovery of which this action was brought was made in pursuance of the act of May 28, 1879, and that the question to be raised and disposed of was the validity and constitutionality of so much of said above entitled act and the amendments thereto, as related to the inspection fees of the said mine inspectors, and the imposing upon the mine operator and owner the duty of paying such fees, and also whether there was any remedy at law to recover such fees.

A judgment having been entered for the payment of these fees the case was carried by writ of error to the Supreme Court, where the judgment of the Circuit Court of St. Clair County was affirmed.

Mr. Charles W. Thomas for plaintiff in error.

Mr. Howland J. Hamlin for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

The act of the general assembly of the State of Illinois, entitled an act to provide for the health and safety of persons employed in coal mines, originally passed May 28, 1879, subsequently incorporated in the Revised Statutes of 1895, and amended in 1897, Hurd's Statutes, 1897, p. 1088, c. 93, provides as printed in the margin.[1]

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[1] "Sec. 11 *a*. This State shall be divided into seven inspection districts, as follows:" etc.

"Sec. 11 *b*. *The Governor shall*, upon the recommendation of a board of examiners selected for that purpose, composed of two practical coal miners, two coal operators, and one mining engineer, to be appointed by the Bureau of Labor Statistics of this State, all of whom shall be sworn to a faithful discharge of their duties, *appoint seven properly qualified persons to fill the offices of inspectors of coal mines of this State* (being one inspector for each district, provided for in this act), whose commissions shall be for the term of two years, but they shall at all times be subject to removal from office, for neglect of duty or malfeasance in the discharge of duty, as hereinafter provided for.

"Sec. 11 *c*. The inspectors so appointed shall have attained the age of thirty years, be citizens of this state, and have a knowledge of mining en-

The Supreme Court found that all the state questions involved in this case had been disposed of in *Chicago, Wilmington*

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gineering sufficient to conduct the development of coal mines, and a practical knowledge of the methods of conducting mining for coal in the presence of explosive gases, and of the proper ventilation of coal mines. They shall have had a practical mining experience of ten years, and shall not be interested as owner, operator, stockholder, superintendent or mining engineer of any coal mine during their term of office, and shall be of good moral character and temperate habits, and shall not be guilty of any act tending to the injury of miners or operators of mines during their term of office. They shall provide themselves with the most approved modern instruments for carrying out the intention of this act," etc.

"SEC. 11*d*. Any person, company or corporation operating any coal mine in this State *shall be required to pay an inspection fee of not less than six dollars nor more than ten dollars for each visit of inspection or investigation of a coal mine by a state mine inspector, such fee to be regulated by the class of the mine, which shall be fixed by the inspector and depend upon the length of time consumed, and the expense necessarily incurred in the inspection of such mine*, and such fees shall be paid quarterly by the person, company or corporation operating the mine inspected to the Secretary of the Bureau of Labor Statistics and by him covered into the state treasury to be held as a fund for the payment of salaries of state Mine Inspectors, as herein provided. *It shall be the duty of each inspector, as often as he may deem it necessary and proper, and at least four times a year, to inspect each and every mine in his inspection district.* Each inspection shall be certified to by the pit committee and mine manager of said mine. It shall be the duty of each inspector to keep a detailed record of all inspections and of all fees for such inspections, and he shall file a copy of the same with the Secretary of the state Bureau of Labor Statistics quarterly, between the first and fifteenth days of the following months: October, January, April and July, which reports shall be published annually as a part of the regular report of the state Bureau of Labor Statistics. The inspectors provided for in this act shall receive as full compensation for their services the sum of eighteen hundred dollars each per annum, to be paid quarterly out of such funds in the state treasury as may be received for inspection fees: *Provided, however*, That in the event of such fees being inadequate to compensate the inspectors in the amount provided herein, the deficiency in the salaries shall be paid out of any moneys in the state treasury not otherwise appropriated. The mine inspector shall be required to post up in some conspicuous place at the top of each mine visited and inspected by him, a plain statement of the condition of said mine, showing what in his judgment is necessary for the better protection of the lives and health of persons employed in said mine; such statement shall give the date of inspection and the number of hours spent in the inspection, also the date of the latest previous inspection, and shall be signed by the inspector and the

& Vermilion &c. Coal Co. v. *The People*, 181 Ill. 270. It only remains for us to determine whether the validity of the state statute above cited was drawn in question on the ground of its repugnancy to the Constitution and laws of the United States, and the decision was in favor of its validity, when it should have been held invalid. While the constitutionality of the law was not specially set up and claimed before the trial in the Circuit Court, there was a motion made in arrest of judgment, in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the Fourteenth Amendment to the Constitution. The motion was denied, although the Su-

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check weighman, and, if there be no check weighman, employed by the miners, then said statement shall be signed by the weighman at the mine.

"SEC. 11*e*. It shall be unlawful for any person, company or corporation to operate any coal mine in this State without first having complied with all the conditions and sanitary regulations required under existing laws and paying all inspection fees provided for in this section; and in case of the refusal of any person, company, corporation, owner, agent or operator to pay said inspection fees, after assuming to operate a coal mine, it shall be the duty of the mine inspector in said district, through the State's attorney of the county, or any other attorney, in case of his refusal promptly to act, to proceed on behalf of the State against said person, company, corporation, owner, agent or operator of said mine, by injunction, without bond, to restrain said person, company, corporation, owner, agent or operator from continuing or attempting to continue to operate said mine or carry on a mining business."

In 1897 section 11*e* was amended so as to read as follows, the words in italics being inserted into the paragraph as it was originally enacted (Session Laws, 1897, p. 269):

"SEC. 11*e*. It shall be unlawful for any person, company or corporation to operate any coal mine in this State, *where more than five men are employed at any one time*, without first having complied with all the conditions and sanitary regulations required under existing laws, and paying all inspection fees provided for in this section, and in case of the refusal of any person, company, corporation, owner, agent or operator to pay said inspection fees, after assuming to operate a coal mine, it shall be the duty of the mine inspector in said district, through the State's attorney of the county, or any other attorney, in case of his refusal to promptly act, to proceed on behalf of the State against said person, company, corporation, owner, agent or operator of said mine by injunction, without bond, to restrain said person, company, corporation, owner, agent or operator from continuing or attempting to continue, to operate said mine or carry on a mining business."

preme Court did not in terms pass upon the Federal constitutionality of the law. But this was a sufficient presentation of the Federal question.

The regulation of mines and miners, their hours of labor, and the precautions that shall be taken to ensure their safety, health and comfort, are so obviously within the police power of the several States, that no citation of authorities is necessary to vindicate the general principle. Many of these cases are reviewed in *Holden* v. *Hardy*, 169 U. S. 366, in which it was held to be competent for a state legislature to limit the hours of labor, in mines and smelting works, to eight per day.

1. We do not understand the general principle to be questioned that the State may appoint mining inspectors, and provide for their payment by the owners of mines, *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Morgan* v. *Louisiana*, 118 U. S. 455; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96, 121; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Charlotte &c. R. R.* v. *Gibbes*, 142 U. S. 386; *Chicago &c. Coal Company* v. *People*, 181 Ill. 270; but it is insisted that the acts here involved, in so far as they give to district mining inspectors, a discretion as to the number of times they shall inspect such mines, and a further discrimination as to what fees they shall charge, within the limit fixed by these acts, is in contravention of the Fourteenth Amendment, forbidding a State from depriving any person of life, liberty or property without due process of law, or denying any person within its jurisdiction the equal protection of the law.

2. Another question is whether the act, as amended in 1897, in so far as it discriminates as to penalties imposed upon some persons engaged in the mining business, and not upon others, is a proper exercise of the police power. It is true that the act of 1897 amended the former law of 1895, by limiting its application to coal mines "where more than five men are employed at any one time." This is a species of classification which the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable, as it was in *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, in which an act defining what should constitute public stock yards and regulat-

ing all charges connected therewith was held to be unconstitutional, because it applied only to one particular company, and not to other companies or corporations engaged in a like business in Kansas, and thereby denied to that company the equal protection of the laws. In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines, which are worked upon so small a scale as to require only five operatives, would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for a discrimination here.

It is true that the act of 1897 does not in terms declare that the act of 1895 shall only apply to coal mines where more than five men are employed at any one time, but merely exempts the owners of such mines from punishment for violations of the general law. No one, however, can read this act, in connection with the prior act of 1895, without perceiving an intention on the part of the legislature to exempt such mines from the scope of the act. An act which declares it to be unlawful for any person to operate mines *of a certain class* without first complying with all the conditions and sanitary regulations required under existing laws, and paying all inspection fees, and, in case of refusal, to make it the duty of the mine inspector, through the State's attorney, to proceed in behalf of the State against such person, to compel the discontinuance of the mine, is so plainly an exemption from the operation of the law of all *other* mines as to constitute a classification in their favor.

3. Another charge is that by section 11 *d*, "it shall be the duty of each inspector, as often *as he may deem it necessary and proper*, and at least four times a year, to inspect each and every mine in his inspection district." It requires no argument to show that, for the protection of the operatives, one mine may be

required to be inspected oftener than another, depending largely upon the number of miners, the depths of their workings and the nature of the ground through which the excavations are made. While at a certain stage of excavation the precautions imposed by the mining inspector may be quite adequate for the protection of the operatives, at another time the same precautions would be obviously insufficient, depending largely upon the rapidity with which the excavations were made and the changes of air observed as the excavations progressed.

It is true that the act itself furnishes no basis for a classification as to the number of inspections and as to the price charged in each case, except that it provides that no inspection shall be required, unless five operatives are employed at the same time, that at least four inspections shall be made each year, and that the fees shall be dependent upon the length of time consumed, and the expense necessarily incurred in the inspection of such mine. It also provides that the charges for each inspection shall not be less than six nor more than ten dollars.

It is insisted that such classification of mines, as to the number of inspections and fees therefor, should be made by the legislature, and nothing be left to the inspectors or other officers to determine the number of times a particular mine shall be inspected and the fees chargeable therefor. The ordinary classification is made by the legislature, where such classification can be logically made, either upon the basis of capital stock, number of operatives, mileage, or other facts which can be seized upon as an easy and an approximately just basis for classification. But in such a case as this there are so many elements entering into the classification as to make it impossible to seize upon one or two, and make them the only basis. For instance, the number of inspections to be made might depend not only upon the size of the mines, and the number of the operatives, but upon the character of the work being done, the nature of the soil being excavated, the depth of the excavation and a dozen other features, all of which might enter into the basis of a classification by a competent inspector, and no one of which can be said to be determinative.

We do not regard the act as necessarily violative of the Four-

teenth Amendment, in the fact that some discretion is allowed to the inspector in determining the number of times the mines shall be inspected, and the fees fixed therefor, particularly in view of the fact that no complaint is made of the abuse of such discretion, or that the inspector has been "guilty of any act tending to the injury of miners or operators of mines during their term of office." Sec. 11 *c*.

While it is undoubtedly true that legislative power cannot be delegated to the courts or to the executive, there are some exceptions to the rule under which it is held that Congress may leave to the President the power of determining the time when or exigency upon the happening of which a certain act shall take effect. Thus in the leading case of *The Aurora*, 7 Cranch, 382, it was held that Congress might make the revival of a law conditional upon a fact then contingent, and empower the President to declare by proclamation that such fact has occurred and the law revived. It has also been the immemorable policy in this country and in England to vest in municipal organizations certain local powers in respect to which they are peculiarly interested, and of the necessities of which they are much better informed than a general legislature possibly could be. Other instances are cited by Judge Cooley in his work upon Constitutional Limitations: "For the like reasons the question whether a county or a township shall be divided and a new one formed, or two townships or school districts, formerly one, be reunited, or a county seat be located at a particular place, or after its location removed elsewhere, or the municipality contract particular duties, or engage in a particular improvement, is always a question which may be with propriety referred to the voters of the municipality for decision."

The last case in this court in which the question arose, is that of *Field* v. *Clark*, 143 U. S. 649, in which it was held that while Congress could not under the Constitution delegate its legislative power to the President, it might authorize him to suspend, by proclamation, the free introduction of sugar, coffee and similar articles, when he was satisfied that any country producing such articles imposed duties, or other exactions, upon the prod-

ucts of the United States which he might deem to be reciprocally unequal or unreasonable.

In enacting a law with regard to the inspection of mines, we see no objection, in case the legislature find it impracticable to classify the mines for the purposes of inspection, to commit that power to a body of experts who are not only experienced in the operation of mines, but are acquainted with the details necessary to be known to make a reasonable classification, although it may affect the amount of fees to be paid by the mine owners.

It is obviously necessary that the number of inspections per year shall be determined by some one and by some executive officer. As it is clearly a matter of detail which could not be determined by the courts, it occurs to us that it could be entrusted to no one so safely as to the inspector of the district, who is appointed with great care, and who must be thirty years of age, a citizen of the State, and have a knowledge of mining engineering sufficient to conduct the development of coal mines and a practical knowledge of the method of conducting the mining for coal in the presence of explosive gases and of the ventilation of coal mines. Each one must have a practical mining experience of ten years, not interested as owner, operator, stockholder, superintendent or mining engineer of any coal mine during his term of office, and be of good moral character and temperate habits.

The stipulation upon which the case was tried shows that the defendants were the owners of thirty-one mines, and that they were inspected between November 22, 1895, and June 26, 1899, two hundred and forty times, which was at the rate of about seventy-eight times per year for all of the thirty-one mines, or about two and one half times per year for each mine. As section 11 *d* of the act requires each inspector to inspect each and every mine in his district at least four times a year, it would seem that instead of overdoing his duty, he had been derelict in the performance of it.

4. It is also true that the fees for each inspection shall not be less than six dollars nor more than ten dollars, and that such fees shall be regulated by the class of the mine, which shall be fixed by the inspector and depend upon the length of time con-

sumed and the expense necessarily incurred in the inspection of such mine. Objection is made upon the ground that it gives to each mining inspector not only the right to determine the number of times each mine shall be inspected, but the fees to be charged in each case. If his discretion were unlimited in this direction, and the fees were retained by himself, there would be much force in the suggestion; but the truth is that the amount of the fee must be in each case somewhere between six dollars and ten dollars, and must be paid to the Secretary of the Bureau of Labor Statistics, and by him covered into the State treasury, to be held as a fund for the payment of the salaries of the mining inspectors. Each inspector provided for by the act receives for his services $1800 per annum, to be paid quarterly out of the funds in the state treasury received for the inspection fees, and in the event of such fees being inadequate to compensate such inspectors in the amount provided for herein, the deficiency of the salaries shall be paid out of the money in the state treasury not otherwise appropriated. It appears, then, *first*, that the state inspector receives a regular salary, neither increased nor diminished by the number of inspections or the amount paid for each inspection; and, *second*, that he receives such salary directly from the Bureau of Labor Statistics and not from the fees paid to him therefor. As his compensation is dependent neither upon the number of his visits nor upon the amount of his fees, it is difficult to see how he would gain by multiplying one or magnifying the other. We know of no reason why the legislature should deprive itself of the best attainable evidence of the facts it seeks to make determinative of these two questions.

As we fail to discover any repugnancy between the acts in question and the Fourteenth Amendment to the Constitution, we are of opinion that the decree of the Supreme Court was right, and should be

Affirmed.

UNITED STATES *v.* LEE YEN TAI.

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

CHIN BAK KAN *v.* UNITED STATES.
CHIN YING *v.* UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Nos. 503, 525, 526. Argued March 13, 14, 1902.—Decided April 21, 1902.

In case statutes are alleged to be inconsistent with each other, effect must be given to both, if by any reasonable interpretation, that can be done; and like principles must control when the question is whether an act of Congress has been superseded in whole or in part by a subsequent treaty with a foreign nation.

THESE three cases were all argued together. The opinion of the court is entitled only in No. 503, *United States* v. *Lee Yen Tai.* The case is stated in that opinion of the court.

Mr. Assistant Attorney General Hoyt for the United States in all the cases.

Mr. B. Lewinson and *Mr. Max J. Kohler* for the appellees in No. 503, and for the appellants in Nos. 525 and 526.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case is here upon a certified question of law arising in the Circuit Court of Appeals for the Second Circuit.

The facts out of which the question arose and the question itself are shown by the following statement sent up by that court:

"On the 8th day of October, 1900, complaint was made un-

der oath before a commissioner of the United States for the Northern District of New York, charging that Lee Gin Moy, *alias* Lee Yen Tai, on the sixth day of October, A. D. 1900, 'did unlawfully come into the United States from China, he being then and there a Chinese person and laborer, and not being a diplomatic or other officer of the Chinese or any other Government, and without producing the certificate required of Chinese persons seeking to enter the United States, and that he was not entitled to be or remain within the United States.' A warrant for said defendant's arrest was issued by said United States commissioner on the same day, and after a hearing before said commissioner he issued a warrant of deportation in which the following adjudication was placed on record:

"'I now hereby find and adjudge that the said Lee Gin Moy is a Chinese person and laborer; that he is not a diplomatic or other officer of the Chinese, or of any other Government, and unlawfully entered the United States as charged in said complaint; and I further adjudge him, said Lee Gin Moy, guilty of not being lawfully entitled to be or remain in the United States.'

"Said defendant's immediate removal to China by the United States marshal for said Northern District of New York upon said warrant was ordered by said commissioner. While the marshal had him in custody, and in process of deportation, *habeas corpus* was issued by the District Court for the Southern District of New York. The petition upon which the writ of *habeas corpus* issued averred, among other things, that said Lee Yen Tai was a merchant having an interest of one thousand dollars ($1000) in the capital of the firm, and is not a laborer, and has not been a laborer, but is a merchant and member of a firm specified in the petition, and has always been a merchant since he had any status.

"Before the District Court the prisoner was produced, and a return made which included the aforesaid warrant of deportation; said return was traversed and no evidence as to defendant's status other than the allegations in the aforesaid petition and return was before the District Court. Upon the hearing in the District Court the petitioner was discharged upon giving

bail for his appearance as may be determined by any final order on appeal. Appeal was duly taken by the United States to this court."

By the preamble of the act of May 6, 1882, c. 126, it was declared that in the opinion of the Government of the United States the coming of Chinese laborers to this country endangered the good order of certain localities within our territory. It was therefore provided that from and after the expiration of ninety days from the above date, and until the expiration of ten years from such date, the coming of Chinese laborers to the United States should be suspended, and during such suspension it was made unlawful for any Chinese laborer to come, or having come after the expiration of said ninety days, to remain within the United States. § 1. Penalties were imposed upon the master of any vessel who should knowingly bring within the United States on his vessel and land or permit to be landed any Chinese laborer from any foreign port or place. § 2. In order to identify such Chinese as were entitled, under the treaty of November 17, 1880, 22 Stat. 826, to go from and come to the United States of their free will and accord, provision was made for certificates to be granted to such persons. § 4.

The twelfth section of the above act was as follows:

"That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to remove therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States." 22 Stat. 58, 61.

By the act of July 5, 1884, c. 220, the twelfth section of the above act of May 6, 1882, was amended so as to read as follows:

"That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons

seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of the provisions of this act." 23 Stat. 115, 117, 118.

Subsequently, by the act of May 5, 1892, c. 60, entitled "An act to prohibit the coming of Chinese persons into the United States," it was provided that "all laws now [then] in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this [that] act." 27 Stat. 25, § 1.

The question certified to us is whether the twelfth section of the act of 1882, amended and continued in force as above stated, was abrogated by the treaty with China proclaimed December 8, 1894. 28 Stat. 1210.

As this question cannot be properly disposed of without examining the entire treaty, the provisions of the treaty are here given in full:

"Whereas, on the 17th day of November, A. D. 1880, and of Kwanghsii the sixth year, tenth moon, fifteenth day, a treaty

was concluded between the United States and China, for the purpose of regulating, limiting or suspending the coming of Chinese laborers to, and their residence in, the United States;

"And whereas the Government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

"And whereas the two Governments desire to coöperate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;

"And whereas the two Governments are desirous of adopting reciprocal measures for the better protection of the citizens or subjects of each within the jurisdiction of the other;

"Now, therefore, etc. . . .

"ART. I. The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

"ART. II. The preceding article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited. And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States

may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.

"ART. III. The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided visèd by the diplomatic or consular representative of the United States in the country or port whence they depart.

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

"ART. IV. In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880, (the 15th day of the tenth month of Kwanghsii, sixth year,) it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all the rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Ar-

ticle III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

"ART. V. The Government of the United States, having by an act of Congress, approved May 5th, 1892, as amended by an act approved November 3d, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named act to be registered as in said act provided, with a view of affording them better protection, the Chinese Government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, (not merchants as defined by said act of Congress,) citizens of the United States in China, whether residing within or without the treaty ports. And the Government of the United States agrees that within twelve months from the date of the exchange of the ratifications of this convention, and annually, thereafter, it will furnish to the Government of China registers or reports showing the full name, age, occupation and number or place of residence of all other citizens of the United States, including missionaries, residing both within and without the treaty ports of China, not including, however, diplomatic and other officers of the United States residing or traveling in China upon official business, together with their body and household servants.

"ART. VI. This Convention shall remain in force for a period of ten years beginning with the date of the exchange of ratifications, and, if six months before the expiration of the said period of ten years, neither Government shall have formally given notice of its final termination to the other, it shall remain in full force for another like period of ten years." 28 Stat. 1210.

The first proposition made on behalf of the defendant is that the treaty of 1894 should be construed as covering the whole subject of Chinese exclusion, and that its failure to prescribe any judicial procedure for deportation, or to continue in force any prior statute on that subject, shows that the Commissioner was without jurisdiction.

If the words of the treaty of 1894, reasonably interpreted, indicate a purpose to cover the whole subject of Chinese exclusion—including the methods to be employed to effect that result—then the proceedings against the defendant before the Commissioner were without authority of law; for the treaty itself does not provide any particular method by which Chinese laborers may be prevented from entering the United States, or for sending them out of the country if they illegally enter, although both nations expressed in the treaty a desire to cooperate in preventing the immigration or coming to this country of such persons. China itself recognized it to be its duty to coöperate with the United States to that end, "in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States." As both countries were agreed that this result should be attained, the court ought to hesitate to adopt any construction of the treaty that would tend to defeat the object each had in view. We must assume that the two Governments knew that a general prohibition of the coming of Chinese laborers to the United States would be ineffectual if no provision were made for determining whether a particular Chinaman seeking to enter the country, and whose right to enter was denied, belonged to the class prohibited from coming within our territorial limits.

It is not disputed that such provision exists if section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884, and as continued in force by the act of May 5, 1892, be held not to have been repealed or superseded by the treaty of 1894.

That it was competent for the two countries by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior act of Congress on the same subject. In *Foster & Elam* v. *Neilson*, 2 Pet. 253, 314, it was

said that a treaty was "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." In the case of *The Cherokee Tobacco*, 11 Wall. 616, 621, this court said "a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." So in the *Head Money Cases*, 112 U. S. 580, 599, this court said: "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." Again, in *Whitney* v. *Robertson*, 124 U. S. 190, 194: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." See also *Taylor* v. *Morton*, 2 Curtis, 454, 459; *Clinton Bridge Case*, 1 Woolworth, 155; *Ropes* v. *Church*, 8 Blatchf. 304; 2 Story on Const., § 1838. Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty.

In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that "there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy;" and that "if harmony is impossible, and only in that event, the former is repealed in part or wholly, as the case may be." *Wood* v. *United States*, 16 Pet.

342, 363; *United States* v. *Tynen*, 11 Wall. 88, 93; *State* v. *Stoll*, 17 Wall. 425, 431. In *Frost* v. *Wenie*, 157 U. S. 46, 58, this court said: "It is well settled that repeals by implication are not to be favored. And when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute."

The same rules have been applied where the claim was that an act of Congress had abrogated some of the provisions of a prior treaty between the United States and China. *Chew Heong* v. *United States*, 112 U. S. 536, 550. In that case it was held that the treaty could stand with the subsequent statutes, and, consequently, it was enforced.

Like principles must control when the question is whether an act of Congress has been superseded in whole or in part by a subsequent treaty. A statute enacted by Congress expresses the will of the people of the United States in the most solemn form. If not repugnant to the Constitution, it is made by that instrument a part of the supreme law of the land, and should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced. So far from there being any inconsistency between the statute and treaty here in question, the twelfth section of the act of 1882, as amended in 1884 and continued in force for ten years from and after the passage of the act of 1892, is in absolute harmony with the treaty and can be enforced without affecting or impairing any right secured by the treaty. On the contrary, the enforcement of that section as amended will serve to advance the purpose of the two countries in respect of Chinese laborers, as avowed in the treaty of 1894. Despite the ingenious argument to the contrary, we do not perceive any difficulty whatever in reaching this conclusion, after carefully

scrutinizing the treaty and the statute. A different conclusion would be hostile to the objects which, as avowed in the treaty, both the United States and China desired to accomplish. This is so clearly manifest that argument cannot, as we think, make it more so.

The question certified is answered in the negative, and an order so declaring will be sent to the Circuit Court of Appeals.

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

UNITED STATES *v.* BORCHERLING.

APPEAL FROM THE COURT OF CLAIMS.

No. 150. Argued January 30, 31, 1902.—Decided April 14, 1902.

The facts and law of this case were so fully and satisfactorily discussed in the Court of Claims that its opinion might well be adopted as that of this court.

That court held that the claimant Borcherling was entitled, on the facts shown, to recover from the United States the sum of seven thousand and nine hundred dollars, and this court holds that the conclusions of that court were correct and affirms the judgment.

The rule that, as between different states or sovereignties the courts of one will not aid the officers of another to withdraw funds or property of a decedent without providing for local creditors has no application to a case like the present.

THE facts of this case were thus found by the Court of Claims:

"By act of Congress approved February 23, 1891, the Secretary of the Treasury of the United States was authorized and directed to adjust, upon principles of equity and justice, the accounts of Rodman M. Price, late purser in the United States Navy and acting navy agent at San Francisco, crediting him with the sum paid over to and receipted for by his successor, A. M. Van Nostrand, acting purser, January 14, 1850, and pay to said Rodman M. Price, or his heirs, out of any money in the Treasury not otherwise appropriated, any sum that may be found due him upon such adjustment.

Statement of the Case.

"August 31, 1892, the Treasury officials adjusted Price's accounts and found there was due him $76,204.08, which included a credit of $75,000 that Price said he had advanced to Van Nostrand from his private funds.

"In 1857 Samuel Forrest recovered in the Supreme Court of New Jersey a judgment against Price for $17,000 and costs. Execution on that judgment was returned unsatisfied. Forrest died in 1869, intestate.

"In 1874 his widow, Anna M. Forrest, as administratrix of his estate, revived the judgment by *scire facias*. In her bill she prayed discovery, injunction, and the appointment of a receiver. Price and his wife answered. The cause slept till August 9, 1892, when Mrs. Forrest, administratrix, filed a petition stating that since filing her bill of complaint no payment had been made on the judgment against Price; that neither she nor her solicitors had been able to find any personalty or real estate belonging to Price by levy upon and sale of which any part of the amount due on the judgment could be obtained; that it had lately come to her knowledge that about $45,000 was about to be paid Price by officers of the Treasury of the United States; that that sum was to be paid by the delivery to Price or his attorneys of a draft of the Treasurer of the United States payable to his order; that said draft was to be made and the transaction closed on the 15th day of August thereafter; and if Price obtained said money he would, unless restrained, put the same beyond the reach of the petitioner.

"The petitioner prayed the appointment of a receiver of the draft, and that Price be ordered immediately on the receipt of such draft to endorse the same to the receiver, to the end that the same might be received by him as an officer of the court and disposed of according to law.

"The chancellor, August 8, 1892, issued a rule, returnable September 12, 1892, to show cause and restraining Price from making any endorsement of the draft referred to in the petition.

"A duly certified copy of the order was served upon Price August 10, 1892. Nevertheless after that date, Price received from the Assistant Treasurer of the United States at Washington and, without permission of the court, collected four several

drafts signed by that officer for the respective sums of $2704.08, $13,500, $20,000, and $9000, in all the sum of $45,204.08, leaving in the hands of the United States of the amount due on the settlement of Price's accounts the sum of about $31,000.

"On the 10th day of October, 1892, Charles Borcherling was appointed by the chancery court receiver in said cause of the property and things in action belonging or due to or held in trust for Price at the time of issuing said executions, or at any time afterwards, and especially of said four drafts, with authority to possess, receive and sue for such property and things in action and the evidence thereof; and it was made the duty of the receiver to hold such drafts subject to the further order of the court. The receiver was required to give bond in the sum of $40,000, conditioned for the faithful discharge of his duties. At the same time Price was ordered to convey and deliver to the receiver all such property and things in action and the evidence thereof, and especially forthwith to endorse and deliver the drafts to him, and he and all agents or attorneys appointed by him were enjoined and restrained from intermeddling with the receiver in regard to said drafts, and ordered, if in possession or control thereof, to deliver them to the receiver with an endorsement to that officer or to the clerk of the court for deposit; provided, the order should be void if the drafts other than the one for $9000 were delivered with Price's endorsement to the clerk, the proceeds to be deposited to the credit of the cause. Price was expressly enjoined from making any endorsement or appropriation of the drafts other than to the receiver or the clerk for deposit.

"The receiver gave the required bond, and having entered upon the duties of his office, he caused a copy of the above order to be served upon Price, and demanded compliance with its provisions.

"In 1892, the particular day not being stated, the chancery court issued an attachment against Price for contempt of court in disobeying the order of August 8, 1892. By an order made May 18, 1894, the court held him to be guilty of such contempt, and he was directed to pay the receiver the sum of $31,704.08, and a fine of $50 and costs, and in default of obedience to that

order to be imprisoned in the county jail until it was complied with. 7 Dickinson (52 N. J. Eq.), 61, 31. Upon appeal to the Court of Errors and Appeals the order of the chancery court was affirmed. 8 Dickinson (53 N. J. Eq.), 693.

"The Treasury Department, at the time of allowing the $76,204.08, withheld $31,000, under the provisions of the act of March 3, 1875, 18 Stat. 481, to await the determination of a suit to be instituted against Price, or surety upon Van Nostrand's bond as acting purser, United States Navy.

"The suit was instituted, but was dismissed some time previous to December 22, 1893.

"On the 16th of July, 1892, counsel for Mrs. Forrest wrote the Secretary of the Treasury referring to a previous letter to the Department of May 14, 1891, in the matter of the claim of Rodman M. Price, and asking to be seasonably advised in the case the Department took action in the direction desired by Price.

"The Secretary was advised that Mrs. Forrest could prove to the satisfaction of the Department that if Mr. Price did turn over $75,000, or any large sum, to the United States, a part of that sum, namely, $17,078.04, must have belonged to Mrs. Forrest; that it was trust money, and it would not be equitable to cause that much to be paid to Price.

"By letter of November 27, 1893, counsel for the receiver notified the Secretary of the Treasury of Borcherling's appointment and qualification by giving bond of $40,000; that Price, though personally enjoined, had, in contempt of the New Jersey court, endorsed the drafts and collected the proceeds. The letter inclosed is a certified copy of the order of the court, October 10, 1892, appointing the receiver. Counsel in behalf of the receiver made claim for the balance of $31,000, about to be paid Price under act of February 23, 1891.

"The letter closed as follows: 'I respectfully ask that comity be shown the chancellor of New Jersey, and that the draft to be issued in payment of the balance due and payable to the order of Rodman M. Price be not delivered (or mailed) to said Price or his attorney, but be transmitted to the chancery court of the State of New Jersey, at Trenton, N. J., where said Price's

rights will be abundantly protected, the receiver, of course, being an impartial officer of the court. I request that before action is taken (other than as asked for by the receiver) due notice may be given me that the receiver may be heard, to set forth the reasons why this disposition should be made of the drafts in question. Let me add that the Forrest judgment and interest now exceeds the sum of $60,000.'

"On December 4, 1893, the chancery court of New Jersey, being informed by the receiver that Price, assisted by John C. Fay, Esq., his attorney, was endeavoring to obtain payment at the Treasury of the balance, about $30,000, of this debt, and appropriate it for his own use, issued orders against Price, enjoining him from seeking to obtain payment of any part of that sum.

"On December 6, 1893, the receiver notified the Secretary of the Treasury, by letter, that a copy of injunction of December 4 had been served upon Price, and enclosed a copy of the same to the Secretary. He also invited the attention of the Secretary to the opinion of the Court of Claims in *Redfield* v. *United States*, in the twenty-seventh volume of reports of the court; informed him that he (the receiver) had applied to the Supreme Court of the District of Columbia for an injunction, and asked, that if that court should not grant relief, he might have the benefit of the injunction of the New Jersey court now brought to the Secretary's notice. The receiver asked that if no relief were granted by the Supreme Court of the District that the Secretary send the drafts (otherwise to be handed to R. M. Price) to the chancellor of New Jersey, at Trenton.

"The Supreme Court of the District of Columbia, December 19, 1893, in a proceeding for injunction upon bill of Borcherling, receiver, and Anna M. Forrest, administratrix, after personal service upon Price and Fay, enjoined Price from receiving, assigning, collecting or endorsing to his own use, by himself or by attorney, any warrants or drafts from the Treasury of the United States in payment, in whole or in part, of any balance remaining unpaid under act of February 23, 1891, until the further order of the court; and it being the design of this order in nowise to interfere with the claim of any creditor of

the said Rodman M. Price, resident in this District against said Price, it is further ordered and decreed that, upon the representation of any person so claiming to be a creditor in this District and the establishment of such claim in a manner that shall satisfy the court of the *bona fide* existence of such claim, so much of said balance as shall be sufficient to cover any and all such claims so established shall be considered as exonerated from the effect of this decree.

"The Supreme Court of the District, on the 22d of December, 1893, passed the following order in the said suit:

"'From the affidavits of John C. Fay and Jeremiah M. Wilson, claimants, and the assent and affidavit of the said Rodman M. Price, filed this day, it appearing to the satisfaction of the court that John C. Fay, Richard J. Bright, Frank S. Bright, Samuel Shellabarger, J. M. Wilson and M. L. Woods, residents of the District of Columbia, appear to be *bona fide* creditors of the defendant, Rodman M. Price, and it appearing to the satisfaction of the court that as such they have *bona fide* claims for services rendered said Price, to the extent of $7900, it is ordered that the sum of seven thousand nine hundred dollars ($7900) shall be exonerated from the effects of the decree passed herein on the 19th of December, instant, restraining and enjoining Rodman M. Price from receiving, etc., any warrants and drafts from the Treasury in payment of the whole or any part of the balance due to him under the act of February 23, 1891; and said injunction order shall not operate to affect said sum of seven thousand nine hundred dollars.'

"Counsel for the receiver, Friday, December 22, 1893, addressed the Assistant Secretary of the Treasury, setting forth the fact that the order of that day had been hastily acted upon, and explaining that the judge sent a verbal order to counsel to be in court at 1 o'clock; that he had already told Mr. Fay, attorney of Price, that he wanted copies of his papers served two days in advance, in compliance with the rules; that at 12 o'clock he had been telegraphed for to go out of the city on account of illness in his family, and had sent a message to that effect to the judge. The letter also notified the Secretary that the receiver claimed that the money under the *Redfield* case be-

longed to the receiver and not to Price. Counsel asked a reasonable delay, that he was obliged to leave Washington, but expected fully to return Saturday night, and expressed hope that 'no action will be railroaded through to pay out any money to-morrow.' He also notified the Treasury that a mandatory order had been issued against Price in New Jersey, and asked that before any action was taken to paying Price, that he (counsel) might be heard to show reason why the money had not passed to the receiver under the ruling of the Redfield case, copy of which he enclosed.

"The same day counsel for the receiver sent the following telegram to the Secretary of the Treasury: 'Washington, D. C., December 22, 1893.—To Secretary of Treasury, Washington, D. C.: Please defer action in Price matter over to-morrow. The receiver notifies Treasury that he claims the money is his, not Price's, and will hold the United States responsible if paid Price or his attorney. Frank W. Hackett, attorney for receiver.'

"On the same day, namely, Friday, December 22, 1893, the Acting Secretary of the Treasury endorsed a copy of the order of the Supreme Court of the District of Columbia of December 22, with a reference to the Second Comptroller to issue a certificate in favor of Rodman M. Price for $7900, 'the balance to be withheld pending an injunction against Price from receiving said balance.'

"On the same day, Friday, December 22, 1893, Second Comptroller certified that there were due and payable to Rodman M. Price $7900; the balance, $23,100, to be withheld 'pending an injunction against Price from recovering said balance now pending before the Supreme Court of the District of Columbia.'

"The draft on navy warrant No. 907, dated December 23, 1893, and payable to the order of Rodman M. Price, late purser, United States Navy, for $7900, was paid at the Treasury December 23, 1893, by the Treasurer of the United States, said draft being endorsed 'Rodman M. Price, late purser, United States Navy; John C. Fay.'

"On the 25th of December, 1893, Borcherling, receiver, addressed a letter to the Secretary of the Treasury, claiming that

on and after October 10, 1892, all property in the right to Price to receive from the United States the balance under the act approved February 19, 1891, passed to him, the receiver. He reminded the Secretary that on the 27th of November, 1893, he had the honor of advising the Treasury of his appointment and enclosing a copy of the order of the chancellor; that Mr. Fay, attorney for Mr. Price, had full notice of the receivership as well as of the injunction of the court of chancery addressed to Price and his attorneys forbidding them from receiving any part of the $31,000; and that both Fay and Price had committed contempt of court. The receiver asked the secretary to take the opinion of the Attorney General upon the following questions:

"1. Did the appointment of a receiver by the Chancery Court of New Jersey convey to that officer the property in the claim against the United States of Rodman M. Price?

"2. Would payment to the receiver be a quittance to the United States in the premises?

"3. Can the Secretary of the Treasury safely pay to Rodman M. Price or his heirs the money still unpaid under the act of February 19, 1891, now that the receiver claims that it should be paid over to him?

"A similar letter was addressed by the receiver and his counsel to the Secretary of the Navy.

"On April 1, 1899, the Comptroller ordered the balance, $23,100, to be paid to Charles Borcherling, receiver, and the same was paid at the Treasury that day to Mr. Borcherling, the present claimant.

"Upon the foregoing findings of fact the court decide, as a conclusion of law, that the claimant is entitled to recover from the United States the sum of seven thousand and nine hundred dollars ($7,900)."

Thereafter an appeal was allowed and taken to this court.

Mr. William H. Button for the United States. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. Cortlandt Parker and *Mr. Frank W. Hackett* for Borcherling.

Opinion of the Court.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The facts and law of this case were so fully and satisfactorily discussed in the court below that its opinion might well be adopted as that of this court. 35 C. Cl. 311.

We shall, however, briefly examine some of the propositions urged in the brief of the Government filed in the case.

The first and principal contention is that the United States is a sovereignty and has absolute control of the manner in which it shall pay its debts, the persons to whom they shall be paid, and, in fact, whether they shall be paid or sued upon at all; that it is incompetent for the State of New Jersey, through a statute or a decree of its courts, to direct to whom such a debt shall be paid; that the United States, through comity, may or may not recognize such a New Jersey statute or decree, as it may determine, but without such recognition such statute or decree is inoperative upon the disposition of such debt; that the United States does not recognize, through comity, the passing of title to a claim against it to a receiver appointed under a state statute or decree, and that consequently, in the present case, the United States had a right to pay the debt to the original creditor, and was discharged by such payment.

It is not necessary for us to consider whether the power of the United States over debts due by it and over the mode by which such debts shall be paid is wholly unrestricted, because the United States has not chosen to stand upon its sovereignty in such particulars, but has provided in the act of March 3, 1887, c. 359, that the Court of Claims and, concurrently, the District and Circuit Courts of the United States, "shall have jurisdiction to hear and determine all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of any executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admirality, if the United States were suable."

This is not a case within the category of payments by way of gratuity, payments as of grace and not of right, as was the case of *Emerson's Heirs* v. *Hall*, 13 Pet. 409, and where it was said by Mr. Justice McLean: "A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the application of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government, from motives of public policy, or any other considerations, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation—a donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government. In the present case the government might have directed the money to be paid to the creditors of Emerson, or to any part of his heirs. Being the donor, it could, in the exercise of its discretion, make such distribution or application of its bounty as circumstances might require. And it has, under the title of an act 'for the relief of the heirs of Emerson,' directed, in the body of the act, the money to be paid to his legal representatives. That the heirs were intended by this designation is clear; and we think the payment which has been paid to them under this act has been rightfully made; and that the fund cannot be considered as assets in their hands for the payment of debts."

This distinction between mere grants by the government by way of gratuity and debts or claims of right was likewise recognized by this court in the French spoliation cases, where it was held that the payments prescribed by the acts of Congress were gratuities, and that creditors, legatees and assignees in bankruptcy could be rightfully excluded. *Blagge* v. *Balch*, 162 U. S. 439.

Here the government was not the donor of the money of Price, but was its custodian, awaiting its lawful distribution.

As to the contention that the debt due from the United States to Price could not be transferred from Price to the claimant by operation of the laws of New Jersey, nor by any decree that

the courts of New Jersey, operating under such laws, could make, it is sufficient to say that this court has held otherwise.

In *Vaughn* v. *Northrup*, 15 Pet. 1, Mr. Justice Story, delivering the opinion of the court, said: "The debts due from the government of the United States have no locality at the seat of government. The United States in their sovereign capacity have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the United States; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile," and accordingly it was held, in that case, that "the administrator of a creditor of the government duly appointed in the State where the creditor was domiciled at the time of his death, has full authority to receive payment and give a full discharge of the debt due his intestate in any place where the government may choose to pay it, whether it be at the seat of government or at any other place where the public funds are deposited; and that moneys so received constituted assets under that administration, for which he was accountable to the proper tribunals of the State where he was appointed."

Price v. *Forrest*, 173 U. S. 410, was one phase in the present controversy. There the question was between the heirs of Rodman M. Price and Borcherling, who had been appointed by the Chancery Court of New Jersey receiver of the assets of Price, including the money belonging to him in the Treasury of the United States. It was held by the courts of New Jersey that the receiver was entitled to the money in the Treasury, and the heirs and administrator of Price were enjoined from demanding or receiving from the Secretary of the Treasury, or any officer thereof, the said money or any part thereof. The cause was brought to this court, and, after full consideration, the decree of the Court of Errors and Appeals of the State of New Jersey was affirmed. Two things were thus determined—first, generally, that it was competent for a state court of the domicil of a creditor of the United States, and having jurisdiction over his person, to decide a controversy between his heirs and creditors as to the right to receive moneys held in trust by the United

States; and, second, specifically, under the facts of the present case, that the title to the moneys of Price in the Treasury of the United States had passed, under the laws of the State of New Jersey and the decree of its courts, from Price and his heirs, and had become vested in Borcherling, the receiver.

It is not open to doubt that the Court of Claims has jurisdiction to entertain the claim of the receiver to receive the fund, the title to which had thus become vested in him. The jurisdiction of that court extends throughout the United States. It issues writs to every part of the United States, and is specially authorized to enforce them. 10 Stat. 612, c. 122, sec. 3. By establishing this court, the United States created a tribunal to determine the right to receive moneys due by the government. Such legislation did not leave the Treasury or its officers free to arbitrarily select, between conflicting claimants, the one to whom payment should be made.

It is finally contended, in behalf of the government, that even if it was competent for the state courts to determine the controversy between the rival claimants to this fund, and even if the Court of Claims has jurisdiction to give effect to such determination, yet the rights of creditors resident within the District of Columbia were paramount to those of the New Jersey receiver, and that a payment made directly to them by the acting Secretary of the Treasury would be a lawful discharge of the United States.

Undoubtedly, as between different States or sovereignties, the general rule is that the courts of one will not aid the officers of another to withdraw funds or property of a decedent without providing for local creditors. But such a rule has no application in a case like the present, where the government of the United States has ubiquity in all the States of the Union, and does not hold moneys due a creditor subject to the local demands or claims of residents of the District of Columbia. Moreover, such a rule is for a court having control over the fund in dispute. It is not for a ministerial officer of the Treasury, having no judicial powers, to give effect to such demands.

It is, indeed, suggested that the action of the Supreme Court

of the District of December 22, 1893, was a legal determination which operated to relieve Price, as to a portion of this fund, from the injunction of that court, enjoining him from receiving or collecting moneys due him in the Treasury of the United States, and to authorize the Treasurer of the United States to pay such portion of the fund in disregard of the decree of the New Jersey court.

But it is obvious that the Supreme Court of the District had no jurisdiction or control over the money in the Treasury of the United States. It was dealing only with the parties before it, of whom the United States was not one. The order referred to doubtless did relieve Price from the existing injunction of that court, and left him free, so far as that injunction was concerned, to urge his claim against the United States; but it did not, and could not, relieve Price from the injunction and decree of the New Jersey court. Nor could such order operate as a legal adjudication, which would permit the Treasurer of the United States to disregard the decree of the courts of New Jersey and the title of the receiver thereunder, of which the department had full notice. In point of fact, inspection shows that this order was not intended as an adjudication. It was merely *ex parte*, and its only purpose or effect was to permit Price to push elsewhere his claim against the government. Such an order could not have been the subject of an appeal, even if an opportunity had been afforded to the receiver to take an appeal.

When analyzed, this contention will be perceived to be only a renewal of the one already considered, namely, that a ministerial officer, having no judicial or statutory powers in the premises, in a case wherein the government was the debtor, could arbitrarily, without notice to the legal holder of the claim, pay the money in dispute in this case over to Price. This, we have seen, he had no power under the law to do, and such a disposition of the money could not be successfully pleaded in the Court of Claims as a lawful discharge of the United States.

For these reasons, and referring, for a fuller discussion of the questions involved, to the opinion of the Court of Claims, we

think the conclusions of the court were correct, and its judgment is accordingly

Affirmed.

MR. JUSTICE WHITE dissented.

MR. JUSTICE HARLAN took no part in the decision of this case.

UNITED STATES *v.* FINNELL.

APPEAL FROM THE COURT OF CLAIMS.

No. 523. Submitted February 28, 1902.—Decided April 21, 1902.

The District and Circuit Courts of the United States are always open for the transaction of some business which may be transacted under the orders of the judge in his absence, and on such transaction rest the plaintiff's claims in this case, which the court sustain as business which could be transacted by the clerk in the absence of the judge, following the departmental construction of the statutes.

Of course if that construction were obviously or clearly wrong it would be the duty of the court to so adjudge; but if there simply be doubt as to the soundness of that construction, the action of the Government in conformity with it for many years should not be overruled except for cogent reasons.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Pradt and *Mr. Philip M. Ashford* for appellants.

Mr. Charles C. Lancaster for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellee was clerk of the District and Circuit Courts for the Kentucky District from July 1, 1894, to June 30, 1898, his office, during that period and previously, being in the city

of Covington, one of the places at which those courts were held. The District Judge resided in the city of Louisville, while the Circuit Judges resided in other States.

The clerk presented to the proper officers of the Treasury for payment his account for certain services rendered during the above period, amounting to $995.

The account was sworn to and approved as required by the act of February 22, 1875, which provides, among other things, that before "any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States Circuit or District Court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law, and just." 18 Stat. 333, c. 95, § 1.

Payment of the account having been refused, this suit was brought against the United States, the petitioner averring that "his whole compensation, if said fees were added, would not exceed the maximum compensation of $7000 for any one year."

Judgment having been entered in favor of the plaintiff for the amount sued for, the Government has prosecuted this appeal.

The findings of fact upon which the judgment below was based were as follows:

"I. The claimant, Joseph C. Finnell, was clerk of the District and Circuit Courts of the United States for the District of Kentucky from July 1, 1894, to June 30, 1898, duly qualified and acting.

"II. During said period he entered orders, decrees and other proceedings of the court on 199 days, extending through said time. None of the judges of said courts were personally pres-

ent at the time of the entry of such orders, decrees and proceedings, but said orders, decrees and proceedings were transmitted to the claimant by mail by the different judges composing the courts of said district. Said orders, decrees and proceedings were endorsed: 'Enter this order' (signed by the judge); or, 'Enter this' (signed by the judge); or, 'Enter' (signed by the judge). For the purpose of entering said orders, decrees and other proceedings the claimant made the following entries on the journal for opening and adjourning court on the dates for which attendance is claimed: 'Court met: Present, Hon. John W. Barr, sitting as Circuit Judge' (or Judge Taft, or Judge Lurton, or whoever may have been the judge sending the order. Then follows the entry of the order or other proceedings of the court for that day) and, 'It is now ordered that the court stand adjourned until .' The date to which adjournment was had was left blank and when another such order, decree or other proceeding was received to be entered said blank was filled by entering therein the date on which the same was received, and another entry, similar to the above, opening and adjourning the court to a blank date was made. The record containing the entries of the opening and adjourning of court, the certified presence of the judge, and the orders, decrees and other proceedings of the court was afterwards signed by the judge sending such orders, decrees and other proceedings to be entered as the record of the court for the days on which the same were respectively entered. The Exhibits A, B and C, attached to and made a part of these findings, are illustrative copies of the record of the court upon such days.

"The nature and character of business transacted on the days on which court was opened and adjourned, as aforesaid, is best shown by the following statement of the subject-matter of said orders, decrees, and other proceedings entered as aforesaid on the days actually claimed for:

"Entry of order granting additional time to plead, 4 days.

"Entry of order directing drawing of jury by jury commissioners, 18 days.

"Entry of order granting restraining order, 5 days.

"Entering orders disposing of sundry demurrers and motions, 21 days.

"Entry of orders granting rule, 10 days.

"Entry of orders granting application for writ of certiorari, 4 days.

"Entry of orders granting petition for witnesses on behalf of the defendant at the cost of the United States, 7 days.

"Entry of orders approving report of receivers, authorizing compromise by receiver, instructions issued to receiver, and various other orders pertaining to the appointment and conduct of receivers, 33 days.

"Entry of orders and decrees finally disposing of cases, 17 days.

"Sundry entries of orders granting writs of possession, approving bond of clerk of court, granting leave to withdraw exhibits, granting leave to file intervening petition, ordering sale of property, confirming sale of property, determining the priorities of liens, continuing cases, and granting appeals, 80 days.

"III. Claimant made his account for said services as attendance on court when the same was opened and adjourned by order of the judge and while the same was actually in session and business actually transacted, which was verified and presented to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment, and payment of fees as per diems in Finding IV was refused.

"IV. Item 1. Per diems for attendance on court on the days on which said orders, decrees and other proceedings were entered, 199 days, at $5 per day, $995.

"V. Charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed and paid by the accounting officers of the Treasury up to June 30, 1893."

By section 828 of the Revised Statutes, a clerk of a Circuit or District Court of the United States was allowed "five dollars a day for his attendance on the court while actually in session."

This section was similar to one in the act of February 26, 1853, c. 80, 10 Stat. 161, 163. Under that act clerks were allowed five dollars a day for attendance only, whether business was transacted or not by the court. After many years had expired, Comptroller of the Treasury Durham held that interpretation of the statute to be erroneous, and ruled that the transaction of business was a condition precedent to the right to a per diem compensation for attendance, although the court may have been, in fact, regularly opened for business and awaiting the coming of suitors. But the Court of Claims held, in 1885, that the Comptroller was in error, and adjudged that within the meaning of section 828 the clerk was entitled to five dollars a day for his attendance on court even when no business was transacted. *Jones* v. *United States*, 21 C. Cl. 1.

The judgment of that court did not, however, put the matter at rest; for, by the Sundry Civil Appropriations Act of August 4, 1886, c. 902, it was provided that no part of the money appropriated *by that act* should "be used in payment of a per diem compensation to any clerk or marshal for attendance in court except for days when business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts." 24 Stat. 222, 253. That act, by its terms, was temporary.

At the subsequent session of Congress the subject was again considered, and resulted in a permanent provision to be found in the Sundry Civil Appropriations Act of March 3, 1887, c. 362. By that act it was provided "that *hereafter* no part of the appropriations made for the payment of fees of United States marshals or clerks shall be used, etc., . . . nor shall *any part of any money appropriated* be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court, except for days when the court is opened by the judge for business, *or* business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which facts shall be certified in the approval of their accounts." 24 Stat. 509, 541.

The sections of the Revised Statutes referred to in the act of 1887 are as follows:

"§ 583. If the judge of any District Court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

"§ 584. If the judge of any District Court, in Alabama, California, Georgia, Indiana, Iowa, Kentucky, North Carolina, Tennessee or West Virginia is not present at the time for opening the court, the clerk may open and adjourn the court from day to day for four days; and if the judge does not appear by two o'clock afternoon of the fourth day, the clerk shall adjourn the court to the next regular term. But this section is subject to the provisions of the preceding and next sections."

"§ 671. If neither of the judges of a Circuit Court is present to open any session, the marshal may adjourn the court from day to day until a judge is present: *Provided*, That if neither of them attends before the close of the fourth day after the time appointed for the commencement of the session, the marshal may adjourn the court to the next regular term.

"§ 672. If neither of the judges of a Circuit Court be present to open and adjourn any regular or adjourned or special session, either of them may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term."

"§ 2013. The Circuit Court, when opened by the judge as required in the two preceding sections, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this Title, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court."

Section 2013 had reference to the functions of the Circuit Court in election matters, and has been repealed.

The account here in suit is not for the attendance of the

clerk under sections 583, 584, 671 and 672, but for attendance under sections 574 and 638, which are hereafter given in this opinion.

It will be observed that the act of 1887 recognizes the right of the clerk to a per diem compensation in two states of case, namely, "when the court is opened for business, *or* business is actually transacted in court."

What do those words mean? We are informed by the representatives of the Government that for nearly forty years prior to 1886 it had been the practice of its accounting officers to allow a per diem compensation to clerks for attendance, when court was opened by the judge and adjourned without transacting any business; and that such practice had been sanctioned by an unbroken line of decisions in the Federal courts. And it is suggested that the purpose of the act of 1886 was to break up that practice. All this only serves to prove that Congress used the words found in the act of 1887 with full knowledge of the former practice, and of the change made, or supposed to be made, by the act of 1886. It is clear that the words used, reasonably interpreted, indicate a purpose to allow the per diem compensation for attendance as well when the court was opened for business, whether any business was actually transacted or not, as when business was actually transacted in court. It is said that no business could be lawfully transacted "in court" unless the judge was personally present. We do not assent to that view. It rests upon a construction which is too literal. The services for which Finnell's account was rendered constituted business actually transacted in court, unless it be that a clerk could never enter any order unless the judge was, at the time, in the place, room or building where his court was ordinarily held. But we cannot so adjudge. There are many things that may be legally done by a clerk pursuant to the written order of a judge sent to him, and which, being done, may be fairly held to constitute business "actually transacted in court." This much is to be implied from sections 574 and 638 of the Revised Statutes, which are as follows:

"§ 574. The District Courts, as courts of admiralty, and as courts of equity, so far as equity jurisdiction has been conferred

upon them, shall be deemed always open, for the purposes of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing upon their merits of all causes pending therein. And any District Judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

"§ 638. The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing upon their merits of all causes pending therein. And any judge of a Circuit Court may, upon reasonable notice to the parties, make, and direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

As will be seen from those sections, the District and Circuit Courts of the United States are always open for the transaction of certain kinds of business which, we think, may be transacted under the orders of the judge, who may at the time be absent from the place, room or building in which the court is held. The business transacted by the appellee was such as could be transacted by the clerk under the orders of the judge. It is too narrow an interpretation of the statute to hold that such business was not actually transacted in court. This whole subject was carefully considered and the statutes relating to it fully analyzed by Judge Baker in *Butler* v. *United States*, 87 Fed. Rep. 655.

These views are justified by long practice in the Department, and upon that we may properly rest our affirmance of the judgment of the Court of Claims. It is found as a fact that the present appellee, in every account rendered by him since 1882,

has charged for services similar to those set out in the account here in suit, and such accounts were uniformly allowed and paid up to June 30, 1893. And on his account for the period from January 1, 1892 to June 30, 1894, he obtained judgment in the Court of Claims, which judgment was paid—no appeal having been prosecuted by the United States. *Finnell* v. *United States*, 32 C. Cl. 634. It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States* v. *Graham*, 110 U. S. 219; *Wisconsin C. R'd Co.* v. *United States*, 164 U. S. 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Philbrick*, 120 U. S. 52, 59; *United States* v. *Johnston*, 124 U. S. 236, 253; *United States* v. *Alabama G. S. R'd Co.*, 142 U. S. 615, 621. Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests.

The judgment of the Court of Claims is

Affirmed.

MR. JUSTICE GRAY took no part in this decision.

MR. JUSTICE BROWN, with whom concurred MR. JUSTICE WHITE and MR. JUSTICE PECKHAM, dissenting.

From the passage of the act of 1791, fixing the compensation of officers of the courts of the United States, the subject of

fees for attendance upon the Circuit and District Courts appears to have been one of constant dispute between the officers on one hand, who naturally seek a construction of the fee bill favorable to them, and the Treasury officials upon the other, whose duty it is to supervise and pass upon the accounts of these officers. A statement of some, although by no means all, the acts of Congress upon this subject may aid in the solution of these difficulties. The earliest is that of March 3, 1791, 1 Stat. 216, wherein there was allowed "to the clerk of the District Court, for attending in the District or Circuit Court, five dollars per day." The act, however, was made temporary, and at the next session, May 8, 1792, 1 Stat. 277, certain changes were made, though none in the matter of attendance.

The law upon the subject of attendance was apparently not changed until April 18, 1814, 3 Stat. 133, when it was provided, under "an act to lessen the compensation" of such officers, that there should not be allowed or paid to the clerk of the Circuit or District Courts of the United States in Massachusetts, Rhode Island, Connecticut, the Southern District of New York, or Pennsylvania, "any daily compensation for attending on the said courts." Why this discrimination was made we have no means of knowing, but the act was repealed March 8, 1824. 4 Stat. 8. No important change was made in the law until 1842, when in the Civil and Diplomatic bill of May 18, 5 Stat. 475, 484, it was provided that no per diem compensation should be paid to clerks for attendance upon the Circuit or District Courts "while sitting for the transaction of business under the bankrupt law merely, or for any portion of the time during which either of said courts may be held open, or in session, by the authority conferred in that law. . . . And no per diem or other allowance shall be made to any such officer for attendance at rule days of the Circuit or District Courts," or for more than one per diem while both courts are in session.

But even before this act of 1842 was passed, it had been held by Mr. Justice Story in *United States* v. *Cogswell*, 3 Sumn. 204, which involved the validity of marshal's charges for attendance upon rule days, that as the marshal did not either

travel to or attend these rule days at the clerk's office, his claim was for a constructive travel and attendance; "but we are of opinion that this charge, whatever might be its validity, if the marshal had actually traveled and attended at these rules, is, under the circumstances, wholly inadmissible. To justify the charge an actual travel and attendance are, in our judgment, indispensable."

By act of February 26, 1853, 10 Stat. 161, R. S. sec. 828, the whole subject of fees was revised, and an attendance fee allowed to the clerk of $5 per day for his attendance on the court "while actually in session." By that act the words "while actually in session" were first introduced into the law. It is evident that some change was contemplated by the use of these words. For some purposes, notably in admiralty and equity cases, (R. S. §§ 574, 638,) the court may be deemed to be sitting when a judge is present upon a rule day, or makes an order which can only be made by the court; but, as we shall show hereafter, no attendance was contemplated on these days, at least in the absence of the judge.

The words "actually in session," found in the act of 1853, are emphasized by the sundry civil appropriation act of March 3, 1887, 24 Stat. 509, 541, wherein it is enacted as follows: That hereafter no part "of any money appropriated (shall) be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court, except for days when the court is open (opened) by the judge for business, or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts." The special sections here mentioned and reproduced in full in the opinion of the court may be dismissed from consideration, as, with the exception of section 2013, since repealed, they relate to cases where there is no judge present at the opening of the term, when special authority is given to the clerk or marshal to adjourn the court from day to day until a judge is present. As no claim is made in the case under consideration for attendance under these sections, they are only important here as indicating the will of Congress that neither the clerk nor the

marshal, should have an unlimited discretion in opening the court in the absence of the judge, and requiring a special authority for that purpose. These sections undoubtedly contemplate a special exigency, to prevent a lapse of the term, which might follow from the absence of the judge, and to allow the court to be adjourned for a limited number of days. In two of these sections (584 and 671) there is a provision that, if the judge does not attend before the close of the fourth day, the court shall be adjourned until the next regular term. We have already held in the case of *United States* v. *Pitman*, 147 U. S. 669, that the officers are entitled to per diem fees for attendance under these sections, the same as if the judge were present and business were transacted.

By Rev. Stat. sec. 828, under which this claim is made by the petitioner, the court must have been "actually in session," and by the act of 1887 the court must have been opened by the judge for business, or business must have been actually transacted in court. There is no conflict between these acts, since, in order that the court be opened *by the judge* for business, it must be "actually in session," and if business be actually transacted *in court*, the court must be opened for the transaction of such business. In either case the court must have been actually opened *by the judge* or actually in session, which amounts to the same thing. As the petitioner bases his claim upon section 828, we shall inquire, first, when the court is *actually in session*. It is certainly not in session upon rule days, since, by Rev. Stat. section 831, "no per diem or other allowance shall be made . . . for attendance at rule days of a District or Circuit Court." We are then remitted to the real question in this case: When is a court actually in session, for we agree entirely in the opinion of the court that if the court be opened by the judge in person, and no business is transacted, the per diem compensation is still payable.

We had supposed the law to be that no court could be in session without the presence of a judge, and that the sections above cited from the opinion of the court in this case (583, 584, 671, 672,) allow an attendance to be charged, not because the court is actually in session, but to prevent a lapse of the term, when

the officers are supposed to be present and in readiness, should the judge appear. Bouvier says (Law Dict.) in giving a definition of the word "court" and the different styles of court, "that the one common and essential feature in all courts is a judge or judges—so essential, indeed, that they are even called *the court* as distinguished from the accessory and subordinate officers." So, too, in Bacon's Abridgment, a court is defined as an incorporeal political being, which requires for its existence the presence of the judges.

Thus in *State* v. *Judges*, 32 La. Ann. 1261, it is said: "The court is an incorporeal political being, which requires for its existence *the presence of the judges*, or of a competent number of them, and a clerk or a prothonotary, at the time during which and at the place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court." A similar definition is given in the *Lawyers' Tax Cases*, 8 Heisk. 650. So in *Schoultz* v. *McPheeters*, 79 Ind. 376, discussing the powers of a master commissioner, the court is said to be "a tribunal organized for the purpose of administering justice, and presided over by a judge or judges." So a court is defined in *Mason* v. *Woerner*, 18 Mo. 570, to be a tribunal established for the public administration of justice, and composed of *one or more judges*, who sit for that purpose at fixed times and places, attended by the proper officers. And in *White County* v. *Gwin*, 136 Ind. 562, a court is defined as consisting of persons, officially assembled at a time and place fixed by law for the administration of justice, although a judge alone does not constitute a court. *Gold* v. *Vermont Central Railroad Co.*, 19 Vt. 478. But the presence of a judge is indispensable. *Hobart* v. *Hobart*, 45 Iowa, 503; *Levey* v. *Bigelow*, 6 Ind. App. 677; *Michigan Central R. R.* v. *Northern Indiana R. R.*, 3 Ind. 245.

In *Davis* v. *Township of Delaware*, 41 N. J. Law, 55, where the question arose as to the validity of a verdict taken by a crier in the absence of the judge and clerk, it was held that the verdict so taken was entirely invalid. "It seems a profitless labor to discuss so obvious a proposition." "No verdict therefore is valid unless given openly in court." It was held, how-

ever, in that case that the record of the court, showing the verdict of the jury to have been returned into the court, imported absolute verity.

So, too, in *In re Terrill, Petitioner*, 52 Kan. 29. This was a writ of *habeas corpus* in which the prisoner, convicted of murder, claimed his release, because his trial was had at a time not authorized by law. It appears that the judge was not present at the time and place when the term should have begun, nor for several days afterwards, and after several adjournments the clerk attempted to adjourn the court, until a later day, when the judge appeared and the prisoner was tried. It was held that the failure of the judge to appear and open court upon the day appointed resulted in the loss of the term, and that the proceedings were absolutely void. Said the court: "There is ample power in a court which has been regularly convened to adjourn to a future time, provided it be not beyond the term; but in the absence of a statute authorizing it, the clerk or other ministerial officer cannot act for the judge in either opening or adjourning court. The clerk is a ministerial officer, and, without statutory authority, can exercise no judicial functions. The opening, holding and adjournment of court are the exercise of judicial power to be performed by the court. To perform the functions of a court, the presence of the officers constituting the court is necessary, and they must be present at the time and place appointed by law. . . . 'To give existence to a court, then, its officers and the time and place of holding it, must be such as are prescribed by law.' *Hobart* v. *Hobart*, 45 Iowa, 503. There being no authority in law for the clerk to open and adjourn the court, the consequence of the failure of the judge to appear upon the day appointed for holding court was the loss of the term."

The citation of these authorities, however, appears to be quite unnecessary in view of the express provision of the act of 1887, that no fees for attendance in court shall be payable except for days when the court is opened by the judge for business.

The exhibits to which reference was made in the findings of fact are in the following form:

"Exhibit A.

"United States Circuit Court, District of Kentucky.

"May term, Monday, October 15th, A. D. 1894.

"Court met. Present: Hon. ——— ———, Circuit (or District) Judge.

"Julius C. Lang, Admr.,
vs.
The Ches. & Ohio R. R. Co. et al.

"This cause coming on to be heard upon the motion of the Chesapeake and Ohio Railway Company for writ of certiorari and for a rehearing upon the motion to remand, the court having considered said motion and the affidavit filed herein, and the original petition for removal herein having been exhibited to the court, and being now duly advised, it is ordered that the clerk of the Kenton Circuit Court at Independence, Ky., be, and he hereby is, directed and ordered to make and transmit to the clerk of the United States Circuit Court for the District of Kentucky, at Covington, Kentucky, a true and correct transcript of the papers and proceedings in this case. The order remanding the case is now set aside and a rehearing of the motion to remand is hereby granted and is set for Saturday, October 20th, A. D. 1894, at 10 o'clock A. M. in chambers, at Cincinnati, Ohio.

"It is now ordered that court stand adjourned until Friday, November 2nd, A. D. 1894."

(The others are in form like unto this.)

It will thus be seen that, while the form of the journal entry showed an exact compliance with the law, the findings of fact show that it was a mere form, and that the facts found by the court were wholly inconsistent with the proceedings as they appear upon the journal, and were presented to the accounting officers. The form shows that the court met. It did not meet. That the circuit or district judge was present. He was not present. That a certain cause in each case came on to be heard and that an order was made in such cause, none of which took place at the time or place indicated; but the order was made

and transmitted by mail to the clerk. The final entry is that the court stands adjourned until a definite day, when the actual fact was that the day to which adjournment was made was left blank, and when another such order, decree or proceeding was received to be entered, such blank was filled with the date on which it was received, and another entry similar to the above, opening and adjourning the court to a blank day, was made. From the nature and character of business transacted on the days on which the court was opened and adjourned as aforesaid, it appears that with scarcely an exception they were orders which might have been made and which in fact were made in chambers. While the judge in each case directed the order to be entered, he did not direct the court to be opened for that purpose.

Now, while as before stated, if the court be properly opened, no business need be done to entitle the officers to their attendance fees, and when authority to do so is given by statute, the clerk or marshal may open the court and adjourn it, we know of no authority under which a clerk may open court at his own will, when he may have some order to enter; nor do we know of any authority under which even a judge may open court without his personal presence, unless specially authorized to do so by statute. Under the practice pursued in this case the court might be opened every day in the year, provided some excuse be found in the shape of an order signed by a judge, though the work actually done in court might not have occupied ten days during the entire year.

The opening of a court is a solemn judicial act, and must be performed by the judge in person, unless special authority is given by statute for its performance by a subordinate officer. No such authority is found in this case. It is true that in *United States* v. *Pitman*, 147 U. S. 669, it was held that the officers were entitled to their attendance while waiting for the judge to appear. We said in that case that "the court should be deemed actually in session within the meaning of the law, not only when the judge is present in person, but when, *in obedience to an order of the judge directing its adjournment to a certain day*, the officers are present upon that day, and the

journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge." This, however, was said with particular reference to the case under consideration, and is no authority for the practice pursued in this case, since the court was not opened in obedience to any order from the judge.

Great stress is laid in the opinion of the court upon the practice of the departments in this connection, and upon the finding that the present appellee in every account rendered by him since 1882 has charged for services similar to those set out in the account here in suit, and that such accounts were uniformly allowed and paid up to June 30, 1893. An inspection of the entries in this case will show the weight to be attached to this practice of the departments. When it appears upon the journal that the court met, that the judge was present, that an order was made in court, and that the court adjourned to a specific date, how are the accounting officers of the Treasury to know that such was not the fact? The practice of the departments to pay these bills might have continued for a century without anything to show that they were apprised of the actual facts appearing in the findings, and no inference can be drawn from such practice. Had it appeared that in such cases the facts set forth in these findings had been called to the attention of the accounting officers the rule would be different; but we fail to see how the practice could afford any justification for these charges. A practice like this is liable to throw one's notions of differences of form and substance into sad confusion. Fictions in pleading were long, and still are, tolerated in many cases, but we know of no definition of the word "fiction" which authorizes journal entries like this, based upon the findings shown in this case. Had the facts been actually stated in connection with these entries, we imagine the practice of the department would have been so quickly changed that no argument based upon it could have been made.

Petitioner in his brief claims his attendance under sections 574 and 638, fully set forth in the opinion of the court, which, construed together, declare that courts of admiralty and equity "shall be deemed always open" for the purpose of filing any

pleading, issuing and returning process, and making and directing interlocutory motions, orders, etc., preparatory to the hearing upon their merits of all cases pending therein. No claim under these sections, however, is made in the petition, wherein the petitioner relies alone upon section 828 for attendance when the court is "actually in session."

There are, however, so many other answers to his claim under sections 574 and 638 that no elaborate discussion of them is necessary. (1) These three sections, 574, 638 and 828, are all taken from the Revised Statutes, and must be construed together as if they constituted parts of one act, as they really do. Nothing is said about attendance in the first two of these sections, and all the orders are such as are usually made at chambers. Both sections provide upon their face that the proceedings therein authorized may be made at chambers, or in the clerk's office, and in vacation as well as in term; but in a separate and distinct section, 828, providing for clerk's fees, his fees for attendance are limited to such as are earned while the court "is actually in session." Of course, if there be any conflict between these sections the later rules, but in addition to that it is inconceivable that Congress, while providing specially for attendance while the court is in actual session, should throw the door wide open in sections 574 and 638 to a charge for attendance upon every day when the judge may happen to make an order, whether the court be actually in session or not. All that is meant by sections 574 and 638 is a recognition of the old custom that courts of admiralty and equity are presumed to be always open for incidental purposes, a custom as old as the very existence of these courts. (2) The list of the orders actually made by the judge, for the entry of which the clerk claims attendance in this case, shows that none of them were in admiralty cases, and comparatively few in equity cases. The great bulk were in common law cases. The claim under these sections was evidently an afterthought. (3) If these sections be construed as opening the door for an attendance fee each time an order was made, then they were clearly repealed by the act of 1887, under which the clerk has a right to compensation only when the court is opened *by the judge* for business, or

business is actually transacted *in court*, and when they attend under certain sections, in which sections 574 and 638 are *not* included.

For these reasons I am compelled to dissent from the opinion of the court in this case.

I am instructed to say that MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

MR. JUSTICE GRAY took no part in the decision of this case.

WASHINGTON STATE *v.* NORTHERN SECURITIES COMPANY.

ORIGINAL.

Argued April 14, 1902.—Decided April 21, 1902.

In the exercise of original jurisdiction by this court the usual practice in equity cases is to hear applications for leave to file bills, *ex parte*, and, ordinarily, leave is granted as of course.

But this is not an invariable rule, and where it is apparent on the face of the proposed bill that there is a defect of parties, which cannot be supplied without ousting the jurisdiction, leave will be denied.

Where the objection is one of jurisdiction over the subject-matter, and the case is of grave importance, leave to file will be granted that the fullest argument may be had.

THE case is stated in the opinion of the court.

Mr. W. B. Stratton for the motion. *Mr. Wallace B. Douglas* was on his brief.

Mr. C. W. Bunn and *Mr. John W. Griggs* opposing. *Mr. George B. Young* and *Mr. M. D. Grover* were on Mr. Bunn's brief.

THE CHIEF JUSTICE:

This is an application by the State of Washington for leave

to file an original bill in this court against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; and the Northern Pacific Railway Company, a corporation of Wisconsin. Notice was given to the proposed defendants and argument had in support of and against the motion.

The usual practice in equity cases has been to hear such applications *ex parte*, *Georgia* v. *Grant*, 6 Wall. 241; although under special circumstances a different course has been pursued. *Mississippi* v. *Johnson*, 4 Wall. 475. Ordinarily, as stated by the Chief Justice in the latter case, the motion for leave to file is granted as matter of course. 4 Wall. 478.

In *Georgia* v. *Stanton*, 6 Wall. 50, a bill in equity was filed by the State of Georgia to enjoin the Secretary of War and other officers representing the Executive authority from carrying into execution certain acts of Congress, on the ground that such execution would overthrow the existing state government of the State and establish another and different one in its place; and a motion was made to dismiss for want of jurisdiction over the parties and over the subject-matter, on which full argument was had. It was held that the bill called for the judgment of the court on political grounds and on rights of a political character, and that, therefore, the court had no jurisdiction over the subject-matter.

In *Louisiana* v. *Texas*, 176 U. S. 1, the case stated shows that "argument was had on objections to granting leave, but it appearing to the court the better course in this instance, leave was granted, and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs."

In *Minnesota* v. *Northern Securities Company*, decided at this term, 184 U. S. 199, application to file a similar bill to that before us, and seeking similar relief, was made, and after examining the bill we directed notice to be given and heard argument on both sides. The result was that leave to file was denied because of the want of certain indispensable parties, who could not be brought in without defeating our constitutional jurisdiction. That insuperable difficulty does not meet us on

the threshold here, but, among other objections to granting leave, it is urged that the court would have no jurisdiction over the subject-matter because, as contended, the bill does not present the case of a controversy of a civil nature, which is justiciable under the Constitution and laws of the United States, in that the suit is purely a suit for the enforcement of "the local law and policy of a sovereign and independent State, whose right to make laws and to enforce them exists only within itself and by means of its own agencies, and is limited to its own territory."

In the exercise of original jurisdiction the court has always necessarily proceeded with the utmost care and deliberation, and, in respect of all contested questions, on the fullest argument; and in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case on those which may succeed it. In view of this it seems to us advisable to take the same course on the pending application as was pursued in *Louisiana* v. *Texas*, that is, without intimating any opinion whatever on the questions suggested, to grant leave to file in accordance with the usual practice. Our rules require service sixty days before the return day of process, but as the final adjournment of the term will have taken place within that time, process will be made returnable on the first day of next term.

Leave is granted and process will issue accordingly.

UNITED STATES *v.* GREEN.
CHRISTIE *v.* UNITED STATES.

APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS.

Nos. 109, 129. Argued January 27, 28, 1902. — Decided April 28, 1902.

The terms of the act of March 3, 1891, 26 Stat. 854, (establishing the Court of Private Land Claims), with reference to a proceeding like this, leave no room for doubt that it was the intent of Congress to require that, be-

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fore a decision of the court in the premises, all those asserting claims in the land, adverse to the United States, should be made parties, and should be heard in support of their validity.

By the law in force at the time of the sale under consideration, a grant initiated in the manner in which the one in question is claimed to have been, could not exceed in the aggregate four sitios.

In its essential features this case is like *Ely's Administrator* v. *United States*, 171 U. S. 220.

It may be presumed that the Mexican officials duly performed the duty imposed upon them of registering the fact of the making of a grant of public lands.

In *Cameron* v. *United States*, 148 U. S. 301, the matter passed upon was not the same as that which is present in the case at bar.

These appeals concern the title to a tract of land situated in the county of Pima, Territory of Arizona. The litigation was begun by the filing in the Court of Private Land Claims, on February 27, 1893, on behalf of Alfred A. Green, of a petition by which the court was asked to declare the validity of the title of Green to the tract. It was alleged that Green had become invested with the title by mesne conveyances from one Ramon Romero and others, to whom the land had been granted on May 15, 1825, by the State of the West in the Republic of Mexico.

While the original documents constituting the grant were averred to be in the official custody of the surveyor general of the United States for the Territory of Arizona, it was alleged that the claim had not theretofore been considered or acted upon by Congress, or any other authority of the United States. A map was annexed to the petition, which it was asserted showed the boundaries of the land, and established that the quantity thereof was sixteen square leagues. Not only the United States, but also Colin Cameron, and others whom it was averred claimed some interest in the land, were made parties defendant to the cause.

The United States filed a general denial. Thereafter, on March 20, 1895, upon the application of the United States, Harvey L. Christie was made a party defendant, on the ground that he asserted title to the land under the grant to Romero.

On March 25, 1895, Colin Cameron filed an answer, in which he denied that petitioner had any interest in whole or in part

in the land, and it was also averred that he (Cameron) was the owner in fee simple, and that he was in possession of the tract, under the grant of May 15, 1825, referred to in the petition. The land claimed by Cameron was delineated on a map annexed to the answer, and the land was averred to be embraced within the original survey of the grant. The proceedings which it was claimed culminated in the grant were detailed at length. It was also alleged that as the result of proceedings instituted on February 28, 1880, by the successors in interest to the original grantees the surveyor general of the United States for the Territory of Arizona, on April 28, 1880, recommended the confirmation by Congress of said grant to the legal representatives of the original grantees to the extent of four square leagues, but that no action had been taken thereon by Congress.

Defendant also pleaded that on September 6, 1886, the United States, under the act of Congress approved February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands," brought suit against him for an alleged unlawful enclosure of public lands, a part of the tract in question, and that the trial court had adjudicated that the map attached to Cameron's answer in this case correctly represented the land included within the boundaries described in the original title papers of said grant, and that such map correctly represented the location of each monument called for and described in said title papers. Such findings of fact as to the monuments and location of the said grant were thereupon averred to be *res adjudicata* herein. The answer concluded as follows:

"Defendant further avers, in order to save every right belonging to him, that he in nowise invokes the jurisdiction of this court or submits himself to it voluntarily, and that he answers herein only because he has been made a party defendant. Defendant avers that he claims the lands of the said San Rafael de la Zanja grant under a title derived from the Mexican government that was complete and perfect when the United States acquired sovereignty over such lands; that all the steps and proceedings in the matter of the petition, survey, appraisement offers, auctions and sale of said grant and payment therefor were regular, complete and lawful, and vested a perfect and

valid title in fee thereto in the said grantees of said grant, and that said grantees at the time went into the actual possession, use and occupation of said grant and erected the proper monuments, and that said grantees and their descendants and legal representatives have continued ever since and until the present time in the actual possession, use and occupation of the same, and are now seized and possessed in fee thereof; that said grant document is a complete, definite grant in fee by way of sale, coupled with the condition subsequent not to abandon the same for a longer period than three years, without good reason, which abandonment would subject the tract to adjudication to third parties who might apply for or denounce the same; but that no forfeiture of said grant was ever claimed.

"Defendant avers that by reason of the premises he is in nowise bound by the act of Congress, establishing this court to apply to this court for a confirmation of said title, and that he is unwilling to submit himself to the conditions, or any of them, imposed by the act establishing this court, upon petitioners applying to said court for confirmation of their title, and that he does not by this answer, or in any other way, so apply."

On February 4, 1899, Cameron filed what was termed a "separate answer," in which were repeated the averments in the prior answer as to the petitioner not possessing any interest in the tract, the ownership thereof in the defendant, the proceedings which culminated in the grant to Romero, and the proceedings had before the surveyor general of Arizona. An averment was made that the map filed with the answer, as a part thereof, was a correct map of the grant in question, and showed the area of the grant to be 152,889.62 acres. It was next alleged that the grant to Romero was not a grant by quantity, but was a sale by metes and bounds and natural landmarks established by the Spanish survey, and that the grant vested in the grantees a true and valid title in fee to the whole of the surveyed land; and it was further alleged that each and every person in the occupancy of any portion of the tract was unlawfully occupying and that any patents issued by the Uni-

ted States for land within the grant were null and void. The answer next contained the following averments:

"Defendant further avers that prior to said treaty, known as the Gadsden treaty, no resurvey of said grant had ever been applied for or ordered by any one, and that none of the grantees or their successors in interest had prior to said treaty any knowledge or notice that within the said monuments there was any excess of land over the area stated in said title papers, and defendant 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 owners even after such overplus is shown, without other obligations 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 defendant further avers that if this honorable court should decide that said sale as recited in said title papers did not, as defendant 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."

The answer concluded with a tender of $1359 as payment for any overplus, and the further sum of $200 for the costs of ascertaining and determining the existence or non-existence of such overplus, and concluded with the prayer "that upon said payment this honorable court decree that defendant 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 ownership and possession of the whole of said tract, and defendant, answering herein by reason of the fact that he has been made a party defendant, prays that the validity of his said title may be inquired into and decided, and that his title to all of said lands be declared valid, and that the said grant be adjudged to be and always to have been a com-

plete and perfect and unconditional title in fee, and the defendant be adjudged to be the owner in fee thereof, and for such other and further relief as to the court may seem meet and proper in the premises."

On February 4, 1899, an answer of defendant Christie was filed, in which it was averred that Christie was the owner of the land granted to Romero. In other respects the answer reiterated the allegations contained in the separate answer of Cameron just stated.

In a supplemental answer filed by leave on May 19, 1899, Cameron reiterated the plea of *res adjudicata* contained in his original answer.

From time to time various other defendants filed answers, setting up title by adverse possession, and otherwise to sundry portions of the land in controversy. The cause was heard on the theory that the pleadings of Cameron and Christie just referred to were cross complaints, demanding affirmative relief against the United States. On behalf of the two defendants named, there was introduced in evidence a certified copy of the expediente of the grant, as also the original titulo. This titulo shows the following as the original proceedings upon which the title was based:

On July 19, 1821, Don Manuel Bustillo, a resident of the presidio of Santa Cruz, applied to the intendant of the province of Sonora and Sinaloa, Antonio Codero, at Arispe, for four sitios of land at a place to which was afterwards given the name of San Rafael de la Zanja. Three of these sitios were to be north of and adjoining the lands of said presidio, and the other at the place called Cajoncito to the east. The application was granted on the same day without prejudice to third parties, and the commandant of Santa Cruz was ordered to make the survey, appraisement and publication of the land for thirty consecutive days in solicitation of bidders. Gonzales, the commandant of Santa Cruz, accepted the commission October 4, 1821, and ordered the survey to be commenced on the next day, after summoning the party in interest and the owners of coterminous lands. An assistant was appointed, and the survey made on October 5 and 6, 1821. After a waxed and twisted hempen

cord of fifty varas had been measured, the applicant (Bustillo) requested that, inasmuch as the place called Cajoncito was inside of the presidio lands, the one sitio he had asked for there be given to him in one tract with the other three, which request was granted. In substance it appeared that the survey was made by running or estimating the lines from the central point two hundred cords east, west, north and south, the ends of the lines being extended to form a square. The recitals of the survey concluded as follows:

"With which measurements was formed the square of the four sitios registered by Don Manuel Bustillo for raising cattle, and as such he accepted them; being informed that in due time he was to establish his boundaries with monuments of lime and rough stone as required by law."

Appraisers were appointed, and four sitios were appraised as follows: Three sitios at $60 each, because they had permanent water, and one sitio at $30, because it was dry. Publication was then made for thirty consecutive days, soliciting bidders. None appeared. Affidavits were taken to show that Bustillo was able to stock four sitios. The expediente was then forwarded to the intendant, who, in December, 1821, referred it to the attorney general for his opinion. The latter official submitted a written opinion December 20, 1821, approving the proceedings, and recommending that the three usual public offers be made and the land sold to the highest bidder upon payment of the price and the usual fees. The intendant approved the recommendation, and ordered the three public offers made. The first offer was made January, 1822. The proclamation made by the crier, as recited in the account of the proceedings of the first auction, was as follows:

"There are going to be sold for this commission of auctions four sitios of public lands for cattle raising, comprised in the place named San Rafael de la Zanja, situated within the jurisdiction of the presidio of San Cruz, surveyed in favor of the one who denounced them, Don Manuel Bustillo, and appraised in the sum of two hundred and ten dollars, being at the rate of sixty dollars each for three of said sitios, and the remaining one at thirty dollars."

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The bidders at the sale were Bustillo and one Romero. The latter, on behalf of himself and the residents of the presidio of Santa Cruz, became the purchasers for the sum of $1200. Romero was notified of the result, with which he expressed satisfaction, and asked the grant to be made. On January 11, 1822, the intendant *ad interim*, Ignacio de Bustamente, approved all the proceedings, and ordered Romero to be notified and to pay into the treasury the price of the land and the usual fees, and, as soon as that was done and a voucher for the payment was attached to the expediente, it be sent to the superior board of the treasury in Mexico for such action as it might see fit to take. Romero made the payment, and a certificate was given him for the amount thereof. At this point the proceedings were suspended, and so remained until May 15, 1825, when the recently created commissary general of the State of Sonora, Juan Miguel Riesgo, issued a title to "Don Ramon Romero and the other residents in interest," for "the four sitios of land for breeding cattle, comprising the place called San Rafael de la Zanja," under article 81, ordinance of intendants, and the royal instructions of October 15, 1754, at Fuerte, the then capital of the United States of Sonora and Sinaloa.

The following appears at the end of the titulo, viz: "Entry of this title is made at folio 3 of book No. 2 that exists in this commissariat general."

The expediente, which was on file in the archives of the State of Sonora, Mexico, at the city of Hermosillo, the capital, contained, following the certificate of the payments made by Romero, the following recital:

"The title on this expediente was issued on May 15, 1825, in favor of the interested parties, Don Ramon Romero and other residents of Santa Cruz. Rubricas E. R. Pa. 7 a. Notification. Vale."

The court found (two members dissenting) that a valid grant had been made, that the evidence established the central point of the original survey, and confirmation was made and decreed "of the said title of the said Ramon Romero, and of his coowners and of their heirs, successors in interest, and assigns" to four sitios of the tract, measured in a square from the center

established by the Mexican surveyor, as shown on the map of a certain survey made in 1895, and in evidence in the cause. The claim of plaintiff and of defendants Cameron and Christie to all other land not so confirmed was rejected.

Appeals were prosecuted by the United States and by Cameron and Christie.

Mr. John W. Griggs and *Mr. Francis J. Henry* for appellants in No. 129, and appellees in No. 109.

Mr. William H. Pope and *Mr. Matthew G. Reynolds* for the United States. *Mr. Solicitor General* was on their brief.

Mr. Rochester Ford filed a brief for the United States and for Christie.

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

We will first dispose of the questions presented by the appeal of the United States. In substance, it is asserted that the grant should have been rejected *in toto*, instead of being confirmed to the extent of four sitios, upon the following grounds: 1. That the claim was barred by section 12 of the act establishing the Court of Private Land Claims, because not asserted until after the expiration of two years from the passage of the act. True, it is said, the claim of Green was presented in time, but as he was not represented at the trial and Cameron and Christie were treated as the sole claimants and they had not by their cross complaints asked for affirmative relief within the statutory limitation, the bar of the statute was operative as to them. 2. The intendant *ad interim* Bustamente, through whom the sale to Romero and others purported to have been effected, and the commissary general of Sonora who ultimately extended the title, did not possess the power in the premises which they assumed to exercise; 3. The grant in question was not duly located prior to September 25, 1853, as required by article VI of the Gadsden treaty; 4. The grant was not duly recorded in the archives of Mexico prior to September 25, 1853, which was

made a condition precedent to the recognition of an alleged grant, by the article of the treaty just referred to.

As respects the bar of the statute, we think the contention is clearly without merit, even upon the hypothesis that the grant to Romero constituted, at the date of the treaty, but an imperfect title to the extent to which the court below confirmed the same. The provision of the act establishing the Court of Private Land Claims, relied upon, is as follows:

"SEC. 12. That all claims mentioned in section six of this act which are by the provisions of this act authorized to be prosecuted shall, at the end of two years from the taking effect of this act, if no petition in respect to the same shall have then been filed as hereinbefore provided, be deemed and taken, in all courts and elsewhere, to be abandoned, and shall be forever barred."

By the filing of the petition on behalf of Green the court below was vested with jurisdiction to determine the validity of the grant upon which the proceeding was based and to pass upon the question as to whether or not the lands embraced therein were at the date of the treaty public land of the United States. The terms of the act establishing the Court of Private Land Claims, with reference to a proceeding thus instituted, in our opinion leave no room for doubt that it was the intention of Congress to require that before a decision by the court in the premises, all those asserting claims in the land adverse to the United States, under the grant relied upon, should be made parties and be heard in support of its validity. The provisions of section six of the act, which relate to claims for confirmation of imperfect and incomplete titles, manifestly import that every adverse possessor or claimant should be made a party defendant, and the section prohibits the entry of a decree "otherwise than upon full legal proof and hearing." By section seven, "all proceedings subsequent to the filing of the petition" are required to "be conducted as near as may be according to the practice of the courts of equity of the United States;" and, in addition, it is provided as follows:

"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 treaty concluded between the United States and the Republic of Mexico, at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord eighteen hundred and forty-eight, or the treaty concluded between the same powers at the city of Mexico on the thirtieth day of December, in the year of our Lord eighteen hundred and fifty-three, 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."

The fact also that, by section 8, the United States may, without limitation as to time, voluntarily institute a proceeding for the determination of the validity or invalidity of any claim or title deemed by it "open to question," affords further support for the construction that Congress intended that in a proceeding brought in due time to settle the validity of an alleged Spanish or Mexican grant, the United States might, at any stage of such pending litigation, apply to the Court of Private Land Claims—as was done by the United States with respect to the defendant Christie — to have brought into the case adverse claimants who had not been made parties defendant by the petitioner, in order that such parties might be afforded an opportunity to be heard, and the Court of Private Land Claims be aided in reaching a just decision. As further establishing the fact that it was not the purpose of Congress to deprive the Court of Private Land Claims of power to adjudicate upon claims asserted by defendants during the pendency of a lawful proceeding to obtain an adjudication respecting the validity of an alleged Mexican grant, even though such defendants were made parties or filed claims for affirmative relief after the pe-

riod limited for the institution of an original proceeding to obtain confirmation of a claim of title, we excerpt the following proviso to the portion of section 12 heretofore quoted:

"*Provided*, That in any case where it shall come to the knowledge of the court that minors, married women or persons *non compos mentis* are interested in any land claim or matter brought before the court, it shall be its duty to appoint a guardian *ad litem* for such persons under disability, and require a petition to be filed in their behalf, as in other cases, and if necessary to appoint counsel for the protection of their rights."

The second and third grounds relied upon by the Government, as above stated, to defeat the claim in its entirety do not require extended consideration, as they are foreclosed by recent decisions of this court. By the law in force at the time of the sale under consideration a grant initiated in the manner in which the one in question is claimed to have been, could not exceed, in the aggregate, four sitios. The evidence clearly showed that the quantity of land denounced, appraised, paid for and purported to have been granted was only four sitios. Under these circumstances, the court below properly sustained the grant to the extent of four sitios only. As said by the Court of Private Land Claims: "The cause is founded on a proceeding initiated in 1821 and concluded in 1825. In its essential features it is like *Ely's Administrator* v. *United States*, 171 U. S. 220. The proceedings under which the grant was made are precisely like those upon which the grant in that case was made, and were had under the same laws, and the two grants were made by the same officer." The case in the particular stated is, therefore, ruled by *Ely* v. *United States*, *supra*; *United States* v. *Maish*, 171 U. S. 277; *Perrin* v. *United States*, 171 U. S. 292; and *United States* v. *Camou*, and *Reloj Cattle Company* v. *United States*, 184 U. S. 624.

As from the evidence the Court of Private Land Claims was able to determine the true boundaries of the tract as limited, the cases just cited are also authority for deciding that the grant was duly located to that extent, and hence that the court rightfully confirmed the grant for the lawful extent thereof.

The remaining ground upon which the United States con-

tends that the claim should have been rejected, is that it was not established that a record of the grant was made. As respects the evidence of a due recording of the grant, the case at bar is similar to the *Ely* case, *supra*, where, however, no question was raised by the Government as to the want of a proper record. In the Sonoita grant, passed on in the *Ely* case, the final title was issued on the same day on which the final title in the case at bar purports to have been issued, and contained a like notation that "note of this title is taken on page 3 of book No. 2 in this general commissariat." A memorandum of this character appears to have been customarily endorsed on the titulo.

The evidence in the case at bar showed that there are only two books of Toma de Razon in the records at the capital of the State of Sonora, Mexico. One book has the figure 1 written on the first page of the first leaf, and contains entries of grants up to and including May 13, 1825. The first entry on the other book bears date of 1831. In the case at bar the final title or titulo, of date prior to the regulations of 1828, was admitted in evidence without objection or question as to its genuineness, nor was any objection interposed by the Government to the introduction in evidence of a letter, dated some time in 1831, written by the provincial secretary of Sonora, on behalf of the commissariat general of that State, alluding to the existence of the title to this San Rafael grant. The expediente is also on file in the Mexican archives, and contains thereon a memorandum of the issue of a grant. In view of all these circumstances it may properly be presumed that the ministerial duty which it is claimed was imposed on the Mexican officials of registering the fact of the making of a grant of public lands was duly performed, and that such record was in fact made. Whether, as held by the court below, the mere retention in the Mexican archives of the expediente constituted the record of the grant, within the meaning of the treaty of 1853, need not be determined.

We come then to consider the contentions relied upon by the claimants to sustain their appeals. Those contentions are in substance that the grant to Romero and his associates consti-

tuted a complete and perfect title to the full quantity of land embraced within the original survey, which it was asserted by witnesses for the claimants aggregated not merely four sitios, but nearly one hundred and sixty thousand acres of land. It is manifest however, from the authorities which we have previously cited, that as the grant was lawful to the extent of only four sitios, the claimants cannot be heard successfully to assert that it embraced and could be confirmed for the larger quantity.

The previous decisions of this court also preclude the claim for a confirmation of the grant as to the overplus upon payment of the asserted value of such excess. In *Ainsa* v. *United States*, 184 U. S. 639, decided at this term, discussing the contention of the claimant that he was entitled to an award of the demasias or overplus beyond the cabida legal or real quantity granted, upon payments of such amount as might be found due, the court concluded as follows:

"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.'"

Counsel for claimants in their brief call attention to the plea of *res adjudicata* interposed by the claimant Cameron, though they do not discuss the same. The action in which the judgment thus pleaded was rendered related to land within the asserted exterior bounds of the grant, near the alleged north and northeast monuments, as said boundaries were recited and

measured in the expediente. The courts of the Territory had held that the lands enclosed were public lands of the United States, that Cameron had unlawfully enclosed the same, and the removal of the fence enclosing the land was ordered. On appeal, however, this court, while expressly disclaiming any intention to pass upon the validity of the asserted title of Cameron, held that there was color of title sufficient to take the case outside of the operation of the statute, reversed the judgment against Cameron, and remanded the case with directions to dismiss the petition. 148 U. S. 301. It is clear that, irrespective of the question of parties, the matter passed upon in the fence case was not the same as that which is present in the case at bar. The fence case did not involve, as does the case at bar, the question whether or not the claimant had a valid title to land within the boundaries of the alleged grant, and hence nothing decided in that case was conclusive in this.

Decree affirmed.

COVINGTON *v.* COVINGTON FIRST NATIONAL BANK.

APPEAL FROM THE COURT OF CLAIMS.

No. 604. Argued and submitted March 24, 1902.—Decided April 28, 1902.

Matters within the pleadings in this case having been left undetermined by the court below, and the cause having been detained for the purpose of thereafter passing upon them, and for the entry of a further decree, the decree entered below was not final, and this court is without jurisdiction to pass upon it.

On July 23, 1900, the appellee herein filed a bill seeking to enjoin the threatened assessment and collection by the defendants below (appellants here) of municipal taxes under the assumed authority of an act of the general assembly of the State of Kentucky approved March 21, 1900, a copy of which is excerpted in the margin.[1]

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[1] "Whereas the Supreme Court of the United States has lately decided

Statement of the Case.

In substance, it was averred in the original bill and in an amendment thereto that the complainant was chartered on

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that article three, chapter one hundred and three of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article, in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while state banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, state and local; therefore

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"SEC. 1. That the shares of stock in each national bank of this State shall be subject to taxation for all state purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

"SEC. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

"SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid state taxes under the Hewitt bill in excess of the state taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its state taxes required by this act.

"SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"SEC. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

November 17, 1884, for a term of twenty years; that in 1886, by the acceptance of the provisions of an act of the general assembly of Kentucky, approved May 17, 1886, known as the Hewitt Act, a contract was entered into with the State of Kentucky, irrevocable during the existence of the charter of the bank, whereby the complainant became obligated to pay to the State taxes upon the shares of its stock, surplus and undivided profits at a designated rate, such taxes to be in full of all other taxes (state, county or municipal,) except those levied upon its real property; that complainant had regularly made the payments stipulated in said contract up to and including the payment due July 1, 1900; that the taxes thus paid much exceeded the regular taxes imposed by the State during said period upon other real and personal property; and that the fact of the existence of an irrevocable contract had been conclusively determined by the judgment and decree of the Court of Appeals of Kentucky in a litigation between the bank and the State and the city of Covington, growing out of an attempt to collect state and city taxes upon the franchise of the bank, under the authority of an act of the general assembly of Kentucky, approved November 11, 1892. It was also averred that notwithstanding the foregoing the general assembly of Kentucky enacted the statute of March 21, 1900, already referred to, and that the defendants were attempting, under the assumed authority of said act, to compel complainant to list for taxation its shares of stock, and that the defendants designed and intended to assess said shares and to collect municipal taxes thereon for the benefit of the city of Covington for the years 1893 to 1900, both inclusive.

At much length facts were detailed in the bill and amendment regarding a reduction of the capital stock of the com-

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"SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as state banks as nearly as may be consistently with said article three of the revenue law and said decision of the Supreme Court.

"SEC. 7. Whereas, it is important that state banks and national banks should be taxed equally for all purposes, and an emergency exists, this act shall take effect and be in force from and after its passage."

plainant made in July, 1897, as to the regular payments of dividends to stockholders during the years for which the tax was sought to be assessed and collected and as to changes in the ownership of the stock during said period. The unconstitutionality of the statute and the illegality of the threatened proceedings thereunder were asserted upon various grounds.

The defendants filed a plea to the jurisdiction and also demurred for want of equity. A motion for a temporary injunction was heard and granted, the court embodying its views in an elaborate opinion. 103 Fed. Rep. 523. The order for the temporary injunction concluded as follows:

"It is ordered, adjudged and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law and to what extent."

The complainant thereupon moved that the injunction be made permanent, and by stipulation the cause was submitted to the court "upon said motion, and also upon the plea of the defendants to the jurisdiction of the court, and also upon their demurrer to the bill of complaint," it being agreed that "if the said plea and said demurrer are both disallowed and overruled, then the cause is submitted for the judgment of the court as upon a final hearing, the bill then to be taken for confessed, and further delay thereon being waived."

On December 17, 1900, the following decree was entered:

"This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged and decreed as follows, namely:

"First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

"Second. That the bill of complaint, as amended and to which the demurrer and plea were considered as applying, is sufficient and contains matters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

"Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of the capital stock, any taxes upon any of said shares, upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendants elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

Opinion of the Court.

An application for the allowance of an appeal was filed by the city of Covington and Middendorf; and an assignment of errors was also filed on behalf of said defendants, the grounds, as stated therein, being reproduced in the margin.[1]

An order allowing the appeal as prayed was made. No appeal was prayed by the complainant.

Mr. Assistant Attorney General Pradt for the United States submitted on his brief, on which was also *Mr. Philip M. Ashford.*

Mr. Charles C. Lancaster for Van Duzee.

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

It is apparent that the bill as amended sought by injunction to prevent the collection of taxes on the shares of stock of the bank for the years 1893 to 1900, both inclusive, and indeed it is obvious from the decree that the court considered the case also involved the question whether any other than the taxes provided by the Hewitt Act could be imposed upon the bank during the remainder of its corporate existence. The relief

[1] "Come now the defendants and each of them and file the following assignment of errors, upon which they and each of them will rely:

"First. The court erred in overruling the defendants' plea to the jurisdiction of the court.

"Second. The court erred in holding the bill of complaint as amended, to which the plea and demurrer were considered as applying, sufficient, and in overruling the demurrer of the defendants thereto.

"Third. The court erred in enjoining the defendants and each of them from assessing the shares of stock in complainant bank, and from levying taxes thereon for any purpose for any time or period previous to March 21, 1900, and erred in enjoining and restraining the collection of any taxes, either from the complainant bank or from any of the holders of the shares of the capital stock of said bank, for any time subsequent to that date.

"Fourth. The court erred in retaining control of this cause for any purpose.

"Fifth. The court erred in decreeing costs herein against defendant.

"Sixth. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint."

sought was based upon the following grounds: 1. There was a contract with the bank by which the taxes authorized by the act of 1900 could not be levied without impairing the obligation of such contract. 2. The existence of this contract and its binding efficacy was concluded by the thing adjudged. 3. The tax provided by the act of 1900 was discriminatory and repugnant to section 5219 of the Revised Statutes. Now, although the Circuit Court enjoined the assessment and collection of taxes for the years prior to March 21, 1900, it did so, not upon the consideration and determination of the questions of contract or *res adjudicata*, but solely upon the question of discrimination. So far, however, as any taxes subsequent to March 21, 1900, were concerned, they were not disposed of, for the decree expressly provided as follows:

"The defendants are at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendant elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment, and the expiration of the present and existing articles of incorporation of the complainant."

Whilst the decree on its face thus unambiguously discloses that the court did not finally dispose of the entire controversy made by the pleadings, an inspection of the opinion of the court makes it perfectly clear that the court did not intend to and did not dispose of the entire controversy which was involved in the cause.

The only opinion pronounced was that rendered on the decision made upon the application for a preliminary injunction. Though in that opinion some reference was made by the court to the contentions of contract and *res adjudicata*, the court expressly declared that it would not make a "final expression on

the question," but would leave that subject open for further consideration. And when the court came to render the decree which is appealed from, making the injunction permanent, although it in substance reiterated the provisions of the order allowing the preliminary injunction, it added thereto the fourth paragraph, expressly retaining the cause "for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant, at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

The court below, in effect, having reserved for future determination the right of the complainant below to enjoin the collection of a municipal tax for 1900, and subsequent years, this court obviously cannot decide that controversy. Matters within the pleadings having been left undetermined and the cause having been retained for the purpose of thereafter passing on them and for the entry of a further decree, the decree entered was not final. *McGourkey* v. *Toledo & Ohio Central Railway*, 146 U. S. 536, 545, 546, and cases cited. As a necessary result this court cannot adjudicate upon the contention respecting that portion of the issue which was actually determined by the Circuit Court, because a decree of a Circuit Court upon the merits can be reviewed here only by appeal, which cannot be taken until after a final decree has been made disposing of the whole cause. The case is not to be brought here in fragments by successive appeals. *Southern Railway Co.* v. *Postal Telegraph Cable Co.*, 179 U. S. 641, 644, and cases cited.

Appeal dismissed.

UNITED STATES *v.* VAN DUZEE.

APPEAL FROM THE COURT OF CLAIMS.

No. 604. Submitted and argued March 24, 1902.—Decided April 28, 1902.

Section 19 of the act of May 28, 1896, c. 252, providing that "the terms of office of all commissioners of the Circuit Courts heretofore appointed shall expire on the thirtieth day of June, 1897, . . . and said commissioners shall then deposit all the records and other official papers appertaining to their offices in the office of the clerk of the Circuit Court, by which they were appointed," not having authorized the filing of the writings in question, and no provision having been made for compensating the clerk for the service of receiving them and retaining them in his custody, the Court of Claims erred in awarding judgment in favor of the claimant.

THIS is an appeal from a judgment of the Court of Claims entered in favor of the appellee (claimant below) for the sum of $993. 35 C. Cl. 214. The conclusion of law by which the court determined that judgment ought to be entered against the United States was based upon the following:

"*Finding of Facts.*

"I. The claimant, Alonzo J. Van Duzee, was clerk of the Circuit Court of the United States for the Northern District of Iowa from August, 1882, to December 31, 1897, duly qualified and acting.

"II. During said period he made up his accounts for services rendered on behalf of the United States, and presented the same, duly verified, to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment. In the settlement of the account from July 1, 1897, to September 30, 1897, part was paid, but payment of services embraced in Finding III was refused.

"III. Item 1. For filing and entering 9930 separate and dis-

tinct records and other official papers appertaining to the offices of commissioners of the Circuit Court of the United States for the Northern District of Iowa, which were deposited by said commissioners under the act of May 28, 1896, in the office of the clerk of the Circuit Court for said district, at 10 cents each as follows:

(*a*) Dockets and records, 16	$ 1 60
(*b*) Information or complaints, 2997	299 70
(*c*) Warrants, 1984	198 40
(*d*) Subpœnas, 1899	189 90
(*e*) Documentary testimony, 446	44 60
(*f*) Bonds, 649	64 90
(*g*) Affidavits, 445	44 50
(*h*) Mittimus, 446	44 60
(*i*) Search Warrants, 22	2 20
(*j*) Applications for discharge of poor convicts, 587.	58 70
(*k*) Oaths for discharge as poor convicts, 232	23 20
(*l*) Mandates to jailer for discharge as poor convicts, 169	16 90
(*m*) Applications for seamen's wages, 24	2 40
(*n*) Summons on applications for seamen's wages, 13	1 30
(*o*) Præcipe, 1	10
	$993 00

"IV. During the period when the aforesaid services were rendered, it was the settled practice under the verbal orders of the court for the clerk to file all papers sent up by the commissioners in said district; and by a written rule of court entered of record, it was made the duty of the clerk in cases wherein the commissioner held the defendant to appear at court to file the papers and transcripts sent up by the commissioner, and to forthwith enter the case on the docket, which rule is as follows:

"'*Commissioner's papers.*

"'Upon receipt by the clerk of the papers and transcript of proceedings before a commissioner, wherein the party is held to appear at court, the same shall be properly filed and the same entered upon the docket.'

"The aforesaid services were performed in compliance with said practice and rule of court."

Mr. Assistant Attorney General Pradt submitted for appellant. *Mr. Philip M. Ashford* was on his brief.

Mr. Charles C. Lancaster for appellee.

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

The question involves the construction of a portion of paragraph 19 of the act of Congress of May 28, 1896, 29 Stat. 184, which reads as follows:

"That the terms of office of all commissioners of the Circuit Courts heretofore appointed shall expire on the thirtieth day of June, eighteen hundred and ninety-seven; and such office shall on that day cease to exist, and said commissioners shall then deposit all the records and other official papers appertaining to their offices in the office of the clerk of the Circuit Court by which they were appointed. All proceedings pending, returnable, unexecuted, or unfinished at said date before any such commissioner shall be continued and disposed of according to law by such commissioner appointed as herein provided, as may be designated by the District Court for that purpose."

Upon the assumption that the Government had not appealed from a judgment rendered against it, in *Marsh* v. *United States*, 88 Fed. Rep. 879, 890, item 57, upon a claim similar to that now being considered, the Court of Claims, in the case at bar, adopted the decision in the case referred to, and held that the provision of the act of 1896, above quoted, authorized the filing by the claimant of all papers deposited with him in accordance with the requirements of the act, and that by such deposit they became part of the records and files of the court of which he was clerk. The United States, however, on a motion for a new trial directed attention to the fact that the court had mistakenly supposed that the decision in the *Marsh* case had been acquiesced in, since proceedings to review the judgment in that case were then pending in the proper Circuit Court of Appeals.

We are unable to concur in the construction of the statute thus adopted by the court below. As said by Mr. Justice Jackson, in *United States* v. *Shields*, 153 U. S. 88, 91: "Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officers." Now, the act of 1896 did not expressly provide that the papers to be surrendered by the commissioners to the custody of the clerk should be *filed* by the latter, and we are unable to infer from the language employed that such a direction was given. Congress, having abolished the office of Circuit Court commissioner, naturally deemed it expedient to provide for the safekeeping of the dockets, records and official papers of those officers. It, therefore, directed that upon the cessation of such offices, the commissioners should "deposit" the official documents in their possession with the "clerk of the Circuit Court by which they were appointed." No good purpose would have been subserved by the formal filing of these dockets and writings, which, in the ordinary course, never would have been forwarded to the clerk for filing, and, hence, the construction which attributes to the word "deposit," as used in the statute, a meaning synonymous with "filing," is strained.

So, also, the legal conclusion embodied in the fourth finding, to the effect that the services of the claimant were performed in compliance with a rule of court promulgated prior to May 28, 1896, was erroneous. The documents in question were not covered by the rule, which plainly had relation only to the current business of the Circuit Court commissioners.

The statute which directed the deposit not having authorized the filing of the writings in question, and no provision having been made for compensating the clerk for the service of receiving and retaining them in his custody, the Court of Claims erred in awarding judgment in favor of the claimant. *United States* v. *Patterson*, 150 U. S. 65, 69; Rev. Stat. sec. 1764.

The decree of the Court of Claims is reversed, and the cause is remanded to that court with instructions to render judgment for the United States.

EXCELSIOR WOODEN PIPE COMPANY *v.* PACIFIC BRIDGE COMPANY.

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

No. 375. Submitted February 3, 1902.—Decided May 5, 1902.

Where the decree of a Circuit Court and the order allowing an appeal both state that the bill was dismissed for want of jurisdiction, no separate certificate is necessary, and the appeal may be taken at any time within two years.

If a bill be brought to enforce or set aside a contract, though such contract be connected with a patent, it is not a suit under the patent laws, and the jurisdiction of the Circuit Court can only be maintained upon the ground of diversity of citizenship.

Although the bill be an ordinary bill for the infringement of a patent, of which the Circuit Court would have jurisdiction, if the answer show that it is really a suit upon a contract the court should dismiss the bill.

Where a bill is filed by a licensee (the license being set up merely to show the title of the plaintiff to the patent) against the patentee and another party to whom the patentee has granted a conflicting license, the jurisdiction of the court is not ousted by reason of allegations in the answer that the plaintiff had forfeited all his rights under the license by failure to comply with its terms and conditions, by reason of which the license had been revoked by the patentee.

THIS was a bill in equity filed by the Excelsior Wooden Pipe Company, a California corporation, against the Pacific Bridge Company, also a California corporation, but having a branch in the city of Seattle, Washington, and Charles P. Allen, for the infringement of a patent issued to Allen, one of the defendants, for a wooden pipe.

Beside the usual allegations of a bill for the infringement of a patent, the plaintiff averred that, prior to the acts charged against the respondents, the said Charles P. Allen, one of the defendants, had granted December 20, 1892, unto the Excelsior Redwood Company, a California corporation, the exclusive right within the Pacific States of manufacturing and selling wooden pipe under his patent to the full end of its term; that the Ex-

celsior Redwood Company had, with the written consent of Allen, the patentee, on December 22, 1892, transferred unto the Excelsior Wooden Pipe Company, plaintiff, the said exclusive license to it, from Allen, with all rights and privileges thereunder, and that Allen had been, and still was, the exclusive owner of the patent, and the plaintiff the sole and exclusive licensee; that the plaintiff has ever since and still is engaged in the manufacture and sale of the patented articles, and has filled all orders therefor, and is well known as the exclusive licensee, and that Allen has joined with the plaintiff in suits against infringers of his patent, all of which have resulted in his favor. The gravamen of the bill lies in the allegation that, notwithstanding all this, the defendant, the Pacific Bridge Company, and the said Allen, have since such license conspired to make and sell, and without the license and consent of your orator, exclusive licensee as aforesaid, have made and sold, within one year last past, within the State of Washington, wooden pipe substantially the same as that described in the patent and embodying the invention; and therefore it brought this bill to recover damages for this infringement and for an injunction.

The answer, which was a joint one of both defendants, admitted the issue and validity of the patent and its ownership by defendant Allen. It is also admitted a license by defendant Allen to plaintiff's assignor, whereby the latter obtained the exclusive right to make and sell the patented articles in the territory described, and set out the license in full; but it denied that this license was a subsisting one, and alleged an abandonment of the same by the plaintiff, a forfeiture of all rights thereunder by failure and refusal to comply with its terms and conditions, and by acts of bad faith toward the patentee by seeking to defeat the patent and destroy its monopoly; and a revocation of the license by Allen for cause in pursuance of the terms of the contract. It also set up that after the alleged revocation of the license the defendant Allen granted a license to his joint defendant, the Pacific Bridge Company. In short, the only defence was a denial of the license which lies at the basis of plaintiff's suit, and constitutes its title to the patent.

The usual replication was filed, and, pending an application

on the part of defendants for an extension of time to take proofs, the plaintiff, apparently at the suggestion of the court, moved for a decree in its favor upon the pleadings and affidavits on file. Upon argument, which was upon the question of jurisdiction alone, the court held that the suit was not one arising under the patent laws, but solely out of a contract; that the court had no jurisdiction, and a decree was entered to that effect. Plaintiff thereupon appealed to the Circuit Court of Appeals, which dismissed the case upon the ground that it had no jurisdiction itself over the appeal, and that, as such appeal was prosecuted from an order dismissing the bill solely for want of jurisdiction, it should have been taken to this court. 109 Fed. Rep. 497. Whereupon the mandate of the Circuit Court of Appeals being filed in the Circuit Court, an appeal from the final decree of that court, which had been entered November 5, 1900, was taken to this court.

Mr. N. A. Acker, *Mr. L. S. Bacon*, *Mr. William F. Booth*, *Mr. W. W. Wilshire* and *Mr. A. H. Kenaga* for appellant.

Mr. James B. Howe, *Mr. A. R. Titlow* and *Mr. W. G. Bogle* for appellees.

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

1. Motion is made by defendants to dismiss this appeal upon the ground that no appeal was taken, and no certificate of the trial court upon the question of jurisdiction, was made by such court during the term at which the decree was rendered; and that no such certificate has since or ever been made.

As the appeal was taken directly to this court, it must appear, under the fifth section of the Court of Appeals act, either that the question of jurisdiction was certified to this court, or that the decree appealed from shows upon its face that the sole question decided was one of jurisdiction. Plaintiff evidently supposed that the case was a proper one to carry to the Court of Appeals, but its appeal having been there dismissed, it took this

appeal May 27, 1901, from the original decree of the Circuit Court made November 5, 1900. This decree, after reciting "that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction." An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed "from the final order and decree dismissing said suit for want of jurisdiction." This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that court. *Shields* v. *Coleman*, 157 U. S. 168; *In re Lehigh Mining Co.*, 156 U. S. 322; *Huntington* v. *Laidley*, 176 U. S. 668.

The case, being thus in proper condition for appeal, such appeal could be taken at any time within two years. *Allen* v. *Southern Pacific Railroad*, 173 U. S. 479; *Holt* v. *Indiana Manfg. Co.*, 176 U. S. 68.

2. The most important question is whether this is a suit under the patent laws of the United States within the meaning of Rev. Stat. sec. 629, sub. 9, which grants original jurisdiction to the Circuit Courts "of all suits at law or in equity arising under the patent or copyright laws of the United States." The rule is well settled that, if the suit be brought to enforce or set aside a contract, though such contract be connected with a patent, it is not a suit under the patent laws, and jurisdiction of the Circuit Court can only be maintained upon the ground of diversity of citizenship. But difficulties sometimes arise in determining whether the action be upon a contract or upon the patent. The first case involving this question was *Wilson* v. *Sandford*, 10 How. 99, in which a bill filed on the equity side of the Circuit Court by the assignee of a patentee, to set aside a contract in the nature of a license upon the ground that the licensee had not complied with the terms of the contract, was held not to be a case under the patent laws. The object of the bill was to have the license set aside and forfeited, and plaintiff's title reinvested in him. Such was also the case in *Brown* v. *Shannon*,

20 How. 55, which was a bill to enforce the specific execution of certain contracts respecting the use of the patent; and in *Albright* v. *Teas*, 106 U. S. 613, which was a suit brought by the plaintiff for moneys alleged to be due under a contract whereby certain letters patent granted to him were transferred to the defendant. This was clearly a bill to recover royalties, and no question under the patent laws was involved. *Dale Tile Manfg. Co.* v. *Hyatt*, 125 U. S. 46, was an action in a state court by the owner of the patent upon an agreement by which such owner granted an exclusive license to make and sell the patented articles within a certain territory. Defendant expressly acknowledged the validity of the patent. This, we held to be, clearly within the jurisdiction of the state court. A like ruling was made in the next case of *Felix* v. *Scharnweber*, 125 U. S. 54. In the same line of cases are those of *Marsh* v. *Nichols*, 140 U. S. 344, to enforce the specific performance of a contract to transfer an interest in a patent to the plaintiff; *Wade* v. *Lawder*, 165 U. S. 624; and *Pratt* v. *Paris Light & Coke Co.*, 168 U. S. 255, which was an action by patentees in a state court upon the common counts to recover of the defendant the stipulated price for manufacturing and setting up an apparatus for the manufacture of water gas. Defendant pleaded that the plaintiff had agreed to save it harmless against any suit which might be brought against it for infringement, and to defend such suits at their own expense, and averred, among other things, that the patents were void and an infringement upon prior patents; that defendant had not kept plaintiffs harmless against such suits, but had refused to defend a certain suit brought against it, and that the defendant had rightfully rescinded the contract. It was held that the action was not one arising under the patent laws of the United States, and that to constitute such a cause the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of those laws. That "section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *cases* arising under those laws. There is a com-

plete distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals."

Now, as the bill in this case differs from an ordinary bill for infringement only in the fact that the suit is by a licensee against two defendants, one of whom is the licensor and owner of the patent, and the license is set forth only for the purpose of showing title, there would be no difficulty whatever in sustaining it, were it not for the question whether we are not also bound to consider the averments of the answer. We think this difficulty is practically settled by a reference to section 5 of the Jurisdictional Statute of 1875, 18 Stat. 470, 472, which provides "that if, in any suit commenced in a Circuit Court, . . . it shall appear to the satisfaction of the said Circuit Court, *at any time after such suit has been brought*, . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, . . . the said Circuit Court shall proceed no further therein, but shall dismiss the suit," etc. While it seems reasonable to say that a jurisdiction once acquired by the filing of a proper bill ought not to be taken away by any subsequent pleading, the statute is peremptory in this particular, and requires the court to dismiss the case whenever *at any time* it shall appear that its jurisdiction has been improperly invoked. We are by no means without authority upon this question. In *Robinson* v. *Anderson*, 121 U. S. 522, it was held that when it appeared, after all the pleadings were filed, that the averments in the declaration which alone gave the court jurisdiction, were immaterial and made for the purpose of creating a case cognizable by the court, it was the duty of the Circuit Court to dismiss the bill for want of jurisdiction. Said the Chief Justice: "Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the

answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defences against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were relied on." In *Williams* v. *Nottawa*, 104 U. S. 209, this court went so far as to dismiss a case in which judgment had been rendered for the plaintiff in the Circuit Court, because it appeared from the testimony of the plaintiff that certain bonds were put in his hands for collection in which he had no real interest. It was held that it was the duty of the Circuit Court on its own motion, as soon as the evidence was in and the collusive character of the case shown, to stop all further proceedings and dismiss the suit, the Chief Justice further remarking that this proviso of the act of 1875 was a salutary one, and that it was the duty of the Circuit Courts to exercise their power under it in proper cases. See also *Wetmore* v. *Rymer*, 169 U. S. 115; *Morris* v. *Gilmer*, 129 U. S. 315; *Lake County Commissioners* v. *Dudley*, 173 U. S. 243.

Is there anything in the answer to show that the court was bound to dismiss the bill for want of jurisdiction?

The bill makes the usual allegations of a bill for infringement, and puts in issue (1) the title of the plaintiff, which in this case was a license from one of the defendants, fully set forth in the margin;[1] (2) the validity of the patent; and

"[1] *License and Agreement.*

"This agreement, made this 11th day of March, 1893, by and between Charles P. Allen, of Denver, Colorado, party of the first part, and the Excelsior Redwood Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city and county of San Francisco in said State, party of the second part:

"Witnesseth: That, whereas, the party of the first part is the owner and holder, for, to and in the States and Territories hereinafter mentioned, of the whole right, title and interest in and to letters patent of the United States, No. 359,590, dated March 22, 1887, for 'wooden pipe.'

"And, whereas, the party of the second part is desirous of obtaining for, to and within the said States and Territories hereinafter mentioned an exclusive right, license and privilege to manufacture and sell wooden pipe under and in accordance with said letters patent:

(3) the infringement. The answer raises no issue as to the validity of the patent, or as to the acts charging infringement. It admits the license, but denies that it is a subsisting one, and pleads abandonment of the same by plaintiff, a forfeiture of all rights thereunder by failure to comply with its terms and conditions, and by acts of gross bad faith towards the patentee by seeking to defeat the patent, and a revocation of the license by Allen. It will be observed that the answer raises no question of the construction of the license, but merely of its existence—that is, of the title of the plaintiff to sue. Before deciding that these allegations oust the jurisdiction of the court it must at least appear that the plaintiff has another remedy by an action in a state court. But what remedy has it? All the

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"Now, therefore, the parties have agreed as follows: The party of the first part hereby grants, subject to the conditions hereinafter stated, unto the party of the second part, its successors and assigns, the exclusive right, license and privilege, within the States of northern California, Oregon, Washington, Nevada, Montana and Idaho, and Territories of Arizona and Utah, of manufacturing and selling wooden pipe under and in accordance with the said letters patent, to the full end of the term of said letters patent.

"The party of the second part agrees to pay unto the party of the first part, as a license fee or royalty under this license and agreement, the following sums to wit: One dollar ($1.00) on every one thousand feet, board measure, of lumber employed in the manufacture of said pipe, and two and one-half per cent (2½ per cent) on the cost at factory of all steel and iron used in said manufacture.

"The said license or royalty is to be paid by the said party of the second part to the said party of the first part upon the final payment to the party of the second part of the contract price on each and every contract taken by said party of the second part, involving the manufacture and sale of said patented wooden pipe. The right, license and privilege hereby granted is not transferable or assignable, either in whole or part, by the party of the second part, without the consent of the party of the first part. It is agreed that in case the party of the second part shall fail to use the above-described patent in any pipe constructed by them, of twelve (12) inches diameter and upwards, or from any cause the said party of the second part shall cease the manufacture of wooden pipe, then and in that event all rights and privileges granted by this agreement and license to the said party of the second part shall at once be revoked.

"It is understood and agreed that this agreement is binding upon the heirs, legal representatives and assigns of the party of the first part, and upon the successors and assigns of the party of the second part."

agreements and conditions of the license are such as are made by the plaintiff's assignor, the Excelsior Redwood Company. This company, the party of the second part, agrees *first*, to pay a licensee fee or royalty, the time of payment being fixed in a subsequent sentence; *second*, that it will neither transfer nor assign the license without the consent of the patentee, (it was admitted that the patentee consented to the assignment to plaintiff); *third*, that in case the licensee should fail to use the patent in any pipe constructed by them, or from any cause it should cease to manufacture a wooden pipe, the license shall be at once revoked. The only clause in the license in which the patentee appears as promisor is that wherein " he hereby grants, subject to the conditions hereinafter stated, unto the party of the second part, its successors and assigns, the exclusive right, license and privilege within " certain States " of manufacturing and selling wooden pipe under and in accordance with the said letters patent to the full end of the term of said letters patent."

Now, it may be freely conceded that, if the *licensee* had failed to observe any one of the three conditions of the license, the *licensor* would have been obliged to resort to the state courts either to recover the royalties, or to procure a revocation of the license. Such suit would not involve any question under the patent law.

But the same does not hold good with respect to the *licensee*. There were practically but two ways in which the patentee could impair the grant he made to the licensee, and those were by a revocation of the license by a bill in equity, or by treating it as abandoned and revoked, and granting a license to another party. He elected the latter remedy, and made a contract with the Pacific Bridge Company to make and sell wooden pipe within the same territory. A suit in a state court would either be inadequate or would involve questions under the patent law. If the licensee sued at law he would be obliged to establish the fact that the patent had been infringed, which the patentee might have denied, and in any case could only recover damages for past infringements. If he sued in equity, he could only pray an injunction against future infringements; but this is exactly

what he prays in this case, and thereby raises a question under the patent laws. In either case the patentee could defeat the action by showing that he did not infringe,—in either case the defendant could so frame his answer as to put in issue the title, the validity or the infringement of the patent.

The natural and practically the only remedy, as it seems to us, was for the plaintiff to assert his title under the license and to prosecute the defendants as infringers. In doing this he does what every plaintiff is bound to do, namely, set forth his title either as patentee, assignee or licensee, and thereby puts that title in issue. The defendant is at liberty in such a case to deny the title of the plaintiff by declaring that the license no longer exists, but in our opinion this does not make it a suit upon the license or contract, but it still remains a suit for the infringement of a patent, the only question being as to the validity of plaintiff's title. There can be no doubt whatever that if the plaintiff sued some third person for an infringement of his patent, the defendant might attack the validity of his license in the same way, but it would not oust the jurisdiction of the court. Why should it do so in this case?

Much reliance is placed upon the case of *Hartell* v. *Tilghman*, 99 U. S. 547, which was a bill by a *patentee* against one with whom he had made a contract in the nature of a license, alleging that defendants, after paying the royalty for several months, refused to do certain other things which he charged to have been a part of the contract, and thereupon he forbade them further to use his patented process, and charged them as infringers. Defendants pleaded the contract as they understood it, and the tender of all that was due plaintiff under it, and their readiness to perform it.

Plaintiff's case was that there was a verbal agreement that he should prepare and put up his patented mechanism in defendants' workshop, and that after this was done defendants should take a license for the use of the invention. The machinery was put up, but defendants refused to sign the license apparently upon the ground that the patentee claimed the right to visit the works of the defendants, and inspect their books with a view to ascertaining the amount of work done. The dispute was as

to the terms of the agreement, defendants insisting that they had never proposed to accept the license with the conditions mentioned. It was held that the patentee could not sue the defendants for an infringement, and in answer to the objection that he had no other remedy Mr. Justice Miller observed that he could establish his royalty once every year, and sue at law and recover every month or every year for what was due, and that, if he desired to assert his right of examining the works of the defendants, he could in a proper case compel them to submit to the examination. The case is the converse of the one under consideration, inasmuch as it was a suit by the patentee against the licensee for a violation of his contract, and, as the court observed, the plaintiff might have brought suit for royalties. As already said, the *patentee* might have done the same in this case, if he had sought to enforce his contract.

Much more nearly analogous to the case under consideration and practically upon all fours with it is that of *Littlefield* v. *Perry*, 21 Wall. 205. This was a suit by an assignee against the patentee, who had made a conveyance to the plaintiff of his patent with all improvements thereon, within certain States, for which plaintiff had agreed to pay royalty upon all articles sold, with a clause of forfeiture in case of non-payment or neglect after due notice, to make and sell the patented articles to the extent of a reasonable demand therefor. There was by a supplementary document an agreement reserving to the patentee the right to apply the principle of his invention to one special purpose. It was held that whether the plaintiff was an assignee or a licensee, he had a right to maintain a suit for infringement in his own name in a Federal court against the *patentee*. Said the Chief Justice: "They," the plaintiffs, "certainly had the exclusive right to the use of the patent for certain purposes within their territory. They thus held a right under the patent. The claim is that this right has been infringed. To determine the suit, therefore, it is necessary to inquire whether there has been an infringement, and that involves a construction of the patents, . . . such a suit may involve the construction of a contract as well as of a patent, but that will not oust the court of its jurisdiction. If a patent is involved, it carries with it the whole case."

Upon the subject of a licensee suing his own patentee the Chief Justice observed: "A mere licensee cannot sue strangers who infringe. In such cases redress is obtained through or in the name of the patentee or his assignee. Here, however, the patentee is the infringer, and, as he cannot sue himself, the licensee is powerless, so far as the courts of the United States are concerned, unless he can sue in his own name. A court of equity looks to the substance rather than form. When it has jurisdiction of parties it grants the appropriate relief without regard to whether they come as plaintiff or defendant. In this case the person who should have protected the plaintiff against all infringements has become himself the infringer."

White v. *Rankin*, 144 U. S. 628, was a bill by a patentee for infringement, to which there was answer setting up an agreement between the plaintiff and one of the defendants to assign to him an interest in the patent on certain conditions, which it was alleged were performed, and certain other matters which it was alleged gave the defendants the right to make, use and sell the patented invention. The case was tried upon a stipulation admitting that defendants had made and sold the patented inventions, and that a certain written agreement between the plaintiff and one of the defendants had been made as above stated. The Circuit Court entered a decree dismissing the bill, which was reversed by this court. "It" (the court) "appears," said Mr. Justice Blatchford, "to have dismissed the bill on the simple ground that the defendant set up a contract of license from White. The bill being purely a bill for infringement, founded upon patents, what was set up by the defendants was set up as a defence and as showing the lawful right in them to do what they had done, and as a ground for the dismissal of the bill because they had not infringed the patents." The decree was not one upon the facts of the case, but was simply a decree that the court had no jurisdiction to try the case. The subject-matter of the action, as set forth in the bill, gave the court jurisdiction, and exclusive jurisdiction, to try it. All of the parties to the suit were citizens of California, and if jurisdiction did not exist under the patent laws it did not exist at all. "The Circuit Court found nothing as to the existence or

validity of the contract, decree or deed mentioned in the stipulation. The stipulation provides that at the hearing the contract, complaint, answer, decree and deed set forth in the stipulation may be offered in evidence, subject to such objections as might be urged against the originals thereof. The stipulation further states that the defendants do not admit that anything is due to the plaintiff from Thompson, and that they do admit that nothing had been paid by Thompson to the plaintiff under the decree of the state court of August 26, 1884, and since the making thereof. All these matters and questions ought to have been adjudicated by the Circuit Court before it could find ground to determine whether or not it should dismiss the bill. Until it had so adjudicated those questions the decision in the case of *Hartell* v. *Tilghman* could not apply."

The cases in the Circuit Courts and Courts of Appeal are too numerous to be analyzed, or even cited. One of the most recent and satisfactory is that of the *Atherton Machine Co.* v. *Atwood-Morrison Co.*, 102 Fed. Rep. 949, in which it was broadly held that a suit in which the relief sought is an injunction and a recovery of damages for the infringement of a patent is one arising under the patent laws of the United States, although it incidentally involves a determination of the question of the ownership of the patent, which was claimed by both complainant and defendant under separate assignments from the patentee. All the cases cited herein are reviewed and the jurisdiction sustained.

The difficulty with the defendant's position in the case under consideration is that it apparently leaves the plaintiff without an adequate remedy. Defendant has broken no express covenant of the contract, since it has made no covenant. It has simply ignored the existence of the contract and granted a license to another party. It is difficult to see what remedy is available to the plaintiff in a state court that would not involve the right of the defendant to use the patent. In other words, it would be an ordinary suit for infringement in which the Federal courts would alone have jurisdiction. Whether it sued at law or in equity, its damages would be such as are

usual in cases of infringement, and the only injunction it could obtain would be against the further use of the invention.

In any suit that could be brought the title of the plaintiff to sue must be put in issue, and, that being the title to the patent, is put in issue in every suit for infringement. We held in *Pratt* v. *Paris Light & Coke Co.*, 168 U. S. 255, with respect to an action in a state court, which involved the question whether the patents were void and an infringement upon prior patents, that this did not necessarily oust the state court of its jurisdiction; and by parity of reasoning we hold in this case that the mere fact that the suit may involve the existence of the license does not oust the court of jurisdiction of a suit for the infringement of a patent.

While we do not intend to allow the jurisdiction of the Federal courts to be invoked primarily for the determination of the respective rights of parties to a contract concerning patents, yet when the bill is an ordinary one for an infringement and the answer puts in issue the title of the plaintiff to sue, we think the jurisdiction is not ousted by the mere allegation that the license has been revoked and that the court is at liberty to go on and determine that fact. We regard this question as conclusively settled in *Littlefield* v. *Perry*, 21 Wall. 205, and *White* v. *Rankin*, 144 U. S. 628, and have no disposition to disturb it.

The decree of the Circuit Court is, therefore,

Reversed, and the case remanded for further proceedings consistent with this opinion.

Mr. Justice Gray did not sit in this case or participate in the decision.

FOK YUNG YO *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 478. Argued January 7, 1902.—Decided May 5, 1902.

The power to exclude or expel aliens is vested in the political departments of the Government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations, except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene. And this is true of the privilege of transit.

By the treaty between the United States and China, of 1894, the privilege of transit across the territory of the United States could only be enjoyed subject to such regulations of the Government of the United States as might be necessary to prevent the privilege from being abused.

The treaty, in recognizing the privilege and providing that it should continue, proceeded on the ground of its existence and continuance under governmental regulations, and no act of Congress was required to carry it into effect.

Under existing regulations the action of the collector of customs in refusing transit cannot be interfered with by the courts.

THIS was a petition to the District Court of the United States for the Northern District of California for a writ of *habeas corpus*. The petition represented that the petitioner was a citizen of the Empire of China, and a resident of Guatemala in the Republic of Mexico, and was travelling to that place when interrupted in his journey as afterwards described; that on August 24, 1901, he purchased, for the sum of 183 Mexican dollars, from the agent of the Japanese steamship company of the Toyo Kisen Kaisha at Hong Kong in China, passage thence to San José de Guatemala in Mexico, and received from said agent a ticket for passage on the steamship Nippon Maru to the port of San Francisco, and an order upon the San Francisco agent of said company for a steerage ticket from San Francisco to San José de Guatemala; that upon arriving in the port of San Francisco he was, on September 19, 1901, examined by a customs inspector, his baggage and private papers opened, and his

Statement of the Case.

person searched; that, after the examination of the petitioner, the collector of customs at the port made an order of deportation, denying him the privilege of transit, and he was, by virtue of that order, detained by the agent of the steamship company in a frame building on the Pacific Mail dock at San Francisco, and, unless released by the court, would be deported and sent back to China; that the petitioner was not making application to enter the United States, or to pass in transit through the territory thereof, but was merely a passenger en route for a foreign port, and touching at the port of San Francisco while on his journey along the usual course of travel, and for the purpose of transshipping to another vessel; that the order under which he was held was illegal and void, and not authorized by any law of the United States, or by any treaty between the United States and the Empire of China; and that the collector of customs had no authority under the law to examine or to confine the petitioner.

The District Attorney, by leave of court, intervened in behalf of the United States, and suggested that the petitioner was a native of the Empire of China, and a laborer by occupation, and before the filing of his petition arrived at San Francisco from Hong Kong in transit, through the territory of the United States, for the Republic of Mexico; that the collector of customs for the port of San Francisco, after careful and due investigation, had decided that he was satisfied that the petitioner did not intend in good faith to continue his voyage through the territory of the United States to the Republic of Mexico, and had for that reason denied him the privilege further to continue his journey through the territory of the United States, and had ordered him deported to China; and that the court had no jurisdiction over the person of the petitioner, or over the subject matter of this proceeding.

The parties submitted the case to the decision of the court upon the following facts: "The petitioner is a subject of the Empire of China. He arrived at the port of San Francisco on the Japanese steamship Nippon Maru, the manifest of which vessel states that he intended to go to San José de Guatemala. Petitioner herein also alleges that that was his intended destina-

tion. The collector of customs at the port of San Francisco did, on September 23, 1901, deny the petitioner the privilege of further pursuing his journey to his alleged point of destination. The petitioner has a ticket, or an order for a ticket, for a through passage from Hong Kong, China, to San José de Guatemala by steamer. The petitioner is now held by W. H. Avery, agent for the Japanese steamship company, by virtue of an order issued by the collector of customs for the port of San Francisco, directing him to retain the person of the petitioner in his custody, and deport him to China."

The court ordered the petition and the writ of *habeas corpus* to be dismissed, and the petitioner remanded to custody; and he appealed to this court.

Mr. Maxwell Evarts for appellant.

Mr. Assistant Attorney General Hoyt for appellee.

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

The facts upon which the parties submitted the case to the decision of the court below do not include, on the one hand, the statement of the petition that the petitioner was examined by a customs inspector, his baggage and papers opened, and his person searched; nor, on the other hand, the statements in the intervention of the United States, that the petitioner was a laborer by occupation, and that the decision of the collector for his detention and deportation was made after due and careful investigation, and for the reason that he was satisfied that the petitioner did not intend in good faith to continue his voyage through the territory of the United States to the Republic of Mexico. But the facts agreed are simply that the petitioner was a subject of the Empire of China, arriving at the port of San Francisco, whose intended destination, as appeared by the manifest of the vessel in which he arrived, and by his own allegation, was San José de Guatemala in the Republic of Mexico, and who had a ticket, or an order for a ticket, for a through passage from Hong Kong, China, to San José de Guatemala by

steamer; and that the collector of customs at San Francisco denied him the privilege of further pursuing his journey to his alleged point of destination, and issued an order directing him to be detained and deported to China.

The whole question in the case, therefore, is whether this denial and order of the collector were authorized by law.

Before the treaty of 1894 between the United States and China, the privilege of transit of Chinese persons across the territory of the United States was not specifically mentioned in any treaty or statute, except in the last clause of section 8 of the act of September 13, 1888, c. 1015, by which the Secretary of the Treasury was authorized to make, and from time to time to change, "such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of" a treaty between the United States and China, signed March 12, 1888, but not then ratified, "the rights therein mentioned and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles." 25 Stat. 478. As that treaty was never ratified, it may be doubtful whether that section ever took effect. See *Li Sing* v. *United States*, 180 U. S. 486, 490; *United States* v. *Gee Lee*, 50 Fed. Rep. 271.

But such privilege of transit was recognized by successive Attorneys General from 1882 to January, 1894; (17 Opinions, 416, 485; 18 Opinions, 388; 19 Opinions, 369; 20 Opinions, 693;) and it was regulated by orders of the Treasury Department.

By regulations of Secretary Folger of January 23, 1883, it was provided that "where a Chinese consul resides at the port of landing or entrance into the United States by any Chinese laborer claiming to be merely in transit through the territory of the United States in the course of a journey to or from other countries, the certificate of such Chinese consul, identifying the bearer by name, height, age, etc., so far as practicable, and showing the place and date of his arrival, the place at which he is to leave the United States, the date when his journey is to begin, and that it is to be continuous and direct, shall be accepted as

prima facie evidence;" that, "in the absence of such certificate, other competent evidence to show the identity of the person, and the fact that a *bona fide* transit only is intended, may be received;" and that "the production of a through ticket across the whole territory of the United States intended to be traversed may be received as competent proof, and should be exhibited to the collector and verified by him. Such tickets and all other evidence presented must be so stamped or marked and dated by the customs officer as to prevent their use a second time."

By regulations of Secretary McCulloch of January 14, 1885, the regulations of January 23, 1883, "relative to the transit of Chinese laborers through the territory of the United States, will be applied to all Chinese persons intending to so go in transit through the United States;" and "Chinese persons who may be compelled to touch at the ports of the United States in transit to foreign countries may be permitted to land under the regulations of January 23, 1883, so far as the same may be applicable, such persons to take passage by the next vessel leaving for their destination, or the voyage of which may form part of the route necessary to carry them to their destination."

By regulations of Secretary Windom of September 28, 1889, "any Chinese laborer claiming to be in transit through the territory of the United States, in the course of a journey from and to other countries, shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States intended to be traversed, and such other proof as he may be able to adduce, to satisfy the collector of the fact that a *bona fide* transit only is intended; and such ticket and other evidence presented must be so stamped, or marked, and dated by the customs officer as to prevent their use the second time;" a bond in the penal sum of $200 was required for each Chinese laborer, "conditioned for his transit and actual departure from the United States within a reasonable time, not exceeding twenty days from the date of arrival;" and previous regulations on the subject were rescinded.

By article 3 of the treaty between the United States and China

of March 17, 1894, it is "agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused." 28 Stat. 1211. That article was also in the unratified treaty of 1888.

On December 8, 1900, Secretary Gage issued regulations amendatory of the regulations of September 28, 1889, and addressed "to collectors of customs and all other officers charged with the enforcement of the Chinese exclusion laws," the material parts of which were as follows:

"Complaints having reached the Department of attempted violations of the laws enacted for the exclusion of Chinese by those who have been allowed to pass through the United States to foreign territory, the following rules are hereby adopted for your guidance in granting permission for such transit:

"Any Chinese person arriving at your port, claiming to be destined to some foreign country, and seeking permission to pass through the United States, or any portion thereof, to reach such alleged foreign destination, shall be granted permission for such transit only upon complying with the following conditions:

"1. The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said collector that a *bona fide* transit only is intended; and such ticket and other evidence presented must be so stamped, or marked, and dated by the said collector, or such officer as he shall designate for that purpose, as to prevent their use a second time; but no such applicant shall be considered as intending *bona fide* to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States.

"2. The applicant in each case, or some responsible person on his (or her) behalf, or the transportation company whose

through ticket he (or she) holds, shall furnish to the said collector of customs a bond in a penal sum of not less than $500, conditioned for applicant's continuous transit through, and actual departure from, the United States within a reasonable time, not exceeding twenty days from the date of arrival at said port."

These regulations repeat the requirements of those of 1889, (which took the place of previous regulations,) that evidence must be produced to satisfy the collector "that a *bona fide* transit only is intended." Clearly in the absence of provision for review his decision is final.

The doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the Government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations, except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Li Sing* v. *United States*, 180 U. S. 486.

And as a general proposition this must be true of the privilege of transit. The underlying principle is thus stated by Kent, (vol. 1, p. 35): "Every Nation is bound, in time of peace, to grant a passage, for lawful purposes, over their lands, rivers, and seas, to the people of other States, whenever it can be permitted without inconvenience; and burthensome conditions ought not to be annexed to the transit of persons and property. If, however, any government deems the introduction of foreigners, or their merchandise, injurious to those interests of their own people which they are bound to protect and promote, they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it."

In short, the privilege of transit, although it is one that should not be withheld without good cause, is nevertheless conceded only on such terms as the particular Government prescribes in

view of the well-being of its own people. If then these regulations have the force of law, they bind the courts.

The first article of the treaty of December 8, 1894, provides that "the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited." The second paragraph of article three reads: "It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused."

We regard this as explicitly recognizing existing regulations, and as assenting to their continuance, and to such modification of them as might be found necessary to prevent abuse. It dealt with the subject specifically, and was operative without an act of Congress to carry it into effect.

The treaty of 1880, 22 Stat. 826, in declaring in respect of the coming of Chinese laborers into this country that the Government of the United States might "regulate, limit or suspend such coming or residence," did not refer to the privilege of transit, and, as it was not self-executing, the act of May 6, 1882, was passed to carry the stipulation into effect. But the provision of this treaty applicable here, in recognizing the privilege of transit and providing that it should continue, proceeded on the ground of its existence and continuance under governmental regulations, and no act of Congress was required. *Lee Gon Yung* v. *United States*, 111 Fed. Rep. 998.

Nor is the provision open to the ingenious construction suggested, that it is only after transit has commenced that the privilege may be abused. The abuse of the privilege might consist in the use of passage across the country to reach a point from which to effect an entrance into it, contrary to law. The journey contemplated would in effect be continuous, and the intermediate destination could not absolve from the guilt involved in the effort to attain that forbidden ulterior destination. Such an abuse of the privilege could only be prevented by arresting the journey on the threshold.

Necessarily the collector's decision could not be controlled by the bare production of a through ticket to a point in foreign territory. The very question to be determined is good faith in the transit, and good faith would be lacking if that transit were merely a means of effecting admission into the United States. And the decision of the Treasury Department as to the right of admission is made final by statute.

For instance, it is difficult, if not impossible, to police effectively the long frontier between the United States and Mexico, and if, in a given case, a Chinese laborer arrives at San Francisco ostensibly bound to a port in Mexico, but going there for the purpose of crossing thence into this country, this would be an abuse of the privilege, and denial of transit would be justified. And this, in cases where such is the intent and purpose, is in accordance with the terms of the treaty, and not in the exercise of a general power to prohibit that which the treaty permits.

By the act of August 18, 1894, 28 Stat. 390, the decision of the proper executive officer, if adverse to an alien's admission, was made final unless reversed on appeal to the Secretary of the Treasury.

That act came under consideration in *Lem Moon Sing* v. *United States*, 158 U. S. 538. Petitioner contended that while the immigration officers had authority to exclude aliens from coming into the United States, yet if an alien was entitled of right to enter the country, and was nevertheless excluded by such officers, the latter exceeded their jurisdiction, and the courts might intervene; but Mr. Justice Harlan, speaking for the court, said: "That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the Government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States.

Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value."

So in the case before us, the treaty manifestly operated to commit the subject of transit to executive regulation and determination; and by the then, as well as the present, regulations, the final decision as to permitting transit was devolved on the collector of customs, and no appeal to the Secretary was provided for. In appears from the official documents referred to on the argument that the Treasury Department has "held that neither the treaty nor the laws relating to the exclusion of Chinese, either expressly or by implication, give to Chinese persons refused the privilege of transit the right of appeal;" but possession of the power to grant an appeal, or to supervise the action of the collector in some other appropriate way, in circumstances demanding intervention, has not been disavowed.

This case is an attempt to transfer the inquiry from the collector to the courts. Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country. The regulations to prevent abuse of the privilege of transit have been and are intended to effectuate the same policy, and recourse to the courts by *habeas corpus* to determine the existence of such abuse appears to us equally inadmissible.

The record does not present a case of regulation or action in contravention of the Constitution, and we think that, upon the admitted facts, the orders of the collector cannot be held to have been invalid.

Order affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

LEE GON YUNG *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Argued January 7, 1902.—Decided May 5, 1902.

Fok Yung Yo v. *United States*, *ante* 296, followed.

The authority of the Government in prescribing regulations in respect of transit being unqualified, and the existing regulations not open to constitutional objection, the court below could not interfere by *habeas corpus* with the collector's orders, and its ruling on an offer of evidence, the entire record considered, was not erroneous.

THE case was argued with the preceding case by the same counsel.

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

This case was a writ of *habeas corpus* substantially like the preceding case of *Fok Yung Yo* v. *United States*, *ante*, 296. The petition was addressed to the Circuit Court of the United States for the Northern District of California; and alleged that the petitioner had taken passage from the agent of the Pacific Mail Steamship Company at Hong Kong to the city of Mexico, and received from him a ticket for passage on one of its steamships to the port of San Francisco, and an order upon the agent of the company at that port for passage by rail thence to the city of Mexico; that upon arriving at San Francisco the petitioner was on September 28, 1901, examined by a customs inspector, his baggage and private papers opened, and his person searched; and that he was held in custody under an order of deportation by the collector of the port. The agent of the steamship company at San Francisco made a return to the writ, stating that he detained the petitioner under the collector's order of deportation. The District Attorney of the United States, in an intervention filed by leave of court, suggested

"that the United States collector of customs at the port of San Francisco, after a careful and due investigation, has decided that he is not satisfied that the said Chinese person, the petitioner herein, does intend in good faith to continue his voyage, if permitted so to do, through the territory of the United States to the Republic of Mexico, and has denied the said Chinese person for that reason the privilege to further continue his journey through the territory of the United States, and has ordered the said person deported to China, the country whence he came;" and that the court had no jurisdiction of the person of the petitioner, or of the subject matter of the proceeding.

The petitioner filed a demurrer to the return, and to the intervention. The court overruled the demurrers, and ordered the writ of *habeas corpus* to be discharged, and the petitioner remanded to custody. 111 Fed. Rep. 998. The court also allowed a bill of exceptions, stating that it excluded, against the objection and exception of the petitioner, evidence offered by him tending to support each and all of the allegations of his petition. He appealed to this court.

This case must take the same course as that just decided. The difference between them is that in this case the court sustained the objection to an offer of evidence. But as in our view the authority of the Government in prescribing regulations is unqualified, and these regulations are not essentially unreasonable and do not transgress constitutional limitations, jurisdiction to interfere with the collector's orders was lacking, and the ruling was not erroneous. If petitioner had just cause of complaint of the conduct of the collector's subordinates, the remedy is not to be found in his discharge on *habeas corpus*.

Order affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

FIDELITY MUTUAL LIFE ASSOCIATION *v.* METTLER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 165. Argued January 31, 1902.—Decided May 5, 1902.

The classification of life and health insurance companies separately from fire, marine and inland insurance companies, and mutual benefit and relief organizations doing business through lodges and mutual benefit associations, made by the State of Texas in respect of insurance, is not so arbitrary and destitute of reasonable basis as to be obnoxious to constitutional objection.

In an action on a life insurance policy it is not necessary to prove the fact of death beyond a reasonable doubt. A verdict for the party in whose favor the weight of evidence preponderates will be sustained.

The inference of death may arise from disappearance under circumstances inconsistent with a continuation of life.

The belief of the family of an assured that he is dead is not admissible on the trial of an action on a policy of insurance on his life as independent evidence of the fact of his death, but the entertainment of such belief may be proven as tending to show innocence of fraud. And, in this case, the evidence which was admitted cannot be presumed, the entire record considered, to have had any influence whatever on the verdict except from the point of view in which it was admissible.

No other objection urged constituted reversible error or requires particular mention.

THIS was an action brought by Jennie M. Mettler in the District Court of Dallas County, Texas, December 2, 1897, and removed to the Circuit Court of the United States for the Northern District of Texas, against the Fidelity Mutual Life Insurance Association of Philadelphia, to recover on three policies of insurance upon the life of one William A. Hunter, payable to his widowed sister, Jennie M. Mettler, each stipulating for the payment of $5000 in case of Hunter's death. The policies were dated in October, 1896, and Hunter paid at the time of their delivery the sum of $32.55 on each policy, and agreed to pay on each a like sum semi-annually thereafter, on the 28th day of the

months of April and October, for the period of ten years from October 28, 1896.

At the commencement of the trial "defendant admitted that all matters of proof relating to the death of the insured, all formal proofs, are sufficient, and that the only question to be tried and involved is the question of whether or not W. A. Hunter is dead as claimed in plaintiff's petition, and whether he died in the manner and form as alleged therein."

The evidence tended to show that Hunter left Mrs. Mettler's house on the third of December, 1896, announcing his intention to go to Mentone, in Loving County, for the purpose of making proof of a section of land in that county belonging to him, and which he had occupied for three years; that he left with a team consisting of a wagon and two horses, with hay, provisions, camping outfit, cooking utensils, and a gun; and that he expected to be absent a week or ten days, intending, at a later period, after having returned from Mentone, to go back to that place; that shortly before leaving he handed to a lawyer a package of papers sealed in a large envelope, which he asked should be kept in a vault, and which packages contained the policies of insurance; and that Mrs. Mettler did not know that the policies had been taken out in her name.

The evidence further tended to show that Mrs. Mettler, not hearing anything of her brother for fifteen days after his departure, sent twice to ascertain whether he had arrived, but found that he had not; a searching party then went out; this party followed the trail of the wagon, and found it and hay, provisions, harnesses, etc., abandoned where Hunter had camped near the banks of the Pecos River, some miles distant from Pecos; a bed on the ground, which some one had slept in, cooking utensils, remains of a fire, a skillet in which meat had been fried, some bread, some tomatoes were there; and a gun was leaning against the wagon wheel. One of the horses was lying dead; it had been tied to a mesquite bush with an inch rope, and had struggled to get to the hay, but could not reach it; there were signs of the other horse, which was elsewhere seen wandering about with a rope on its neck. Footprints, identified by Mrs. Mettler as those of her brother, were found lead-

ing to the river, but not returning; two water buckets were near; some of the foot tracks were at the edge of the river; and there were marks of the slipping of one of the feet, and a broken mesquite root in the bank.[1]

[1] The county clerk of Reeves County, who headed the searching party which left Pecos on the morning of December 27, testified in respect of the abandoned camp thus: "The wagon was standing with the tongue pointing to the southwest and a little down the river. The harness for two horses was found; two wooden water buckets, with a piece of rope tied in the bail; off to the right of the wagon, about twelve feet from the wagon, was a dead horse, tied to a mesquite bush with a rope about twelve feet long. On the right side of the wagon was a pallet made down. The spring seat had been taken off the wagon and turned upside down, and the wagon sheet laid lengthwise. The sheet was a tarpaulin; this was laid on the ground and spread out full length, with one end resting on the wagon seat. One or two heavy cotton comforts were doubled lengthwise and lay with the end on the wagon seat. Lengthwise of the wagon sheet and on top were two comforts spread out full size, and the wagon sheet had been drawn up over the entire bed. To the left of that, about four feet south and away from the edge, was where there had been a little fire, and there was a skillet and lid. The skillet was setting right where the fire had been built, as if in the middle of the fire, and the lid laying against it. The skillet looked like it had been cooked in. Just behind the front wheel of the wagon, leaning against the axle, was a Winchester rifle. In the wagon were two bales of alfalfa hay and some flour, some canned goods, some light bread, and several joints of stove pipe, and I think, may be, a stove in the wagon and a few other such things. The bread had been untied, and there was still some of it in the paper. When I first saw the bed the centre of the bed had the shape of a man in it; looked so much like it we thought there was a man in it until we got right up, and when George Mansfield started to raise the cover up he dropped it, and turned and looked at me, his face as white as anything could be, and I told him to raise it up; that if there was a man in it, it would not hurt him, and he raised the cover up. The appearance of the bed was as I have described it; there was just the shape of a man there, as if a man had lay in bed; the print of him was in bed. I think both buckets had a piece of rope tied in the bail ten or twelve feet long, and on the bottom two or three inches around; the buckets had the prints of water having been in there and dried up, and a little red sand; they were both dry. The dead horse could not reach the wagon; it had been tied to a mesquite bush with an inch rope, and it appeared that the horse had been struggling to get to the hay in the wagon; he had gone out as far as he could with the rope; there was considerable trail beat around where he was trying to get to the wagon where the hay was. The trail was two or three inches deep. There had been other stock about the wagon and camp; there was the sign of another horse there, and we trailed that

There was conflicting evidence as to quicksands in the river; its depth; rapidity; and dangerous character. Two of defendant's witnesses gave testimony tending to show that some time after the alleged death they had seen a person whom they identified as Hunter by photographs.

In the course of the examination of plaintiff the following occurred:

"'Q. State what is the general reputation in the family—your father, brothers, and sisters—as to the death of your brother, W. A. Hunter.' To which defendant objected because it is incompetent and hearsay; (2) family reputation cannot establish or prove death, especially where it is 1500 miles away; (3) it is competent for no purpose, especially when that reputation has been established since the institution of this cause of action, which objection the court overruled and said: 'I think the question is one of weight to be given the evidence. It is a question for the jury to say whether or not family belief tends to prove his death.' To which ruling defendant then and there excepted for the reasons stated in the objection, and the witness thereupon testified: 'My father, brothers, and sisters all believe

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horse away from the wagon and back to the wagon at about a half a dozen places. I think one bale of hay had been eaten and tramped down; there was a great deal of trash on the back end of the wagon and laying on the ground."

The witness then described the tracing of the tracks of a man "to the edge of the river and back to the wagon;" then later other footprints "going toward the bank of the river at a point higher up." "We followed right up to the edge of the bank and followed that until they went over a little slant; the top of the river bank was a little sloping; these two footprints, last two, were standing right on that slant, left foot a little behind the right. The footprints had been about half facing the river. The left foot seemed to have turned a little and slipped; the print of it was there, and showed that it had slipped; and just in front and just below where this bank dropped off perpendicular there was a mesquite root that had been broken off and a part of it was sticking out of the ground. We could see none of these tracks were going back and away from the river; we looked to determine whether they did go away from it and we could not see any going away from there."

Mrs. Mettler, being informed of the discovery, went to the camp with this witness, December 29, and she identified the footprints and testified to the same effect.

my brother to be dead.' Witness further testified, over the same objections made by defendant, which objections were overruled by the court, and then and there excepted to by defendant, 'that the family believed he was drowned in the Pecos River, out in the West, and that this family belief has existed ever since I wrote them about it.' The witness was here handed a letter, which she recognized as written by herself and addressed to her father, dated December 30, 1896. 'I think I wrote it the day I came back from the camp, from where we found my brother's camping outfit.' 'I reported that my brother was dead. I know he wrote to and received some letters from the family. The very best relations existed between my father and brother. Never was any disagreement between them. The very closest of friendship existed between my brother and me; brotherly and sisterly love.'"

Plaintiff introduced the depositions of W. A. Hunter, Sr., the father of the insured; Charles E. Hunter, his brother; and five sisters, all residing in Homer, Ohio. The father testified that plaintiff and W. A. Hunter, Jr., lived at Homer until they went to Texas in 1885; that a family correspondence had been kept up with both of them regularly until the fall of 1896, when he disappeared, and was still kept up with her; that the family relationship was happy and affectionate; that his son's habits were good, and that he possessed the confidence of his family and of his friends; that he "seemed thoroughly contented with life, and I know of no reason to cause any change in his disposition. I could not tell exactly when any member of the family at Homer last received a letter from said William A. Hunter, Jr., but a short time before his disappearance. I last heard of him through Jennie M. Mettler, about the time he disappeared, and he was living at Mentone, Texas, I believe."

The following question was propounded to the witness, W. A. Hunter, Sr., and to the other members of the family:

"Q. If you know, state what is the general reputation and repute in the family as to whether said William A. Hunter is dead or alive? How do you know the general repute in the family as to whether he is dead or alive? If you know, what

is the general repute in the family as to what has become of said William A. Hunter? As to the 'family,' who do you mean?"

To this question and the answer thereto of each witness, defendant then and there objected, which was overruled, and defendant excepted. The answer was:

"A. That the general repute in the family is that William A. Hunter, Jr., is dead. He is supposed by the family to have drowned in the Pecos River; that is the general belief. By the 'family' is meant the father and the brothers and sisters of William A. Hunter, Jr."

Each of the other witnesses testified in substance as their father, and the same objection was made to their testimony, and the same ruling had and exception preserved. The father testified "in answer to cross interrogatories propounded by defendant, that he never offered any reward or took any steps to find W. A. Hunter, Jr., either dead or alive, after he heard of his disappearance; that he made no inquiry concerning the said W. A. Hunter, Jr., save through his daughter, Mrs. Mettler; that he did not have the Pecos River seined, and made no search either of the river or elsewhere, or any effort to find him or his body. Newark, Licking County, Ohio, is sixteen miles from witness's home. When witness saw the articles published in the Newark Advocate about the disappearance of W. A. Hunter, Jr., he did not go there to see the editor of said paper. The town is not connected by rail with witness's residence. The same facts as to failure to offer reward or to make any search or inquiry for W. A. Hunter, Jr., were elicited by cross interrogatories from Charles E. Hunter, brother of the plaintiff and W. A. Hunter, Jr."

The jury was charged, among other things: "Reputation in his (insured's) family on the part of his father, sisters and brothers of his death is proper evidence for your consideration, but not the opinion of any one."

The policies were stated to be made in consideration of written application of Hunter therefor, and a copy of the application was attached. Hunter therein agreed "that the truthfulness of the statements above made or contained, by whomsoever

written, is material to the risk, and is the sole basis of the contract with the said association;" "that I will not without the written consent of the president engage in any occupation or employment more hazardous than that above mentioned; and that if any concealment, or untrue statement, or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be *ipso facto* null and void, and all moneys paid hereon shall be forfeited to said association." And the applications showed, among other things, that Hunter in answering questions as to his occupation said: "That my present occupation is real estate and farming, prior was bookkeeping."

There was evidence that Hunter had occupied a section of land in Loving County for three years; that he was in the real estate and farming business; that he planted corn, grain, potatoes, and so on; that the farming was experimental, the land requiring irrigation; that he and Mr. Mettler, then deceased, had been connected with an irrigation company and the construction of a ditch; and that he resided at Mentone, Loving County, "where he engaged in the real estate and farming business, and looked after their irrigation business in Loving County." That he was bookkeeping in 1888 and 1889, and two years, deputy clerk, etc. Defendant introduced evidence in reference to forfeitures of Hunter's claims to public lands entered in February, 1897; and the testimony of a photographer that Hunter was in his employ two or three months one summer at Fort Worth, which he thought was in 1896. Defendant's agent who took the application testified that he had known Hunter since 1888, at which time he was keeping books; that Hunter stated when he applied that he was in the real estate business and farming, and that witness had a talk with him about irrigation matters in connection with his farming.

This witness testified for defendant that when Hunter made the application he said: "That he and his brother-in-law had gotten into an irrigation scheme and had bought a good deal of Pecos Valley land and owed a good deal of money on the land, and his brother-in-law had afterwards died, and he thought, if he should happen to die, his sister would lose what they had

paid. For this reason he thought of taking some insurance, so that she could pay the land out in the event of his death."

The constitutionality of the statute of Texas allowing twelve per cent damages and reasonable attorneys' fees was denied and duly put in issue by defendant.

The verdict was for plaintiff for "$15,000 as principal; $2250 as interest at rate six per cent from December 2d, 1897, to June 2d, 1900; $5175, the same being twelve per cent damages on the amount of $15,000 and interest thereon at six per cent; $2500 as reasonable attorney's fees." Plaintiff remitted the sum of $3375 of said $5175, "leaving $1800 on the item of twelve per cent damages, on the amount of the loss," and judgment was thereupon entered.

The writ of error was allowed directly from this court, and a motion to dismiss for want of jurisdiction was made, the consideration of which was postponed to the merits.

Mr. John G. Johnson for plaintiff in error.

Mr. C. A. Culberson for defendant in error.

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

Inasmuch as the validity of the statute of Texas authorizing the recovery of damages and attorneys' fees for failure by life and health insurance companies to pay losses was seasonably drawn in question by defendant below as being in contravention of the Constitution of the United States, we think the case comes within *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472; *American Sugar Refining Company* v. *New Orleans*, 181 U. S. 277, and that the writ of error may be maintained. The motion to dismiss is, therefore, overruled.

Four propositions are relied on as grounds of reversal, which we will consider in the reverse order in which they are stated in the brief for plaintiff in error.

I. "The court erred in not charging the jury to find a verdict in favor of the defendant because of the failure to offer sufficient evidence from which an inference of Hunter's death could be drawn."

In our opinion the evidence was sufficient to justify the inference that Hunter was drowned in the Pecos River, on December 4, 1896, and the court below properly refused to peremptorily instruct the jury to find for defendant.

The question of Hunter's death was a question of fact to be determined on all relevant facts and circumstances disclosed by the evidence. The evidence tended to show that he was last seen alive on December 3d, when he parted from his sister and started for Mentone, with the intention of returning in a few days. He did not arrive, nor return, but disappeared. He camped on the banks of the Pecos River; and the abandoned wagon, harnesses and gun, the starved horse, the ashes of the fire, the used cooking utensils, the fragments of food, the bed with its imprint of the sleeper, bore testimony that he cooked, ate, and slept there, and that he went no farther. The footsteps to the river's brink, going but not returning, the water buckets, the mark of slipping, the fractured root, the flowing stream, indicated what might have happened, and the fact that he was not seen nor heard from thereafter, although his relations with his family were intimate and cordial, and he had always kept up a correspondence with them, so that one or more of them would have been likely to hear from him unless his life had abruptly terminated or its habitual course been suddenly changed, rendered the inference of fatal accident reasonable.

The record does not set forth the general charge of the court in full, but, among others, this instruction was given: "While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead."

Defendant excepted to the giving of this instruction, and

requested the court to instruct that "the circumstances proven must exclude, to a reasonable and moral certainty, the fact that such person is still living, and each fact in the chain of facts from which the death of the party is to be inferred must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact in issue, and all the facts proven must be consistent with each other and consistent with the main facts in issue, that is, the death of the party."

The court did not err in giving the one and refusing the other instruction. This was not a criminal case, and it was not necessary that the death should be proven beyond a reasonable doubt. The party on whose side the weight of evidence preponderated was entitled to the verdict. Proof to a "moral certainty" is an equivalent phrase with "beyond a reasonable doubt." Gray, C. J., *Commonwealth* v. *Costley*, 118 Mass. 1. In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis that it is adduced to prove, but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. It has been held in some cases that when a criminal act is alleged the rule of reasonable doubt is applicable in establishing that act, but this is not such a case. 1 Greenleaf, Ev. (15th ed.) § 13*a*, note.

The court also instructed the jury as follows: "If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict." "Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. While the death of Hunter is not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence."

To this defendant excepted, and it is now argued that there was error because the court did not call the attention of the

jury to defendant's contention that Hunter's continued absence might be attributed to the desire to obtain the insurance money. But it nowhere appears that defendant requested the court to modify the instruction in that particular, and as given it was correct.

The jury were not left to infer death from the mere fact of disappearance, but were specifically told that that was not in itself sufficient, and that all the facts and circumstances must be considered.

Defendant asked the court to give this instruction: "If you believe from the evidence that William A. Hunter, Jr., has been seen or heard from by any one at any time since his disappearance, you will find for the defendant." This the court refused, and gave the following instruction: "The evidence of witnesses is also before you tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant."

There was some evidence that Hunter had been seen, but none that he had been otherwise heard from. The request of defendant was rightly rejected, and the instruction given was sufficient. The criticism that the jury may have supposed that they were instructed that they must be satisfied that he had been seen by both witnesses, or on two occasions, is without merit. It was impossible to have misunderstood what the learned judge of the Circuit Court intended. If, as matter of fact, Hunter was seen alive, whether once or twice, then, of course he did not die as contended by plaintiff.

It is further argued that the court erred in not instructing the jury as requested by defendant, that "unless the jury believe from the evidence that William A. Hunter, Jr., when last seen was in a position of peril, such as that it is more probable that he then and there lost his life than that he extricated himself from such perilous position alive, you must find for the defendant."

Such an instruction was uncalled for and calculated to mislead. There was no evidence that Hunter was in a position of peril when last seen. The evidence did, indeed, tend to show that he probably fell into the river, and so came in contact with a specific peril, and there was evidence regarding the depth, the rapidity and the quicksands of the river; but the instruction was objectionable in that it assumed that he was seen in a perilous position of such a character as to afford the basis for speculation as to the probabilities of his extrication.

In *Davie* v. *Briggs*, 97 U. S. 628, 634, Mr. Justice Harlan said: "If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years."

But it was not thereby ruled that the inference of death might not arise from disappearance under circumstances inconsistent with a continuation of life, even though exposure to some particular peril was not shown, and the evidence indicated that Hunter came within the range of immediate danger.

II. "The court erred in not charging, as requested, that if Hunter at the time of making application for insurance was not a farmer and real estate agent, there could be no recovery."

This relates to the refusal to instruct that "the jury must believe from the evidence that W. A. Hunter, Jr., at the time of making application for insurance to defendant, on which policies of insurance were issued and are herein involved, was at the time he made such application both a farmer and real estate agent, and unless you so believe, you will find for the defendant."

The entire charge of the court is not in the record, and there is nothing to show that the subject of Hunter's answer as to his occupation was not covered by it. Again, Hunter did not say that he was "a farmer and real estate agent," but that his occupation when he made the application was "real estate and farming," and the evidence of the truthfulness of that statement was so plenary, and the evidence from which to infer the contrary

was so slight, that we think the refusal was justified on that ground.

Treating the statement of occupation as a warranty, the evidence that Hunter was behind in his payments on the land in Loving County, and that forfeitures were entered in February, 1897, and that he may have been engaged with a photographer for two or three months, even in the summer of 1896, did not so impugn the substantial truth and good faith of his answer as to demand an instruction so worded.

III. "The court erred in admitting the testimony of a repute in the family of Hunter, concerning his death, and the manner thereof."

Hunter had parted with his sister and started for Mentone, December 3, with the intention of returning within a week or ten days. "After he had been gone ten days and did not come back and then two weeks and did not come back," his sister sent a man to make inquiry, who reported that Hunter had not been to Mentone. A few days later she sent again, and received a similar reply. The searching party went out, found the abandoned camp, and reported, and Mrs. Mettler then went herself. She described the condition of things at the camp and the brink of the river. This was December 29, and December 30, the day after she returned, she wrote her father in Ohio about it and that her brother was dead, drowned in the Pecos River, and she testified that her father, brothers and sisters, all believed that this was so, because of what she had written; while they testified that this was the belief of the family, based on the information she furnished. If this testimony should not have been admitted it is difficult to see that it could have been so prejudicial as to be fatal to the verdict, for it amounted to nothing more than the assertion of Mrs. Mettler's belief and the acceptance by the family of that belief as their own. In other words, it cannot be supposed that the jury regarded the evidence as tending to establish the fact of death when it purported only to state Mrs. Mettler's belief and the family's concurrence.

Moreover, in the aspect of showing the entertainment of such belief in good faith the evidence was admissible, if it had been

offered at the proper time. Hunter had suddenly disappeared. Search was made, but was not prosecuted after the discovery of the deserted camp. The father was sharply interrogated as to failure to offer reward, to seine the river, to make "effort to find him, or his body." And so was the brother Charles. The theory of the insurance company was that the disappearance was voluntary, and that the conduct of Mrs. Mettler and the family was consistent with the belief that he was yet alive, and was indicative of a combination to defraud the company. This inference the family were entitled to repel by testifying to their conviction of his death. As to the fact of death, it was mere matter of opinion, but as to their belief it was matter of fact showing innocence of fraud. Reasonable inquiry is frequently a prerequisite to the inference of death from disappearance, as well as other effort, but no inquiry or effort was made here after discovery of the camp, because the belief of death and lapse of time rendered it useless. Whether that belief was well founded was for the jury, but that there was such belief was a relevant fact. *New York Life Insurance Company* v. *Hillmon*, 145 U. S. 285, 296; *Wallace* v. *United States*, 162 U. S. 477.

But we do not think the evidence was competent to establish the fact of death, under the circumstances of the case. To illustrate: In *Scott* v. *Ratliffe*, 5 Pet. 81, it was held that the testimony of a witness that "she was told that Mr. Madison was dead," was admissible; and in *Secrist* v. *Green*, 3 Wall. 744, 751, it was said that "it is competent to prove death and heirship by reputation." But these and similar rulings and expressions in other cases must be taken in connection with the particular facts and circumstances. In this case no question of pedigree; of birth, marriage, or death as bearing on legitimacy, descent, or relationship; of ancient rights; of past events prior to controversy, was involved; nor was there any pretence that this was evidence of tradition, or historical fact, or general reputation in the community participated in by the family. If evidence of death it would be evidence of the particular fact on which recovery was sought, and inadmissible as such. The ruling was incorrect that: "It is a question for the jury to say

whether or not family belief tends to prove his death," although that was qualified by the learned judge charging the jury: "Reputation in his (insured's) family on the part of his father, sisters, and brothers of his death is proper evidence for your consideration, but not the opinion of any one." But, the entire record considered, we are of opinion that it cannot be presumed that the evidence affected the verdict injuriously to defendant, if at all, and, on the contrary, that it affirmatively appears that if it could have had any influence whatever, it was solely from the point of view, which rendered it admissible.

IV. "The statute of Texas, which directs that life and health insurance companies, who shall default in payment of their policies, shall pay twelve per cent damages, together with reasonable attorney's fees, is in violation of the Constitution of the United States."

The statute referred to is article 3071 of the Revised Statutes of Texas of 1895, which reads as follows: "In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

Article 3072 provided that if any life or health insurance company failed to pay off and satisfy any execution issued on final judgment against it within thirty days of demand of payment, the commissioner of insurance should declare the company's certificate of authority to do business null and void.

These articles were sections of chapter three of Title LVIII, "Insurance," and had been brought forward from the Revised Statutes of 1879, arts. 2953, 2954, chapter three, Title LIII, "Insurance." And the same provisions as to foreign life insurance companies and those incorporated outside of the State of Texas were contained in the first general insurance statute of Texas, which was passed on May 2, 1874. 2 Paschal's Dig. art. 7116 *o*.

Under this title no insurance company was permitted to do

business in Texas without first obtaining a permit from the commissioner of insurance, and compliance with the law was required before permission could be granted, while by the terms of article 3060 the commissioner was required to revoke the certificate of authority to do business in the State in case any company failed for thirty days to pay any execution issued against it on any valid judgment.

The provisions of chapter three embodied many conditions on which business was permitted to be done. By article 3061 it was made unlawful for any person to act within the State as agent or otherwise for any insurance company for soliciting business unless the company had procured authority to do it from the commissioner. Article 3062 provided that any life or health insurance company desiring to do business in the State should furnish a sworn statement to the commissioner as prescribed, which by article 3063 was to be accompanied by a copy of its charter or the law creating it. Article 3064 required the company to designate an agent or attorney in fact on whom service might be had in case of suit, and article 3065 declared that no life or health insurance company incorporated in Texas or any other State should transact business in Texas with less capital than $100,000 actually invested. Article 3066 required insurance companies of other States to make such deposit in Texas as the laws of their home State required of Texas companies doing business there, and article 3067 provided that all foreign companies should deposit $100,000 with the state treasurer before doing business in Texas; which deposit, by article 3068, was to be applied to the payment of judgments in favor of policyholders; but article 3069 provided that it should be sufficient if the deposit required by section 3066 was made in any other State. Article 3070 provided that suits might be brought in any county where loss occurred or where the policyholder resided.

By article 3073 it was made unlawful for any life or health insurance company to take any kind of risks or issue any policies of insurance except those of life or health, and the business of life and health insurance in the State was forbidden to be "in any wise conducted or transacted by any company, which

in this or any other State or country, is engaged or concerned in the business of marine, fire, inland or other insurance."

Articles 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3083, 3084 related to marine, fire or inland insurance companies.

Articles 3081, 3082, 3086, 3087, 3089 applied to insurance companies generally.

Article 3092 read: "The provisions of this chapter shall in nowise apply to mutual benefit organizations doing business in this State through lodges or councils, such as the order of chosen friends, knights of honor, or kindred organizations." Article 3096 read: "Nothing in this title shall be construed to affect or in any way apply to mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other State, which have no capital stock, and whose relief funds are created and sustained by assessment made upon the members of said associations in accordance with their several by-laws and regulations;" but an annual statement under oath to the department of insurance was required, and the article concluded: "And should any such benevolent organization refuse or neglect to make an annual report as above required, it shall be deemed an insurance company conducted for profit to its officers and amenable to the laws governing such companies."

Article 3092 was taken from an act of April 3, 1889, entitled "An act to provide for the admission from other States of companies or associations carrying on the business of life or casualty insurance on the assessment or natural premium plan," and certain conditions were affixed to their right to do business in the State, which should not apply to mutual benefit organizations doing business through lodges or councils. Laws, 1889, p. 98.

Article 3096 was taken from an act of March 28, 1885, which amended chapter three, Title LIII of the Revised Statutes of 1879, by adding an article thereto couched in similar terms. Laws, 1885, p. 62.

In the revision of 1895 these two laws were assigned to their appropriate place under the title of insurance. Such were the conditions which for many years had been imposed on life in-

surance companies doing business in Texas when the policy sued on in this case was issued. But it is now contended that article 3071 is in conflict with the Constitution of the United States, in that it denies the equal protection of the laws, because the same conditions are not imposed on fire, marine and inland insurance companies; and on mutual benefit and relief organizations doing business through lodges and mutual relief benevolent associations, more particularly the latter.

In other words, the contention is that the classification is so arbitrary, so destitute of reasonable basis, as to be obnoxious to constitutional objection.

In *Union Central Life Insurance Company* v. *Chowning*, 86 Texas, 654, the Supreme Court of Texas held that the statute in providing for the recovery of damages and attorney's fees was not in violation of the Constitution of Texas or of the United States, and was a valid law. This decision was rendered in May, 1894, but section 2953 of the Revised Statutes of 1879 was the same as section 3071 of the Revised Statutes of 1895, and the acts of March 28, 1885, and April 3, 1889, were in force, which were subsequently brought forward as sections 3092 and 3096. The Supreme Court held that as all corporations embraced in the classes named were affected alike by the provision, it did not deny the equal protection of the laws; and the court said that the twelve per cent was given as damages for a failure to comply with the contract by payment, and the attorney's fees were allowed as compensation for the costs of collecting the debt. The court was further of opinion that even if the twelve per cent was a penalty for failure to pay when due, there was no provision of the constitution of Texas which forbade such legislation, and that it was for the legislature to determine when the public was so interested in the enforcement of contracts as to justify that enforcement by penalties.

In *Fidelity &c. Company* v. *Allibone*, 39 S. W. Rep. 632, this ruling was repeated by the Court of Civil Appeals of Texas, and affirmed by the Supreme Court in *Fidelity &c. Company* v. *Allibone*, 90 Tex. 660. Both these courts held that the constitutional question involved was distinguishable from that ruled by this court in *Railway Company* v. *Ellis*, 165 U. S. 150.

In *New York Life Insurance Company* v. *Orlopp*, 61 S. W. Rep. 336, the same conclusion was reiterated, on the ground that the state legislature had the right to provide the terms on which foreign corporations of that class might do business in the State, and that being a valid exercise of such power and right, the statute formed a part of the contract of every life and health insurance company issued and made in Texas, since the date of its enactment. The Circuit Court of Appeals for the Fifth Circuit in *Merchants' Life Association* v. *Yoakum*, 98 Fed. Rep. 251, held the section to be valid on full discussion.

It is apparent from the various sections of the title relating to insurance, to which we have before referred, that this particular liability amounted to one of the conditions on which life and health insurance companies were permitted to do business in Texas, and the power of the State in the matter of the imposition of conditions on its own and foreign corporations, has been repeatedly recognized by this court. If, however, notwithstanding the acceptance of these conditions, the constitutionality of the particular condition were nevertheless open to question, we must decline to sustain the objection. The reasoning in *Railroad Company* v. *Matthews*, 174 U. S. 96, applies rather than that in *Railway Company* v. *Ellis*. The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit, (and we are not called on to refine as to the distribution of such profits,) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured.

Orient Insurance Company v. *Daggs*, 172 U. S. 557; *Waters-*

Pierce Oil Company v. *Texas*, 177 U. S. 28; *New York Life Insurance Company* v. *Cravens*, 178 U. S. 384, are in point and are decisive.

In *Insurance Company* v. *Warren*, 181 U. S. 73, a section of the Revised Statutes of Ohio provided in effect that no answer to any interrogatory made by the applicant to the policy should bar the right to recovery or be used in evidence on a trial unless it was clearly proved that such answer was wilfully false and was fraudulently made, that it was material, and induced the company to issue the policy, and that but for such answer the policy would not have been used; and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer; and this provision was only applicable to life insurance companies. The constitutionality of that act was upheld by the Supreme Court of Ohio, and this court affirmed its judgment, and in the opinion the language used in *Waters-Pierce Oil Company* v. *Texas* was quoted: "A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. The purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader meaning to foreign corporations." And we added: "It was for the legislature of Ohio to define the public policy of that State in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the State as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events, we cannot say that the Federal Constitution has been violated in the exercise in this regard by the State of its undoubted power over corporations."

Our conclusion is that the record shows no reversible error, and the judgment is, therefore,

Affirmed.

Mr. Justice Brewer concurred in the judgment.

Mr. Justice Harlan (with whom concurred Mr. Justice Brown) dissenting.

I cannot assent to that part of the opinion of the court relating to the constitutionality of the statute of Texas of 1895 which provides that a life or health insurance company, failing to pay a loss within the time specified in the policy, after demand therefor, shall be liable, *in addition* to the amount of the loss, to pay the holder of the policy "twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The operation of the statute is well illustrated in the present case; for, the verdict of the jury was for $15,000 as principal, $2250 as interest, $5175 as twelve per cent damages, (of which the plaintiff remitted $3375), and $2500 as special attorney's fees for the plaintiff.

The rule embodied in the statute is not made applicable to fire or marine insurance companies, or to any other companies or corporations doing business in Texas. Does not the State by that statute deny to life and health insurance companies, doing business within its limits, the equal protection of the laws which is secured by the Fourteenth Amendment of the Constitution of the United States?

It seems to me that this question must be answered in the affirmative if any regard whatever be had to the principles announced in *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150, 153, 154.

In that case we had before us a statute, declaring that any person in Texas having "a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railroad corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation, by filing it with any station agent of such

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

That statute being in force, an action was brought to recover $50 for a colt killed by the railway company. There was a judgment against the company for the amount claimed, and a special attorney's fee of $10 in favor of the plaintiff was added, as required by the above statute.

The contention in that case was that the statute made such an arbitrary discrimination against railroad companies embraced by its provisions as to bring it within the prohibition of the Fourteenth Amendment. That view was sustained. This court said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law.

They do not receive its equal protection. All this is obvious from a mere inspection of the statute." Referring to the Fourteenth Amendment of the Constitution, the court said: "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the laws than it has to individual citizens." Again: "Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

I do not perceive how the present decision can be upheld without disregarding the principles of the *Ellis case*. If a railroad company sued in Texas upon a claim of less than $50 for killing or injuring stock, cannot be required, when unsuccessful in its defence, to pay a special attorney's fee—no such rule being established in reference to other corporations or individuals, sued for a like amount of money—I cannot understand how life and health insurance companies, alone of all corporations or companies doing business in Texas, can be required to pay special damages and special attorney's fees when unsuccess-

ful in defending suits brought against them. The two statutes are alike in this, that the defendant company or corporation, whether a railroad corporation or a life or health insurance company, even if successful in an action brought against it, could not recover special attorney's fees or special damages against its adversary. Thus the defendant company in a suit brought under either statute is not permitted to appear in court upon terms of equality with the party suing it, and is subjected to special burdens not imposed upon other companies or other corporations refusing to pay money demanded of them.

We are informed by the opinion of this court that the courts in Texas have held that the *Ellis case* was distinguishable from the present case, and we are referred to *Union Central Life Ins. Co.* v. *Chowning*, 86 Texas, 654; *Fidelity and Casualty Company* v. *Allibone*, 39 S. W. Rep. 632, affirmed in *Fidelity &c. Company* v. *Allibone*, 90 Tex. 660, and *New York Life Ins. Co.* v. *Orlopp*, 61 S. W. Rep. 336. The first named of those cases was decided more than two years before the *Ellis case* was determined by this court. The first case in Texas in which the *Ellis case* was referred to was that of *Fidelity &c. Company* v. *Allibone*. In that case the Court of Civil Appeals of Texas, after referring to certain prior decisions in that State sustaining the constitutionality of the statute here in question, said: "A late decision of the Supreme Court of the United States, *Railway Co.* v. *Ellis*, construing a somewhat analogous statute of this State, and reversing the decision of our Supreme Court approving its validity, may be at variance with the cases just cited; but, until it is expressly so held either by our own Supreme Court or that of the United States, we will adhere to the decisions already made." The judgment in the last case was affirmed, the Supreme Court of Texas observing nothing more than that the case was "distinguishable" from the *Ellis case*. Upon what grounds the two cases were distinguishable was not stated. It is a very convenient mode for distinguishing two cases, apparently in conflict, to say nothing more than that they are distinguishable. In *New York Life Ins. Co.* v. *Orlopp*, the statute was sustained upon the ground that the State could prescribe the terms on which foreign insurance companies might do business within its limits.

This court says that the particular liability imposed by the statute in question "*amounted* to one of the *conditions* on which life and health insurance companies were permitted to do business in Texas, and the power of the State in the matter of the imposition of conditions of its own and foreign corporations has been repeatedly recognized by this court."

Of course, speaking generally, a State may impose conditions on its own and foreign corporations. But will any one say, or has this court ever directly held, that a provision of a state enactment relating to corporations, foreign or domestic, was legally operative or binding if such provision be inconsistent with the Constitution of the United States?

It is one thing for a State to forbid a particular foreign corporation, or a particular class of foreign corporations, from doing business at all within its limits. It is quite another thing for a State to admit or license foreign corporations to do business within its limits and then subject them to some statutory provision that is repugnant to the Constitution of the United States. If a corporation, doing business in Texas under its license or with its consent, insists that a particular statute or regulation is in violation of the Constitution of the United States, and cannot therefore be enforced against it, the State need only reply—such seems to be the logical result of the present decision—that the statute or regulation is a condition of the right of the corporation to do business in the State, and, whether constitutional or not, must be respected by the corporation. Corporations created by the several States are necessary to the conduct of the business of the country; and it is a startling proposition that a State may permit a corporation to do business within its limits, and by that act acquire the right to subject the corporation to regulations that may be inconsistent with the supreme law of the land.

In *Insurance Company* v. *Morse*, 20 Wall. 445, 455, 456, a statute of Wisconsin, requiring insurance companies of other States to stipulate, as a condition of their right to do business in that State, that they would not remove into the Federal court any suit brought against them in the state courts, was held invalid not only because it tended to oust the courts of the

United States of a jurisdiction conferred upon them by the Constitution, but because it created an obstruction to the exercise of a right granted by that instrument. The court said: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford." The court further said that the right of the insurance company to remove the suit was "denied to it by the state court on the ground that it had made the agreement referred to, and that the statute of the State authorized and required the making of the agreement. We are not able to distinguish this agreement and this requisition, on principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior, in this respect, to that of a corporation. The State of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitution of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the Constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the statutes of the two in this respect."

This question was presented in somewhat different form in *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 468. That was an action by the State to prevent a Wisconsin corporation from operating a warehouse owned by it until it should have obtained a license from the Railroad and Warehouse Commission of Minnesota organized under a statute of that State, and relating to elevators and warehouses. That statute provided: "It shall be unlawful to receive, ship, store or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license therefor from the state Railroad and Warehouse Commission, which license shall be issued for the fee of one dollar per year, and only upon written application under oath, specifying the location of such elevator or

warehouse and the name of the person, firm or corporation owning and operating such elevator or warehouse, and the names of all the members of the firm or the names of all the officers of the corporation owning and operating such elevator or warehouse, and all moneys received for such licenses shall be turned over to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this State and the rules and regulations prescribed by said Commission, and every person, company or corporation receiving such license *shall be held to have accepted the provisions of this act, and thereby to have agreed to have complied with the same.*"

The Wisconsin corporation defended the suit brought against it upon the ground that the statute there involved was repugnant to the Constitution of the United States. This court said: "We cannot question the power of the State, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation." Again—and this is most pertinent here—the court said: "The defendant however insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the words of the statute) 'thereby to have agreed to comply with the same.' The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or comply with any provisions of the statute or with any regulations prescribed by the state Railroad and Warehouse Commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the State and the valid rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or

with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

In the case before us, the defendant company was doing business in Texas under a license issued by the State. By accepting such license, the company did not agree to submit to any local regulation that was repugnant to the Constitution of the United States. It could resist the enforcement of any regulation or statutory provision that was inconsistent with rights secured to it by that instrument.

The court says that the ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious. The only reason assigned for that statement is "the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured." But the same reasons exist for prompt payment by a fire insurance company when the house which shelters the insured and his family is destroyed by fire. And yet, under the statute, a fire, marine or inland insurance company, if it resists a claim for loss, is not liable, when its defence is unsuccessful, to pay any special damages or special attorney's fee. It can defend any suit brought against it under the same conditions accorded to individual citizens or to corporate bodies generally. But a different and most arbitrary rule is prescribed for life and health insurance companies. Their good faith in refusing to pay a claim for loss, or in defending an action brought to enforce payment of such a claim, is not taken into account. If, in any case, they do not, within a specified time, pay the amount demanded of them, no matter what may be the reason for their refusal to pay, and if they do not succeed in their defence, they must pay not only the principal sum, with ordinary interest, but, in addition, twelve per cent damages on the amount of the principal, and all reasonable attorney's fees for the prosecution and collection of the loss. Thus the State, in effect, forbids a life or health insurance company to appear in a court of justice and defend a suit brought

against it, except subject to the harsh condition that if the jury does not sustain the defence, the company must pay special damages and special attorney's fees that are not exacted from any other defendant, corporate or individual, who may be sued for money.

This is such an arbitrary classification of corporations and such a discrimination against life and health insurance companies as brings the statute within the decision in the *Ellis case*, which has been often referred to by this court with approval. *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 294; *St. Louis, Iron Mountain &c. R. R. Co.* v. *Paul*, 173 U. S. 409; *Nicol* v. *Ames*, 173 U. S. 521; *W. W. Cargill Co.* v. *Minnesota*, above cited.

In my opinion, the statute in question comes within the constitutional prohibition of the denial by a State of the equal protection of the laws and should be held void.

NEW ORLEANS WATERWORKS COMPANY *v.* LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 590. Submitted March 10, 1902.—Decided May 5, 1902.

In order to warrant the exercise by this court of jurisdiction over the judgments of state courts, there must be some fair ground for asserting the existence of a Federal question, and in the absence thereof a writ of error will be dismissed, although the claim of a Federal question was plainly set up; and where by the record it appears that such a claim, although set up, had no substance or foundation, the fact that it was raised was not sufficient to give this court jurisdiction.

That the State has power to forfeit the charter of a corporation for an abuse of its privileges, is recognized as law in Louisiana.

In Louisiana a corporation is liable to be proceeded against for taking illegal rates by *quo warranto* at the suit of the State.

Upon a careful review of all the questions, the court is of opinion that no Federal question exists in this record, and that the court is without jurisdiction in this case.

THIS is a proceeding in the nature of a *quo warranto*, brought by the attorney general of the State of Louisiana, in the name

of the State, to obtain a forfeiture of the charter of the defendant, the waterworks company. Upon the trial there was judgment in favor of the company, but upon appeal to the Supreme Court of the State that judgment was reversed, and judgment in favor of the State and against the company was entered, decreeing the forfeiture of the charter and of all the franchises heretofore conferred upon the defendant. The company has brought the case here by writ of error for review.

It appears from the petition filed in behalf of the State, through its attorney general, that in June, 1898, the general assembly of the State adopted a concurrent resolution providing for the appointment of a committee, with instructions to investigate the complaints against the methods of operation of the New Orleans Waterworks Company, and to report back to the general assembly such action as it might deem necessary to the public interests in the premises. The committee was duly appointed, made the investigation, and having submitted two reports thereon, the legislature on July 14, 1898, adopted the following:

"Whereas, the majority and minority reports of the joint committee of the house and senate, appointed to investigate the affairs, administration and condition of the New Orleans Waterworks Company, have been submitted to the general assembly, together with the testimony and evidence adduced at the various sessions of the said committee; and

"Whereas, the subject-matter of the said reports involves the consideration and the determination of intricate questions of law and fact; and

"Whereas, it is impossible, in view of the limited time at its disposal, for the general assembly to give the matter the examination and consideration necessary for a proper determination thereof;

"*Be it, therefore, resolved by the senate, the house of Representatives concurring*, That the whole subject-matter of the said report, together with the testimony and evidence upon which they are based, be respectfully referred to the attorney general of the State for such action in the premises as he may deem proper."

Statement of the Case.

The attorney general after such reference commenced this proceeding, and in the petition it was averred that the water company had been duly incorporated by the state legislature, and that after its incorporation it had been guilty of repeated and continuous violations of the charter, and had thereby forfeited the same and its franchises, and the petition then set forth twelve different causes of forfeiture which were alleged to have been violations of its charter. It was alleged that the company had failed to supply the inhabitants of the city with pure water; that the supply was not only muddy and impure, but also wholly inadequate, either to extinguish fires, to wash yards, alleys and streets, or to furnish the inhabitants with water for bathing and domestic purposes; that the water furnished was at no time fit for drinking or cooking.

It was also averred that the company had habitually since 1878 to the time of filing the petition illegally exacted and collected greater rates than those exacted and collected by the city of New Orleans for the same quantity of water when it was the owner of the plant, and that the company had no right to charge any greater rate than had then been charged by the city. Various other grounds were stated in the petition not necessary to be particularly noticed. The prayer of the petition was for the forfeiture of the charter of the company and all its franchises, and, in the alternative, should that relief not be granted, that then it might be decreed that the company had forfeited all exclusive privileges, and that the city of New Orleans should be adjudged to have the right to contract with any one else for a supply of water and to expropriate the tangible property of the company if the city should see fit, etc.

Exceptions were filed to this complaint, which were overruled by the court, and the waterworks company then answered, denying the allegations of the petition. The city of New Orleans then filed a petition for leave to intervene and to become a party plaintiff in the proceeding. The board of liquidation of the city also filed a petition to intervene and be made a party defendant on the ground that it had an interest in common with the waterworks company to have the complaint against it dismissed. The court allowed both petitions in intervention to be filed, and

the State then answered the petition in intervention of the board of liquidation, and the water company filed its answer to the petition of the city of New Orleans.

The answer of the water company to the complaint on the part of the State, after denying various allegations, averred that the primary reason for the incorporation of the defendant was neither to provide the city with a proper water supply nor to obtain an enlargement of the existing waterworks, because for more than forty years prior thereto the city had works adequate to furnish such a supply, with full power to enlarge the works as occasion required. The answer also averred that in 1833 the Commercial Bank of New Orleans was incorporated for the purpose of providing a waterworks plant and system for the city of New Orleans, and that it immediately complied with the duty of providing the same, and had operated it for many years; that the city, about the time of the incorporation of the bank, had become an owner of five thousand shares of the stock of the company, and had issued its bonds in payment therefor at the time of the purchase. There was a provision in the charter of the bank that the city might purchase the plant in thirty-five years upon the conditions mentioned in the act. It was further averred that the city had become the owner of the waterworks plant under this provision, in 1869, and that it had operated the same up to and including the year 1878. At that time the city was under great financial pressure and almost bankrupt, and had failed to pay most of the bonds it had issued for the five thousand shares of stock it had owned in the bank corporation, although such bonds were due, and also there were the current obligations of the city to an amount of several millions of dollars over due and unpaid. For the purpose of relieving the city it was averred that the legislature in 1877 passed an act providing for a sale of the plant by the city under the circumstances mentioned in the act, but for some reason subscribers enough were not found who would form a corporation and take the plant upon the terms therein mentioned. Accordingly in 1878 the act was amended making the terms more liberal, and thereupon subscribers who were owners of the city bonds and other obligations, came together and formed a cor-

poration with a capital stock of two million dollars, divided into twenty thousand shares of one hundred dollars each. In accordance with the terms of the act these shares were assigned to the city, and the city, in consideration thereof, sold and assigned to the company the entire waterworks plant of the city, including the franchises and rights granted by the State and sold with the balance of the property, rights and franchises so offered for sale by the act of the legislature, amongst which property thus sold was the valuable and indispensable franchise to be a corporation, which, as averred, was a right not severable in law from the balance of the property. The city has since sold all of the twenty thousand shares of the stock of the company, excepting 3927 shares held by the board of liquidation in trust and as security for the extinguishment of the debts of the city. The balance of the twenty thousand shares is in other hands, whose title is traceable to the city. In order to raise money to carry out its obligations, having received none for the stock issued to the city for the property purchased, the company has, pursuant to the permission granted it by the act of 1877, twice mortgaged the property, including the franchise to be a corporation, and the bonds secured by those mortgages are in the hands of *bona fide* purchasers for value, and it is claimed on the part of the defendant that they are indispensable parties to this or any action to destroy the franchise of the defendant to be a corporation. The defendant also avers that the State as plaintiff acts in bad faith in assailing the franchises of the defendant in such an action, and also in violation of the Fourteenth Amendment of the Constitution of the United States, which forbids a State to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws. It was also alleged that the grant of corporate life to the defendant was not, as is usually the case, a grant of corporate life for the purpose, and consideration only of the establishment of public works or improvements of a public character, where the only consideration passing to the State for the grant of corporate life is some supposed increased general public benefit re-

sulting from the construction and installation of public works; but that, on the contrary, in the case of the defendant corporation, the contract and agreement between the State and the defendant was, and is, an unquestionable contract of bargain and sale of all the property, rights and franchises described in the acts of 1877 and 1878, for an exact price fixed by the State in its offer of the property for sale, which offer was accepted and price paid by the defendant as the result of a bargaining in which the State was acting, not alone in its character as a sovereign, but as a merchant and trader in commerce, and that in the bargaining and sale of the said property and franchises the State must, in law and by the courts, be considered a trader engaged in driving a hard commercial bargain in its own interest and on its own terms, and for its own benefit and profit. The contract thus set forth, it was averred, was protected from all impairment at the hands of the State, by the Constitution of the United States, particularly by section 10 of article 1, acting on the State of Louisiana as a prohibition, while acting or moving, as plaintiff in this action, in impairment of the faith of its own contract, to the same extent as if such impairment had been attempted through and by means of legislation compassing the same effect and result, that if the joint resolution of the state legislature, referred to in the petition, could be construed as directing the institution and prosecution of this suit, or as directing the attorney general of the State, in the name of the State, to institute and prosecute this action, for the purpose and with the intent to segregate from the mass of the property sold by the State to the defendant its franchise to be a corporation, or if there exist any other statutes of the State authorizing or directing the attorney general to that end and purpose, such joint resolution and statutes are repugnant to the Constitution of the United States, particularly to section 10 of article 1 thereof, which is specially pleaded in defence of this action. The defendant also averred that by virtue of the provisions of section 15 of the charter of defendant, (Act No. 33 of the Laws of 1877,) the remedy for illegal charges for water was confined to an application by the city for a mandamus to compel the

Counsel for Plaintiff in Error.

company to desist from such charges. The section is reproduced in the margin.[1]

The answer further specifically denied all grounds of forfeiture and prayed that the plaintiff's suit might be dismissed. The case came to trial in the city of New Orleans, and after an investigation of the issues raised by the pleadings, including the examination of a large number of witnesses and the hearing of arguments of counsel, the court determined, (1) that the two intervening parties, the city of New Orleans and the board of liquidation, should not have been allowed to intervene, and accordingly it was decreed that the intervention of those parties should be dismissed at the cost of the respective intervenors. (2) The court then ordered judgment in favor of the water company and against the plaintiff, the State of Louisiana, rejecting its demand for the forfeiture of the defendant's charter. The State appealed from that judgment to the Supreme Court, and the city of New Orleans also took a separate appeal from the judgment dismissing its intervention. Upon hearing in the Supreme Court the judgment in favor of the water company was reversed, and, as already stated, a judgment was entered forfeiting the charter of the water company.

Mr. Edgar H. Farrs, *Mr. Ernest B. Kruttschnitt*, *Mr. B. F. Jonas* and *Mr. James R. Beckwith* for the New Orleans Waterworks Company.

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[1] SEC. 15. Be it further enacted, etc., That said waterworks company shall have the right to fix the rates of charges for water; provided, that the net profits of the company shall not exceed ten per cent per annum, and shall publish sworn annual statements of its business and condition; and that the city council shall have the power to appoint a committee of not less than five, who shall have access to the books of the said company and make such extracts from the same as they may deem necessary, and in case the said profit shall exceed ten per cent, the city council shall have the right to require said company to reduce the price of water in such manner, and in such a proportion, that the profits shall never exceed the above named rates; and provided, further, that the rates charged shall never exceed those now paid by the city, and in case said company shall refuse compliance, the demand of said city may be enforced by a writ of mandamus.

Mr. Walter Guion, *Mr. Benjamin Rice Forman* and *Mr. Samuel L. Gilmore* for New Orleans.

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

The defendant in error has made a motion to dismiss this writ of error on the ground of a lack of jurisdiction, because no Federal question is disclosed in the record.

The plaintiff in error, on the contrary, claims the existence in the record of several questions of a Federal character, and in the brief prepared to oppose this motion they are set forth as follows:

"(1) The charter of the waterworks company prescribing mandamus as the remedy to maintain a lawful tariff of water rates, is not the substitution by the writs of forfeiture of charter, as a remedy for the maintenance of unlawful rates, a breach of the contract, and a deprivation of the property without due process of law, and a denial of the equal protection of the laws?

"(2) If such remedy be sanctioned by, and sought pursuant to a state statute, subsequent in date to the charter of the waterworks company, does not such a statute impair the obligation of the charter contract, divest vested rights, and deny to said company the equal protection of the laws?

"(3) Can the State forfeit such a charter and take back the franchises at the same time that she leaves the corporation in possession of the physical property depleted in value by the loss of the franchise, and at the same time that she keeps the money paid for the property plus the franchise?

"(4) The general law of the State providing a *restitutio in integrum* in all cases where a synallagmatic, commutative contract is dissolved, and the charter containing no special provision taking the State's contract from under general provisions of law, is not a state statute authorizing the attorney general to institute proceedings to forfeit the contract and take back the franchise, at the same time that the State keeps the consideration paid for the same, a statute impairing the obligations of a contract?

"(5) Is not a judicial decision refusing to apply to this contract the general provisions of the law of contracts prevailing in the State, a taking by the State through her judiciary of the property of the defendant corporation without due process of law?

"(6) Is not the legislative resolution, the action of the attorney general, and the action of the Supreme Court of the State, the taking by the State of property without due process of law through the instrumentality of her legislative, her executive and her judicial departments, both jointly and severally?

"(7) Is not the refusal to apply to this case the general provisions of the law of contract prevailing in the State of Louisiana a denial to the plaintiff in error of the equal protection of the laws of the State of Louisiana?"

These questions are, as is said, simply amplifications of the grounds actually taken by plaintiff in error upon the trial and on the argument of the case in the Supreme Court of the State, and which are plainly set out in the record. This may be assumed, and the point which arises is whether the matters thus set forth do in truth create even a color of a Federal question.

It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus in *Millingar* v. *Hartupee*, 6 Wall. 258, the Chief Justice (at page 261) said: "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power." This case arose under the twenty-fifth section of the Judiciary Act, and jurisdiction was sought to be maintained upon the assertion that the validity of

an authority exercised under the United States was drawn in question, and the decision was against its validity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion.

In *New Orleans* v. *New Orleans Waterworks Company*, 142 U. S. 79, upon a motion to dismiss the writ of error on the ground that no Federal question was involved, it was said by the court (page 87):

"While there is in the amended and supplemental answer of the city a formal averment that the ordinance No. 909 impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free of charge, the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

Again, in *Hamblin* v. *Western Land Company*, 147 U. S. 531, upon a like motion to dismiss the writ of error, the court said: "It is doubtful whether there is a Federal question in this case. A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgment of state courts," citing the two cases just above referred to.

In *St. Joseph & Grand Island Railroad Company* v. *Steele*, 167 U. S. 659, it was said by the court (page 662):

"We cannot accede to the proposition that, because the acts of Congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll bridge, the conceded power of the State to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in the Circuit Court of the United States. Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real, substantive question, on which the case may be made to turn."

Although the above case relates to the jurisdiction of the Circuit Court, yet, so far as this question is concerned, the principle is the same as to both courts.

And in *Wilson* v. *North Carolina*, 169 U. S. 586, it was held that there must be a real and substantial Federal question existing in order to give this court jurisdiction to review a judgment of a state court, and if the question raised were so unfounded in substance that the court would be justified in saying there was no fair color for the claim that it was of a Federal nature, the writ would be dismissed.

These cases show the rule and its limitations, and where by the record it appears that although a claim of a Federal question had been plainly made, if it also clearly appear that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised was not sufficient to give this court jurisdiction.

We must look at the questions submitted by the plaintiff in error in the light of these decisions for the purpose of determining whether there is any fair foundation for the several claims. It must also be remembered that for years prior to and at the time of the formation of this corporation it was the unquestioned law that all corporations were created by the State subject to its implied power, if not stated in the charter, to dissolve the corporation for a misuse or for a non-use of its corporator powers or obligations. The contract contained in a charter is always subject to this power residing in the State.

Thus in *Terrett* v. *Taylor*, 9 Cranch, 43, it was stated by the court (page 51):

"A private corporation created by the legislature may lose its franchises by a misuser or non-user of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce a forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation."

It is stated by Chancellor Kent, in his Commentaries, (vol. 2, p. 378, Comstock's ed.,) that there were two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for default or abuse of power; the one by *scire facias*, the other by information in the nature of a *quo warranto;* both these modes of proceeding against corporations being at the instance and on behalf of the government. The State must be a party

to the prosecution, for the judgment is that the parties be ousted, and the franchises seized into the hands of the government.

In *Chicago Life Insurance Company* v. *Needles*, 113 U. S. 574, the court, at page 579, said:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired, if that company be held subject to the operation of subsequent statutes, regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained, consistently with the power which the State had, and, upon every ground of public policy, must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett* v. *Taylor*, 9 Cranch, 43, 51; Angell & Ames on Corporations, 9th ed. sec. 774, note."

In that case the question was whether the company could be dissolved on account of its insolvency. Here one of the questions is whether this company can be dissolved and its charter forfeited on account of the illegal rates charged for supplying water. Upon the question of insolvency in the *Needles* case, the court (at page 581) said:

"It is not competent, under existing laws, for this court to inquire whether the state court correctly interpreted the evi-

dence as to the company's insolvency; nor whether the facts make a case which, under the statute of 1874, required or permitted a judgment perpetually enjoining it from doing any further business. We are restricted by the settled limits of our jurisdiction to the specific inquiry whether the statutes themselves, upon which the judgment below rests, impair the obligation of any contract which the company, or its policyholders, had with the State, or infringe any right secured by the National Constitution. . . . Did the company, by its charter, have a contract that it should, without reference to the will of the State, or the public interests, exercise the franchises granted by the State after it became insolvent and consequently unable to meet the obligations which, as a corporation, under the sanction of the State, it had assumed to its policyholders? Our answer to these questions is sufficiently indicated by what has been said."

The statute in question in the above case, it will be observed, was passed subsequently to the grant of the charter to the corporation. Even there it was held that such a statute did not impair the obligation of the contract contained in such charter. In the case before us there is no subsequent statute.

And again, at page 584 of the same case:

"It is further contended that the state enactments in question impair the obligation of the contracts which the company has made with its creditors and policyholders. To this it is sufficient to reply, in the language of the court in *Mumma* v. *Potomac Co.*, 8 Pet. 281, 287, where it was said: 'A corporation, by the very terms and nature of its political existence, is subject to a dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuse and nonuse. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter.' The contracts of policyholders and creditors are not annihilated by such a judgment as was rendered below; for, to the extent that the

company has any property or assets, their interests can be protected, and are protected by that judgment. The action of the State may or may not have affected the intrinsic value of the company's policies; that would depend somewhat on the manner in which its affairs have been conducted, upon the amount of profits it has realized from business, and upon its actual condition when this suit was instituted; but the State did not, by granting the original and amended charter, preclude herself from seeking, by proper judicial proceedings, to reclaim the franchises and privileges she has given, when they should be so misused as to defeat the objects of her grant, or when the company had become insolvent so as not to be able to meet the obligations which, under the authority of the State, it had assumed to policyholders and creditors."

That the State has power to forfeit the charter of a corporation for an abuse of its privileges is recognized as the law of Louisiana. The Civil Code of that State, article 447, has for many years authorized a proceeding in the nature of a *quo warranto* to forfeit the charter for misuse, and it has been held that such article applies to every charter granted since its adoption. *Atchafalaya Bank* v. *Dawson*, 13 La. R. 497; *State of Louisiana* v. *New Orleans Gas Light & Banking Company*, 2 Rob. La. 529, 532.

Again, the claim that the judgment deprives the plaintiff in error of property without due process of law must be looked at with reference to the cases upon the subject as to what constitutes due process of law. Thus in *Davidson* v. *New Orleans*, 96 U. S. 97, it was held that a statute which required that before an assessment upon land should become effectual it must be submitted to a court of justice, with notice to the owner of the property and an opportunity given him to appear and contest the assessment, constituted due process of law.

In *Murray's Lessee et al.* v. *Hoboken Land &c. Company*, 18 How. 272, the question of what amounted to due process of law was examined, and the proceeding in that case held valid. Mr. Justice Curtis said, in delivering the opinion of the court:

"To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To

this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

In *Kennard* v. *Louisiana*, 92 U. S. 480, cited in *Foster* v. *Kansas*, 112 U. S. 201, 206, it was held that a state statute regulating proceedings for the removal of a person from a state office was valid with regard to the Federal Constitution, if it provided for bringing the party proceeded against into court, notifying him of the case he had to meet, giving him an opportunity to be heard in his defence, and for the deliberation and judgment of the court.

And in *Simon* v. *Craft*, 182 U. S. 427, it was held that the essential elements of due process of law were notice and an opportunity to defend, and in determining whether those rights were denied the court will be governed by the substance of things and not by mere form; that the due process clause in the Fourteenth Amendment of the Constitution did not necessitate that the proceedings in a state court should be by a particular mode, but only that there should be a regular course of proceeding, in which notice was given of the claim asserted and opportunity offered to defend against it.

Regarding the impairment of any alleged contract, it must be borne in mind that the constitutional provision refers to state legislation, or to an enactment of a legislative character, though by a municipal corporation, made subsequent to the contract, and which impairs its obligation. *New Orleans Waterworks Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 118, 130; *St. Paul Gas Light Company* v. *St. Paul*, 181 U. S. 142, 148.

This court does not obtain jurisdiction to review a judgment of a state court because that judgment impairs or fails to give effect to a contract. The state court must give effect to some subsequent statute or state constitution which impairs the obli-

gation of the contract, and the judgment of that court must rest on the statute either expressly or by necessary implication. *Railroad Company* v. *Rock*, 4 Wall. 177, 180; *Railroad Company* v. *McClure*, 10 Wall. 511; *Knox* v. *Exchange Bank*, 12 Wall. 379.

These cases are referred to and applied in *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392.

With these principles in mind, we come to an examination of the questions raised by the plaintiff in error.

The answer to the first question, as to mandamus being the exclusive remedy for illegal rates, is that the state court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by *quo warranto* at the suit of the State through its attorney general. The claim that by so proceeding there is any impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of law, or a denial of the equal protection of the laws, has no colorable foundation.

An examination of this question, among others, was made by the state court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no Federal question.

As to the second question, there is no state statute subsequent in date to the charter of the water company under or by virtue of which this proceeding was commenced, or which in any way affects the contract of plaintiff in error. The joint resolution of the legislature of Louisiana referred the whole matter to the attorney general for him to bring suit to forfeit the charter or to take such action as he might think proper. It was a simple authority, if any were needed, to present the question to the court, and neither the contract nor any other rights of the parties were in anywise altered by such resolution. The proceeding herein is based solely upon an alleged violation of the terms of the charter by the corporation; that question has been judicially determined after a full investigation by the state courts, and in a proceeding to which the company was a party and

after a full hearing has been accorded it in such proceeding. This was due process of law, and no Federal question arises from the decision of the court.

The same answer would seem to fit the other questions submitted by the plaintiff in error. They are all based upon the proposition that the judicial determination of these particular questions by the state tribunal was erroneous, and on account of such error the rights of the plaintiff in error, under the Federal Constitution, have been violated. But mere error in deciding questions of this nature furnishes no ground of jurisdiction for this court to review the judgments of a state court.

Assuming that there was a contract, as is claimed by the plaintiff in error, arising by virtue of the passage of the acts of 1877 and 1878, and their acceptance by the corporation, yet still the erroneous decision by the state court, admitting, *arguendo*, that it was erroneous, raises no Federal question. This court does not and cannot entertain jurisdiction to review the judgment of a state court, solely because that judgment impairs or fails to give effect to a contract. *Curtis* v. *Whitney*, 13 Wall. 68, holds that a statute may even affect a prior contract without always impairing its obligation. The judgment must give effect to some subsequent state statute, or state constitution, or, it may be added, some ordinance of a municipal corporation passed by the authority of the state legislature, which impairs the obligation of a contract, before the constitutional provision regarding the impairment of such contract comes into play. See authorities above cited.

The State in this case has secured the forfeiture of the charter of the defendant by means of a judicial decree obtained in a state court which had jurisdiction to give the relief prayed for, and after a hearing of the defendant in the usual manner pertaining to courts of justice. The facts upon which such forfeiture was based have been judicially declared and found, and the defendant has had full opportunity for its defence upon such hearing. The cause of forfeiture was the fact, which was found by the court, that the corporation had charged illegal rates for the water it furnished, and the right to declare such forfeiture because of a violation by defendant of the conditions

of its charter, was implied in the very grant of the charter itself. The claim, therefore, that the forfeiture was a violation of the charter, and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the State by such judgment had denied to defendant the equal protection of the laws, cannot obtain. Whether defendant had so violated its charter was a fact to be decided by the state court. That court had full jurisdiction over the parties and the subject-matter, and its decision of the question was conclusive in this case so far as this court is concerned.

Neither the legislative resolution, nor the action of the attorney general, nor that of the Supreme Court of the State, nor all combined, can, as contended for by plaintiff in error, be in anywise regarded as the taking by the State of property without due process of law through the instrumentality of its legislative, its executive and its judicial departments, either jointly or severally. When analyzed, the whole claim is reduced to the assertion that in enforcing a condition which is impliedly a part of the charter, the State, through the regular administration of the law by its courts of justice, has by such courts, erroneously construed its own laws. This court in such a case has no jurisdiction to review that determination.

The assumption that the state court has refused to apply to the contract herein set up the general provisions of the law of contracts prevailing in the State, and that, therefore, the State has taken through her judiciary the property of the plaintiff in error without due process of law, is wholly without foundation. If it were otherwise, then any alleged error in the decision by a state court, in applying state law to the case in hand, resulting in a judgment against a party, could be reviewed in this court on a claim that on account of such error due process of law had not been given him. This cannot be maintained.

That the bondholders were not made parties is also a question which this court cannot review. As is said in the *Needles case*, 113 U. S. *supra*, the corporation, by the very terms of its existence, is subject to a dissolution at the suit of the State on account of any wilful violation of its charter, and the creditors

of the corporation deal with it subject to this power. They must accept the result of the decision of the state court.

Upon a careful review of all the questions, we are of opinion that within the authorities cited the claim that any Federal question exists in this record is so clearly without color of foundation that this court is without jurisdiction in this case, and the writ of error is, therefore,

Dismissed.

WOODWORTH *v.* NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

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

No. 222. Argued April 16, 1902.—Decided May 5, 1902.

The obligee in a bond which supersedes an order confirming a sale of real estate, and directs the immediate execution of a deed and delivery of possession thereof to the purchaser, is entitled, after that order has been affirmed on appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond, and the appeal in which it was allowed.

THE question arising for decision in this cause is embodied in the following certificate from the United States Circuit Court of Appeals for the Eighth Circuit:

"The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the city of St. Louis, Missouri, on this 27th day of December, 1900, hereby certifies that upon the record on file in said court in the above-entitled causes, wherein Lucian Woodworth, Frank D. Brown and George N. Clayton are plaintiffs in error and the Northwestern Mutual Life Insurance Company is defendant in error, and Lucian Woodworth, Frank D. Brown and George N. Clayton are appellants and the Northwestern Mutual Life Insurance Company is appellee, and which

causes are now pending before this court on writ of error to and appeal from the Circuit Court of the United States for the District of Nebraska, the following facts appear, namely:

"On August 26, 1896, the Northwestern Mutual Life Insurance Company filed its bill of complaint in the Circuit Court of the United States for the District of Nebraska against Lucian Woodworth and others to foreclose a mortgage given by Woodworth and his wife to said company, upon certain real estate situated in the State of Nebraska. A decree on said bill was entered on December 3, 1896, in said Circuit Court, foreclosing the mortgage, directing that a master in chancery of the court sell the premises, and upon confirmation of the sale by the court execute a deed to the purchaser, and ordering that the purchaser of the premises at said sale be put in possession thereof, and that any of the parties to said cause who might be in possession of said premises, or any person claiming under them or either of them, should deliver possession to the purchaser on production of the master's deed of said premises and a certified copy of the order confirming the report of said sale, after such order had become absolute. On February 14, 1898, said real estate was sold by the master under said decree and was purchased at said sale by the Northwestern Mutual Life Insurance Company for $39,152, a sum less than the amount of the debt secured by the mortgage and the costs in the suit. The master made his report of sale to the court on February 15, 1898. On March 15, 1898, said Circuit Court confirmed said report of sale, directed that the master convey said real estate to the purchaser at said sale, awarded a writ of possession to put said purchaser in possession thereof and rendered a deficiency judgment for the sum of $2696.90 and interest in favor of the Northwestern Mutual Life Insurance Company and against said Woodworth. On March 30, 1898, said Woodworth was allowed an appeal from this order of confirmation to the United States Circuit Court of Appeals for the Eighth Circuit and thereafter, on April 8, 1898, he filed his appeal bond in the sum of $5500 with Frank D. Brown and George N. Clayton as sureties thereon, which bond was conditioned for the payment of 'all damages and costs which it (the Northwestern Mutual Life Insurance Com-

pany) may incur by reason or on account of said appeal,' and worked a supersedeas of the order of confirmation. The United States Circuit Court of Appeals on January 24, 1899, affirmed said order of confirmation of sale, and on March 29, 1899, its mandate was duly issued to, and filed in said Circuit Court. On June 19, 1899, the deficient judgment and the costs taxed in said cause in the United States Circuit Court of Appeals were fully paid and satisfied. On September 16, 1899, the defendant in error, The Northwestern Mutual Life Insurance Company, filed its petition in said Circuit Court against Lucian Woodworth, and the sureties on said appeal bond, Frank D. Brown and George N. Clayton, alleging, among other things, that the possession and use of said real estate was withheld from said company by reason of the superseding of the order of March 15, 1898, during the pendency of the appeal therefrom, that the value of such use and possession during the pendency of said appeal amounted to $3750, and praying that Woodworth and the sureties Brown and Clayton be cited to appear and show cause why judgment should not be summarily entered against them for said $3750 and interests and costs. On September 16, 1899, an order to show cause against said Woodworth, Brown and Clayton was made on said petition as prayed for therein, and on October 2, 1899, they filed their showing in resistance to said petition, alleging that 'damages for the rents and profits of the premises, or use and detention thereof pending appeal, are not recoverable on a supersedeas bond, and that the bond in question was not given as security, or for the payment of rents and profits, or the use or detention of the property pending appeal' and praying for the dismissal of said petition. On December 9, 1899, said Circuit Court entered a judgment and decree against the plaintiffs in error, Woodworth, Brown and Clayton, as prayed for in said petition. Afterwards, in due season, to wit, on January 31, 1900, said last named judgment and decree having been rendered on December 9, 1899, the record in the proceedings on said petition was removed by writ of error and also by appeal to the United States Circuit Court of Appeals for the Eighth Circuit, where it still remains, the cause being as yet undecided.

"And the said United States Circuit Court of Appeals hereby certifies, that to the end that it may properly decide said case, it desires the instruction of the Supreme Court of the United States upon the following question or proposition of law arising therein which is duly raised and presented by the record in said case, said question being as follows:

"Is the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser, entitled after that order has been affirmed on the appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed?"

Mr. John N. Baldwin for plaintiffs in error and appellants.

Mr. Howard Kennedy, Jr., for defendant in error and appellee.

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

The question propounded is to be considered in view of the following facts: The property affected by the sale under foreclosure was situated in the State of Nebraska, the bond in question was given in a judicial proceeding in a court of the United States, and—as stated by counsel for plaintiff in error in argument—upon the affirmance of the order of confirmation by the appellate court, a deed was issued to the purchaser at the sale under foreclosure and demand was made by him for payment of the rents, issues and profits sought to be recovered by the action at bar.

As said by this court in *Nalle* v. *Young*, 160 U. S. 624, 637, in an equity foreclosure in a Circuit Court of the United States, the requirements of the state law should be complied with and

the forms of proceedings thereby prescribed pursued as nearly as practicable. This appears to have been done in the foreclosure proceedings under review, the decree of confirmation of the sale not purporting to vest title in the purchaser but containing a direction for the execution and delivery of a deed. A reference to the statutes of Nebraska, regulating sales under foreclosure, and to the decisions of the courts of that State will conduce to an ascertainment of the nature of the right or title, if any, vested in a purchaser under a sale thus confirmed.

By section 497*a* of the Code of Civil Procedure of Nebraska, it is provided that the owner of any real estate against which a decree of foreclosure has been rendered, or upon which an execution has been levied to satisfy a judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be finally confirmed. Section 498 provides for the examination and confirmation of such sale by the court. Section 499 provides that, upon the confirmation of a sale made of real estate sold on execution, the sheriff or other officer who made such sale shall make to the purchaser of such real estate as good and sufficient a deed of conveyance for the property or land sold as the person against whom such writ of execution was issued could have made of the same at the time the land became liable to the judgment, or at any time thereafter. And section 500 provides, among other things, that the deed so made shall vest in the purchaser as good and perfect an estate in the premises as was vested in the execution debtor at or after the time when the land became liable for the satisfaction of the judgment.

Construing these sections of the code, the Supreme Court of Nebraska, in *Yeazel* v. *White*, (1894) 40 Neb. 432, held that the owner of real estate sold on execution retains the legal title thereto, and is entitled, in his own right, to the possession, rents, profits and usufruct of such real estate, until a final confirmation of the sale. In the course of the opinion the court said:

"In *Bank* v. *Green*, 10 Neb. 130, Lake, J., speaking for this court, said: 'Under our law governing sales of real property on execution, the title of the purchaser depends entirely upon

the sale being finally confirmed, and until this is done the rights of the execution debtor are not certainly divested.' And in *Lamb* v. *Sherman*, 19 Neb. 681, Maxwell, C. J., speaking for this court, on that subject, said: 'A purchaser at execution sale of real estate upon the payment of the purchase money and confirmation of the sale becomes the equitable owner of the property, and in a proper case may compel the issuing of a sheriff's deed to himself.'"

In *Clark & Leonard Investment Co.* v. *Way*, (1897) 52 Neb. 204, the following among other facts were presented for the consideration of the court: A junior mortgagee, one of the defendants in a foreclosure suit instituted by a prior mortgagee to foreclose such prior mortgage as respected unpaid interest and the amount of certain taxes which had been paid by the prior mortgagee, became the purchaser at the sale made under the decree of foreclosure. The sale was confirmed by the court. Thereupon the mortgagor defendants appealed from the order of confirmation of sale, but, after the case was pending in the appellate court for about a year, the appeal was voluntarily dismissed. Thereafter, upon the hearing of a motion to require the purchaser to complete his bid, it was held—and the decision in this particular was affirmed by the Supreme Court of Nebraska—that on the dismissal of the appeal from the order confirming the sale the "title" of the purchaser related back, for all purposes, at least to the time of such confirmation, and the purchaser from that time was the owner of the property and liable for subsequent taxes and interest on the prior mortgage encumbrance. Further, it was said by the court: "Undoubtedly the purchaser is entitled to an accounting for rents in such a case from the time of confirmation."

The authorities just reviewed seem to be decisive of the proposition that by the local law of Nebraska, in a case like that at bar, where, upon confirmation of a sale under a decree of foreclosure, the sale is treated as perfected, credit is given to the purchaser mortgagee upon the mortgage indebtedness then due, and judgment passes for a deficiency, but the delivery of a deed is prevented, by the prosecution of an unfounded appeal from the order confirming the sale, the affirmance by the

appellate court of the order of confirmation of the sale and the deed subsequently executed vest in the purchaser, by relation, as of the time of the confirmation of the sale, as well the legal as the equitable title to the land, with the right to the rents, issues and profits which accrued after the confirmation of the sale. The cases of *Orr* v. *Broad*, 52 Neb. 490; *Clark* v. *Missouri, Kansas & Texas Trust Co.*, 59 Neb. 539, and *Huston* v. *Canfield*, 57 Neb. 345, are, however, cited as sustaining a contrary doctrine to that just announced, but, on careful examination, they will be found not to do so. In each case the right of a mortgagor to the possession of the land and the rents and profits thereof was declared to continue *until the confirmation of a sale on foreclosure.* True, in the first two cases, the right of a purchaser at a sale under execution of a debtor's interest in land, encumbered by mortgage, to the possession of the land and the rents and profits, as against a mortgage, was in effect declared to be dependent upon the acquisition of the legal title, by the delivery to the purchaser of a deed of the premises, following the confirmation of the sale. In each of the cases, however, a deed had regularly issued, and there was no claim that the mortgagor or debtor had wrongfully interfered with the passing of the legal title. There was consequently no occasion for considering or applying the doctrine of relation.

It is, however, strenuously insisted that in *Philadelphia Mortgage & Trust Co.* v. *Gustus*, 55 Neb. 436, broad expressions were used in the opinion announced by the court which do not harmonize with the reasoning contained in the opinion in *Clark* v. *Way*. But we do not need to pass on this contention. The point for decision in the *Gustus* case was whether, under the statutes of Nebraska, the judgment debtor possessed the right to redeem from a foreclosure sale during the pendency of an appeal from the order of confirmation of the sale, and the Nebraska court, in holding that the right to redeem might be exercised during the pendency of the appeal, said:

"The appeal and bond, if they did not vacate the order of the District Court, superseded, suspended or rendered it inoperative. The purchaser acquired no rights, and the applicant was

not divested of his title to and rights in the land. *Tootle* v. *White*, 4 Neb. 401; *Bank* v. *Green*, 8 Neb. 297; *Bank* v. *Green*, 10 Neb. 133. All things remained as before the sale and subsequent order of the District Court, and will so remain and exist until a decision in and by this court of the matter appealed. The order of the District Court, by the perfection of the appeal, became ineffectual as to all other purposes for which it was made, and it certainly does not seem unfair to say that it was not of force or effect as against the right to redeem, nor does it appear unwarranted to construe the section of the code in its reference to time to have indicated the date when the order shall become forceful and of full operation, which it cannot until this court has so decreed."

Nowhere, however, in the opinion was any allusion made to the prior decision in *Clark* v. *Way*, which we are constrained to think would have been done if the grounds for the decision in the latter case and the reasoning of the opinion in that case were deemed to be destructive of the ruling made in the earlier case. The court in the *Gustus* case was dealing with a judgment debtor who was seeking the benefit of a remedial statute. We entertain no doubt that if the Supreme Court of Nebraska was called upon to determine whether or not a judgment debtor who had taken an unfounded appeal might rightfully retain the rents and profits which he had collected while in possession of the property during the pendency of such appeal, it would, in order to prevent injustice, apply the doctrine of relation, as was done in *Clark Co.* v. *Way*, and hold that the affirmance of the order of confirmation of the sale related back and gave efficacy to the original order of confirmation, as of its date, and vested in the purchaser, from that time, at least, the equitable title to the land sold and an equitable right to the thereafter accruing rents and profits.

The claim in the case at bar is for the rents and profits of the land, which accrued and were collected by the mortgagor after the entry of the order of confirmation of the sale. Upon general principles, independent of the decisions of the courts of Nebraska, we would be constrained to hold that, under the circumstances present in the case at bar, as we have heretofore

detailed, the purchaser acquired as against the mortgagor, by relation, both the legal and equitable title to the land purchased, at least as of the date of the order of confirmation of the sale. This being the case, we come to consider the question as to whether recovery may be had upon a supersedeas bond given in a judicial foreclosure proceeding pending in a court of the United States, of the rents and profits which accrued and were collected by the judgment debtor after the confirmation of the sale of the mortgaged property.

It has been strenuously urged that a negative answer to the question just stated is rendered necessary by the decision of this court in *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378. This contention is based upon the following grounds: 1, That no distinction can logically be made between an appeal from an order confirming a sale had under a decree in foreclosure, as in the case at bar, and an appeal from a decree ordering a sale, as in the *Kountze* case; and, 2, That the mortgagor, after the sale of the land under a decree in foreclosure, is the owner of the rents and profits of such land until final approval by the court of the sale and the execution and delivery of a deed by the master. Of course, if the assumption existing in the second ground be correct, that is, that the mortgagor, despite the confirmation of the sale, is entitled in his own right to the rents and profits subsequently accruing, there would be plausibility in the claim that there was no logical distinction between an appeal from a decree of sale and an appeal from an order of confirmation of the sale. But the assumption in question, as we have shown, is not well founded, and this being the case, it results that there is a substantial distinction in the character of the two classes of decrees. In the one case, the title to the land, both legal and equitable, continues in the mortgagor; in the other, at least the equitable title to the land and its rents, issues and profits vested in the purchaser by the sale under the decree at the time of the confirmation of such sale. In this aspect, following the reasoning in the *Kountze* case, the appropriation by the mortgagor, during the pendency of a wrongful appeal by such mortgagor from the order confirming the sale, of the rents, issues and profits of the land, which equitably

belonged to the purchaser, was "damage" within the meaning of the statute and the condition of the bond. True, in the *Kountze* case the mortgagee purchaser was denied the right to recover the rents and profits which had been collected by the mortgagor intermediate the decree of sale and the actual sale of the property. But this was, because the appeal was from a decree ordering a sale, and it was held the mortgagor was not divested of the right to collect and retain the rents and profits of the land before a final determination of a right to sell and a sale made accordingly. The taking by the mortgagor of that which belonged to him and not to the mortgagee it was decided did not constitute an injury to the latter. The court, however, in its reasoning, made plain the fact that where, as in the case at bar, the real owner of the rents and profits of real estate, in whom the legal as well as equitable title had become vested before action brought upon the bond, was the party for whose benefit the bond on appeal was given, and the effect of the giving of such bond was to enable the mortgagor, the principal in such bond, to appropriate rents, issues and profits of the land during the pendency of the appeal, which equitably belonged to the purchaser, that appropriation constituted "damage" to the obligee in the bond, within the meaning of the condition for payment of "all damages and costs which it may incur by reason or on account of said appeal."

The question certified must be answered in the affirmative, and it is so ordered.

Mr. Justice Harlan and Mr. Justice Brewer took no part in the decision of this cause.

TRAVELLERS' INSURANCE COMPANY *v.* CONNECTICUT.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 219. Argued April 14, 15, 1902.—Decided May 5, 1902.

The legislation of the State of Connecticut, in respect to the taxation of shares of stock in a local corporation, held by non-residents, which is set forth in the statement of facts, is not in conflict with paragraph 1 of section 2 of article IV of the Federal Constitution, or the Fourteenth Amendment to that Constitution.

SECTION 2 of chap. 153 of the Public Acts of Connecticut, passed in 1897, reads as follows:

"The cashier or secretary of each corporation whose stock is liable to taxation, and not otherwise taxed by the provisions of this title, shall, on the first day of October, annually, or within ten days thereafter, deliver to the comptroller as worn list of all its stockholders residing without this State on said day, and the number and market value of the shares of stock therein then belonging to each; and shall on or before the twentieth day of October, annually, pay to the State one and one half per centum of such value; and if any such cashier or secretary shall neglect to comply with the provisions of this section he shall forfeit to the State one hundred dollars, in addition to said one and one half per centum so required to be paid."

This method of assessment and taxation of non-resident stockholders in insurance corporations has been in force in Connecticut since 1866, although at first the rate of tax was only one per cent. Public Acts, 1866, chap. 29.

By section 1 of chap. 50 of the Public Acts of 1899, it is provided:

"Section 1923 of the General Statutes is hereby amended to read as follows: When not otherwise provided in its charter, the stock of every corporation shall be personal property, and be transferred only on its books, in such form as the directors

shall prescribe; and such corporation shall at all times have a lien upon all the stock owned by any person therein, for all debts due to it from him; and any corporation desiring to enforce such lien may give notice to such stockholder, his executor or administrator, and if there be none, his heir-at-law, that unless he shall pay his indebtedness to said corporation within three months it will sell said stock; and such corporation may prescribe by its by-laws the manner of giving notice required by this section, but the notice of sale shall in no case be given until the liability has become fixed."

The original section in the General Statutes, enacted in 1888, is precisely the same as the first half of the amended section, and secured to the corporation a lien upon the stock for debts due to it by the stockholder, the amendment consisting in the addition of the last half, which provides the method of enforcing such lien.

Section 3836 of the General Statutes, as amended by chap. 63 of the Public Acts of 1889, reads:

"SEC. 3836. Shares of the capital stock of any bank, national banking association, trust, insurance, turnpike, bridge or plank road company, owned by any resident of this State, shall be set in his list at its market value in the town in which he may reside; but so much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, shall be deducted from the market value of its stock, in its returns to the assessors."

This action was commenced by the State of Connecticut to recover of the Travellers' Insurance Company, under the first of the statutes quoted, taxes due for the year 1898, from non-resident stockholders. The defendant answered, alleging that its capital stock consisted of 10,000 shares, of which 8201 were owned by residents and 1799 by non-residents of the State; that is was the owner of a large amount of real estate on which it had been assessed and had paid a tax, and adding these averments:

"7. The market value of the stock of the defendant company on the 1st day of October, 1898, was $250 per share.

"8. All of the said resident owners of said stock were as-

sessed upon the stock owned by them respectively on the first day of October, 1898, at an assessed valuation equal to the said market value of said stock less a large deduction therefrom by reason of the company's said investments in real estate.

"9. The amount per share sought to be collected from the defendant in this action as a tax upon the stock owned by said non-resident shareholders is far in excess of the amount per share paid and required to be paid as a tax by the several resident shareholders aforesaid on the stock owned by them on the said 1st day of October, 1898."

A demurrer to this answer was sustained and judgment entered for the State, which was affirmed by the Supreme Court of the State, 73 Conn. 255, and thereupon the case was brought here on error.

Mr. William R. Matson and *Mr. Lucius F. Robinson* for plaintiff in error.

Mr. Charles Phelps for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The single question presented for our consideration is whether this legislation of the State of Connecticut in respect to the taxation of the shares of stock in a local corporation held by non-residents is in conflict with paragraph 1 of section 2 of article IV of the Federal Constitution, or the Fourteenth Amendment thereto. It is alleged that there is such discrimination between resident and non-resident stockholders as works a denial of the equal protection of the laws, and to the prejudice of citizens of other States. The stock of the non-resident stockholder is assessed at its market value without any deduction on account of real estate held by the corporation. The stock of the resident stockholder is assessed at its market value, less the proportionate value of all real estate held by the corporation upon which it has already paid a tax. As thus stated, there would appear to be a wrongful discrimination, and that the non-resident stockholder was subjected to a larger burden of

taxation than the resident stockholder, and this not as a result of the action of any mere ministerial officers in making assessments, but by reason of the direct command of the statute to include the real estate in the valuation in the one case and to exclude it in the other.

But this apparent discrimination against the non-resident disappears when the system of taxation prevailing in Connecticut is considered. By that system the non-resident stockholder pays no local taxes. He simply pays a state tax, contributes so much to the general expenses of the State. While, on the other hand, the resident stockholder pays no tax to the State, but only to the municipality in which he resides. In other words, the State imposes no direct taxes for its benefit upon the property belonging to residents, but collects its entire revenue from corporations, licenses, etc. The rate of state tax upon the non-resident stockholder is fixed, fifteen mills on a dollar, applying equally to all, while the rate of local taxation varies in the several cities and towns according to the judgment of their local authorities as to the amount necessary to be raised for carrying on the municipal government. Obviously the varying difference in the rate of the tax upon the resident and the non-resident stockholders does not invalidate the legislation. How then can it be that a difference in the basis of assessment is such an unjust discrimination as necessarily vitiates the tax upon the non-resident? The resident stockholder does not pay the fifteen mills to the State which is demanded of the non-resident, and the non-resident stockholder does not pay to any locality the sum, greater or less than fifteen mills, which may be imposed by the authorities of that locality. In respect to this the Supreme Court, in its opinion, said (p. 281):

"It is unnecessary to consider whether, or under what circumstances, the limitations imposed by a State in respect to the mutual relations of members of its corporations in the matter of taxation may transform legislation for that purpose into a denial of rights secured to citizens of other States; it is enough for present purposes that a mere inequality in the stress of taxation cannot produce that effect.

"But the claim that in this case the inequality operates

against non-residents or citizens of other States as a class is unfounded. While the admissions of the demurrer assume the tax in respect to the defendant for this year to bear more heavily on non-residents than on residents, the general effect of the law is matter of common knowledge. The average rate of taxation for municipal purposes for the 168 towns approximates fifteen mills, which is the rate for the special tax imposed in respect to non-resident shares; but the average rate for municipal taxation in the ten larger towns (representing much more than half the grand list of the State) is about twenty-one mills. The clear purpose of the legislature in fixing the mode of valuation for the property subject to a single rate for special taxation and the valuation for the property subject to widely varying rates for municipal taxation, was to approximate a general equality in the burden that should fall on the two classes of property; and it well may be that the rule objected to in respect to the valuation of the interests of resident shareholders in corporations investing in taxable land still leaves, as a whole, a lighter burden of contribution resting upon non-resident shareholders."

In other words, the State, dealing with the question of taxation of the shares of stock in a local corporation, found two classes; one, shares held by residents, and the other, those held by non-residents. It was believed that a resident in a city or town, enjoying all the benefits of local government, should be taxed for the expenses of that government upon all the property he possessed, whether that property consisted in part or in whole of shares of stock. On the other hand, the non-resident, enjoying little or none of the benefits of local government, was exempted from taxation on account of the expenses of such local government. At the same time it was not right that he should escape all contribution to the support of the State which created and protected the corporation and the property of all its stockholders, and so a tax was cast upon the non-resident stockholder for the expenses of the State. This, with kindred taxes, has been found sufficient to pay the running expenses of the state government. The resident is not called upon to pay any of the expenses of the State, but only to bear his propor-

tional share of those of the municipality. The non-resident is called upon to pay no share of the expenses of the municipality, but only to contribute to the support of the State.

The legislature, with these inequalities before it, aimed, as appears from the opinion of the Supreme Court, to apportion fairly the burden of taxes between the resident and the non-resident stockholder, and the mere fact that in a given year the actual workings of the system may result in a larger burden on the non-resident was properly held not to vitiate the system, for a different result might obtain in a succeeding year, the results varying with the calls made in the different localities for local expenses. If it be said that equality would be secured by imposing upon the resident stockholder a uniform tax for local purposes of fifteen mills, without any reduction on account of real estate held by the corporation, a gross inequality might result in many towns between the resident stockholder and other taxpayers of that locality, in that they might be called upon to pay much more than he. On the other hand, if it be contended that inequality might be avoided by holding the situs of non-resident stockholders to be that of the city in which the corporation has its principal office, (in this case Hartford,) then unjust discrimination between that city and other localities would follow, in that to the one was given the total benefit of property which in fact belonged to parties living outside of the State. So, while there may result from year to year a variance in the amount of the burden actually cast upon non-residents as compared with that cast upon residents, yet it is also true that a like inequality will exist between residents of different localities in the State by reason of the different rates of taxation in those localities. You cannot put one resident against one non-resident stockholder and by a comparison of their different burdens determine the validity of the legislation any more than you can place a stockholder resident in one municipality over against a stockholder resident in another municipality, and by comparison of their different burdens determine the validity of the tax law in respect to resident stockholders. It does not seem possible to adjust, with unerring certainty, all the varying burdens which grow out of the fact that some of the stock of

the various state corporations is held outside of the State and some within the State, and the latter in separate municipalities with different rates of taxation.

It may also be said that apparently equality would be more certainly secured by making the asssesment in each case upon the market value of the stock, diminished by the value of the real estate upon which taxes have been paid. But here again a difficulty is presented. Many of the taxable corporations own no real estate, and much of the real estate which belongs to corporations who have investments therein is located outside of the State. According to the returns made by this particular corporation, out of a holding in real estate amounting in value to $1,778,662.05, upon which it had paid taxes, that which was situated in Connecticut was valued at only $137,965.81. Now, it may be true that as to the real estate held outside of the State the title and possession of the corporation are protected not by Connecticut but by the State in which such real estate is found. But can it be said that there was any unjust discrimination between the different non-resident stockholders in the various corporations, or even between all the non-resident and resident stockholders, when the State, ignoring this matter of real estate, and considering that the corporation as a state institution was protected in all its corporate rights by the State, provided that non-resident stockholders should pay upon the market value of their investments in the property of that corporation? In respect to this the Supreme Court of Connecticut said (p. 280):

"This change as to the valuation of the property and franchise of a corporation owning taxable real estate, for the purposes of municipal taxation, may produce in some instances more inequality, may be uncalled for or unwise (upon such considerations the action of the legislature is conclusive), but it certainly does not transmute the legislation in question from permissible taxation to a denial to citizens of other States of that common right in the use and enjoyment of property secured to our own citizens. The plan of taxation remains the same; after the change in valuation as before, it is simply a mode of securing to towns for purposes of municipal taxation

the benefit of that part of the corporate property represented by shares owned by their inhabitants, and subjecting to state taxation that part represented by shares owned by non-residents, and which cannot be thus subjected to municipal taxation. Here is no hidden purpose to attack the rights of citizens of other States—no evidence that the underlying intention and real substance of the legislation is to hinder citizens of other States in acquiring and holding property. The alleged hindrance is confined to those who buy stock in corporations paying taxes on real estate. Only a small number of the corporations within the scope of the act own taxable real estate to any appreciable amount. Can it be said that the law regulating the taxation of half a dozen different kinds of corporations is really intended to hinder citizens of other States from owning stock in the small number of these corporations that may from time to time invest in taxable real estate; or, that the real substance of the law changes from legitimate taxation to hostile and forbidden discrimination with each change of its investments by a corporation? Clearly the legislature is free from any sinister motive in this legislation."

But further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents.

This court has frequently held that mere inequality in the results of a state tax law is not sufficient to invalidate it. Thus, in *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, 504, it was said:

"Absolute equality in taxation can never be obtained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds

of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems adjusted with reference to the valuation of different kinds of property are adopted. The courts permit this."

Again, in *State Railroad Tax Cases*, 92 U. S. 575, 612:

"Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded."

And in *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 464:

"This whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232."

For these reasons we are of opinion that the act challenged cannot be held to conflict with either of the clauses of the Federal Constitution referred to, and the judgment of the Supreme Court of Connecticut is

Affirmed.

Mr. Justice Harlan did not hear the argument and took no part in the decision of this case.

MINNESOTA *v.* HITCHCOCK.

ORIGINAL.

No. 4. Original. Argued November 1, 4, 1901.—Decided May 5, 1902.

The original jurisdiction, vested by the Constitution in this court over controversies in which a State is a party, is not affected by the question whether the State is a party plaintiff or party defendant.

A dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding.

The United States are to be taken, for the purposes of this case, as the real party in interest adverse to the State.

This court has jurisdiction of this controversy, and is called upon to determine the case on its merits.

Not only the technical rules of statutory construction, but also the general scope of the legislation in these matters, and the policy of the United States in respect to public schools, and also to Indians, concur in sustaining the contention of the Government that none of these ceded lands passed under the school grant to the State.

The court is of opinion that the claim of Minnesota to these lands cannot be sustained, and that the bill should be dismissed.

THIS is a suit in equity, commenced in this court by the State of Minnesota to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling any sections 16 and 36 in what was on January 14, 1889, known as the Red Lake Indian reservation.

By the bill, answer and an agreed statement the following facts appear: By section 18 of the act to establish the territorial government of Minnesota, approved March 3, 1849, 9 Stat. 403, it was enacted "that when the lands in the said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered 16 and 36 in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same."

On February 26, 1856, the legislature of the Territory of Minnesota sent a memorial to Congress for the relief of settlers upon school lands, Laws, Minn. 1856, p. 368, which reads:

"To the Honorable the Senate and House of Representatives of the United States in Congress assembled:

"The memorial of the legislative assembly of the Territory of Minnesota respectfully represents:

"That under the provisions of the act of Congress, extending the provisions of the preëmption law of 1841, over the unsurveyed lands of Minnesota, many of our settlers have heavy investments, both of money and labor, in the opening of farms, erection of buildings, and the laying out and improving of townsites, (lots in which said townsites were frequently transferred before the government survey, at high prices, to the occupants thereof,) who were found, when the government survey was made, to be upon the school sections, and that the said settler had no means of ascertaining previous to the survey where the school sections would come.

"That it is a great injustice and hardship to compel such persons to repurchase or lose entirely the improvements and homes, made by themselves in good faith, in the expectation of preëmpting or entering them according to the provisions of the statute. Therefore, your memorialists would respectfully request your honorable body to pass an act, giving such persons in this Territory as have, previously to the government survey, settled upon the school sections, (and have otherwise the right of preëmption,) the right to preëmpt the same, as other government lands are preëmpted. And also providing for the entry of the townsites in this Territory, which are on school sections and were occupied as such, previous to the government survey, as other townsites upon unoffered government lands are entered.

"And also allowing the county commissioners of the county in which such lands may be situate to enter in lieu thereof, for the benefit of the school fund of the township in which such land so as aforesaid settled or occupied may be, and without charge, an equal amount of such surveyed lands, subject either to private entry or preëmption, in the same land district as they may select.

"And as in duty bound your memorialists will ever pray."

In response to this memorial Congress passed the following joint resolution, March 3, 1857, 11 Stat. 254:

Statement of the Case.

"That where any settlements, by the erection of a dwelling house or the cultivation of any portion of the land, shall have been or shall be made upon the sixteenth or thirty-sixth sections (which sections have been reserved by law for the purpose of being applied to the support of schools in the Territories of Minnesota, Kansas and Nebraska, and in the States and Territories hereafter to be erected out of the same) before the said sections shall have been or shall be surveyed; or when such sections have been or may be selected or occupied as townsites, under and by virtue of the act of Congress approved twenty-third of May, eighteen hundred and forty-four, or reserved for public uses before the survey, then other lands shall be selected by the proper authorities, in lieu thereof, agreeably to the provisions of the act of Congress approved twentieth May, eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for.' And if such settler can bring himself, or herself, within the provisions of the act of fourth of September, eighteen hundred and forty-one, or the occupants of the townsite be enabled to show a compliance with the provisions of the law of twenty-third of May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portion of the sixteenth or thirty-sixth sections, so settled and occupied, shall be in them respectively, as if such sections had not been previously reserved for school purposes."

On February 26, 1857, Congress passed an act authorizing the formation of a state government. 11 Stat. 166. Section 5, so far as is applicable, is as follows:

"And be it further enacted, That the following propositions be, and the same are hereby, offered to the said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said State of Minnesota, to wit:

"First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

On October 13, 1857, a constitution was formed, in which, by section 3 of article 2 the foregoing proposition was accepted in this language:

"The propositions contained in the act of Congress entitled 'An act to authorize the people of the Territory of Minnesota to form a constitution and state government, preparatory to their admission into the Union on an equal footing with the original States,' are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to *bona fide* purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall non-resident proprietors be taxed higher than residents."

By an act of date May 11, 1858, 11 Stat. 285, Minnesota was admitted into the Union. In that it was recited "that the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever."

At the date of this admission a large part of the territory in the northwestern part of the State, including the tracts in controversy, was and for a long time thereafter remained unceded Indian lands, subject to the Indian title of occupancy. It was, among other things, stipulated in the agreed statement:

"That except as its status may have been affected or changed by the treaty of October 2, 1863, 13 Stat. 667, by the President's order of March 18, 1879, enlarging what was then known as the White Earth Indian reservation, by the act of Congress of January 14, 1889, 25 Stat. 642, or by the act of Congress of June 2, 1890, 26 Stat. 126, or by one or more of these, the district or country embracing the lands in controversy continued to be unceded Indian lands subject to the original right of occupancy of the Chippewa Indians up to the time of the action had on March 4, 1890, under the said act of January 14, 1889."

Referring to the matter stated in this stipulation, it may be

noticed that by the treaty of October 2, 1863, the Red Lake and Pembina bands of Chippewa Indians dwelling in northwestern Minnesota ceded lands within certain defined boundaries to the United States, and in article 6 of the treaty the portion of the territory occupied by them and not ceded is spoken of as a reservation, for by it the President was required to appoint a board of visitors, "whose duty it shall be to attend at all annuity payments of the said Chippewa Indians, to inspect their fields and other improvements, and to report annually thereon on or before the first day of November, and also as to the qualifications and moral deportment of all persons residing upon the reservation under the authority of law."

This tract was thereafter known as the Red Lake Indian reservation, and is referred to in the President's order of March 18, 1879, in which he bounds a proposed reservation on one side by the "Red Lake Indian reservation." The act of June 2, 1890, 26 Stat. 126, grants to the Duluth and Winnipeg Railroad Company a right of way through the "Red Lake (and other) reservations." The second section of the act provides the mode of fixing the compensation to be paid the Indians for the right of way, and that no right of way shall vest in the company until, among other things, "the consent of the Indians on said reservation as to the amount of said compensation and right of way shall have been first obtained in a manner satisfactory to the President of the United States." On January 14, 1889, an act was passed, 25 Stat. 642, providing for a commission to negotiate with all the bands or tribes of Chippewa Indians in Minnesota for the cession and relinquishment, "for the purposes and upon the terms" stated in the act, and subject to the approval of the President, "of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts."

That act directed that all the Chippewa Indians in Minnesota, "except those on the Red Lake reservation," were to be removed to and allotted lands in the White Earth reservation,

and those on the Red Lake reservation were to be allotted lands on so much of that reservation as should be reserved by the commission for that purpose. The ceded lands were thereafter to be surveyed, inspected, classified as agricultural or pine lands, the latter appraised by 40-acre tracts and sold at vendue, and the agricultural lands disposed of to actual settlers at $1.25 per acre. The proceeds arising from the disposition of the two classes of land were to be held and applied as directed in section 7, which reads:

"That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: *Provided*, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians,

a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three fourths thereof, during the first five years be expended in procuring live stock, teams, farming implements, and seed for such of the Indians, to the extent of their shares, as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder."

Under this act a commission was appointed and an agreement made with the Indians for a cession of a large part of the Red Lake Indian reservation, which agreement was approved by the President, March 4, 1890, the unceded portion being reserved by the commissioners "for the purpose of making and filling the allotments" provided for in the act.

According to the agreed statement of facts the lands in the reservation were wholly unsurveyed at the time of the passage of this last act, January 14, 1889, and until after the approval of the agreement for this cession, March 4, 1890.

On February 28, 1891, 26 Stat. 796, Congress passed this act:

"Where settlements with a view to preëmption or homestead have been or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and

granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preëmption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

Upon these facts the State contends that the territory in question was not an Indian reservation, but what is known as unceded Indian country, subject to the original right of occupancy by the Chippewa Indians, and also that whether the country

was an Indian reservation or unceded Indian country it was subject to the grant of sections 16 and 36 to the State when the Indian right of occupancy was extinguished.

Defendants' contentions are:

1. That this tract of country was a reservation, set apart and appropriated to the uses of the civilization and support of the Indians.

2. That these lands never became "public lands," and so never became subject to the State's school land grant.

3. That the school land grant attached to no particular lands until surveyed. Until then the specific sections remained subject to disposition by Congress, the State, in the event of such disposition, being remitted to the selection of other lands as indemnity. Especially did the joint resolution of March 3, 1857, subject these sections in Minnesota to reservation for public uses at any time before survey, and, in the event of any such reservation, make the State's grant, to that extent, one of indemnity lands.

4. That the act of January 14, 1889, and the agreement negotiated thereunder with the Indians, dedicated and appropriated all the lands in the Red Lake reservation exclusively to the civilization, education and support of the Indians. This was a disposal of the lands within the meaning of the enabling act of February 26, 1857, and in any event was a reservation of them for public uses under the joint resolution of March 3, 1857.

5. That in interpreting the act of 1889, it is of no moment that the State has a system of common schools aided by a grant of lands from the General Government. That act in terms keeps the education of these Indians under national control, and dedicates a portion of the proceeds of the sale of these lands "exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit."

6. That in determining whether the act of 1889 and the agreement negotiated thereunder were intended to appropriate sections 16 and 36, along with the other lands, to the civilization, education and support of the Indians, inquiry must be made as to how the act and agreement were understood by the Indians.

Mr. Frank B. Kellogg and *Mr. Henry W. Childs* for complainant. *Mr. C. A. Severance*, *Mr. Robert E. Olds* and *Mr. W. B. Douglas* were on their brief.

Mr. Willis Van Devanter for defendants.

Mr. Justice Brewer delivered the opinion of the court.

A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter. The question having been suggested by the court, a brief has been presented, and our jurisdiction sought to be sustained on several grounds. The question is one of the original and not of the appellate jurisdiction. The pertinent constitutional provisions are found in section 2 of article III, as follows:

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

"In all cases affecting ambassadors, other public ministers

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

The first of these paragraphs defines the matters to which the judicial power of the United States extends, and the second divides the original and appellate jurisdiction of this court. By the latter paragraph this court is given original jurisdiction of those cases "in which a State shall be a party." This paragraph, distributing the original and appellate jurisdiction of this court, is not to be taken as enlarging the judicial power of the United States or adding to the cases or matters to which by the first paragraph the judicial power is declared to extend. The question is, therefore, not finally settled by the fact that the State of Minnesota is a party to this litigation. It must also appear that the case is one to which by the first paragraph the judicial power of the United States extends. There are three clauses in the first paragraph which call for notice; one, that which extends the judicial power of the United States to controversies "between a State and citizens of another State;" second, that which extends it "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and, third, that which extends it to controversies "to which the United States shall be a party." To bring the case within the first clause referred to, the bill alleges that the defendant, Ethan Allen Hitchcock, Secretary of the Interior, is a citizen of Missouri, and the defendant, Binger Herman, Commissioner of the General Land Office, a citizen of Oregon, and therefore it is said the case comes strictly within the language of the first paragraph in that there is presented a controversy between a State, Minnesota, and citizens of other States. To that it may be replied that there is no real controversy between the State, the plaintiff, and the defendants as individuals; that the latter, merely as citizens, have no interest in the controversy for or against the plaintiff; that in case either of the defendants should die or resign and a citizen of Minnesota be

appointed in his place, the jurisdiction of the court would cease, and this although the real parties in interest remain the same. In respect to the second it may be said that if it were held that this court had original jurisdiction of every case of a justiciable nature in which a State was a party and in which was presented some question arising under the Constitution, laws of the United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance. To this it may be replied that this court cannot deny its jurisdiction in a case to which it is extended by the Constitution. As to the third, it may be objected that the United States is not in terms a party to the litigation and has no pecuniary interest in the controversy, it being in reality one between the State and the Indians.

We omit, as unnecessary to the disposition of this case, any consideration of the applicability of the first two clauses, because we think the case comes within the scope of the third clause, and we need not now go further. This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.

The case of *United States* v. *Texas*, 143 U. S. 621, is in point, and upon many aspects of the question very suggestive. That was a suit brought by the United States against the State of Texas to determine the title to a tract, called the county of Greer, which was claimed by the State to be within its limits and a part of its territory, and by the United States to be outside the State of Texas and belonging to the United States. The jurisdiction of this court was challenged, but was sustained. After referring to the provisions of the Constitution and the judiciary act of 1789, Mr. Justice Harlan, speaking for the court, said:

"The words in the Constitution, 'in all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction,' necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff.

* * * * * * * *

"It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined by the Constitution. That instrument extends the judicial power of the United States 'to *all* cases,' in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction 'in *all* cases' 'in which a State shall be party,' that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine

them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State." (p. 643.)

While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.

It may be said that the United States is not named as defendant, and therefore it cannot be considered a party to the controversy. It is true that it was at one time held that the Eleventh Amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," was applicable only to cases in which the State was named in the record as a party defendant. *Osborn* v. *United States Bank*, 9 Wheat. 738. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the State, when "the State, though not named, is the real party against which the relief is asked, and the judgment will operate." *In re Ayers*, 123 U. S. 443. Of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the Government cannot be sued except by its consent, nor within the rule established in the *Ayers* case.

Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

But, it may be said, that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and in trust for their benefit. This is undoubtedly true, and if the case stood alone upon the construction of the treaty between the United States and the Indians there might be substantial force in this suggestion. But Congress has, for the Government, assumed a personal responsibility. On March 2, 1901, it passed the following act:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands within any Indian reservation or any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe, or any portion thereof, a party to the suit, if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter shall devolve upon the Attorney General upon the request of such Secretary." 31 Stat. 950.

It has by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit; that the United States will, for the purposes of the litigation, stand as the real party in interest, and so far as it could within constitutional limits has expressed the consent of the Government to the maintenance of this suit in this court. By the act it, in effect, declares that it waives all objections on the ground that it is a mere trustee; that it assumes the full responsibilities of ownership, and that it will, whatever may be the outcome of any litigation, stand responsible to the Indians for the full value of the lands in controversy. Can the court say that the United States may not assume such responsibility; may not waive all objections on account of the mere matter of trusteeship, and stand in court as the responsible owner, against whom all litigation may be directed? If it stands as such owner, then within the proposition heretofore referred to a suit which is against its agents, not affecting them individually, but affecting only its title to the real estate, is in substance and effect a suit against the United States. The controversy is made by the act of 1901 one to which the United States is a party in interest, to be directly affected by the result, and, therefore, the case is within the first paragraph, as one to which the judicial power of the United States extends.

Our conclusion, therefore, is that the original jurisdiction vested by the Constitution in this court over controversies in which a State is a party is not affected by the question whether the State is party plaintiff or party defendant; that a dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding; and that the United States is to be taken, for the purposes of this case, as the real party in interest adverse to the State. We are of opinion, therefore, that this court has jurisdiction of this controversy, and is called upon to determine the case upon its merits.

We pass, therefore, to a consideration of such merits.

Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is

a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.

It is true that in the third division of the agreed statement there is a stipulation that the territory embraced within the so-called Red Lake Indian reservation remained unceded Indian lands, up to the action had on March 4, 1890, unless its status was affected by certain matters named. Doubtless its status, if by that is meant simply the character of the title, was not affected by those matters. While its boundaries were indicated, while it was called the Red Lake Indian reservation, yet the acts referred to did not purport to change the rights of the Indians or the Government, neither did they in fact change them. The land remained on March 4, 1890, land the fee of which was in the United States, but subject to the Chippewa Indians' right of occupancy. No patent had ever been executed by the United States to the Indians in severalty or to the tribe at large. The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract.

Yet if it was necessary to determine the question we should have little doubt that this was a reservation within the accepted meaning of the term. Prior to the treaty of October 2, 1863, the boundaries of the lands occupied by the Chippewa Indians had been defined by sundry treaties, and by that treaty a large portion of the lands thus occupied were ceded by the Indians; that is, the Indians ceded to the United States all their interest and right of possession. While there was no formal action in respect to the remaining tract, the effect was to leave the Indians in a distinct tract reserved for their occupation, and in the same act this tract was spoken of as a reservation. Now,

in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation. *Spalding* v. *Chandler*, 160 U. S. 394, is in point. There, as here, was presented the question of the origin of a reservation, and in respect thereto it was said (pp. 403, 404):

"It is not necessary to determine how the reservation of the particular tract, subsequently known as the 'Indian reserve,' came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. . . . But whether the Indians simply continued to encamp where they had been accustomed to prior to making the treaty of 1820, whether a selection of the tract, afterwards known as the Indian reserve, was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States Government, or whether the selection was made by the Government and acquiesced in by the Indians, is immaterial. . . . If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer."

Turning to the legislation of Congress in respect to school lands in Minnesota, the clause in the act establishing the territorial government has only this significance. It provided that when the lands in the Territory should be surveyed sections Nos. 16 and 36 "shall be and the same are hereby reserved," for the purpose of being applied to schools. But the agreed statement shows that these lands were not surveyed until after

the act of January 14, 1889, and the agreement with the Indians made in pursuance thereof, and approved by the President, March 4, 1900. Further, the State had been admitted into the Union, and the rights of the State are to be determined by the act of admission rather than by any prior declaration by Congress of its purpose in respect to certain lands. The act of admission provided:

"That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

It will be perceived that this grant was of "public lands." It was held in *Newhall* v. *Sanger*, 92 U. S. 761, 763, that—

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In *Leavenworth &c. Railroad Co.* v. *United States*, 92 U. S. 733, 741, speaking of a grant to the State of Kansas in aid of the construction of a railway, as affecting lands within an Indian reservation, it was said:

"But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers, within certain defined limits, is granted; but only the public lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy."

In *Missouri, Kansas & Texas Railway Co.* v. *Roberts*, 152 U. S. 114, 119, are these words, referring to the reservation of sections 16 and 36 to Kansas as school lands:

"If the reservation named was intended as a grant of the sections sixteen (16) and thirty-six (36) to the Territory and to the States to be created out of them, or as a dedication of them for schools, it could only apply to such lands as were public

lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands involved in this controversy, as we have already shown."

See also *Doolan* v. *Carr*, 125 U. S. 618, 632; *Bardon* v. *Northern Pacific Railroad Co.*, 145 U. S. 535, 538; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284; *Barker* v. *Harvey*, 181 U. S. 481, 490.

Again, the language of the section does not imply a grant *in præsenti*. It is "*shall* be granted." Doubtless under that promise whenever lands became public lands they came within the scope of the grant. As said in *Beecher* v. *Wetherby*, 95 U. S. 517, 523, with reference to a similar clause in the act for the admission of Wisconsin into the Union:

"It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted."

And again, in *United States* v. *Thomas*, 151 U. S. 577, 583:

"Mr. Justice Lamar, while Secretary of the Interior, had frequent occasion to consider the nature and effect of the grant of school lands, where the title was at all encumbered or doubtful; and on this subject he said (6 L. Dec. 418) that the true theory was this: 'That where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title and right of possession cannot then vest in

the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the right and title of possession unite in the Government, and then satisfy its grant by taking the lands specifically granted.' And this view he considered 'as fully sustained by the decisions of the courts and the opinions of the Attorneys General,' and cited in support of it *Cooper* v. *Roberts*, 18 How. 173; 3 Opins. 56; 8 Opins. 255; 9 Opins. 346; 16 Opins. 430; *Ham* v. *Missouri*, 18 How. 126."

So also in *Cooper* v. *Roberts*, 18 How. 173, 179, the question presented was whether certain mineral lands were excepted from the grant of school lands to the State. The words of the school land grant were, as here, "shall be granted," and it was said:

"We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others. *Gaines* v. *Nicholson*, 9 How. 356."

But while this is true it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the Government within the State, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the State shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will

justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that within the limits of an Indian reservation or unceded Indian country—that is, within a tract which is not strictly public lands—certain lands should be set apart for a public park, or as a reservation for military purposes, or for any other public uses, it has the power notwithstanding the provisions of the school grant section. So it is that when Congress came in 1889 to make provision for this body of lands it could have by treaty taken simply a cession of the Indian rights of occupancy, and thereupon the lands would have become public lands and within the scope of the school grant. But it also had the power to make arrangements with the Indians by the which the entire tract would be otherwise appropriated.

What was in fact done? The act of January 14, 1889, provided for a commission to negotiate for the cession and relinquishment of "all and so much of" the White Earth and Red Lake reservations as in the judgment of the commission should not be required to satisfy the allotments required by the existing acts, the cession to be "for the purposes and upon the terms hereinafter stated." The allotments referred to were allotments in severalty, made in conformity to the provisions of the act of February 8, 1887. 24 Stat. 388. The ceded lands were to be divided into two classes; one appraised and sold at auction and the other disposed of to actual settlers at $1.25 per acre. The proceeds of these sales were to be placed in the Treasury of the United States as a permanent fund to the credit of the Indians, drawing interest at five per centum for fifty years, the interest to be expended, three fourths paid in cash to the Indians severally and the remaining one fourth devoted, under the direction of the Secretary of the Interior, "exclusively to the establishment and maintenance of a system of free schools among said Indians in their midst and for their benefit." The cession was not to the United States absolutely,

but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at five per cent, and one fourth of the interest to be devoted exclusively to the maintenance of free schools among the Indians and for their benefit.

Now it is contended that this legislation, though dealing with, in terms, all the unallotted lands, is subordinated to the prior promise of the Government to grant sections 16 and 36 to the State for school purposes. In other words, the cession and relinquishment by the Indians, it is said, extend to all the unallotted lands, but that cession and relinquishment having been accomplished, the trust which by the same legislation is created in respect to the same lands is limited, and restricted by the prior promise of the Government, and this notwithstanding the fact that the Government had provided that the State might take other lands, in case any particular sections 16 and 36 had become appropriated to other public uses. We are not disposed to belittle this contention. The arguments in favor of it, both those founded on technical rules of statutory construction and those based upon the long-established policies of the Government in respect to both the Indians and the public schools, are presented by counsel for the State with exceeding force and ability. Notwithstanding this, we are constrained to believe that not only the technical rules of statutory construction, but also the general scope of the legislation in these matters, and the policy of the United States in respect to public schools, and also to Indians, as the wards of Government, concur in sustaining the contention of the Government that none of these ceded lands passed under the school grant to the State.

And first, in reference to technical rules of statutory construction. The cession was, as we have seen, of all the unallotted lands, and the cession was of those lands "for the purposes and upon the terms hereinafter stated." It was a distinct conveyance by the Indians of certain lands for a named purpose. Now if the United States, the recipient of this cession, was competent to carry into execution the expressed purposes, does

it not follow that the cession subjected all the lands to them? Can it be said that the Indians, making the cession, for a moment supposed that the lands ceded were not to be used for the purposes named, and if the language carries upon its face one obvious meaning, and would naturally be so understood by the Indians, that construction within all the rules respecting Indian treaties must be enforced. As said in *Worcester* v. *Georgia*, 6 Pet. 515, 582:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

And in *Choctaw Nation* v. *United States*, 119 U. S. 1, 28:

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

But reliance is placed upon the doctrine that a later general statute does not repeal by implication a prior special statute unless there is an absolute incompatibility between the two,

and the earlier will remain as an exception to the later. It is said that here the earlier statute was a special grant or promise to grant two particular sections in each township; the later a general statute in respect to all of a large body of lands. There is no necessary incompatibility between the two, and the earlier should be taken as an exception to the later and the later held applicable to all the lands except the specially named sections. *Beecher* v. *Whetherby*, *supra*, is referred to as an illustration of the doctrine and in point in reference to school lands. But in that case the cession from the Indians was not subject to any trust. The facts were these: The action was replevin to recover logs cut upon a particular section, and the title to the logs depended on the title to the land. The Wisconsin school grant, in 1846, though of only section 16, was in form similar to that to Minnesota, and the defendant claimed under that grant. A treaty had been concluded with the Menomonees, February 8, 1831, containing a provision that two specified townships should be set apart for the use of the Stockbridge and Munsee Indians. In these townships was the section 16 in controversy. By treaty, ratified January 23, 1849, the Menomonees, in consideration of the sum of $350,000 and a reservation west of the Mississippi, agreed to cede all their lands in Wisconsin. The eighth article of the treaty stipulated that they should be permitted to remain on the ceded lands for two years and until notified by the President that the lands were wanted. By treaty of May 12, 1854, this proposed reservation west of the Mississippi River was retroceded by the Indians to the United States, and in consideration of such cession the United States agreed to give them a home, "to be held as Indian lands are held," upon Wolf River, in Wisconsin, which tract included the townships set apart for the benefit of the Stockbridge and Munsee Indians. On February 6, 1871, Congress passed an act for the sale of these two townships, except eighteen contiguous sections thereof, and the appropriation of the proceeds for the benefit of the Stockbridge and Munsee Indians, and in pursuance of that act the United States sold the land in controversy to the plaintiff. The court held that the title of the defendant under the school grant was superior to that of the plaintiff under the

sale by the United States. Two facts are apparent: First, the Menomonee Indians in the first instance received a cash and real estate consideration for the large reservation which they conveyed to the United States; second, that while thereafter a tract was ceded to them to be held as Indian lands are held —a tract which included the section in controversy—and while by an earlier treaty with the Menomonees two townships of such tract (including this particular section 16) had been set apart for the use and benefit of the Stockbridge and Munsee Indians, yet there appears no treaty or agreement with either the Menomonee or Stockbridge or Munsee Indians in reference to the sale of these two townships. Yet, as stated by the court, "when the logs in suit were cut, those tribes had removed from the land in controversy, and other sections had been set apart for their occupation." The ruling was that the United States held the fee, subject only to the Indian right of occupancy; that by the school land section in the enabling act there was a grant, or promise to grant,—in either event to be taken as an appropriation of the fee to the State, subject to the Indian right of occupancy; that the Indians had removed from the lands and had received other lands for their occupation; that hence all Indian rights had ceased. The court, quoting in its opinion from *United States* v. *Cook*, 19 Wall. 591, said (p. 593): "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians attaches itself to the fee without further grant."

Hence, applying the doctrine in respect to earlier special and later general statutes, the Government having received from the Indians their right of occupancy, without any stipulation or agreement or trust in respect thereto, it was held that the act providing for the sale of the two townships could not have been intended to authorize a sale of specific sections therein which had been already conveyed or promised to the State. But this case stands on entirely different grounds. Before any survey of the lands, before the state right had attached to any particular sections, the United States made a treaty or agreement with the Indians, by which they accepted a cession of the

entire tract under a trust for its disposition in a particular way. The question is not as to the construction of two separate statutes, but as to the scope and effect to be given to a treaty or agreement with the Indians, and whether it is to be narrowed in its scope by any rules applicable to the construction of statutes—rules with which it is not to be supposed the Indians were familiar.

Buttz v. *Northern Pacific Railroad*, 119 U. S. 55, is also referred to. In that case the controversy was in respect to a tract of land within the place limits of the grant to the Northern Pacific Railroad Company, 13 Stat. 365, and which at the time of the filing of the map of definite location was within the limits of an Indian reservation By the second section of the granting act it was provided that "the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill." In 1872 the United States entered into a treaty with the Indians, by which for a cash consideration so much of the reservation as covered the land in controversy was ceded to the United States. It was held that by the original act the fee which was in the United States passed to the railroad company, subject to the Indian right of occupancy, which was afterwards, in pursuance of the promise to the company in the granting act, extinguished for a cash consideration, and immediately there was vested in the company a title paramount to that of one attempting a preemption. Here then, as in the prior case, the cession by the Indians was subject to no trust or condition, and the question was simply as to the effect to be given to various statutes.

Heydenfeldt v. *Daney Gold & Silver Mining Company*, 93 U. S. 634, while not involving any question of Indian rights, is worthy of notice, as affecting a State's claim to school lands. The Nevada enabling act, approved March 21, 1864, 13 Stat. 30, 32, contained this provision: "That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less

than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said State for the support of common schools." The plaintiff claimed title by conveyance from the State of a part of a section sixteen. The defendant rested upon a mineral patent from the United States, his entry upon the lands having been prior to any survey, and in conformity to the miners' laws, customs and usages of the district. Although the terms of the school land section were terms of present grant, and although the entry by the defendant was after the State had been admitted, yet his title was adjudged superior to that obtained from the State, the court holding that the United States had full power to dispose of the land until after a survey and the identification thereby.

Again, it is well to bear in mind the joint resolution passed by Congress on March 3, 1857, a resolution which was prompted by a memorial from the legislature of the Territory of Minnesota, and which, recognizing the possibility of settlements or townsite entries before the public surveys on lands which by such surveys were afterwards found to be school sections, provided that when any such sections should be occupied by settlers or selected as townsites "or reserved for public uses before the survey," then other lands might be selected in lieu thereof. That the sale of the ceded lands for the purpose of creating a fund for the benefit of the Indians was a use of them for a public purpose, cannot be doubted. But the contention of counsel for the State is "that the public uses which were intended to operate as an appropriation prior to the services were uses to which the land itself might be put or employed for governmental uses." It is unnecessary to rest upon a determination of this question. We refer to the resolution as an express declaration by Congress that the school sections were not granted to the State absolutely and beyond any further control by Congress, or any further action under the general land laws. As in *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, *supra*, priority was given to a mining entry over the State's school right, so here, in terms, preference is given to private entries, townsite entries, or reservations for public uses. In other words, the act of admission with its clause in respect to school

lands was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the State. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof. In this connection may also be noticed the act of February 28, 1891, although passed after the approval of the agreement for the cession of these lands by the Indians. That act in terms authorized the selection of other lands "where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States."

We come finally to a consideration of the policy of the Government both in respect to schools and to Indians. It is undoubtedly true that such policy from the beginning has been liberal in the appropriation of lands for school purposes. See a review of the legislation in respect thereto in the opinion in *Cooper* v. *Roberts*, *supra*.

It is not to be supposed that Congress intended any departure from this policy in its legislation in respect to lands within Minnesota, and the courts are justified in any fair construction of such legislation as will secure to the State its full quota of lands for aid in the development of its public school system. It is also true that much of the legislation in respect to Indians and many of the treaties with them have contemplated simply the cession of their lands and their removal to tracts further west. In such cases, where there has been simply a cession by the Indian tribe of its reservation and a removal to some new territory, it is not strange that the school grants have been generally held operative in the ceded reservations. The interests of public schools have always been considered paramount to those of railroad companies in grants made to aid in their construction. The one speaks for intellectual; the other for material development. Of course, when the Indian tribe has been removed by treaty from one body of land to another the interest of the tribe in the land from which it has been removed ceases and the full obligation of the Government to the Indians is satisfied when the pecuniary or real estate consideration for the cession is se-

cured to them. But in some instances, and this is one of them, the Indians have not been removed from one reservation to another, but the Government has proceeded upon the theory that the time has come when efforts shall be made to civilize and fit them for citizenship. Allotments are made in severalty, and something attempted more than provision for the material wants of the Indians. In construing provisions designed for their education and civilization as fully if not more than in construing provisions for their material wants, is it a duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress. Instead of removing these Chippewa Indians from Minnesota, the purpose of the legislation and agreement was to fit them for citizenship by allotting them lands in severalty and providing a system of public schools. Surely it could not have been understood by the Indians that only part of the lands they ceded were to be used for these purposes. They were dealing with the tract as an entirety, and they had a right to expect that the entire tract would be used as declared in the act and agreement. No provision is made for compensating the Indians for lands which would be lost if the right of the State was sustained, whereas, on the other hand, the right of the State to compensation for the particular school sections within the tract had already been secured. Contrasting the two policies—that in respect to public schools and that in respect to the care of the Indians—it would seem that we are called upon to uphold the rights of the Indians, which otherwise would be wholly lost without compensation as against the claims of the State for which satisfaction in other directions has been provided.

For these reasons we are of opinion that the claim of Minnesota to these lands cannot be sustained, and a decree will be entered in favor of the defendants dismissing the bill.

Mr. Justice Gray did not hear the argument, and took no part in the decision of this case.

CARNEGIE STEEL COMPANY *v.* CAMBRIA IRON COMPANY.

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

No. 17. Argued October 17, 18, 21, 1901.—Decided May 5, 1902.

Patent No. 404,414, issued June 4, 1889, to William R. Jones, for a "method of mixing molten pig metal," is a good and valid patent, and was infringed by the defendant.

The process described in the patent consisted of a large reservoir between the blast furnaces and the converters, in which should always be maintained a large quantity of metal, which should be drawn off in small quantities at a time and replenished by a like quantity of metal from the blast furnaces.

A process patent can only be anticipated by a similar process. A process patent is not anticipated by mechanism which might, with slight alterations, have been adapted to carry out that process, unless at least such use of it would have occurred to one whose duty it was to make practical use of the mechanism described.

A disclaimer may extend to a part of the specification as well as to a claim or one feature of a claim, though it would be otherwise if the purpose of the disclaimer had been to alter the description of the invention, or convert the claim from one thing into something else.

A stipulation of counsel entered into for the purpose of saving time may be repudiated where the facts subsequently developed show that with respect to a particular matter it was inadvertently signed, provided that notice be given in sufficient time to prevent prejudice to the opposite party.

THIS was a bill in equity filed in the Circuit Court for the Western District of Pennsylvania by the Carnegie Steel Company against the Cambria Iron Company, for an injunction and the recovery of damages for the infringement of letters patent No. 404,414, issued June 4, 1889, to William R. Jones, of whom plaintiff was the assignee, for a "method of mixing molten pig metal."

In his specification the patentee declares that the—

"Primary object of my invention is to provide means for rendering the product of steel works uniform in chemical com-

position. In practice it is found that metal tapped from different blast furnaces is apt to vary considerably in chemical composition, particularly in silicon and sulphur, and such lack of uniformity is observable in different portions of the same cast, and even in different portions of the same pig. . . . The consequence of this tendency of the silicon and sulphur to segregate or form pockets in the crude metal is that the product of the refining process in the converters or otherwise in like manner lacks uniformity in these elements, and therefore often causes great inconvenience and loss, making it impossible to manufacture all the articles of a single order of homogeneous composition. Especially is this so in the process of refining crude iron taken from the smelting furnace and charged directly into the converter without remelting in a cupola, and, although such direct process possesses many economic advantages, it has on this account been little practiced."

"For the purpose of avoiding the practical evils above stated, I use in the refining process a charge composed not merely of metal taken at one time from the smelting-furnace, but of a number of parts taken from different smelting-furnaces, or from the same furnace at different casts, or at different periods of the same cast, and subject the metal before its final refining to a process of mixing, whereby its particles are diffused or mingled thoroughly among each other, and the entire charge is practically homogeneous in composition, representing in each part the average of the unequally diffused and segregated elements of silicon and sulphur originally contained in each of the several parts or charges. By proceeding in this way not only is each charge for the refining furnace or converter homogeneous in itself, but, as it represents an average of a variety of uniform constituent parts, all the charges of the converter from time to time will be substantially uniform, and the products of all will be homogeneous."

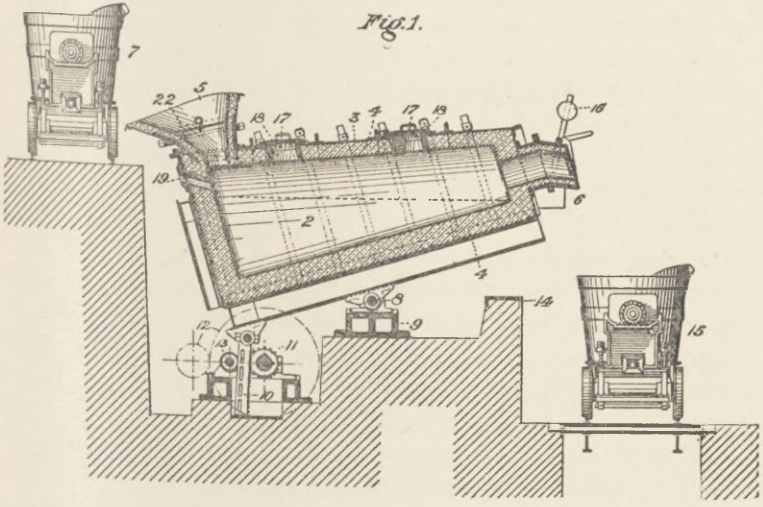
"To this end my invention may be practiced with a variety of forms of apparatus—*for example, by merely receiving in a charging-ladle a number of small portions of metal taken from several ladles or receiving-vessels containing crude metal obtained at different times or from different furnaces, the mixing being*

performed merely by the act of pouring into the charging-ladle, and other like means may be employed. (The clause in italics was subsequently disclaimed.) I prefer, however, to employ the apparatus shown in the accompanying drawings, and have made it the subject of a separate patent application, serial No. 289,673, and, without intending to limit the invention to the use of that specific apparatus, I shall describe it particularly, so that others skilled in the art may intelligently employ the same.

"*My invention is not limited to its use in connection with converters, since similar advantages may be obtained by casting the metal from the mixing-vessel into pigs for use in converters, puddling-furnaces, or for any other uses to which pig-iron may be put in the art.*" (This paragraph subsequently disclaimed.)

(The apparatus is represented by the drawing here inserted.)

Fig. 1.



"Referring now to the drawings, 2 represents the reservoir before mentioned. It consists of a covered hollow vessel having an outer casing 3, of iron or steel, which is suitably braced and strengthened by interior beams and tie-rods, as shown in the drawings. The whole exterior of the vessel is lined with fire-brick or other refractory lining, which should be of suffi-

cient thickness to retain the heat of the molten contents of the vessel and to prevent chilling thereof. The vessel is strongly braced and supported by braces and tie-rods, and may be of any convenient size, holding, say, one hundred tons of metal, (more or less,) and its shape is preferably such as shown in the drawings, being rectangular, or nearly so, in cross-section and an irregular trapezium in longitudinal section, one end being considerably deeper than the other. At the top of the deeper end, which I call the 'rear' end, is a hopper 5, into which the molten metal employed in charging the vessel is poured, and at the front end is a discharge-spout 6, which is so located that the bottom of the spout is some distance above the bottom of the vessel—say two feet in a hundred-ton tank, and more or less, according to the capacity of the vessel—the purpose of which is that when the metal is poured out of the spout a considerable quantity may always be left remaining and unpoured, and that whenever the vessel is replenished there may already be contained in it a body of molten metal with which the fresh addition may mix. I thus secure, as much as possible, uniformity in character of the metal which is fed to and discharged from the tank, and cause the fluctuations in quality of the successive tappings to be very gradual.

"For convenient use of the apparatus I have found it best to so arrange it that it is adapted to receive its charges of metals from cars or bogies 7, which run on an elevated track at about the level of the normal position of the hopper 5, and to discharge its contents into similar cars or bogies 15 on a track below the spout 6. In order to facilitate the charging and discharging of the metal, the vessel is set on journals or bearings 8, which have their bearings in suitable pedestals 9, and its rear end is provided with depending rack-bars 10, which are pivotally connected with the bottom of the mixing-vessel 2 and are in gear with pinions 11, the shaft of which is connected by gearings 12 with the driving mechanism of a suitable engine. The pinions are held in gear with the rack-bars by idler wheels or rollers 13. As the journals or bearings 8 are located on a transverse line somewhat in advance of the center of gravity

of the vessel, it tends by its own weight to tilt backward into the position shown in Fig. 1, but may be restored to a level position by driving the pinions 11, and thus raising the rack-bars 10 until the front part of the bottom of the vessel comes in contact with a rest or stop 14.

"The mode of operation of the apparatus is as follows: When the vessel is in the backwardly-inclined position shown in Fig. 1, it is ready to receive a charge of metal from the car 7. Before introducing the first charge, however, the mixing-vessels should be heated by internal combustion of coke or gas, and when the walls of the vessel are sufficiently hot to hold the molten metal without chilling it it is charged repeatedly from the cars 7 with metal obtained either from a number of furnaces or at different times from a single furnace. The charges of metal introduced at different times into the vessel, though differing in quality, mix together, and when the vessel has received a sufficient charge its contents constitute a homogeneous molten mass, whose quality may not be precisely the same as that of any one of its constituent charges, but represents the average quality of all the charges. If desired, the commingling of the contents may be aided by agitation of the vessel on its trunnions, so as to cause the stirring or shaking of its liquid contents. The mixing-chamber being deeper at its rear than at the front end, as before described, and its normal position when not discharging metal for the purpose of casting being with the bottom inclined upward toward the front or discharging end, and the bottom of the spout being situate above the bottom of the vessel at its forward end, it is adapted to receive and hold a large quantity of molten metal without its surface rising high enough to enter the discharge-spout.

"The discharge-spout 6 is furnished with a movable cover operated by a weighted lever 16, which, when closed, serves to exclude the outside air and prevent a draft of air through the vessel and the consequent rapid cooling of the molten contents. If care is exercised in keeping the cover closed, the metal can be kept in a fluid condition for a long time, the heat being kept up by repeated fresh charges of molten metal, and, if necessary or found desirable, by burning gas introduced by a pipe or pipes into its interior.

"After the vessel is properly charged, the metal is drawn off into the cars 15 from time to time, as it is needed, by opening the door or cover 16 of the spout 6 and driving the engine 12, so as to elevate the rear end of the vessel and tilt it forward, and thus to discharge any required amount of its contents in the manner before explained into the cars 15, which are transported to the converters, *or the metal is cast into pigs or otherwise used.* (Italics disclaimed.) The tilting of the vessel does not, however, drain off all the contents thereof, a portion being prevented from escaping by reason of the elevated position of the spout 6, and as the vessel is replenished from time to time each new charge mixes with parts of previous charges remaining in the vessel, by which means any sudden variations in the quality of the metal supplied to the converter is avoided. Instead of discharging the metal into the cars 12 and carrying it in the cars to the converters or casting-house, the vessel 2 may be so situate relatively to the other parts of a furnace-plant as to deliver its contents immediately to the converters or other place where it is to be utilized.

"I find it in practice very advantageous to employ two or more mixing vessels constructed substantially as I have described, and to draw a portion of each converter charge from each of the mixing vessels. My invention is, however, not limited to the employment of two or any specific number of such vessels.

"I shall now describe, briefly, other parts of the apparatus which are desirable and important in its practical use.

"At the top of the vessel 2 are man-holes 17, designed to permit of access to its interior for the purpose of repairing or fixing the lining. These holes are provided with suitable covers 18 to exclude cold drafts of air from entering the interior. There is also a hole 19 at the rear end of the vessel near the top, through which a rabble may be inserted for the purpose of assisting or accelerating the mixing of the molten metal, and at the other end, at the level of the bottom of the interior, there are holes 20, provided with suitable spouts to enable all the molten contents to be drawn off when it becomes necessary to do so. (See Fig. 3.) The holes 20 should be provided with suitable stoppers.

Counsel for Parties.

"I claim—

"1. In the art of refining iron directly from the smelting furnace, the process of equalizing the chemical composition of the crude metal by thoroughly commingling or mixing together the liquid-metal charge and subsequently refining the mixed and equalized charge, substantially as and for the purposes described.

"2. In the art of mixing molten metal to secure uniformity of the same in its constituent parts preparatory to further treatment, the process of introducing into a mixing receptacle successive portions of molten metal ununiform in their non-metallic constituents, (sulphur, silicon, etc.,) removing portions only of the composite molten contents of the receptacle without entirely draining or emptying the same, and successively replenishing the receptacle with fresh ununiform additions, substantially as and for the purposes described."

The answer set up the invalidity of the patent by reason of an insufficient specification, anticipation, want of novelty and abandonment; and also denied infringement.

Upon a hearing upon the pleadings and proofs, the Circuit Court held with the plaintiff, and found that the process was patentable; that it was not anticipated; that it was of great utility and importance, and that defendant had infringed the second claim. 89 Fed. Rep. 721.

A decree having been entered for an injunction and an account of profits and damages, in accordance with this opinion, the case was carried to the Court of Appeals, which ordered the decree of the Circuit Court to be reversed, and the case remanded to that court with direction to dismiss the bill. 96 Fed. Rep. 850. Whereupon plaintiff applied for and was granted this writ of certiorari.

Mr. Thomas V. Bakewell and *Mr. Thomas B. Reed* for the Carnegie Steel Company. *Mr. Philander C. Knox* and *Mr. Thomas B. Kerr* were on their brief.

Mr. Francis T. Chambers and *Mr. James I. Kay* for the Cambria Iron Company. *Mr. Philip T. Dodge* was on their brief.

Mr. Justice Brown delivered the opinion of the court.

Steel is a product, or, perhaps, more accurately, a species of iron, refined of some of its grosser elements, intermediate in the amount of its carbon between wrought and cast iron, and tempered to a hardness which enables it to take a cutting edge, a toughness sufficient to bear a heavy strain, an elasticity which adapts it for springs and other articles requiring resiliency, as well as a susceptibility to polish, which makes it useful for ornamental and artistic purposes.

Pig iron, which was the original basis for the manufacture of all iron and steel, is made by the reduction of iron ore in large blast furnaces, which are filled with layers of ore, charcoal or coke and flux. By the agency of this the iron is melted out and falls to the bottom of the furnaces, is drawn out through openings for that purpose into canals, and finally into moulds, where it solidifies into what are termed pigs. Prior to the invention of Sir Henry Bessemer, steel was manufactured from a pig iron base by a tedious and expensive process of refining in furnaces adapted to that purpose. The process was so costly that steel was little used except for cutlery and comparatively small articles, and was practically unknown in the construction of bridges, rails, buildings and other structures, where large quantities of iron were required.

In 1856, Bessemer discovered a process of purifying iron without the use of fuel, by blowing air through a molten mass of pig iron placed in a refractory lined vessel called a converter, whereby the silicon, carbon and other non-metallic constituents were consumed, and the iron thus fitted for immediate conversion into steel by recarbonization. The present process of recarbonization was a supplementary invention of Mushet, who accomplished it by the introduction of ferromanganese, or spiegel-eisen, while the iron in a molten state was issuing from the converter, in which it had been purified, and was thus converted into steel. The process of running molten metal from blast furnaces into pigs and remelting them in cupola furnaces for use in a converter was termed the indirect process, and was generally used prior to the Jones invention.

His process is thus described by Bessemer in his patent of 1869: "The most important of these operations consist in melting the pig metal, transferring it in the molten state to the converting vessel, blowing air through it, and converting it into a malleable metal, mixing the metal so converted with a certain quantity of fluid manganesian pig iron, pouring the mixed metals into a casting ladle, and running it from thence through a suitable valve into ingots or other moulds, and the removal therefrom of the ingots or other cast masses when solidified." This invention of Bessemer, simple as it appears, may be said not only to have revolutionized the manufacture of steel, and to have introduced it into large constructions where it had never been seen before, but to have created for it uses to which ordinary iron had been but illy adapted.

While in the Bessemer specification of 1856 it is said "the iron to be used for the purposes of my present invention may be conveyed by a gutter in a fluid state direct from the smelting furnace where it has been obtained from the ore," without the expense and delay incident to the intermediate cupola process, practical experience, in this country at least, showed that the refining of iron without first casting it into pigs, selecting or mixing the pigs and remelting them, was attended with such expense that the entire abandonment of the practice was seriously considered. The difficulty was in the material variations between different portions of the same cast, and even different parts of the same pig,—an irregularity which was increased when the metal was drawn from several furnaces. There was added to this frequent changes in the character and composition of the ore, coke and limestone flux with which the furnace was charged. The consequence was that the non-uniform chemical composition of the metal from the molten blast furnaces yielded products of steel, such as rails and beams, which were not only irregular chemically, but of irregular and uncertain final condition—some sound, others of imperfect strength and full of flaws.

These irregularities were in a measure obviated, not only by a careful selection of pigs beforehand, but by the necessity of employing open receiving ladles or reservoirs into which the

product of one or more cupola furnaces was drawn off into such reservoirs, which were made large enough to hold the product of two or three furnaces, and from which the molten metal was withdrawn into the converters. Had the amount required for the converters in each case been the exact product of one or more cupolas, no reservoirs would have been necessary, but as the demand was variable, a storage of molten metal was required to retain the product of one or more cupolas, until it was required for the converters. Of course, as the product of two or more furnaces was drawn off into these receiving ladles, there would be some intermixing of those products, although the receiving ladles do not appear to have been used for that purpose, the operators relying more particularly upon the careful selection of pigs beforehand, to obtain the requisite uniformity for conversion into steel. The ladles being open at the top, the molten metal could not long be retained in them, and in the best practice it was so arranged that the withdrawals from the reservoir were made every few minutes, and without regard to the amount left in the reservoir after each withdrawal. It will be borne in mind that the object in either case, whether by direct or indirect process, is to obtain, as far as possible, a uniform product of iron for the converter.

"These results," said one of the witnesses (Kennedy), speaking of the process used before that of Jones, "are not obtained by the practice of taking metal from two blast furnaces by running a train of ladles in front of them and tapping into each ladle half a charge and following it from a second furnace. By such practice, of course, there is some independent equalization of the composition of each ladle or of the ladles of each group, but it affords no further advantage, and in fact would not obviate the difficulties of direct metal working. It does not enable the converter manager to foretell the character of each charge from the character of the preceding charge, and would therefore entail the uncertainties of operation and the irregularity of the product which the Jones method avoids."

It had long been an object of manufacturers that steel should be made directly from the molten metal, as it comes from the blast furnaces, without having to pass through the intermediate

or cupola process, which involved the casting of the furnace metal into pigs. These, after becoming cold, were assorted, broken up, recharged and remelted in a cupola furnace, and then placed in a converter for conversion into steel. By this cupola process a product, practically uniform in character and suitable for further treatment in the converters, was secured, but at the expense (more than 60 cents per ton) of rehandling and remelting the iron as it came from the blast furnaces, in cupolas, and the contamination of the metal with sulphur evolved from the coke in the process of remelting. The obstacles connected with this method and the difficulties attendant upon the use of the direct process are thus comprehensively set forth by Mr. Julian Kennedy, one of the experts:

"Ever since the invention of the Bessemer process it has been well recognized that great economies could be attained by transferring the molten metal from the blast furnace to the converter without allowing it to solidify. Until within a few years, however, this direct process, as it has been called, has not been generally used. It is easy to see why this was the case. The fluctuation in the chemical composition of the metal from the blast furnace was too great to allow that degree of uniformity of product in the Bessemer steel produced from it, which is absolutely necessary in the case of steel rails, for example, which must be as reliable as human skill can make them, and where no reasonable expense can be spared to make them perfectly safe and trustworthy. A very few broken rails in a track, with the damage to property and human life which this might cause, would far more than offset any possible saving in a year's work, due to the use of the direct process. For this reason the practice, until within comparatively recent years, has been to cast the metal in pigs, then to analyze it and reject any portion not closely approximating a rigid specification in its chemical composition, and to select, mix and then melt the approved metal in cupola furnaces. By this means very great uniformity of chemical composition of the remelted metal can be obtained, and good and reliable steel made from it with regularity and certainty."

Speaking of a time when the direct process (before that of Jones had been in use for several years) he said:

"After studying the results which had been obtained at the Edgar Thompson works and elsewhere in the use of the direct process, I consulted with Mr. James Gayley, and we agreed that in the building of a new works it would not be profitable to use direct metal, but that on the contrary the disadvantages resulting from the irregularity in the product were so great that it would be better to go to the expense of building and using cupola furnaces. We did not then perceive any means adequate to overcome these disadvantages."

The difficulties connected with the prior devices are also stated in an article by Mr. Holley, published in 1877, from which we extract the following paragraph:

"Third. The embarrassing feature of the direct process is the irregularity in the heat—that is to say, in the silicon of the charges—resulting in the large amount of scrap due to too little of this element, and in the increased number of second-quality rails due to too much of it; while in France, where 3 to 5 per cent of manganese is the heating ingredient, there may always be an excess of this latter element without injuring the quality of the steel, although the variation of heat is here, also, a serious difficulty. In other words, it has not yet been practicable to work the blast furnace with sufficient regularity to realize approximately the theoretical advantages of the direct process."

"Fourth. The obvious remedy is to mix a number of blast-furnace charges, so as to reduce the irregularity to a minimum. Two systems of doing this are on the eve of trial: the one is simply mixing so few charges in a tank that the metal will be drawn out before it chills; the other is to store a larger number of charges in a heated tank—that is to say, in an immense open-hearth furnace."

"A few words of history may be of interest. Mr. Bessemer's early intention was to use blast-furnace metal direct. The earlier Bessemer practice, especially that in Sweden, was with metal right from the blast furnace. But this practice did not make headway, except where there was from 3 to 5 per cent of manganese in the pig blown, for reasons just men-

tioned; so that while it soon became standard at Terrenoire and elsewhere in France, as well as in Sweden, and to some extent in Germany, yet in England it was not only unused but pronounced impracticable so late as September, 1874."

This difficulty, and it seems to have been so serious as to render the direct process commercially impracticable, Jones sought to remedy and did remedy by creating a covered reservoir of molten metal between the blast furnaces and the converters, in which should always be maintained a large quantity of metal, happily termed by the District Judge a dominant pool, which should be drawn off in small quantities at a time, and replenished by a like quantity of metal from the blast furnaces. In this way, while the metals taken from the several blast furnaces might differ in their heat and constitutent elements, yet being received and mixed with the molten metal in the dominant pool, they were, when discharged from the reservoir, approximately, though not perfectly, uniform, the original variations having been lost in their mixture with the dominant pool. "It is therefore plain," says the District Judge in his opinion, "that with a mixer thus operated, it is possible to have wide variations in the composition of the blast furnace metal charges added, and at the same time the successive withdrawals from the Bessemer converter show quite small and gradual changes of composition. The heat of the detained mass is affected by the incoming charges just from the blast furnace, but the heat of such addition, whether relatively high or low, must mingle with, be modified by, and average with, the heat of the larger and dominating mass." It is not insisted that this method gave absolutely uniform results, "nor," says the witness Fry, "did the inventor, as I understood him, comprehend such, but, on the contrary, he recognized the practical impossibility of rendering uniform a continuous supply of metal, and desired only to reduce the abrupt changes of the several portions added to the gradual changes of the portions withdrawn, and this is what he worked out from his invention in a thoroughly practical way."

While the patent in suit is for a process and not for a mechanism, the process will be the more easily understood by a reference to the apparatus above reproduced, which consists of a

reservoir, or closed receptacle, commonly termed a "mixer" lined with fire brick of sufficient thickness to retain the heat of the molten iron, and of such size and strength as to be capable of receiving and retaining a large amount—"say one hundred tons"—of molten iron. This reservoir is mounted upon journals, and is adapted to be tipped so as to receive at one end molten metal from the blast furnaces, carried to it in cars, and by being tipped in the other direction, to discharge the same into similar cars, in which it is carried to the converter. The essence of the invention lies in the fact that the tip is so regulated by a stop that the reservoir can never be wholly emptied, but a "considerable quantity" of metal always remains,—a dominant pool, into which successive additions are received.

That the invention is one of very considerable importance is attested by the fact that it was not only put into immediate use in the Edgar Thompson works at Braddock, then owned by the plaintiff, but has since been adopted by all the leading steel manufacturers in this country, and by many similar works in Europe, where the patent was sold for ten thousand pounds. Mr. Carnegie, one of the witnesses, says of it: "There were both advantages and disadvantages" (in the direct process used prior to Jones' invention,) "but the disadvantages were so great, that we often debated whether to abandon the process or not. We found it impossible to get a uniform quality of rails, as well as by the cupola method. . . . When we were still anxiously struggling with the problem, and undecided whether to continue or abandon it, Captain Jones . . . told us that he believed he had invented a plan which would solve the problem. . . . We thought so well of the idea—I was so convinced of its reasonableness—that I directed him to go ahead with his invention. . . . Captain Jones did so, and almost from that day our troubles ended. He had scored a tremendous success; another step forward was taken in the manufacture of steel, and we are using the invention to-day. . . . Without this invention I believe that we should have abandoned the mode of running direct from the blast furnace. Above all things, the manufacturer has to regard the uniformity of prod-

uct, the equality of rails, and this uniformity cannot be obtained without Jones' invention, as far as I know."

It is true that what is termed the direct process was used in connection with the Bessemer invention in some foreign countries, notably Sweden and France, with more or less success; due to the peculiar character of the ores used in those countries; but such attempts in this country had proven practically failures, and had been abandoned. In regard to this the witness Kennedy said:

"The Jones method has made the direct process, which was attended with great danger and difficulties before the date of his invention, a thoroughly practicable and successful one. Instead of it being a question of great doubt whether to run the metal direct to the converter or remelt it, as it was up to the time of Jones' invention, no one would now think of building a new works, containing both furnaces and converters, without arranging to mix the metal by the Jones method, which not only effects an immense saving in the cost of operating the works, but enables a uniformly good product to be made, and also a purer product that can be obtained from cupola metal, which absorbs and is contaminated by sulphur from the coke which constitutes the fuel of the cupola."

Indeed, the value of the process is not wholly denied, though much depreciated, by the defendant, which relies rather upon the fact that it was well known in the art, and that so far as it is described in the Jones' specification and drawings it was not infringed by it.

1. We now proceed to an examination of the question of *anticipation*, in support of which a number of English patents are produced, which will be briefly considered: First, the British patent to Tabberner of 1856, the object of which was, as stated by the patentee in his specification, "to dispense with the necessity of employing one or more large furnaces, and to use in lieu thereof several small furnaces, the combined capacities whereof are equal to that of one or more large furnaces, and to cause these small furnaces to discharge their contents at short intervals of time into one large reservoir, from which the molten metal may be drawn for casting from . . . The

principal features in this invention consist in directing the blast to the body or belly of the furnace, as well as to the hearth thereof, for the purpose of fusing or smelting the entire mass of ore in the furnace simultaneously, or nearly so. . . . The mode hitherto practiced in smelting furnaces has been to direct blasts into the hearth only thereof, thereby requiring several hours to smelt or fuse the contents of a large furnace." The specification is somewhat blind, and it is difficult to see what definite or valuable result is obtained by the use of several small instead of one large furnace, except perhaps a quicker heating and less delay in its practical operations; but it is sufficient for the purposes of this case to say of it that it contains no suggestion of a mixing of different casts for the purpose of obtaining a more uniform product, and that the invention has no relation to a further treatment or refining. It does contemplate the use of a reservoir, but there is no suggestion of a reservation in such reservoir or a quantity of molten metal. It is not denied that the use of a reservoir from which molten metal may be drawn long antedated the Jones patent. But the best that can be said of the Tabberner patent is that, if the reservoir had been of sufficient size and properly constructed so as to never be completely emptied, it might have been adapted to carry out the Jones process; but there is no evidence that it was ever so constructed, or that the production of a uniform discharge from the reservoir was contemplated. That it could not have been intended for the purpose of carrying out the Bessemer process, or any other process, for the use of blast furnace metal in a converter, is evident from the fact that the patent was nearly simultaneous with the Bessemer patent, of the existence of which the patentee appears to have been entirely ignorant.

The English patent to Deighton of 1873, for "improvements in the arrangement and mode of working an apparatus for the manufacture of Bessemer steel," contains the closest approximation to the principle of the Jones invention. If this does not anticipate, none does. The primary object of the patent seems to have been to prevent the loss of time while the converters are being cooled and relined or repaired, and again

prepared for work, by providing that the converting vessel shall be so arranged that it can be readily detached from its actuating mechanism and lifted bodily out of its bearings by a suitable crane, or other lifting mechanism, and a spare converter substituted in its place.

There is, however, a further provision in the patent, as follows:

"Instead of manufacturing Bessemer iron or steel from pig iron, which has to be melted in cupolas, my invention also consists in taking the molten metal directly from the blast furnace to the converter, in which case I prefer to arrange the Bessemer plant in a line at a right angle to a row of two or more blast furnaces, and place a vessel to receive the molten metal tapped from two or more blast furnaces to get a better average of metal which will be more suitable for making Bessemer steel or metal of uniform quality, the vessel or receiver being placed on a weighing machine so that any required weight may be drawn or tapped from it and charged into the converter."

The specifications provide for manufacturing Bessemer steel directly from the smelting furnace by employing gates or channels for molten metal from each furnace, leading to a reservoir, which is placed low enough to give fall for the molten metal to flow from the blast furnace to this reservoir, which forms a receptacle for mixing the molten metal from two or more of the smelting furnaces. From the reservoir, the mixed molten metal is tapped and flows down the swivel trough into the converter. By placing the reservoir on a weighing machine, it can be readily ascertained when the exact quantity required has been tapped from it into the converter. The sixth claim of the patent is for "the system or mode of arranging and working Bessemer converters with a receiver or receptacle for mixing the molten metal from two or more smelting furnaces to get a more uniform quality of metal, substantially as hereinbefore described and illustrated by the drawings."

While Deighton seems to have conceived the idea that uniformity of product was necessary to the successful use of the direct process, and might be attained by mixing the discharge from several blast furnaces in an open reservoir, standing be-

tween the furnaces and the converter, the dominant idea of the Jones invention, that a constant quantity of molten iron should always be kept in such reservoir to serve as a basis for such mixture and an equalizer of the different discharges, does not seem to have occurred to him. As the discharge pipe was located at the bottom of the reservoir, it was certainly possible to empty it entirely, and the testimony in the case indicates that this was the natural method of operation. If this were so, then the reservoir accomplished nothing beyond the mixing of each batch of metal introduced into it from the different blast furnaces. There is nowhere in the specification a suggestion of supplying to and withdrawing from the reservoir small amounts at a time, a constant quantity of metal being retained in the reservoir for the purpose of equalizing the different products of the blast furnaces. While the Deighton reservoir, if a cover had been added to it, might perhaps have been utilized for that purpose, there is no evidence that such use ever occurred to the inventor. Indeed, the absence of a cover to the reservoir is evidence, even to a non-expert, that it was not contemplated that a permanent quantity of molten iron should be retained in it, since a radiation of heat would thereby be produced and the contents skulled or crusted over with a layer of refuse iron or slag. The testimony is clear that the Jones process cannot be carried on in an open reservoir, and the absence of a cover in conclusive that it is not so used.

It is insisted, however, that defendants have demonstrated, by practical experimentation with a plant constructed according to the specification of the Deighton patent, that the results are practically the same as those obtained by the Jones process. This plant, however, was constructed after suit brought, long after the Deighton patent had been allowed to expire, and with no opportunity afforded the plaintiffs to inspect the plant or witness its operation. The tank was fitted with a cover, and a constant pool of molten metal retained in it; but this was not the Deighton process, but the Jones process adapted to the Deighton device. Were this evidence admissible at all, we are satisfied that it is met by the fact that if the Deighton patent had been adaptable to the Jones process, it is scarcely possible

that its merits should have failed to seize upon the attention of manufacturers, who would have brought the patent into general use, instead of allowing it to lapse for the non-payment of a comparatively small fee. As something in the nature of the Jones process was needed to enable steel to be manufactured directly from the product of blast furnaces, the utility of the Deighton patent for that purpose would at once have been recognized and its success assured. But evidently that patent was not the final step in the accomplishment of the mixing process. It contributed nothing to the art of manufacturing steel, and, although issued in 1873, was allowed to lapse in 1876, after an apparently unprofitable existence for three years, by reason of the non-payment of the stamp duty necessary to keep it alive. It is sufficient to say of it that it fails to disclose, fully and precisely, the essential features of the process covered by the Jones patent. Walker on Pats. sec. 54; *Seymour* v. *Osborne*, 11 Wall. 516, 555; *The Caywood Patent*, 97 U. S. 704.

Although Deighton was an employé of the Moss Bay Company of Workington, England, if any attempt were made by this company to make use of his process, it evidently amounted to nothing, since one of the writers, Snelus, contributing to the Journal of the Iron & Steel Institute, 1876, says: "One great drawback to the direct casting process was that you could not always get your metal at the exact time you wanted it. He believed that it would be found that the great advantage the Bessemer works in America had was the intermediate receiving ladle, which was designed by Mr. Holley, and which was universally used there, although it was never used in England. The Moss Bay Company attempted to modify the thing some time ago, and put up a heating furnace; but that, to his mind, was a step in the wrong direction. Anyhow, the thing had failed, and no one in England, so far as he knew, was using any intermediate receiver between the blast furnace and the converters."

This defence presents the common instance of a patent which attracted no attention, and was commercially a failure, being set up as an anticipation of a subsequent patent, which has proved a success, because there appears to be in the mechanism

described a possibility of its having been, with some alterations, adaptable to the process thereafter discovered. As hereinafter observed, a process patent can only be anticipated by a similar process. It is not sufficient to show a piece of mechanism by which the process *might* have been performed.

In the American patents to Durfee, Nos. 118,597 and 122,312, both of 1871, the desirableness of manufacturing steel directly from the blast furnace is recognized, and in his second patent he says: "That in the manufacture of steel by the pneumatic or Bessemer process, a great saving of fuel and iron, of wear and tear of furnaces, and of labor would be effected were it possible to make uniformly good products of the desired temper by converting the crude iron immediately it is tapped from the blast furnace in which it is made. This plan has been and may still be practiced to a considerable extent, but it has been found that by reason of the irregular working of blast furnaces, and the consequent varying character and quality of the crude iron produced, it was always very difficult and in most cases impossible to secure such uniformity in the converted metal as was essential to success in the business. Hence, at several establishments where the plan of taking the fluid iron as it was tapped from the blast furnaces and pouring it at once into the converter has been practiced, it has been abandoned, the proprietors preferring to incur the expense of handling and remelting the crude iron after it had been cast into pigs in order thus to secure the advantage of carefully selecting and mixing the materials for each charge to be converted."

He proposed to accomplish this by using a reverberatory gas furnace, into which the crude iron from the blast furnace is poured, and in which it may be mixed with other irons, and so treated as to insure uniformity. Pig iron of different qualities, or any metals or metalloids or fluxes can be added and mixed with the metal as may be necessary to bring it to the required character. The process is so manifestly different from that described by Jones that it demands no further attention. If it were put in practice at all, it seems to have proved a failure, as, although an English patent was taken out by Durfee, it was allowed to lapse by reason of the non-payment of the stamp duty.

Opinion of the Court.

Two American patents to James P. Witherow, No. 315,587 and No. 327,425, both issued in 1885, are pressed upon our attention. In the second patent, the only one necessary to notice, he restates the advantages of the direct process and the difficulties theretofore encountered in its practical operation. "In the manufacture of steel by the pneumatic process, the converters are charged with molten metal, the product of the blast furnace. This metal is usually cast in the form of pigs, then remelted in the cupola as needed before being charged into the converter. . . . It is very desirable to take advantage of the molten condition of the metal as it comes from the blast furnace for its use in the converter, because thereby the remelting of the metal and the expense of the construction of a cupola may be avoided. The charge of the converter is from one to five tons, and the casting of a blast furnace runs usually from ten to fifty tons. The difficulty of using the molten metal from the furnace to the converter consists in keeping the large quantity of metal from the latter in a proper molten condition for use in the former." He proposed to remedy this by a reservoir provided with a suitable cover and with tuyeres "which blow down upon the surface of the metal for the purpose of maintaining its heat and fluidity." As this reservoir was apparently adapted to hold only a single cast, and therefore must be emptied before another cast was received into it, it was impossible that Witherow intended by its use to practice the Jones process. There is no suggestion anywhere in the patent of a desire to retain a quantity of metal in the reservoir to serve as a basis for mixing the various products of the blast furnace, which was the dominant idea of the Jones patent. To anticipate a process patent, it is necessary not only to show that the prior patent might have been used to carry out the process, but that such use was contemplated, or that the leading idea of the Jones patent of maintaining a dominant pool in the reservoir was such a use of the Witherow patents as would have occurred to an ordinary mechanic in operating his device. Whether the reservoir in the Witherow patent was partly or fully emptied, seems to have been a matter of complete indifference to the inventor, and the idea of maintaining a constant quantity therein seems to have

never been conceived by him. His design seems to have been merely to provide a reservoir for the storage of the large quantity of metal from the blast furnaces, and to maintain its heat until the comparatively small quantities required in the converters had been drawn off for use. As he states in his specification: "The metal is usually tapped from a blast furnace once in every six hours, and the quantity thus cast is many times in excess of the charge of a converter," which "is from one to five tons," while "the cast of a blast furnace runs usually from ten to fifty tons." While the metal is tapped from the blast furnace once in every six hours, "the time between charges in the converter is usually twenty minutes and upwards, and the metal in the furnace must be kept in condition to be tapped from time to time into the converter as needed." This appears to have been the whole object of the invention.

The same remark may be made of all these prior devices. While all contemplate the reservoir between the blast furnaces and the converters, such reservoir is used for storage and for such incidental steps toward uniformity as the necessary mixing of the different products of the blast furnace would lead to, while in none of them is there a provision for supplying and withdrawing from the mixer such quantities of metal at a time and the retention of a considerable quantity of metal in the reservoir as a necessary prerequisite to that uniformity of product which was recognized as the great desideratum and was the constant effort of manufacturers to secure. Granting that some of these devices may have been made use of to carry out the Jones process, none of them in practical operation seems to have been effective to secure the desired result. A process patent, such as that of Jones, is not anticipated by mechanism which might with slight alterations have been adapted to carry out that process, unless, at least, such use of it would have occurred to one whose duty it was to take practical use of the mechanism described. In other words, a process patent can only be anticipated by a similar process. A mechanical patent is anticipated by a prior device of like construction and capable of performing the same function; but it is otherwise with a process patent. The mere possession of an instrument or piece

of mechanism contains no suggestion whatever of all the possible processes to which it may be adapted. *Fermentation Co.* v. *Maus*, 122 U. S. 413, 428. If the mere fact that a prior device might be made effective for the carrying on of a particular process were sufficient to anticipate such process, the absurd result would follow that, if the process consisted merely of manipulation, it would be anticipated by the mere possession of a pair of hands.

True, if the process were the mere function of a machine, another machine capable of performing the same function might be an anticipation; but this is not because a process can be anticipated by a mechanism, but because, as we have held in several cases, the mere function of a machine is not patentable as a process at all. *Corning* v. *Burden*, 15 How. 252; *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68.

To enable the Jones process to be successfully carried out it is necessary (1) that the intermediate reservoir or mixer should be of large size, "say 100 tons" capacity; (2) that it be covered to prevent the access of cold air from without; (3) that it be provided with a stop, so that it may not be tilted so far as to be emptied of its contents; (4) that a quantity of molten metal so large as to absorb all the variations of the product of the blast furnace received into it and thus to unify the metals discharged into the converters, be constantly retained in it. None of the prior patents or processes to which we are referred meets these requirements. Indeed, it is scarcely too much to say that none meets more than one of them. When we add to this that none of them was ever used, or was ever susceptible of being used, without material alteration, to carry out the Jones process, it is evident that the defence of anticipation by prior patents rests upon a slender foundation.

Certain discussions, reported in the Journal of the British Iron and Steel Institute, are relied upon as embodying a description of the Jones process. Running through all these discussions, there is the same idea of the difficulties experienced in the practical carrying out of the direct process by reason of the want of uniformity in the different products of the blast furnaces, and the possibility of remedying this and

thereby doing away with the expense of remelting the pig iron in cupolas by a mixture of such products in a reservoir intermediate the furnaces and the converters; but the dominant idea of the Jones patent, of maintaining a permanent and large quantity of molten metal in the mixer for that purpose, does not seem to have occurred to any of the writers upon the subject. Through all these papers, there is an admission of practical failure in the efforts theretofore made to obviate the difficulty, and a half-expressed hope that American ingenuity might ultimately solve the problem. Some of the expressions, taken by themselves, seem to foreshadow the Jones idea; but there was nothing in any of these discussions that filled the requirement of the law, Rev. Stat. sec. 4886, of a description in a publication sufficient to anticipate the patent.

In some of the very works where attempts had been made to adopt a direct process, they were abandoned as unprofitable, and the Jones invention subsequently adopted. The witness, David Evans, manager of certain iron works in England and Wales, sums up his testimony in the following answer: "Prior to the invention of Captain Jones several firms used the direct process, but the results were not very satisfactory, as explained before, through want of uniformity. The results obtained gave a large number of defectives. But since the adoption of the mixer at the various works I have been engaged, we have reduced the defective or second class rails fully one half, and also saved the remelting." Indeed, it is stated by several of these writers that the adoption of the Jones invention reduced the defective rails to something like half of what they were before.

Our attention is also challenged to certain unpatented practices, among which is one known as the Whitney foundry practice for the casting of car wheels, wherein the metal is tapped from three cupolas into an open reservior of eight to ten tons capacity, permitted to mix and even up in it, and the charges withdrawn to be cast into car wheels, the reservoir being maintained half full. The practice was to run the metal from the cupola furnaces into the reservoir ladle until it was nearly full, then to begin pouring out charges into the casting ladles, while

still continuing to pour metal into the ladle from the furnaces, the ladle being kept approximately full during the working day, when it was emptied and refilled on the following day. Aside from the fact that this process has only to do with cupola metal, uniformity in which was largely secured by a careful selection of the pig iron charged into the cupola furnaces, and had no reference whatever to the direct process of charging converters with the product of blast furnaces, it appears that, while Whitney recognized the fact that the charges of iron from the cupolas when run together into the ladle would mix, it appears that with this running together of the different charges, the mixing operation ended. The maintenance of a permanent pool, and the constant pouring in and out in ladlefuls—the essence of the Jones invention—had nothing to do with the process. Indeed, it may be doubted whether the mixing of the cupola metal was of any substantial value. Evidently it suggested to no one the Jones process. It is now too late to insist that it would have been suggested to any mechanic of ordinary skill and intelligence. But if the Whitney practice were primarily for the purpose of mixing, and were adequate for that purpose when applied to cupola metal carefully selected beforehand, it might be, and evidently would have been, wholly inefficient when sued for the purpose of unifying the products of blast furnaces,—in other words, for the Jones process; and it might and did require invention to make such changes as were necessary to adapt it to such purpose. Doubtless there was such mixing as the carefully selected cupola metal required for the purpose of manufacturing car wheels, but the fact that the Whitney practice was used for cupola metal has but little tendency to prove that it was adaptable without change to metal tapped from blast furnaces, which varied so largely in chemical composition.

The following observations of the District Judge are illustrative of the distinction between the Whitney Foundry practice and the Jones process:

"We must avoid being misled by mere terms and subjects of work. Jones and Whitney both were concerned in the melting of metals, yet they had widely different objects in view. Whitney's purpose was to cast molten metal into a finished product;

Jones' merely to prepare molten metal for further treatment, to wit, decarburizing it into steel. The *sine qua non* of purpose in Whitney was product uniformity. Uniformity of quality in car wheels is required, so they will stand wear and uniform wear."

"In the Bessemer direct process you cannot secure, initially or by treatment, uniformity of molten metal; so far as yet developed, the best you can do is to make the non-uniformity gradual and not abrupt; in Whitney, non-uniformity, whether gradual or abrupt, would be alike fatal. In Whitney, relatively absolute uniformity is an essential of product and a sequence of material used; in Jones, uniformity is a non-essential, in fact, a non-attainable attribute of product, and is a necessary non-sequence of material used. In Whitney, we remelt in a cupola metal which has already undergone the refining process of the blast furnaces; in Jones, we take metal direct from the furnace and discard the cupola. It will thus be seen that apart from the wide difference between the primary work of a huge blast furnace, the base of all metallurgy, and the cupola of the founder, a mere subdivision of that art, we find in the Jones and Whitney processes a substantial difference of purpose, of process and of subject-matter of work."

It should be borne in mind throughout the whole of this discussion that Jones never claimed to have succeeded in making a perfectly uniform product; that his object was to procure a uniformity which was adequate for the complete carrying on of the Bessemer process, or, as his second claim states, "for further treatment," and really to obviate the necessity of remelting the pigs, which had heretofore been regarded as preliminary to the further treatment by the Bessemer process.

Substantially the same remarks may be made with regard to the Kirk publication, which had to do only with the mixing of cupola metal. This publication was first held by the Patent Office to be an anticipation of the Jones process, the application for which was rejected upon that ground. Upon further consideration, however, and with some slight amendments, the application of Jones appears to have been reconsidered, and was finally granted.

An attempt was made to show that the Jones invention was anticipated by the practice common in steel works prior thereto, of tapping iron from cupola furnaces into a receiving ladle, which became known as the Bessemer cupola ladle, from which it was poured into the converters. Molten iron was tapped from several cupolas into this ladle, from which a charge was drawn and delivered to the converter vessel. Of course, if the ladle were of greater capacity than was necessary to charge a single converter, a residuum of metal would be left in it; but this seems to have been merely an incident of the operation of the ladle, which was used primarily for storage, and to have been of no substantial benefit in securing uniformity of product, which can only be obtained by making the receiver of larger size and retaining a considerable quantity of metal in it after each discharge. The witness Kennedy says of this process:

"The irons were carefully selected from the different piles to make up the cupola charges. . . . I have often seen the ladle drained in pouring into the converter. . . . It did not hold two full charges. . . . I never knew of the ladle being used for mixing purposes. If such was the practice I would have known it. . . . The capacity of the ladle was so small and the size of the pool of metal, when there was a pool, was of such varying size that I do not see how any mixing could be accomplished. . . . Q. 18. When was this ladle drained, and when would there be some metal left in the handle? A. There would be no regularity in the process. The rate at which the converters take the metal does not always correspond with the rate at which the cupolas are melting."

It is true the Jones patent is a simple one, and in the light of present experience it seems strange that none of the expert steel makers, who approach so near the consummation of their desires, should have failed to take the final step which was needed to convert their experiments into an assured success. This, however, is but the common history of important inventions, the simplicity of which seems to the ordinary observer to preclude the possibility of their involving an exercise of the inventive faculty. The very fact that the attempt which had been made to secure a uniformity of product, seems to have been abandoned

after the Jones invention came into popular notice, is strong evidence tending to show that this patent contains something which was of great value to the manufacturers of steel, and which entitled Jones to the reward due to a successful inventor.

2. The phraseology of the patent and the amendments introduced in the Patent Office are made the subject of much criticism, apparently for the purpose of showing either that Jones did not understand what he had invented, or that the specification did not contain "such full, clear, concise and exact terms as to enable any person skilled in the art . . . to make, construct, compound and use the same." Rev. Stat. sec. 4888. If these criticisms are not altogether clear, they are pressed upon our consideration with an earnestness which challenges a careful consideration of the history of this patent in the Patent Office.

In his first application the patentee stated that "the primary object of the invention is to provide means for insuring uniformity in the product of a Bessemer steel works or a similar plant, in which the metal from more than one blast furnace is employed to charge the converters. The product of the different furnaces, or of the same furnace at different times, varies in quality, . . . so that . . . the manufactured steel lacks uniformity in grade. To avoid this I employ suitably constructed reservoirs or vessels, into which the molten metal from the blast furnaces is put, the vessels being of proper capacity to hold a considerable charge of metal from a single furnace, or from a number of furnaces, and being adapted to retain the metal in a molten state for sufficient time to enable the different charges to mix and become homogeneous. . . . Such apparatus possesses also an additional advantage in that it makes it possible to dispense with cupola furnaces for remelting the pigs preparatory to charging the converters. The metal may be tapped from the blast furnace into ladles or trucks, carried to and discharged into the mixing reservoir or vessel, and there retained in a molten state until sufficient metal has been accumulated to charge the converters."

It is true that he subsequently states, as observed in the opinion of the Court of Appeals, that "the main feature of my pres-

ent invention is the method of storing successive charges of molten metal in a receptacle before using it in converters or otherwise," and hence it is insisted that the main feature of the invention was storage and not mixing; but the subsequent words of the same sentence, "drawing portions of the metal from the receptacle without at any time removing the whole thereof, and from time to time replenishing the receptacle with fresh charges, which mingle with the residual molten metal already therein, for the purpose of rendering the successive tappings of metal uniform in quality," convey a wholly different impression, and show that the primary object was that of mixing different charges for the purpose of securing uniformity in the metal when discharged into the converters. This appears still plainer in the claim appended to this specification: "The process hereinbefore described, which consists in storing charges of molten metal in a covered receptacle provided with a heat-retaining lining, removing portions only of the molten contents of the said receptacle, without entirely draining or emptying the same, and successively replenishing the receptacle with fresh additions of molten metal, whereby the character of the several charges of metal so treated is equalized; substantially as described." The word "storing" was evidently used in the sense of pouring the metal into the reservoir or mixer, as essential to the maintenance of a dominant pool therein. The application was evidently considered as not sufficiently differentiating this from former patents, and was rejected upon reference to the Witherow patents and to Kirk's Founding of Metals. Certain slight amendments were then made in the specification; the claim verbally changed, and an argument submitted to the effect that the purpose of the Witherow patent was "to receive and store the molten metal for the purpose of preventing the detention, incident to the necessity of discharging the contents of the blast furnace when there is no converter ready to receive it;" whereas the distinctive idea of the Jones patent was "to have a receptacle capable of holding metal in a molten condition into which, metal, it may be from several blast furnaces, is run from time to time, and from which metal is drawn for treatment in the converters, or otherwise as required."

This was evidently considered as still too indefinite, and the application was thought to be fully met by the description in Kirk's Founding of Metals, and was rejected.

Thereupon the application was again amended, its present phraseology adopted and the distinguishing feature of the invention more clearly set forth. Without further suggestion the application was allowed and the patent issued.

It is true the process is described in the second claim as a "method of mixing molten metal," from which we are asked to infer that it was intended to include the products of cupola as well as of blast furnaces, whereas in the very first sentence of the specification it is stated that "in practice it is found that metal tapped from different *blast furnaces* is apt to vary considerably in chemical composition. . . . Especially is this so in the process of refining crude iron from the smelting furnace and charged directly into the converter without remelting in a cupola, and, although such direct process possesses many economic advantages, it has on this account been little practiced." The first claim of the patent is expressly for an improvement in the art of refining iron directly from the smelting furnace. The second claim apparently extends to the art of mixing all molten metals, but the specification, taken in connection with the disclaimer, which describes a process designed to dispense with the use of cupolas, shows that it was intended to include metal tapped from blast furnaces and was probably intended to be limited to that. Whether the claim would be void if construed to include cupola metal, it is unnecessary to consider. It clearly includes metal from blast furnaces, and is not rendered void by the possibility of its including cupola metal. The claim of a patent must always be explained by and read in connection with the specification, and as this claim clearly includes metal taken from blast furnaces, the question whether it includes every molten metal is as much eliminated from our consideration in this case as if it were sought to show that the word "metal" might include other metals than iron. Were infringement charged in the use of an apparatus for mixing cupola metal, the question would be squarely presented whether the claim had been illegally expanded beyond the specification.

Much ingenuity and many words have been expended in an endeavor to prove that the plaintiff and defendant, as well as the courts, differed widely in their construction of the patent and of what Jones was trying to accomplish. Upon the theory of the defendant the Circuit Court "did not attempt to construe the patent in any proper sense, but bent all its energies to wrest and torture the plain English of the patent into a meaning diametrically opposed to that which it bears on its face," and to make it appear that the great trouble at the time Mr. Jones conceived his invention arose, not from any lack of uniformity in the percentages of silicon and sulphur, but were solely the natural difficulties incident to abrupt variations in the percentage of silicon present; and that his statement that the trouble in the Bessemerizing operation, which was the thing Jones had in mind to obviate, was absolutely irreconcilable with the specification of the patent, because the sole object stated by Jones was to secure products, whether of Bessemer steel or otherwise, which would be practically homogeneous and substantially uniform in their contained sulphur and silicon, results which can only be obtained by mixing the iron to a substantial uniformity. Defendant further states its view of the case as follows:

"If, as a matter of fact, Mr. Jones at the time he applied for his patent, had in view not only the process described by him for securing uniformity in the admixture of silicon and sulphur, but also another process, similar to that now used by the plaintiff and defendant, and by means of which the operation of Bessemerizing iron was made, . . . without securing uniformity in the product, then . . . it is manifestly clear from his patent and from all the surrounding facts that he deliberately and carefully suppressed any disclosure of this invention in his specification."

One of the arguments that this was the case was that if Jones "believed the method of use by which abrupt variations in silicon could be avoided without securing uniformity in product, to be a patentable invention, there was even more reason for carefully suppressing all suggestion of such a mode of use in the patent for the manipulation *to obtain uniform products*, because the two processes are obviously alternative and inconsistent with

each other, incapable of being claimed in one application, and therefore disclosure might have worked a loss of a possible grant of the patent for the alternative mode of use."

It is true that its construction of the patent was pressed upon the courts by the defendant with great earnestness and elaborateness of detail, and appears to have created an impression of its soundness upon the Circuit Court of Appeals, but the Circuit Court did not seem to look upon it as the turning point of the case, nor do we regard it as at all decisive. It seems to assume that the second claim can only be met by evidence of absolute uniformity of product, whereas all that is claimed is a uniformity in the constituent parts of molten metal *preparatory to further treatment.* In other words, to make it fit for further treatment in the converters, without the necessity of remelting in the cupola furnaces. Or, as stated by the District Judge, "It is therefore plain that with a mixer thus operated, it is possible to have wide variations in the composition of the blast-furnace metal charges added, and at the same time the successive withdrawals for the Bessemer converter show quite small and gradual changes of composition. The heat of the detained mass is affected by the incoming charges from the blast furnace, but the heat of such addition, whether relatively high or low, must mingle with, be modified by and average with the larger and dominant mass."

With regard to this portion of the opinion, counsel for defendant observes:

"The judge of Circuit Court, having lost sight of the statutory requirements as to a full, clear and concise statement of the invention, and having persuaded himself that it was his judicial duty to find a way if possible to protect the Carnegie Company in his monopoly of what Mr. Gayley and his colleagues claim ought to have been the invention described in the patent, adopted the ingenious view that the patent was to be construed as though it disclosed and covered two inventions, one having for its object to obtain a product substantially uniform in its contained silicon and sulphur, and the other having for its object the improvement in the operation of Bessemerizing iron which is incident to an avoidance in the successive charges of abrupt variations in contained silicon."

We have not, however, been able to persuade ourselves that the two processes are so alternative and inconsistent with each other as to render them mutually destructive, or to justify counsel in charging the District Judge with an abdication of his judicial duty of deciding the case according to what he believed to be the law and the facts. We dismiss the subject with the simple observation that much more seems to have been made of it than it deserves, and that a reference to the second claim shows its object was to secure uniformity of the molten metal in its constituent parts preparatory to its further treatment, by which further treatment we are to understand the Bessemerizing process of converting metal into steel, and that any step in that direction would necessarily lead to an avoidance of abrupt variations in silicon and sulphur, while such avoidance of abrupt variations would in their turn only tend toward a greater uniformity of product.

Some criticism was made upon the action of the court in permitting a disclaimer of certain clauses in the specification, printed above in italics, which was made after the argument and upon the petition of the plaintiff, "that at the hearing of this cause it was taken by surprise by the argument of the defendant that the portions of the specification now disclaimed enlarged the scope of the invention of the said letters patent beyond what your petitioner believes to be the import of the claims thereof." Upon the hearing defendant seems to have insisted that certain portions of the specifications were broader than the second claim. Those parts of the specification therefore were disclaimed. As we had occasion to observe in *Sessions* v. *Romadka*, 145 U. S. 29, "the power to disclaim is a beneficial one, and ought not to be denied except where it is resorted to for a fraudulent and deceptive purpose." In that case the plaintiff was permitted to enter a disclaimer of all the claims but the one in suit, the patentee having included in the patent more devices than properly could be the subject of a single patent. In the case under consideration the disclaimer was not of a claim but of certain statements in the specification, which if retained might be construed to have the effect of illegally broadening the second claim. The first statement dis-

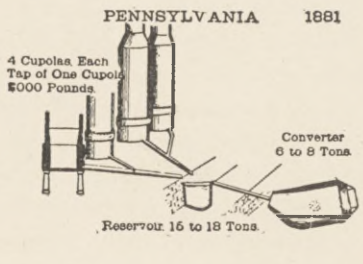
claimed was that the invention might be practiced by *merely* receiving a number of small portions of metal taken from different ladles, the mixing being performed *merely* by the act of pouring into the charging ladle. The use of the word "merely" ignored the steps embodied in the second claim, where the mixing is not performed by merely pouring together the several charges into a ladle, but by maintaining a permanent quantity of metal in the reservoir, to which charges were alternately added and from which they were withdrawn. The other clauses were intended to disclaim the casting of the metal into pigs. We think there is no force in the criticism that a disclaimer may not extend to a part of the specification, as well as to a distinct claim. *Hurlbut* v. *Schillinger*, 130 U. S. 456; *Schillinger* v. *Gunther*, 17 Blatch. 66; *Schwartzwalder* v. *New York Filter Company*, 26 U. S. App. 547. Had the purpose of the disclaimer been to reform or alter the description of the invention, or convert the claim from one thing into something else, it might have been objectionable, as patents can only be amended for mistakes of this kind by a reissue. But the disclaimer in this case appears to have been made to obviate an ambiguity in the specification, and with no idea of obtaining the benefit of a reissue. If the clauses had the effect of broadening the patent the disclaimer removes the objection. If they did not, the disclaimer could do no harm, and cannot be made the subject of criticism.

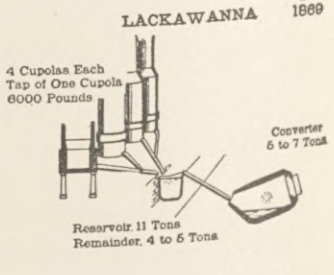
It is insisted, too, that there is no mention in the second claim of a dominant pool, and that the words, "removing portions only of the composite molten contents of the receptacle without entirely draining or emptying the same, and successively replenishing the receptacle with fresh ununiform additions," are satisfied by leaving a quantity of iron, however small, in the reservoir, and that it really includes nothing that was not well known before. It is true that neither the size of the reservoir nor the amount of metal to be left therein, after each discharge is made into the converter, is specified, but it is stated in the specification that this reservoir may be of any convenient size, "holding, say, one hundred tons of metal (more or less)," with the bottom of the discharge spout some distance above the bot-

tom of the vessel, "say, two feet in a hundred ton tank, and more or less according to the capacity of the vessel, the purpose of which is that when the metal is poured out of the spout a *considerable quantity* may always be left remaining and unpoured, and that whenever the vessel is replenished there may already be contained in it a body of molten metal with which the fresh addition may mix." Though the size of the reservoir and the considerable quantity left therein as a dominant pool might have been described more definitely, (but perhaps at the risk of an infringement being avoided by one using a receiver of a different size containing a different quantity,) we think it is impossible to read this patent without gathering from it the dominant idea of Jones not to describe a reservoir for storage, with or without incidental mixing, but to provide a receptacle the main, if not the sole, object of which is to preserve therein a large and constant quantity of molten iron as a basis for a gradual unification of the product of several blast furnaces, or of several casts from the same furnace, and herein distinguishing it from all prior inventions. The specification of the patent is not addressed to lawyers, or even to the public generally, but to the manufacturers of steel, and any description which is sufficient to apprise them in the language of the art of the definite feature of the invention, and to serve as a warning to others of what the patent claims as a monopoly, is sufficiently definite to sustain the patent. He may assume that what was already known in the art of manufacturing steel was known to them, and, as observed by Mr. Justice Bradley, in *Webster Loom Co.* v. *Higgins*, 105 U. S. 580, 586, "He may begin at the point where his invention begins, and describe what he has made, that is new, and what it replaces of the old. That which is common and well known is as if it were written out in the patent and delineated in the drawings." We think this second claim not only describes with sufficient clearness the purpose of the patent to secure uniformity of the molten metal in its constituent parts preparatory to further treatment, but read with the specification sufficiently describes the process by which this uniformity may be secured, by always preserving in the reservoir a sufficient quantity of molten metal to secure such uniformity

of product. It is undoubtedly true that the storage feature appeared more prominently in the specification which was first rejected upon the ground that it was not sufficiently differentiated from prior patents, than in that which was finally accepted, but there is nothing to indicate that Jones did not understand from the first that the distinguishing feature of his invention was the preservation of a considerable quantity of iron in the reservoir.

3. The question of *infringement* only remains to be considered, and, in the view we have taken of the prior devices, presents no serious difficulty. The Court of Appeals was of opinion that "the defendant's reservoir, or accumulating ladle complained of, is the same in principle as one which has been in use at the Cambria works ever since Bessemer steel was first manufactured there, with only this difference, that at first it was used at cupola, now at furnace." If such were the fact, of course defendant would not be open to the charge of infringement. Undoubtedly it has the right to make use of all prior devices, and particularly such as had been used at its own manufactory. In order to understand the device made use of by the defendant prior to the Jones invention, we reproduce herewith two small but easily understood cuts, taken from its brief, showing the character of the ladle known as the Bessemer Intermediate ladle, used by it and generally by all American mills manufacturing steel by the Bessemer process.

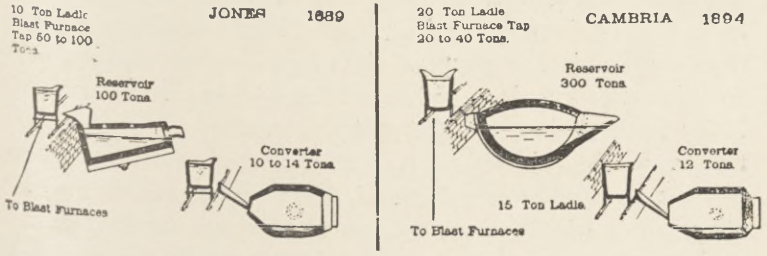




It appears elsewhere in the testimony that the intermediate reservoir or ladle was from fifteen to eighteen tons capacity, and the converter from six to eight tons; that the molten metal

was tapped from the cupolas into the reservoir and withdrawn for the converter, and as the intermediate ladle held considerably more than the amount of metal necessary to charge a converter, there was some incidental mixing; but the main and perhaps the only purpose of the reservoir was for storage, and that if any quantity of metal were left in the reservoir it was by accident rather than by design. It will be noticed, too, that the reservoir was open at the top. It does not appear to have been made use of in carrying out what is known as the direct process, the difference being that the cupola practice furnished a metal for the Bessemer converter that was uniform in composition, or practically so, while the direct metal was largely variable in composition.

The testimony further shows that, after the installation of the Jones mixer at the Edgar Thomson works, Mr. Morgan, the defendant's mechanical engineer, visited and inspected these works and obtained information as to their practical operation, and was advised by the superintendent as to the location and proper size of the mixer and its contiguity to the converters. Mr. Morgan does not deny this conversation, although he qualifies it by saying that he thought the Jones apparatus had grave defects. Shortly after this visit, and in the latter part of 1895, defendant installed an apparatus of its own for the operation of the direct process, which is herewith produced upon a small scale, and in comparison with the Jones process. It consisted of a covered refractory lined and turtle-shaped vessel of about



three hundred tons capacity, arranged to tilt, and having a spout at either side for receiving and pouring out the metal. The metal was brought to the mixer and poured in at one end, and

through a spout on the other side, was poured into a ladle, which supplied the Bessemer converters. The metal was supplied both from blast furnaces and cupolas, the former furnishing about two thirds, the latter about one third of the metal used; but the metal from the cupola system was delivered by a ladle to the converter direct, and not through the reservoir. The metal from the blast furnace entered the reservoir in about fifteen-ton ladle lots, and was withdrawn in approximately twelve-ton lots. The chief engineer of the company states that "in accordance with the natural way of using the reservoir, it is ordinarily kept well filled up." That in the practical operation of the mixer or reservoir a large quantity of iron was retained for mixing purposes is evident from the fact that a chalk mark was made on the side of the mixer, which was not allowed to run below the floor, as a guide to the men who rotated or tilted the mixer, since, if the mark went below the floor and out of sight, they could not tell how much iron was left in the mixer. Under these instructions not to allow the chalk mark to go below the floor there was retained in the mixer about 175 tons of molten metal, amply sufficient for the purposes stated in the Jones patent. Its principle of construction was similar to that of the Jones mixer, and its operation identical. Indeed, defendant's engineer himself says: "With the exception of additions of cupola metal I do not know that there is any material difference between our practice and that described in the second claim" of the Jones patent. We agree, in the opinion of the Circuit Court, that "it is quite clear, in view of these facts, that infringement takes place. That initial mixing rather than storage is the purpose of the reservoir is shown by the fact that the cupola metal is not stored, but served direct in ladles to the converter plant. And that the homogeneous mixture, once obtained, is used as a dominant pool to produce a graduated, non-abrupt product, is shown by the chalk line minimum limit of 175 tons. With such a permanent dominant pool in constant use, we are clear that respondent's practice infringed the second claim of the Jones patent in both letter and spirit."

If the contents of the mixer used by defendant were allowed

habitually to become empty in carrying out its process, there would be no infringement; but all the evidence contradicts this. In the Jones practice this *cannot* be done, since the mixer cannot be tilted beyond a certain point. In the defendant's mixer it *can* be done, but is *not*, since the operator is not allowed to tilt it beyond a certain point gauged by a chalk mark. This seems to be the only foundation for the charge so frequently reiterated, and in varying language, that the methods in use before the Jones process deprived that process of all novelty, and if novelty existed it was by reason of the varying modes of executing such methods; the inference from this being that as the Jones method was old, it could only be treated as new because of the conduct of individuals in applying the method and their intentions, and that this reduces itself to the proposition that the Jones patent rests upon the mere intention or minds of persons. If we understand this argument correctly, it is that the prior method contemplated storing only, and the mixing was but an incident, while the Jones patent contemplates mixing as its main object and storage only as an incident.

This proposition that the application of this patent depends upon the individual intent of the operator overlooks the essential nature of a process patent. The directions and specifications of such a patent are addressed to those engaged and skilled in the art. It professes to disclose a method of procedure, not the particular instrumentality that may be employed. It may be, as suggested, that one person may, and in ignorance of the patented method, make use of a reservoir *merely as such*, and without any desire to avail himself of the patented process; but such a fact would not deprive the discoverer of the process of the protection of his patent. Such a supposed case might present a question of fact for a court or jury, and if it were made to appear that the party charged with infringement had, as in this case, changed the instrumentalities used by him after a new method had been disclosed, and particularly if he had for the first time used a special device necessary to that process, a jury might well refuse to believe and find that the defendant was only following the old methods of procedure, and not seeking to avail himself of the plaintiff's invention.

But we think the difference in the two processes may be illustrated by a very simple example: Let us imagine a reservoir containing, say, three quarts, and filled with one quart each, of three liquids of different constituent parts, and withdrawn for further treatment at the rate of one or two quarts at a time. Necessarily there would be some incidental mixing, but it would occur at once that the main object of the reservoir was a retention of a sufficient quantity of the mixture to supply the receptacle for further treatment, and if no necessity existed for a longer retention of the liquid in the reservoir, it could be very quickly emptied by two discharges into the receiving vessel. Now, let us substitute for this reservoir a cask of, say, 60 quarts, into which the liquids of different constituent parts are poured in at one end from a multitude of receptacles, and discharged at the other end after remaining a certain time in the cask, and that this cask could not be tilted so far but what a quantity of liquid would be left within it amounting, say, to half its capacity. Now, if there be no distinction between these two operations there would be little left to the Jones process, the very vitality of which consists in the size of the cask relative to the ladles and the mixing of the various liquids poured into it before they are withdrawn.

If, as insisted by the defendant and found by the Court of Appeals, the reservoir now used is the same in principle as the one which had been in use at the Cambria Iron Works ever since the Bessemer steel was first manufactured there, and the same were adequate for the purposes of the direct process, why was any change made? Therein we think the Court of Appeals made its most serious error. The defendant had an unquestioned right to manufacture steel, as it had been accustomed to do; but instead of that it abandons the Bessemer uncovered ladle of twelve to eighteen tons, and adopts a covered refractory lined reservoir of 300 tons capacity, and makes use of it, not as before, for the storage of *cupola* metal, but for the mixing of *blast furnace* metal according to the direct process. This, too, was done immediately after Mr. Morgan's visit to plaintiff's works.

It is true that with the growth of the production of furnaces

from fifty tons a day in 1872 to four or five hundred tons in 1895 all apparatus would naturally be increased in size; but why was the open reservoir theretofore used for cupola metal provided with a cover and enlarged in its capacity from fifteen to three hundred tons—twentyfold, while the converter was little more than doubled in size? Why was it so operated that 175 tons were left in the mixer as a dominant pool, if no infringement were contemplated? In the face of these facts the question so earnestly pressed by the defendant, whether the "method of mixing molten metal," covered by the second claim, was one for securing a substantial homogeneous composition of metal, to the end of getting a practically uniform product, or was one simply for the purpose of preventing sudden variations in the compositions of successive small portions drawn from the reservoir, without attaining substantial uniformity, loses most of its significance. We do not know how the process can be better described than in the specification itself: "To provide means for rendering the product of steel works uniform in chemical composition." The variations in such composition are said to be "particularly in silicon and sulphur," and the process to be one of mixing, whereby the particles of metal "are diffused or commingled thoroughly among each other, and the entire charge is practically homogeneous in composition, representing in each part "an average of a variety of uniform constituent parts, all the charges of the converter from time to time will be substantially uniform." This, denuded of all hypercriticism, is the object of the Jones invention, which seems to be the only one yet devised for carrying on what is known as the direct process. If it be true that this process cannot be carried on without infringing the Jones patent, he is certainly entitled to a monopoly of the invention. If it can be, then every method theretofore known for carrying on such process was open to the defendant. But we think the change from the Bessemer intermediate label to the Jones mixer was a radical one, and was made for a purpose. That purpose was clearly the adoption of the Jones process.

It is true that before the facts were fully ascertained, a stipulation was signed to the effect that the "amount of molten

metal in said mixer (defendant's) varies from nothing to its full capacity, depending on the supply and demand, the supply being generally sufficient to keep the mixer more than half full of molten metal, which metal remains molten therein." It appears, however, that upon the facts being more fully ascertained, notice was given that in so far as the stipulation varied from the facts appearing in the testimony of defendant's expert, it would be repudiated, and particularly that portion wherein it was said, "that the amount of the molten metal in the mixer varies *from nothing* to its full capacity." As it clearly appears from the mouths of defendant's own witnesses (notably Mr. Morgan) that, in the usual operation of the mixer, the ordinary amount of metal kept in the reservoir was more than one half its capacity, we think that plaintiff's case should not be prejudiced by this stipulation. Stipulations are ordinarily entered into for the purpose of saving time, trouble or expense, and in this case it recites that "as defendant's counsel is expected to sail for Europe in a few days and may not be back for about four months, it is therefore stipulated by counsel for both parties, to save delay, as follows." But while the stipulation is undoubtedly admissible in evidence it ought not to be used as a pitfall, and where the facts subsequently developed show, with respect to a particular matter, that it was inadvertently signed, we think that upon giving notice in sufficient time to prevent prejudice to the opposite party, counsel may repudiate any fact inadvertently incorporated therein. This practice has been frequently upheld in this and other courts. *The Hiram*, 1 Wheat. 440; *Hurt* v. *Hollingsworth*, 100 U. S. 100, 103; *Malin* v. *Kinney*, 1 Caines, 117; *Barry* v. *Mut. Life Ins. Co.*, 53 N. Y. 536.

In short, we are clearly of opinion that the reservoir now in use is used for entirely different purposes from the intermediate Bessemer ladle formerly employed; that the process carried on with it is identical with the Jones invention, and that its primary, if not its sole use, is for mixing purposes, with necessarily incidental storage, while the Bessemer intermediate ladle was solely used for storage, with little, if any, thought of the advantages to be gained by an incidental mixing.

Opinion of the Court.

Discarding now all that does not bear directly upon the validity of the Jones patent, and dropping all superfluity of words, let us determine exactly what Jones has contributed, if anything, to the art of making steel. He undoubtedly found reservoirs of small size in use in which were poured from receiving ladles enough molten metal to fill them, and from which a sufficient amount was discharged to supply a converter, usually about half the size of the reservoir. But in all these cases the fact whether any particular amount of metal was left in the reservoir was treated as a matter of indifference or accident, although there must have been necessarily some incidental mixing; and probably the metal as it ran into the converters approximated more nearly to uniformity than when it ran into the reservoir. The former methods were adequate for cupola metal, uniformity in which had been largely secured by a careful selection and breaking up of the pigs, but it had not proved a success for blast furnace metal, except that it had been used to a very limited extent in foreign countries where the peculiar character of the iron ore had rendered it possible to carry on a direct process, although apparently by methods quite other than those employed by Jones. The principal step employed by Jones was to magnify the capacity of the reservoir about twentyfold, provide it with a cover, and to arrange that it should not be tilted beyond a certain point, in order that a "considerable quantity" of molten metal might be retained in it for a sufficient time to accomplish a pretty thorough mixing, but little change having been made in the meantime in the size of the receiving ladles and converters. As the reservoir was designed to hold a large quantity of metal for a considerable time it must have been covered to obviate the contents being crusted over or skulled.

As soon as this method had proven to be successful by employment at the Edgar Thomson works, and had become so well known as to attract the attention of other manufacturers of steel, it found a ready sale, was adopted by all the leading manufacturers in this country, and was sold for use abroad for about $50,000.

It should be borne in mind that this process was one not

accidentally discovered, but was the result of a long search for the very purpose. The surprise is that the manufacturers of steel, having felt the want for so many years, should never have discovered from the multiplicity of patents and of processes introduced into this suit, and well known to the manufacturers of steel, that it was but a step from what they already knew to that which they had spent years in endeavoring to find out. It only remains now for the wisdom which comes after the fact to teach us that Jones discovered nothing, invented nothing, accomplished nothing.

We cannot better conclude this opinion than by the following extract from the opinion of Mr. Justice Bradley in *Loom Co.* v. *Higgins*, 105 U. S. 580, 591: "But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. . . . Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

The decree of the Circuit Court of Appeals is therefore reversed and the case remanded to the Circuit Court for the Western District of Pennsylvania for further proceedings consistent with this opinion.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE HARLAN and MR. JUSTICE BREWER, dissenting.

To elucidate the reasons which constrain me to dissent, it is deemed essential to give a mere outline of the processes by which iron and steel were made prior to June 4, 1889, when the patent in suit was issued, in so far as such processes in some aspects con-

cern the manufacture of steel by what is known as the Bessemer method, to which the court now declares the patent in suit solely relates.

Into the stack of a smelting furnace iron ore, with suitable fluxing material and fuel, was introduced. In the operation of the furnace the ore was reduced to a metallic state by the oxidizing action of carbon or gas containing carbon. This metallic iron melted in the lower part of the furnace, taking up a proportion of carbon and other ingredients, dropping to the bottom of the hearth as molten pig iron. The earthy impurities combined with the flux, and were also melted and descended into the hearth, resting upon the top of the molten metal. The molten metal was drawn from the hearth from time to time by tapping, and the molten impurities, combined with the flux, forming a cinder, were also drawn from the hearth at a higher level. As the molten iron was tapped it was run out into molds and came to be known as pig iron or pigs. These pigs were not of uniform composition, because of the varying quantity of the constituents contained in the ore and the chemical changes wrought by irregularities incidental to the operation of the furnace.

To make foundry castings, pigs were selected, broken up, charged into a cupola furnace, reduced to a molten state, and the liquid was drawn off into a receiving ladle. From this the quantity desired was tipped into a smaller vessel, known as a casting ladle, and was poured into the molds. Where more than one cupola furnace was employed each was tapped and the metal poured through a groove into a receiving ladle, common to the furnaces, where it was held for use, and drawn as required into a casting ladle and carried to the molds, as already mentioned.

In 1855 and 1856, Sir Henry Bessemer obtained various patents covering his discovery for producing malleable iron and steel by forcing currents of air through molten iron. The appliance described was a refactory lined vessel, called by Bessemer a converting vessel, which came to be designated as the converter or the vessel. Without going into detail, it suffices to say that, for various reasons the method of Sir Henry Besse-

mer proved not to be as advantageous as had been expected. Indeed, it was not until Mushet patented a method of decarbonizing iron by completely blowing it and adding ferromanganese or speigel-eisen in a molten state that the difficulty of producing steel was solved, and the process of Sir Henry Bessemer was rendered practical. Despite, however, the fact that Mushet's discovery was of immense value and rendered Bessemer's conceptions a commercial success, Mushet allowed his patent right to lapse through neglect to pay the requisite fees in the third year; and (to quote the language of the author of the article on Iron, contained in Encyclopœdia Britannica, 9th ed. vol. 13, p. 342) "in consequence his name is all but forgotten in connection with his improvement on Bessemer's own process, the combination being ordinarily termed 'Bessemerizing.'"

In the manufacture of steel by the Bessemer-Mushet process two methods were followed: one termed the indirect, the other the direct. In the indirect, pigs were charged into a reverberatory furnace, for which, at a later date, a cupola furnace was substituted. In such furnace the pigs were melted and run into ladles or reservoirs, and thence the molten iron was conveyed to the converter for the necessary treatment. Without attempting to give accurately the variations in the size and consequent capacity of cupola furnaces and converters, it is unquestioned that the quantity of molten metal which could be drawn at a single tapping from the cupola was usually not adequate to supply a full charge to the converter. It followed that ordinarily more than one cupola furnace was used to supply a converter, and that the tappings from such cupolas were drawn into a common reservoir, or ladle, and there stored until required to be carried to the converter. Indeed, irrespective of the necessity of storing the tappings, growing out of the difference between the capacities of the vessels in question, such storage was additionally required in order that the operation might be continuous, in case of delay resulting from accident to the converter or otherwise.

In the direct process the capacity of blast furnaces greatly exceeded that of cupola furnaces. The molten iron was tapped directly from the blast furnace into a number of receiving reservoirs or ladles, and carried for treatment to the converter.

WHITE, J., FULLER, C. J., HARLAN and BREWER, JJ., dissenting.

On October 31, 1888, William R. Jones made application for two letters patent, one stated to be for a new and useful improvement in apparatus "for mixing molten pig metal," the other for a process declared to be "a new and useful improvement in methods of mixing molten pig metal." The application for the first or apparatus patent was several times rejected, and, after various amendments, was finally allowed. This patent may be dismissed from view, as it is not involved in this controversy. The first application for the process patent—which is the patent under consideration in this case—was rejected. Thereupon a new and amended application was presented. This was also rejected, when a second amendment was made, and the application was finally allowed.

As the opinion of the court has reproduced the specifications and claims of the patent, it is unnecessary to repeat them in detail, and therefore a mere outline of them is now given. The patent was entitled "Method of Mixing Molten Pig Metal." The *primary* object of the invention was stated to be "to provide means for rendering the product of steel works uniform in chemical composition." It was also stated that: "My invention is not limited to its use in connection with converters, since similar advantages may be obtained by casting the metal from the mixing vessels into pigs for use in converters, puddling furnaces, or for any other uses to which pig iron may be put in the art." It was further stated that "My invention may be practiced with a variety of forms of apparatus—for example, by merely receiving in a charging ladle a number of small portions of metal taken from several ladles or receiving vessels containing crude metal obtained at different times or from different furnaces, mixing being performed merely by the act of pouring into the charging ladle, and other like means may be employed."

It was, however, declared that it was preferable to use the device covered by the apparatus patent, and a description of the same was set out. That device may be thus described: It consisted of a covered tilting tank of large size, "holding, say, one hundred tons of metal (more or less,)" lined so as "to retain the heat of the molten contents of the vessel and to pre-

vent chilling thereof," with receiving and charging spouts, a gas-heating appliance contained in the discharging spout, and so constructed that, after being fully charged with molten metal, drawn from the furnaces into ladles and poured into the reservoir, as the metal was poured out for use a considerable residue would remain in the reservoir to mix with an incoming charge.

The patent embodied two claims which read as follows:

"1. In the art of refining iron directly from the smelting furnace, the process of equalizing the chemical composition of the crude metal by thoroughly commingling or mixing together the liquid metal charge and subsequently refining the mixed and equalized charge, substantially as and for the purposes described.

"2. In the art of mixing molten metal to secure uniformity of the same in its constituent parts preparatory to further treatment, the process of introducing into a mixing receptacle successive portions of molten metal ununiform in their non-metallic constituents, (sulphur, silicon, etc.,) removing portions only of the composite molten contents of the receptacle without entirely draining or emptying the same, and successively replenishing the receptacle with fresh ununiform additions, substantially as and for the purposes described."

On December 2, 1895, the Carnegie Steel Company, Limited, which had acquired full title to the Jones patents, commenced the present suit against the Cambria Iron Company, for an alleged infringement of the foregoing process patent. The defences made by the answer were substantially a denial of infringement, and an averment of want of patentable novelty.

After the evidence for the defendant was all in and several witnesses had been examined in rebuttal, the complainant, on March 30, 1897, stated "that at the hearing of the cause he will urge infringement of the second claim only of the patent in suit." At the close of all the evidence the complainant filed what is termed a "Petition for Disclaimer," praying that the court would receive in evidence a certified copy of a disclaimer of portions of the specifications, which on that day had been sent to the Patent Office for filing. The trial court admitted the disclaimer in evidence. The portions of the specifications

covered by the disclaimer are printed in italics in the patent as reproduced in the opinion of the court. The disclaimer need not be further noticed at this time.

It was shown beyond question that in November, 1895, the defendant had erected at its works a reservoir of the capacity of about 300 tons, for the storage of molten metal drawn from its blast furnaces, the metal so stored being held in the reservoir for the purpose of treatment in the converters. This reservoir was described by a witness in the following condensed manner: "It was cylindrical in shape, with slightly convex ends, and in turning (for the purpose of pouring out the metal) it revolves upon the center of the cylinder. It is supported upon cradles of rollers and the motion is imparted to the reservoir by hydraulic cylinders." As this cause, as already stated, does not involve the Jones apparatus patent, no question of infringement of the mechanical device embraced in such patent can possibly arise. In this reservoir the molten metal as tapped from the furnaces was stored continuously and the reservoir was drawn upon with like continuity to supply molten metal for treatment in the converters. Whilst it is not asserted that the use of the reservoir, as just stated, caused the metal stored therein to become uniform in its chemical constituents, it is conceded that the method pursued counteracted the inconvenience of sudden variations in the metal as drawn for converter purposes.

There is controversy, however, whether the defendant, in reservoiring its molten metal, irrespective of the supply and demand, intentionally retained in the reservoir a considerable residuum. From the view taken by me, however, it is unnecessary to pass on this contention, since the principles deemed by me applicable to the cause will be wholly unaffected, even if it be conceded that the defendant in operating its reservoir, in filling it with molten metal and in drawing the same off for use in the converter, designedly held in the reservoir a considerable residuum of molten metal in order that the metal which was subsequently charged into the reservoir might commingle with that retained.

The cause was decided by the Circuit Court in favor of the

complainant. The court held: That the second claim of the patent referred alone to metal direct from the blast furnace intended to be Bessemerized in a converter, and that the object was, not the obtaining, by mixing, a molten metal substantially uniform in its chemical constituents, but the avoidance of abrupt variations between the various charges supplied to the converter. The patent was construed as not contemplating the mixing of batches of metal, that is, the filling up of the apparatus and a drawing down to a "residue" before replenishing. The gist of the Jones idea was stated to be "the creation and maintenance of a great pool of metal between the blast furnaces and converters, through which all the incoming and outgoing metal must pass," by which means abrupt variations were prevented, although neither a uniform molten metal nor a uniform product was thereby obtainable. Indeed, the court said: "In Jones, uniformity is a non-essential; in fact, a non-attainable attribute of product, and is a necessary non-sequence of material used."

Whilst the court found that reservoiring was well known in the art at the time the Jones patent was obtained, and that mixing necessarily resulted from such reservoiring, it held that the Jones method was patentable, because the reservoiring known to the art contemplated storage, and not the prevention of abrupt variations; that although a mixing of the metals was of course the inevitable result of the reservoiring, such fact did not preclude the validity of the Jones patent, because prior to its grant the mixing arising from reservoiring was incidental to storage, whilst under the Jones method the storage was incidental to the mixing. The court said:

"Now that mixing of some character took place in the ladle during these operations, that where it took place the resultant was a homogeneous average of all constituent ingredients contained, are facts to gainsay which would be to question nature's laws; but the indisputable fact remains that such mixing was accidental, eccentric and non-systematic, and, therefore, not of a systematic, regular, functional type or for a systematic, functional purpose."

A decree was entered reciting that the patent in question was valid as to the second claim thereof; that the defendant,

"by reason of the use of a certain method of mixing molten pig metal, as in the said complainant's bill set forth, has infringed the said recited letters patent as to the second claim thereof, and has violated the exclusive rights of the said complainant thereunder." It was adjudged that recovery be had of the gains and profits made by the defendant and the damages sustained by complainant, and a master was appointed to ascertain the amount of such gains, profits and damages. The defendant was, in general terms, enjoined from any further infringement of the second claim of the letters patent and of the exclusive rights of the complainant thereunder.

An appeal was taken to the Circuit Court of Appeals. That court held that the second claim of the patent did not cover the retention in reservoiring of a considerable residuum, even though the same was designated as a dominant pool, and if it did that the method was not patentable in view of the state of the art, and that the proceedings in the Patent Office demonstrated that this was in effect conceded by Jones. It was decided that the defendant had the right to reservoir its molten metal, and that its method of doing so did not infringe the patent. The court decided that the disclaimer was not warranted by the statute, but that in any event it was ineffective to alter the true meaning of the patent. Thereupon the decree of the Circuit Court was reversed.

This court now reverses the decree of the Circuit Court of Appeals, adopts the views of the Circuit Court, and in effect affirms the decree of that court. The court expressly upholds the theory of a dominant pool, and decides that the Jones patent related, not to the obtaining of uniform molten metal by mixing in a reservoir, and a resultant uniform product, but solely to the procuring by means of reservoiring, molten metal which would not abruptly vary in its chemical constituents when drawn from the reservoir for use in a converter. The opinion of this court now, as did that of the Circuit Court, expressly concedes that reservoiring of molten metal was well known in the art at the time the Jones patent was applied for, and that mixing was the inevitable result of such reservoiring, but it is decided that this fact did not operate to deprive the Jones

method of novelty or to relieve the defendant from the charge of infringement.

My mind is unable to assent to the construction which the court affixes to the patent, and as it is conceded that the method used by the defendant does not infringe, unless the patent has the import which the court has given to it, the reasons for my dissent would perhaps be most directly made manifest by stating what seems to me to be the true construction of the patent. Doing so, however, is for the moment pretermitted for two reasons: 1. Because to my mind it seems that even if it be granted, *arguendo*, that the patent is susceptible of the construction which the court has placed upon it, on the face of the opinion, the conclusion reached is wrong; in other words, the opinion of the court to me seems self-destructive. 2. Because if the concession of the court be accepted, that reservoiring and mixing were well known in the art, then it follows, from a consideration of the record, that the patent, as construed by the court, was wanting in patentable novelty. That is to say, if the admissions of fact made in the opinion of the court are right, its conclusion is demonstrated by the record to be unsound.

Let me briefly advert to the opinions of this court and of the Circuit Court, to point out the reasons which constrain to the first proposition just stated. The Circuit Court concluded that the reservoiring of molten metal from cupola and blast furnaces for use in casting or in converters was well known to the art at the time the Jones patent was applied for. It also declared as follows: "That mixing of some character took place in the ladle during these operations; that where it took place the resultant was a homogeneous average of all constituent ingredients contained, are facts to gainsay which would be to question nature's laws." But this was held not to establish that at the time the Jones method was patented that method as now construed was known to the art or had been anticipated, because, in the prior practice, the mixing "was accidental, eccentric and non-systematic, and therefore not of a systematic, regular, functional type, or for a systematic, functional purpose;" that such mixing was incidental to storage, whilst in

the Jones method storage was incidental to mixing. This court approvingly adopts and elaborately restates these views.

Now, my reason does not enable me to conceive how, consistently with the view of the prior state of the art as to mixing and reservoiring which is admitted, the conclusion as to the patentability of the Jones method as construed can be sustained.

It would seem to be beyond question that, as it is held that the mixing resulting from the storage as practiced prior to the grant of the Jones patent, was the resultant, as stated, of a well-known law of nature, it must follow that the qualifying words "accidental, eccentric, non-systematic, and functional type or purpose" could only relate to the conduct of the persons who practiced the method prior to the Jones patent. This must be, unless it can be said that a well-known law of nature was accidental, eccentric, non-systematic and non-functional. The qualifications then applying, not to the law of nature, but to the conduct of parties, the reasoning must come to this: Although the method attributed to the Jones patent was well known to the art at the time that patent was issued, and hence it was intrinsically wanting in patentable novelty, nevertheless such method must be held to have embodied invention because the well known practice was carried out by individuals in a varying and irregular manner. But this is only to say that whilst the Jones method was old, it must be treated as new because of the conduct of individuals in applying the method and their intentions. And this reduces itself to the proposition that the Jones patent as construed covered the mere intention or mind of persons. The reasoning is equally applicable to the distinction which is asserted to exist between storing and the mixing incidental thereto, and mixing with incidental storage. The mere form of expression cannot create a distinction where none exists, or destroy a law of nature. As by me it cannot be conceived that various charges of molten metal can be stored in a common reservoir without resulting mixing, it follows necessarily, by the law of diffusion of fluids, the mixing is the secondary result arising from and created by the primary act of storage. It is impossible that the secondary force can be caused to be-

come the first and creating power by a mere collocation of words. If, then, the distinction has significance, as of course it must have, since the court makes it the basis of its decision, it can only mean this, that those who practiced the reservoiring of molten metal before the grant of the Jones patent mainly contemplated storage, and did not in their minds take into view the inevitable mixing, which would arise therefrom by a law of nature; therefore, in the minds of the persons so reservoiring the storage was the primary and the mixing the incidental consequence. But, on the contrary, as those reservoiring metal after the Jones patent must be considered to have contemplated, first, the advantages resulting from mixing, therefore, in their minds, the mixing is the principal and the storage the accessory. But this is only again to say that whilst the Jones method was old it is to be treated as new because it covered the intention of those who stored metal for the purpose of use.

Aside from this, it seems to me the concession that the placing of molten metal in a reservoir for use as required was well known at the time the Jones patent was issued, is inconsistent with the ruling now made, that the Jones patent validly embraced the retention in a reservoir of a mass of such metal, now described by the court as a dominant pool. The elementary import of the right to reservoir, as applied not only to molten metal, but other fluids, is the storing of the fluid for use as required, and this implies the drawing off as desired, the replenishing at will, and the keeping of such residuum or reserve supply as may be deemed best. It may not be doubted that to say that one who stores fluid for use is obliged whenever he draws any off to draw all off before replenishing, is to say that such party has not the right to reservoir. If it be meant by the court that the right to reservoir carries with it the right to draw off or to retain at will, unless the person reservoiring intends to retain a residuum for a particular purpose, the reasoning reduces itself again to the proposition that the Jones patent covers, not the process described therein, but the mind and intention of the individual who may exercise the right to reservoir molten metal. That is to say, my reason does not enable me to understand how the right to reservoir can be admitted,

and yet such right be at once denied by a construction of the patent which imposes qualifications on the right to reservoir, which, in effect, renders its beneficial exercise impossible. In other words, I fail to see how the exclusive right can be conferred to do the very thing which the court admits was well known at the time the patent to Jones was issued. The conflict which my mind perceives between the facts admitted upon the face of the opinion and its conclusion is expressly pointed out by the opinion itself, where it is said: "If the contents of the mixer used by the defendant were allowed habitually to become empty in carrying out its process there would be no infringement." That is, if in the use of its reservoir the defendant did not habitually retain a residuum there would be no infringement. But the admission that the occasional use of a residue would be no infringement concedes that the patent did not embrace the right to use a residue, for if it was covered by the patent it would be an infringement to avail of it even occasionally. Thus it must follow that the exclusive right which the court upholds is expressly declared to relate, not to the process, but to the mere habit of the defendant.

For the purpose of demonstrating the second proposition previously adverted to, let me now recur to the state of the art as depicted by the record, in order to point out that even if the Jones patent embodied the process which the court now attributes to it, that process was wanting in patentable novelty. In doing this, for convenience, the subject is thus divided: (*a*) the use of molten metal drawn from cupolas for foundry purposes, before the invention of Bessemer, as well as the foundry practice and the Bessemerizing practice by the indirect process after such invention and before the grant of the Jones patent; (*b*) the direct process of making steel from blast furnace metal prior to the grant of the Jones patent.

Foundry and Indirect Bessemer Practice Before the Grant of the Jones Patent.

1. *The Whitney Car-wheel Practice:* At the Whitney car-wheel works in Philadelphia, commencing in 1847, remelted pig metal from several cupola furnaces was tapped at intervals

into a large reservoir ladle, having a capacity of from twelve to fifteen tons. From this the molten metal was poured into charging ladles having a capacity of but six hundred pounds. A considerable residue was always maintained in the reservoir ladle. The principal purpose, as testified to by witnesses having personal knowledge of the subject, was to secure, as a consequence of the mixing resulting from the reservoiring, the production of a practically uniform product. Excerpts from the testimony of John R. Whitney contain a clear statement on the subject:

"When the (large) ladle was nearly full we began to pour from it into smaller ladles, each one of which held enough for one wheel; if it was an ordinary size wheel it held enough for one wheel, and if the wheels were smaller ones it held enough for two or three. As that drew the molten iron from the ladle and the iron continued to melt, the ladle was constantly being filled from the cupolas, and it was kept full until all the iron charged in the three cupolas was melted and the bottoms dropped. Then the iron was continued to be poured out of the large ladle until it was all used, these two methods making the uniform mixture; that is, we mixed it in a solid state, first by our charges and then in the molten state in the large ladle."

* * * * * * * *

"As the mixture (of selected iron) was charged into each cupola, as I have stated, it was made up of irons from various furnaces, some iron having one quality and some another. As it is melted in each cupola, it did not all melt at the same time, and if we had drawn it directly from the cupola into the small ladles from which we poured the wheels, one wheel might have been poured out of very hard iron, another wheel out of very soft iron, and so every shade between. There would have been no uniformity in our work. But by taking it from the three cupolas, all melting the same charges of iron, and collecting them in a molten state, the inequalities of melting were all overcome and a uniform product produced."

2. *The Wheeling Foundry Practice:* Kirk on Founding of Metals, 1875, thus described a foundry practice (italics not in original):

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"In melting iron I should recommend melting it hot, and as fast as possible. A quantity of molten iron should be kept in the cupola or in a large ladle, *so as to give the different brands of iron a chance to mix.* In most all the foundries at Wheeling, West Virginia, the cupolas are never stopped in from the time the blast is put on until the bottom is dropped. A large ladle is set on trestles in front of the cupola, in such a manner that the iron can run into it from the cupola and be poured out into the smaller ladles at the same time. The iron is all run out of the cupola as fast as it is melted, and is mixed in a large ladle. I think this is a good way of mixing irons. See alloys."

3. *The Altoona Practice:* At the Altoona wheel works of the Pennsylvania Railroad, from 1871, the cupola metal was designedly stored and mixed. The early reservoir ladle, of seven tons capacity, received the metal from two cupolas, and was thus described:

"A. The ladle turns on two trunnions and has chains leading from these trunnions down to the hydraulic cylinder shown on the drawing, one chain being wound in one direction on one trunnion and other being wound in the other direction on the other trunnion, and the two chains being connected at opposite ends of the piston rod."

In describing the regular way of working each day the witness said (italics not in original):

"In the first place each cupola is charged with about forty tons of metal. We charged about forty tons in each cupola; then after we have this done we put the blast on and begin to melt, and as soon as ever the bed in the cupola is filled up with molten metal we tap it out into the receiving ladle or reservoir, which fills the reservoir about one half full, then we stop the cupolas up again until the iron raises to the eyeholes, then they are tapped again, and this second tap generally fills the reservoir; then after the reservoir is full, we begin to pour the metal out into smaller ladles, then send it around to the moulders for pouring into the wheel moulds."

* * * * * * * *

"*The custom was to empty the receiving ladle about one half; then hold the remainder of iron in the reservoir until the cupo-*

las were ready to be tapped again; and after the reservoir is full we start and pour out into the smaller ladles again. The receiving ladle at all times is kept about one half full, and it is this full when we tap the metal into it from the cupola."

In the London Engineering for 1877, describing the practice pursued at Altoona, when a ten-ton receiving ladle was used, it was said: "It was found advisable to employ a ladle of so large a capacity, because by doing *so a more complete mixture of the different irons is effected* than would be the case if a smaller vessel were employed."

And the methods of using cupola metal for foundry purposes above described were early applied to making Bessemer steel by the indirect process. The following excerpt from the testimony of a witness clearly states the subject:

"A. L. Holley, who built the Troy works, and made his first conversion in 1865, introduced into this original plant tipping accumulating ladle resting on scales. This ladle was patented by Bessemer in 1869, English patent 566, alluded to in the previous answer, but apparently was an American invention. It was introduced in some form or other in all the American works, and was used almost always in duplicate, holding about two heats each, or many cupola tappings. In the last works built in St. Louis by Holley, in 1876, there were three of these ladles. In all American works these ladles were turning or tipping ladles, and were placed on scales to weigh the converter charges."

In 1877, describing the Vulcan works, a plant designed and erected under Mr. Holley's supervision, that gentleman said (London Engineering, vol. 23, 1877):

"The cupola ladles *ff* facilitate the distribution of metal to the vessels. *They form reservoirs which make the smelting department and the converting department independent of each other, within limits. This advantage was not appreciated fully until the large productions of the last few years were attempted.* Should any delay occur in casting, in preparing a vessel, or from any cause, the melting department keeps right on, for those three ladles will hold six vessel charges, which may be stored and converted when the converting department is ready for them. Cast iron will 'live' in these thickly lined ladles,

when covered with charcoal, for several hours. But it is necessary to put these ladles upon weighing machines, so *that either uniform vessel charges may be run out, or so that spiegel charges may be proportioned to such charges as are run out.*"

These ladles were variously named. Holley called them cupola ladles, interposed ladles and reservoirs. Hunt described them as "*intermediate* accumulating ladles."

A witness thus testified respecting the extent of use in this country of the receiving ladle, as follows:

"Early American steel works, commencing with Troy in 1864, Pennsylvania in 1867, Cleveland in 1868, Cambria and Union in 1871, North Chicago in 1872, Joliet and Bethlehem in 1873, Edgar Thomson and Lackawanna in 1875 and Vulcan in 1876, used receiving ladles, two in number, holding about two heats each, with the exception of Bethlehem, which used a single ladle on a car to mix taps from four cupolas, and Vulcan, which used three receiving ladles, holding two heats each. These ladles were used for storing and measuring the heats."

It is shown that from 1879 to 1888 the capacity of the accumulating ladle used at the works of the defendant was 28,000 pounds, and the converter charge 15,500 pounds, leaving 12,500 pounds in the ladle after a charge was supplied to the converter. The cupola taps of from 4000 to 6000 pounds passed into and filled such ladle.

Describing the mode of use of the ladle, Price, a witness, said:

"It was the custom to leave in the ladle an amount of metal equal to the difference between the converter charge and the full ladle capacity. . . . This ladle was again filled to its full capacity by retapping the cupolas. . . .

"The metal from the several cupolas necessarily varied from time to time considerably, both in chemical and physical conditions; at times the metal being such from one or two of the cupolas that in themselves they would be unfit for converter use. But by the means which was afforded by the intermediate ladle, the metal from this one, or the two, cupolas, would be averaged with the better adapted metal for converting from the others."

Speaking of the beneficial effects resulting from the use of the accumulating ladle at the works of the defendant, another witness (Cabot) said:

"The mixing of cupola metal at Cambria was accomplished by the tapping of a number of cupola furnaces into one large receiving ladle, from which converter charges were poured off, and the supply in this ladle again increased by further tapping. The practice at the Bellaire steel works was similar to that. The purpose was to obtain a supply of metal for the converters to equalize the different streams of metal from the different cupolas, and that was its effect. It accomplished that."

Yet another witness (Hunt) declared "it was recognized as one of the great features of the intermediate ladle, that it made the work so much more uniform in results from mixture or evening up of the various grades of pig iron used."

What distinction can be drawn between these methods and the patent as now construed? This court and the Circuit Court did put aside the Whitney method on the ground that it provided for obtaining absolute uniformity of product, while the Jones method was held to provide simply for avoidance of abrupt variations. Whilst it is clear that a method which had for its purpose merely the prevention of abrupt variations would not necessarily include one for the obtaining of a uniform product, how a method of reservoiring molten metal as such metal is produced in the furnace and drawing it off from the reservoir for use, which produced uniformity of product as the result of the reservoiring, can be said not to have embraced the prevention of abrupt variations, is to my mind absolutely unthinkable, since the greater must necessarily include the lesser. For, of course, as there cannot be abrupt variations in the constituent elements of a molten metal which is uniform, it must follow that a process of reservoiring which in the continuous operation of a plant will obtain a uniform metal must necessarily exclude abrupt variations in the quality of the metal.

The court now, in addition, disposes not only of the Whitney practice but of the others to which reference has just been made, by certain general considerations which it is held applies to them all. These considerations are, first, an assertion that al-

though all such practices included reservoiring and the incidental mixing arising therefrom, none of them contemplated mixing as a necessary and inherent attribute, and none of them embraced the retention in the reservoir of a considerable mass of metal, a dominant pool, as a part of the process of reservoiring; and, second, as the practices in question related to molten metal drawn from cupolas, therefore they did not establish that reservoiring and mixing were known to the art so far as concerns the molten metal drawn directly from blast furnaces.

The first proposition, it is submitted, is absolutely in conflict with the express and uncontroverted proof in the record, as manifested by the references which I have already made. Let me recur to the practices under consideration to show that this is the case. Take the Whitney practice as testified to by Whitney. After saying that withdrawals were not made from the reservoir until "it was nearly full," and describing the drawing off of the molten metal from the reservoir, he said:

"And (as) the iron continued to melt (in the cupolas) the ladle was constantly being filled from the cupolas, and it was kept full until all the iron charged in the three cupolas was melted and the bottoms dropped."

The witness thus clearly showed not only the constant retention of molten metal in the reservoir, but that such retention was recognized in the practice as essential to secure "desired uniformity of molten metal." I cannot see how there can be doubt on this subject, in view of the fact that the witness added:

"If we had drawn it (the molten metal) directly from the cupola into the smaller ladles from which we pour the wheels, one wheel might have been poured out of very hard iron, and another wheel out of very soft iron, and so every shade between. There would have been no uniformity in our work. But by taking it from the three cupolas, all melting the same charges of iron, and collecting them in a molten state, the inequalities of melting were all overcome and a uniform product produced."

Take the wheel foundry practice as portrayed in Kirk's publication. The statement is made that "A quantity of molten iron should be kept in the cupola, or in a large ladle, so as to

give the different brands of iron a chance to mix." Again: "The iron is all run out of the cupola as fast as it is melted, and is mixed in a large ladle." The publication thus clearly pointed out the advisability of retaining a residuum in the cupola or in the reservoir, for the purpose of better mixing.

Recurring to the Altoona practice, doubt on the subject seems to me to be in reason impossible. It is not gainsaid that such practice embraced reservoiring and mixing. It cannot, it is submitted, be affirmed that it did not embrace the retaining in the reservoir of a large residuum of metal for the express and necessary purpose of making the mixing more perfect, if the proof as to the practice pursued is not wholly disregarded. What was that practice? When the metal in the cupolas began to melt, it was drawn off into the reservoir until the reservoir was half full; then the withdrawals from the cupolas were stopped. But the metal in the half full reservoir was not, however, then made use of. Why was it not so used, although ready in the reservoir? The answer is, because it was deemed best, in order to obtain beneficial results from mixing, to hold the half full reservoir for a subsequent tapping therein from the furnace, of a quantity of molten metal sufficient to fill the reservoir. Only when the reservoir was thus filled did they commence to draw the metal therefrom, and when by such use the quantity in the reservoir was reduced to about one half, then the drawing off was stopped, so as to retain about the one half until there was a further replenishing from the furnace, and thus the operation continued. How, by a mere affirmation, it can be held that the process which has just been described did not contemplate the constant retention of a considerable residuum in the reservoir, is to my mind inexplicable. Let me quote again from the record the uncontradicted testimony as to the practice in question:

"The custom was to empty the receiving ladle about one half; then hold the remainder of iron in the reservoir until the cupolas were ready to be tapped again; and after the reservoir is full we start and pour out into the smaller ladles again. The receiving ladle at all times is kept about one half full, and it is this full when we tap the metal into it from the cupola."

WHITE, J., FULLER, C. J., HARLAN and BREWER, JJ., dissenting.

The irresistible conclusion thus arising from this proof is, it seems to me, rendered if possible clearer, when it is recalled that as early as 1877 the London Engineering, in a reference to this practice, declared:

"It was found advisable to employ a ladle of so large a capacity, because by doing so a more complete mixture of the different irons is effected than would be the case if a smaller vessel were employed."

And what has just been said applies equally to the practice of making Bessemer steel from cupola furnaces. That the excerpts which I have given on this subject clearly show that mixing by the use of a residue was the result of the employment of the accumulating ladle, and a result that was well known and intended, it seems to me cannot be gainsaid. How the Jones method, as construed, can be declared to have been novel—because in cupola metal there was no variation requiring mixing—in face of the fact that the very patent which is sustained, in various forms of expression, expressly declares that such variation exists, is not by me comprehended.

Besides, the proposition involves an unsound deduction, since it in effect not only disregards the fact that the practices in question were availed of with the avowed purpose of correcting the inequalities found to exist in cupola metal, but also the erroneous assumption that there could be patentable novelty in merely applying to blast furnaces the well known practices as to cupola metal.

It may well be conceded, without affecting the case, that the variation is greater in metal drawn from blast furnaces than in that drawn from cupolas, but this mere difference in the degree of variations between the two affords no ground for construing the Jones patent in such a way as to cause it to cover the well-known prior methods.

Nor does the example given in the opinion of the court for the purpose of illustrating the difference which is found to exist between the practices to which I have referred, and the Jones patent, as now construed, enable my mind to discover the difference. The court says (italics mine):

"Let us imagine a reservoir containing, say, three quarts, and

filled with one quart each, of three liquids of different constituent parts, and withdrawn for further treatment at the rate of one or two quarts at a time. Necessarily there would be some incidental mixing, but it would occur at once that the main object of the reservoir was a retention of a sufficient quantity of the mixture to supply the receptacle for further treatment, and if no necessity existed for a longer retention of the liquid in the reservoir, it could be very quickly emptied by two discharges into the receiving vessel. Now, let us substitute for this reservoir a cask of, say, sixty quarts, into which the liquids of different constituent parts are poured in at one end from a multitude of receptacles, and discharged at the other end after remaining a certain time in the cask, and that this cask could not be tilted so far but what a quantity of liquid would be left within it amounting, say, to half its capacity. Now, if there be no distinction between these two operations there would be little left to the Jones process, *the very vitality of which consists in the size of the cask relative to the ladles* and the mixing of the various liquids poured into it before they are withdrawn."

In the first place, this example fails to notice the fact that in the accumulating ladle the metal was received from several—in some instances as many as four or five cupolas—and that in practice a residue was constantly maintained, and for the purpose of mixing, and that these ladles could not be drained of metal unless there was an intention to do so. The only distinction afforded by the example is that resulting from the difference in sizes of the two supposed receptacles in which the mixing was accomplished. But this would reduce the patentable novelty in the Jones process to the size of the reservoir. Indeed, it is so expressly stated, since in the opinion it is declared that "there would be little left of the Jones process, the very vitality of which consists in the size of the cask relative to the ladles and the mixing of the various liquids passed into it before they are withdrawn." The mixing having been disposed of by what I have already said, it follows that the "*very vitality*" of the patent is found to be the size of the cask relative to the ladles, which in reason is a direct abandonment of the whole theory of a dominant pool previously expounded as the source of vitality

in the patent. But the size of the reservoir—called by the court a cask—relative to the capacity of the plant, is clearly shown not to have been novel, by what has been previously said, and will be further demonstrated beyond peradventure by the consideration which it is now proposed to give to—

The Manufacture of Bessemer Steel by the Direct Process.

The use of the direct process for Bessemerizing, it would seem, was at once resorted to on the continent of Europe, and there is testimony in the record giving rise to the inference that the greater uniformity of the ores used in the blast furnaces on the continent caused such processes to be there at once quite successful. However, it may not be doubted that on the continent the use of a reservoir or accumulating ladle sometimes obtained, and the advantages which it afforded of bringing about a desirable mixture of the metals from several furnaces was known. Thus Kohn, in the Journal of the Iron and Steel Institute, 1871, speaking of the practice at Terre-Noire, in France, said:

"The iron is first run into a ladle, as explained by Mr. Menelaus, and so taken to the converter. The ladle is brought to the back of one furnace, and half filled; it is then run to the next furnace and filled up. In this way the Terre-Noire Company always obtain a mixture of the metals, and therefore the greatest regularity is secured through the rest of the work. The furnaces are kept in regular working order, and by carefully managing the charges of the blast furnaces, and watching them as much as possible, the practical result is that there is no inconvenience as regards the furnaces themselves in tapping frequently. The same thing is done at Mr. Schneider's place at Creuzot, but he believed they do not there go so far as to mix the iron."

In England, the direct process was not made use of until about 1877, and it is shown that this largely resulted from the fact that the Bessemer plants in the early use of the process were not connected with blast furnaces.

In this country, though the manufacture of Bessemer steel was commenced in the early sixties, and in one or two of the

early experimental plants a brief use was made of direct metal, the indirect process was in general use until the year 1882, when the first large plant equipped for direct use of blast furnace metal began operations at the new South Chicago works of the Illinois Steel Company, and later in the same year the Edgar Thomson works (the Carnegie Company), with five new furnaces, also commenced such work. These plants were still producing steel by the direct process, with the use of the accumulating ladle when the Jones patent was granted in 1889, and it was not until the year 1892 that a large storage tank was installed at the South Chicago works.

A number of patents having relation to the making of steel by the Bessemer direct process were from time to time granted before the Jones patent was issued, and I shall now notice the most important of such inventions, as also some other publications embodied in the literature of the art.

In the British patent to Deighton of 1873, the purpose of the inventor, among others, was declared in the specifications to be to keep a steel works plant or apparatus in nearly uninterrupted work, thus very considerably increasing the production of such plant. It was said:

"Instead of manufacturing Bessemer iron or steel from pig iron which has to be melted in cupolas, my invention also consists in taking the molten metal directly from the blast furnace to the converter, in which case I prefer to arrange the Bessemer plant in a line at a right angle to a row of two or more blast furnaces, and place a vessel to receive the molten metal tapped from two or more blast furnaces *to get a better average of metal which will be more suitable for making Bessemer steel or metal of uniform quality*, the vessel or receiver being placed on a weighing machine so that any required weight may be drawn or tapped from it and charged into the converter."

The apparatus was then described in detail, and consisted of blast furnaces, arranged in a line, with channels from each furnace to a common reservoir or mixer, and with a connection from the mixer to a converter, so that the molten metal in running from the blast furnaces might go into the reservoir and be mixed, and might be drawn off as desired to the con-

verter. It was stated that the receiving vessel "is placed low enough to give fall for the molten metal to flow from the blast furnaces to this receiver *m*, which forms a receptacle for mixing the molten metal from two or more of the smelting furnaces. From the receiver *m* the mixed molten metal is tapped and flows down the swivel through *n* into the converter *a*. By placing the vessel *m* on a weighing machine it can be readily ascertained when the exact quantity required has been tapped from it into the converter."

In 1885, a few years prior to the grant of the Jones patent, two United States patents were issued to James P. Witherow, 1, For Apparatus for the Manufacture of Iron and Steel; and, 2, Steel Plant Appliance, which patent showed a blast furnace, an intermediate storage vessel of large size and a converter. In brief, the purpose of the Witherow reservoir apparatus was to receive and store the molten metal for the purpose of preventing the detention incident to the necessity of discharging the contents of the blast furnaces when there is no converter ready to receive it. The advantages of the large storage receptacle was thus stated in the specification of one of the patents:

"'The metal is usually tapped from a blast furnace once in every six hours, and the quantity thus cast is many times in excess of the charge of a converter. . . . The charge of a converter is from one to five tons, and in the case of a blast furnace usually runs from ten to fifty tons. . . . The time between charges of the converter is usually twenty minutes and upward, and the metal from the furnace must be kept in condition to be tapped from time to time into the converter as needed.'"

The evidence establishes that the Deighton and Witherow reservoirs were, each, of a capacity of one hundred tons.

Commenting, in June, 1877, upon the merits and demerits of the use, then just commenced in England, of direct metal—that is, the conversion of molten metal direct from the blast furnace, without remelting in a cupola or storing it in a large reservoir —A. L. Holley said (italics mine):

"It has not yet been practicable to work the blast furnace with sufficient regularity to realize approximately the theoretical advantages of the direct process.

"Fourth. The obvious remedy is to *mix a number of blast-furnace charges*, so as to reduce the irregularity to a minimum. Two systems of doing this are on the eve of trial: the one is simply mixing so few charges in a tank that the metal will be drawn out before it chills; the other is to store a larger number of charges in a heated tank—that is to say, in an immense open-hearth furnace."

The first of these two systems of mixing would seem to be that embodied in the following portion of Mr. Holley's description of the West Cumberland practice:

"In order to get a more uniform metal, Mr. Snelus is about trying the experiment of placing a 20-ton ladle on a hydraulic lift at the 'A' pit, so arranged as to store, mix and pour, say, three 6-ton to 7-ton blast-furnace taps, or to mix blast furnace and cupola metal. No doubt this body of metal will 'live' if the ladle is thickly lined *and well covered.* Mr. Snelus has another object also; tapping half or a third of a vessel heat out of the blast furnace—in other words, tapping so often—wears out the tap-hole more rapidly; slag gets into the walls and weakens them. It is preferable in every way, as blast furnace men well understand, to tap a full hearth. At the same time improvements in working the furnace are gradually developing. More care is taken as to the selection of ores, the size of ore and limestone, the distribution of materials in the furnace, the temperature of the blast, and all elements of uniformity.

". . . uniform results in the Bessemer department can hardly be expected, unless a number of blast-furnace charges are mixed. This would seem to be the theoretical solution of the problem."

The second of the two systems of mixing is undoubtedly the one then being erected at Moss Bay, England, viz., a 60-ton reverberatory coal-fired furnace or two 40-ton furnaces. The ladles of blast furnace metal were to be "tapped out into the large reverberatory furnace," in which "it is the intention *to store* and keep hot some sixty tons of iron from all the blast furnaces." This method, for some reason not stated, perhaps an economical one, was not successful. Mr. Holley, in the article just noticed, referring to the arrangements in connection with

the use of this "large furnace," said: "The complex manipulations due to the arrangement described seem likely to take unnecessary amount of time and labor."

After reviewing the practice in the various English and continental steel works using direct metal, Mr. Holley summed up his conclusions, and recommended the American works to continue for the present to select and remelt the pig metal, and confine their efforts for some time "to the preliminary department of the direct process—*to increasing our uniformity of blast-furnace working and product.*" We excerpt the following passages from the conclusions contained in the report:

"Fourth. But if the storage of a large quantity of iron in a reverberatory furnace or other reservoir should prove successful, then a few blast furnaces making even an irregular product, and, if necessary, working in connection with cupolas, would largely economize the Bessemer manufacture.

"In fact, this mixing of irregular irons on a very large scale, thus avoiding the expensive niceties of ore selection and the necessity of many furnaces, is the theoretical key to the situation. When the way to its successful adoption is demonstrated the direct process will undoubtedly have great advantages, even over the present practice on the continent, which employs manganiferous ores. But until this large-scale mixing is developed it should not appear that the use of our comparatively irregular blast-furnace and part cupola metal can result in any substantial saving.

"But the mixing problem is not such a difficult one. A small amount of flame spread over a large surface of metal should certainly keep it hot for a long time, seeing that the metal will keep hot in a ladle exposed to air for an hour or more. And should there be any trouble about stopping the tap-hole in a large storing furnace, it would not be a very difficult or expensive matter (considering the Pernot revolving hearth experience) to tip the whole hearth to pour a charge."

Without stopping to comment in detail upon all the matters just referred to, there can be no question that they demonstrate that if the vitality of the Jones patent depends upon the size of the reservoir, it was clearly anticipated. They also further

establish that the advisability of the use of a large reservoir for the purposes of storage and mixing was well known, and that it was deemed to be an obvious and desirable expedient is also apparent.

It is not denied that the Deighton and Witherow patents each provided for a reservoir, the former (Deighton) laying stress upon the advantages resulting from the mixing in such reservoir. Both patents, it seems to me, in effect contemplating as they did the continuous operation of the plant and in view of the relative capacities of the furnace or furnaces, the reservoir, and the converters, necessarily embrace the presence in the reservoir of a considerable residuum, without which residue the proposed continuity was impossible. As it is to me apparent, I do not stop to refer to the testimony showing that this must necessarily be the case. The argument that the Deighton reservoir had no cover, and therefore it is not the Jones process, ignores the fact that Jones in his process patent does not provide for the operation of his method in a covered receptacle, but, on the contrary, in the specifications of that patent, it is declared that the process may be carried on in a charging ladle, an uncovered receptacle. Further, it is to be borne in mind that the record overwhelmingly establishes that it was a well known expedient to cover a ladle or other receptacle for molten metal when the metal was required to be retained longer than the customary time. The inappositeness of the suggestion that the Deighton patent ought not to be given any weight as showing the state of the art, because the patentee allowed the patent to lapse for the non-payment of fees, cannot be better illustrated than by this case, when it is recalled that the patent to Mushet, which made Bessemerizing commercially practicable, was allowed to lapse because the Patent Office fees were not paid.

The demonstration of want of novelty in the patent as construed which arises from the previous considerations entirely disposes of the case, as it is, as already observed, conceded that unless the patent means what it is now held to mean, there was no infringement by the defendant. It is to me equally clear, however, that even if the state of the art be, *arguendo*, put out of view, the patent cannot be held to signify what it is now de-

cided to mean, *a*, without repudiating the true meaning of the patent, which is properly deducible from the proceedings in the Patent Office, that is, the file-wrapper and contents, and without refusing to give effect to the express declarations and admissions of the patentee (Jones) as to the significance of the patent, which is also shown by the proceedings in question; and, *b*, without misconceiving and misconstruing the patent. Let me briefly demonstrate these propositions.

As I have said at the outset, the application for the patent in suit when first made was rejected by the Patent Office, on the ground of the prior state of the art, as evidenced by the Witherow patents and the Kirk publication. An amended application was thereupon filed, which beyond all question eliminated from the patent all claim to an exclusive right to reservoir or store the molten metal. When this amendment was presented to the Patent Office, counsel for the applicant submitted a written argument to demonstrate the patentability of the method covered by the amended application, in which no reference whatever was made to the importance of a residue, whether of small or considerable size, but the purpose of the inventor was thus declared (italics mine): "To have a receptacle capable of holding metal in a molten condition, into which metal, it may be, from several blast furnaces, is run from time to time and from which metal is drawn for treatment in the converters, *or otherwise*, as required. This continuous pouring into and drawing out of a common receptacle produces such a mixture of the charges as results in an uniform average quality of metal, whether treated in the converters *or used for casting without such treatment*, as is very desirable, but has hitherto been found unattainable." But the amended application was rejected, and the examiner—evidently having in mind the statement in the argument of counsel above referred to—called the attention of the applicant to the fact that the continual pouring into and drawing out of the molten metal to produce a mixture was anticipated by the Kirk publication. The examiner said (italics mine):

"The process, as now claimed, seems to be fully met by the description in Kirk's metal founding, heretofore referred to,

which states that the *metal is run continuously from the cupola and mixed in the ladle,* from which it is tapped into the smaller ladle. See also the additional references of British patents, No. 859, Broman, March 23, 1866, page 5, lines 25–35, and No. 2382, Stewart, May 10, 1883, page 5, lines 9 and 10."

When it is borne in mind that the Kirk publication thus referred to provides expressly for a continuous inflowing and outdrawing of the metal, and besides expressly said, "*A quantity of molten metal should be kept . . . so as to give the different brands of iron a chance to mix,*" the conclusion cannot by me be escaped that the examiner pointed out to Jones that the conception of a continuous inflow and outflow, and the keeping of a residue for the purpose of mixing, was not patentable.

The presumption cannot be indulged in that the amendment was not intended to obviate the objection on account of which the Patent Office had rejected the application, and, moreover, it cannot be assumed that the Patent Office issued the patent for a method which it declared was not patentable. But now the patent is construed by the court as covering the continuous flowing into and withdrawal from a reservoir of molten metal, and as alone referring to the prevention of abrupt variations in the metal drawn from the reservoir for use in a converter, whilst Jones himself declared to the Patent Office that the patent as amended related to metal drawn (from a reservoir) for treatment in a converter *or otherwise, as required.* Besides it was expressly stated that what the patent contemplated was the production of a uniform quality of metal, intended for further treatment in the converters or to be used for casting without such treatment. It is submitted that this demonstrates that the construction now given by the court to the patent is directly repugnant to the meaning which Jones affixed to it, and besides is in conflict with the ruling of the Patent Office, in which Jones acquiesced, and upon which the patent was issued; and, therefore, that the construction which the patent now receives amounts, it seems to me, to a grant by judicial decision of a new and different patent from that which the Patent Office allowed.

Conclusive as is the view just stated, it is made, if possible,

more so if the correct construction of the patent be ascertained. This it is proposed to demonstrate by an analysis of the patent as originally applied for, by a consideration of the amendments made to it, and by its text in its final form. Considering these matters, it will, I think, appear that the patent was not, as now held to be, solely one for the prevention of abrupt variations in the metal drawn from the receptacle for use in a converter. On the contrary, the true purport of the patent was this and this only: The selection of separate portions of molten metal, pouring the same into a reservoir, mixing such aggregated portions of molten metal thoroughly until it, the commingled metal, became uniform, so that the equalized metal might be used, not alone in the making of steel in a converter, but in any other process of making steel, in a foundry, or in any other mode where a uniform product was desired. Having thus provided for equalizing the contents of the reservoir when filled with selected metal and mixing had been accomplished, the patent contemplated that this equalized molten metal present in the reservoir should be drawn off for any desirable purpose down to an undetermined residue, so that when a fresh supply of selected metal was charged into the reservoir the metal thus newly supplied might be mixed with the residuum and thus not only a further supply of equalized metal might be obtained, but also, as a result, abrupt variations between the freshly equalized metal and that of the preceding batch discharged from the reservoir, would be avoided.

To demonstrate the correctness of this construction, which, as already shown, was undoubtedly the view taken by the Patent Office, let me come to consider the application for the patent, the amendments and the patent as granted.

The application, as originally filed, contained a statement of the *primary* object of the invention, which is excerpted in the margin.[1]

[1] "The primary object of the invention is to provide means for insuring uniformity in the product of a Bessemer steel works or similar plant, in which the metal from more than one (subsequently amended to read 'one or more') blast furnaces is employed to charge the converters. The product of the different furnaces, or of the same furnace at different times, varies

This was followed by a statement of the secondary objects designed to be attained, as follows:

"My invention, however, is not limited to its use in connection with converters, since similar advantages may be obtained by casting the metal from the mixing vessel into pigs for use in converters, puddling furnaces or for any other uses to which pig iron may be put in the art."

A description was then given of the apparatus, which it was previously stated had been invented "for practicing my invention," and the mode of operation of such apparatus was stated. The claim read as follows:

"The process hereinbefore described, which consists in storing charges of molten metal in a covered receptacle provided with a heat-retaining lining, removing portions only of the molten contents of the said receptacle without entirely draining or emptying the same, and successively replenishing the receptacle with fresh additions of molten metal, whereby the character of the several charges of metal so treated is equalized; substantially as described."

Considering the application as thus made, what support does it lend to the theory now announced that it was the purpose of

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in quality, the variation depending on the kind of ore employed, and on many other conditions well known to those skilled in the art, so that when the converters are charged at one time with the output from one furnace, and at another time with the output from another furnace or furnaces, the manufactured steel lacks uniformity in grade. To avoid this I employ suitably constructed reservoirs or vessels, into which the molten metal from the blast furnaces is put, the vessels being of proper capacity to hold a considerable charge of metal from a single furnace, or from a number of furnaces, and being adapted to retain the metal in a molten state for sufficient time to enable the different charges to mix and become homogeneous. The advantage which I thus obtain in securing uniformity and homogeneity in the total product will be readily understood by those familiar with the operations of a steel works and the frequent loss which is caused by the lack of such uniformity. Such apparatus possesses also an additional advantage in that it makes it possible to dispense with cupola furnaces for remelting the pigs preparatory to charging the converters. The metal may be tapped from the blast furnaces into ladles or trucks, carried to and discharged into the mixing reservoir or vessel, and there retained in a molten state until sufficient metal has been accumulated to charge the converters."

the Jones invention merely to prevent abrupt variations between each charge of metal drawn from a reservoir for treatment in a converter? Such purpose is nowhere declared, unless it be inferred from certain statements in the patent descriptive of the mode of operation of the appliance covered by the apparatus patent, to which, hereafter, I shall more particularly advert. The conception that the patent solely related to abrupt variations in metal drawn from a reservoir and supplied to a converter, is absolutely excluded by the fact that the secondary object is pointed out to be to secure a pig metal so uniform in its chemical constituents that it might be used "in puddling furnaces or for any other use to which pig iron might be put in the art." It cannot be conceived that the patent provided for making the metal uniform in the reservoir, and, by the same language, provided merely against the occurrence of abrupt variations in the equalized metal when drawn off to a converter. If made uniform, there could not, in the nature of things, be abrupt variations. It being then certain that the process patent, as originally filed, in and of itself not only contained even no intimation of the claim which the court now attributes to the patent, it must follow that if the patent covered such a claim, it was one not in the mind of Jones, but must have been in some way evolved in the passage of the application through the Patent Office.

This original application, as I have said, was rejected by the Patent Office, as being "completely anticipated" by the Witherow patents, and reference was made to the Kirk publication.

To meet this objection a change was made by which the assertion of an exclusive right to store charges of molten metal was eliminated, the amendment being as follows:

"The process hereinbefore described, which consists in running successive charges of molten metal into a covered receptacle provided with a heat-retaining lining, removing from time to time from said receptacle for subsequent treatment a portion only of its molten contents, and successively replenishing such receptacle with fresh additions of molten metal, for the purpose of equalizing the character of the several charges of metal drawn therefrom, substantially as described."

WHITE, J., FULLER, C. J., HARLAN and BREWER, JJ., dissenting.

Accompanying this paper was the argument of the attorney, already referred to, in which it was expressly declared, as has been seen, that the patent related to uniformity of molten metal for further treatment in converters, *or otherwise;* that is, as declared in the argument, the obtaining of a metal of such uniform quality that it might not alone be used in converters, but might be "used for casting without such treatment."

As the application, as amended, was asserted to embody a claim for the continuous operation of a plant by reservoiring metal, by inflowing and outflowing, with mixing, a method construed by the Patent Office as identical with that described in the Kirk publication, the patent, as already stated, was again rejected. It was again amended, and, as thus finally amended, the patent was allowed. The new amendments consisted, first, of a substituted statement of the primary object of the invention, which is excerpted in the margin.[1] It will be observed,

[1] "The primary object of my invention is to provide means for rendering the product of steel works uniform in chemical composition. In practice it is found that metal tapped from different blast furnaces is apt to vary considerably in chemical composition, particularly in silicon and sulphur, and such lack of uniformity is observable in different portions of the same cast, and even in different portions of the same pig." [Here follows table of analyses said to have been made of metal contained in different ladle charges from one cast of a blast furnace.] . . . "The consequence of this tendency of the silicon and sulphur to segregate or form pockets in the crude metal is that the product of the refining process in the converters or otherwise in like manner lacks uniformity in these elements, and therefore often causes great inconvenience and loss, making it impossible to manufacture all the articles of a single order of homogeneous composition. Especially is this so in the process of refining crude iron taken from the smelting furnace and charged directly into the converter without remelting in a cupola, and, although such direct process possesses many economic advantages, it has on this account been little practised.

"For the purpose of avoiding the practical evils above stated, I use in the refining process a charge composed not merely of metal taken at one time from the smelting furnace, but of a number of parts taken from different smelting furnaces, or from the same furnace at different casts, or at different periods of the same cast, and subject the metal before its final refining to a process of mixing, whereby its particles are diffused or mingled thoroughly among each other, and the entire charge is practically homogeneous in composition, representing in each part the average of the unequally diffused and segregated elements of silicon and sulphur originally contained in each

from the concluding sentence in the first paragraph, that it was clearly implied that the applicant deemed that inequalities were present in cupola metal as well as in blast furnace metal.

There was substituted for the single claim as originally presented and amended the two claims embodied in the patent as finally issued, and which have been previously set out.

It plainly results from the amendment that it was drawn to meet the objection of the examiner and to make clear the fact that the character of the mixing contemplated by the Jones process was not that resulting from a continuous operation of a reservoir by the inflowing and outdrawing of metal with the constant retention of a residuum, but was a distinct character of mixing by thorough commingling of batches of metal, in order to produce in a reservoir a molten metal which would be homogeneous and uniform, of a character deemed to be unattainable by the continuous process; the purpose of securing this reservoir of uniform metal being to obtain a mixed metal so uniform in its chemical constituents that it might be, with greater advantage than theretofore, subjected to further treatment in the converters or be run into pigs, which, by reason of the uniform quality of the metal, might then be used for any purpose where such a metal was desired. In other words, the amendment was drawn for the purpose of satisfying the Patent

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of the several parts or charges. By proceeding in this way not only is each charge for the refining furnace or converter homogeneous in itself, but, as it represents an average of a variety of uniform constituent parts, all the charges of the converter from time to time will be substantially uniform, and the products of all will be homogeneous. To this end my invention may be practiced with a variety of forms of apparatus—for example, by merely receiving in a charging ladle a number of small portions of metal taken from several ladles or receiving vessels containing crude metal obtained at different times or from different furnaces, the mixing being performed merely by the act of pouring into the charging ladle, and other like means may be employed. I prefer, however, to employ the apparatus shown in the accompanying drawings, and have made it the subject of a separate patent application, serial No. 289,673, and, without intending to limit the invention to the use of that specific apparatus, I shall describe it particularly, so that others skilled in the art may intelligently employ the same."

Office that the method which was claimed should not be rejected, because the prior art provided against mere variations in the metal drawn from the reservoir, as the patent went further and described a process of mixing which would bring about the greater result of a uniform molten metal and consequent uniform product.

This conclusion is rendered clear by the fact that the amended application not only retained in substance all the prior declarations as to the purpose of obtaining a uniform mixed molten metal, and as to the use of such uniform metal, in converters or otherwise, but emphasized the same by adding the following:

"To this end my invention may be practiced with a variety of forms of apparatus. For example, by merely receiving in a charging ladle a number of small portions of metal taken from several ladles or receiving vessels containing crude metal obtained at different times or from different furnaces, the mixing being performed merely by the act of pouring into the charging ladle, and other like means may be employed."

And to make the object of the amendment perfectly clear, the prior description of the method was supplemented by stating that the "commingling of the contents may be aided by agitation of the vessel on its trunnions, so as to cause the stirring or shaking of its liquid contents."

True it is that on the trial below the complainant presented a disclaimer, which the court now upholds, by which he sought to eliminate from the patent the amendments which had been inserted to meet the objections of the Patent Office examiner, and which indubitably fixes the meaning of the patent. I do not deem it necessary, however, to stop to refer to authorities to show that a disclaimer which, in effect, has for its object the making of a new patent by striking out the essential representations upon which the patent was granted, is without legal warrant. This, it is submitted, is the obvious result of the authorities to which the opinion of the court refers.

But even if the patent as it is now made over, as I think, by the effect which is given by the court to the disclaimer, be alone considered, it plainly results that the patent as so changed did not contemplate, as now decided, solely the prevention of

abrupt variations in the metal drawn from the reservoir for use in the converter, since the patent yet provides "Instead of discharging the metal into the cars 12 and carrying it in the cars to the converters or *casting house*, the vessel 2 may be so situate relative to the other parts of a furnace plant as to deliver its contents immediately to the converters *or other place where it is to be utilized*." I fail to see how it can be held, even giving the fullest effect to the disclaimer, that the patent provides only for metal to be supplied to a converter, when it expressly points out that the metal may be used "*in the casting house*, in the converters *or other place where it is to be utilized*."

I come now to the statements found in the patent to which I have previously alluded, which the court thinks give support to the claim that the patent had reference merely to the avoidance of abrupt variations in metal supplied to the converters. The statements thus relied upon are contained in that portion of the patent where the mode of operation of the appliance covered by the apparatus patent is described. These passages are excerpted in the margin.[1]

When the passages in question are properly considered, it becomes, I submit, incontrovertible that, instead of sustaining,

[1] "Referring now to the drawings, 2 represents the reservoir before mentioned. It consists of a covered hollow vessel having an outer casing, 3, of iron or steel, which is suitably braced and strengthened by interior beams and tie-rods, as shown in the drawings. The whole exterior of the vessel is lined with fire-brick or other refractory lining, which should be of sufficient thickness to retain the heat of the molten contents of the vessel and to prevent chilling thereof. The vessel is strongly braced and supported by braces and tie-rods, and may be of any convenient size, holding, say, one hundred tons of metal, (more or less,) and its shape is preferably such as shown in the drawings, being rectangular, or nearly so, in cross-section and an irregular trapezium in longitudinal section, one end being considerably deeper than the other. At the top of the deeper end, which I call the 'rear' end, is a hopper, 5, into which the molten metal employed in charging the vessel is poured, and at the front end is a discharge-spout, 6, which is so located that the bottom of the spout is some distance above the bottom of the vessel—say two feet in a hundred-ton tank, and more or less, according to the capacity of the vessel—the purpose of which is that when the metal is poured out of the spout a considerable quantity may always be left remaining and unpoured, and that whenever the vessel is replenished there may already be contained in it a body of molten metal with which the fresh

they are antagonistic to the construction which has been given by the court to the patent, and hence sustain the construction which has been presented in this dissent.

Referring to the excerpted matter in the margin, it will be

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addition may mix. *I thus secure, as much as possible, uniformity in character of the metal which is fed to and discharged from the tank, and cause the fluctuations in quality of the successive tappings to be very gradual.*"

* * * * * * * *

"The mode of operation of the apparatus is as follows: When the vessel is in the backwardly-inclined position shown in Fig. 1, it is ready to receive a charge of metal from the car 7. Before introducing the first charge, however, the mixing vessels should be heated by internal combustion of coke or gas, and when the walls of the vessel are sufficiently hot to hold the molten metal without chilling it it is charged repeatedly from the cars 7 with metal obtained either from a number of furnaces or at different times from a single furnace. *The charges of metal introduced at different times into the vessel, though differing in quality, mix together, and when the vessel has received a sufficient charge its contents constitute a homogeneous molten mass, whose quality may not be precisely the same as that of any one of its constituent charges, but represents the average quality of all the charges.* If desired, the commingling of the contents may be aided by agitation of the vessel on its trunnions, so as to cause the stirring or shaking of its liquid contents. The mixing chamber being deeper at its rear than at the front end, as before described, and its normal position when not discharging metal for the purpose of casting being with the bottom inclined upward toward the front or discharging end, and the bottom of the spout being situate above the bottom of the vessel at its forward end, it is adapted to receive and hold a large quantity of molten metal without its surface rising high enough to enter the discharge spout."

"After the vessel is properly charged, the metal is drawn off into the cars 15 from time to time, as it is needed, by opening the door or cover 16 of the spout 6 and driving the engine 12, so as to elevate the rear end of the vessel and tilt it forward, and thus to discharge any required amount of its contents in the manner before explained into the cars 15, which are transported to the converters, or the metal is cast into pigs or otherwise used. The tilting of the vessel does not, however, drain off all the contents thereof, a portion being prevented from escaping by reason of the elevated position of the spout 6, and as the vessel is replenished from time to time each new charge mixes with parts of previous charges remaining in the vessel, *by which means any sudden variations in the quality of the metal supplied to the converter is avoided.* Instead of discharging the metal into the cars 12 and carrying it in the cars to the converters or casting house, the vessel 2 may be so situate relatively to the other parts of a furnace-plant as to deliver its contents immediately to the converters or other place where it is to be utilized."

seen that in the second paragraph is described the mode of filling the reservoir. Various portions of metal, termed "charges," are drawn "either from a number of furnaces or at different times from a single furnace," and such charges are introduced into the reservoir until the vessel is full, that is, to use the language of the patent, until a "sufficient charge" has been supplied to the reservoir, the result being, as stated in the patent, that the charges of metal thus accumulated in the reservoir "constitute a homogeneous molten mass, whose quality may not be precisely the same as that of any one of its constituent charges, but represents the average quality of all of the charges." Thus it appears that the patentee had in mind the cure of the inequalities or variations present in the "charges" of metal poured into the reservoir to make up the "sufficient charge," and thereby to cause such sufficient charge "to constitute a homogeneous molten mass, whose quality may not be precisely the same as that of any one of its constituent charges, but represents the average quality of all the charges." And the production of this homogeneous mass, it is further observed, "may be aided by the agitation of the vessel on its trunnions, so as to cause the stirring or shaking of its liquid contents." Manifestly, not only the obtaining of the homogeneous molten mass is absolutely incompatible with the theory that the patent related to mere variations, but the statement about the agitation of the vessel on its trunnions is likewise a negation that the conception of the patent related to the continuous inflowing and outflowing of molten metal from the reservoir. The construction now put upon the patent by the court disregards the provision that the variation which was to be cured was that existing between the "charges" as they were poured in, and assumes—contrary to the language of the patent—that the purpose was to cure variations which would exist in the mass of molten metal, when, by a sufficient charge, the reservoir had been filled. And this, although it is expressly declared in the patent that by the operation of the reservoir, in the mode described, the variations existing in the metal before the pouring in would be destroyed by the mixing, which would cause the mass from which withdrawals were to be made to become homogeneous.

The error becomes more manifest upon an examination of the last of the excerpted paragraphs, wherein is contained directions as to the withdrawals of the equalized metal from the sufficient charge, that is, the filled reservoir of equalized metal and the replenishing of the reservoir with new charges to make another sufficient charge. It will be seen that the patent contemplated the discharge of the mass of homogeneous metal by tilting the tank down to a residue, and that no reference is made to replenishing the reservoir until provision is made for the retention of a residue. Then the reservoir is to be replenished by the addition of new charges which mix with these parts of previous charges, which have been equalized and which remain in the reservoir as a residue. Obviously, in this subsequent addition of charges it was intended that a "sufficient charge" of metal should be contained in the reservoir, which, when thoroughly mixed, would form another homogeneous mass of molten metal, it being declared "by which means any sudden variations in the quality of the metal supplied to the converter is avoided." "By which means" is clearly meant the bringing into existence of the homogeneous mass referred to in the patent. In other words, the patent points out that by making all the "constituent charges" of a "sufficient charge" homogeneous there would be no variations in the withdrawals from that equalized mass. And this is besides made more manifest by the following sentence in which attention is called to the fact that the equalized metal thus drawn off might be carried to the converters or be cast into pigs without treatment in the converters.

Moreover, turning to the first paragraph in the excerpt, it will be perceived that it is stated that the operation of the mixer as described will "secure, as much as possible, uniformity in the character of the metal which is fed to and discharged from the tank, (meaning the equalized mass,) and cause the fluctuations in the quality of the *successive* tappings to be very gradual." That is to say, the patent contemplated that each distinct full reservoir or sufficient charge, constituting a batch of metal, would be homogeneous in itself and substantially uniform in its chemical constituents, and the *successive* "sufficient charges" or "full reservoirs" would, by means of the residuum, vary but

slightly between each other. The words "successive tappings" can have no other meaning than successive batches, for it is impossible to conceive that they could refer to the separate withdrawals of metal taken from one full reservoir or sufficient charge, because it had been declared that the "constitutent charges" of each full reservoir of metal by the operation described would become homogeneous; that is, practically uniform.

Certainly, this construction of the patent gives effect to all of its provisions, and harmonizes with its plain letter, whilst the contrary construction, now approved by the court, reads out of the patent the repeated statements as to the purpose of the patent being to secure a uniform molten metal and disregards the fact that the patent expressly provides that what it aims to secure is such uniform metal as is fit not only for use in converters but for castings and any other mode by which such a metal can be utilized. Certainly, what has been previously stated is a demonstration that the construction previously given by me accords with the express declaration made by the patentee when he applied for his patent, and is strictly in harmony with the action of the Patent Office in allowing the patent. It is equally clear that the construction of the patent, which has been by me elucidated, is besides in accord with the conception entertained by the Patent Office of the meaning of the patent long after it had been issued. Thus, the Commissioner of Patents, in a report bearing date January 1, 1896, reviewing the advance in the industrial arts, said (italics mine):

"A process now commonly used in steel manufacture is that of patent No. 404,114, January 4, 1889, to Jones, in which he described a means of *getting a uniform product of metal* by mixing together in a suitable receptacle, *batches of metal* from different furnaces, so that the mixture when drawn off will be the average of the different charges."

As the views hereinbefore expressed sufficiently make manifest the reasons for my dissent, it is unnecessary to stop to notice many matters considered in the opinion of the court. Lest, however, if they are not referred to, it may be assumed that assent is given to them, the more important of such statements

are briefly adverted to. First, it is said that the making of steel by the direct process was commercially impracticable before the grant of the Jones patent, and that that patent operated a revolution in the art. The proposition, in my opinion, finds no support in the record. On the contrary, it is affirmatively established that not only on the continent but in England and in this country, long prior to the grant of the Jones patent, Bessemer steel was made by the direct process, upon a large scale, continuously and successfully. So far as revolution in the art is concerned by the alleged enormous saving rendered possible by the use of the Jones method, it is not perceived how such a statement is compatible with the unquestioned proof in the record that, although the complainants at their Edgar Thomson works erected several of the Jones mixers about the time of the grant of the Jones patent, they did not introduce them into their other works until more than seven years afterwards. Indeed, to my mind it is established by the record that the Jones method, when put into practical operation by the complainant, proved not to be a commercial success, and the apparatus was continued in use despite this fact because of the means which it afforded of securing on a larger scale the benefits of storage hitherto well known in practice, and that the use of this larger storage vessel became more and more advantageous as the capacity of blast furnaces was enlarged and improvements took place in the mode of their operation.

The statement that upon the grant of the Jones patent the so-called mixer was at once adopted by steel works generally in this country is also unwarranted by the facts in evidence, which establish without any conflict that storage reservoirs of like capacity to that of the Jones apparatus were in use at the time of the hearing of this cause in but three steel works in the United States outside of those operated by the complainant, and that their introduction long after the grant of the Jones patent in such outside works is shown to have been coincident with the increase in blast furnace output and the necessity which had thus arisen for greater reservoir capacity to hold the enormous supply of molten metal which was then being produced by the operation of blast furnaces. The record, moreover, es-

tablishes that in the works in question, where long after the grant of the Jones patent large reservoirs were first employed, this was done not because better results were secured by means of mixing than had been obtained by the mixing theretofore resorted to, but because the larger output of blast furnaces pointed to the necessity for the construction of a larger reservoir than those previously employed.

The effect of the decision now rendered it seems to me is, therefore, to put the patentee in a position where, without invention on his part, and without the possession by him of lawful letters patent, he is allowed to exact tribute from the steel and iron-making industry, whenever those engaged in such industry desire to increase their plants or to more conveniently and satisfactorily conduct their operations so as to keep pace with the natural evolution of modern industrial development.

I am authorized to say that THE CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE BREWER concur in this dissent.

SWAFFORD *v.* TEMPLETON.

ERROR TO THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 487. Submitted April 14, 1902.—Decided May 19, 1902.

The court below erred in dismissing this action, for want of jurisdiction, as the right which it was claimed had been unlawfully invaded, was one arising under the Constitution and laws of the United States; and although it has been held that, on error from a state court to this court, where the Federal question asserted to be contained in the record, is manifestly lacking all color of merit, the writ of error should be dismissed, that doctrine relates to questions arising on writs of error from state courts, where, aside from the Federal status of the parties to the action, or the inherent nature of the Federal right which is sought to be vindicated, jurisdiction is to be determined by ascertaining whether the record raises a *bona fide* Federal question.

Statement of the Case.

THIS action was begun by Swafford, plaintiff in error, in the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee. Templeton and Pearcy, defendants in error, were made defendants to the action, the object of which was to recover damages for an asserted wrongful refusal by the defendants to permit the plaintiff to vote at a national election for a member of the House of Representatives, held on November 6, 1900, in the district of the residence of the plaintiff.

The declaration expressly charged that the plaintiff was a white man, a natural-born citizen of the United States, and was such on November 6, 1900, and had been for many years prior thereto a resident and duly qualified voter in the county of Rhea, State of Tennessee, and, as such, entitled under the Constitution and laws of the United States and of the State to vote for members of Congress, and that he had been illegally deprived of such right by the defendants, when serving as election officers at an election held on November 6, 1900, in the district of the residence of the plaintiff, in said county of Rhea.

The declaration specified the manner in which the right which it was asserted existed under the Constitution and laws of the United States and of the State had been violated, as follows: That for a number of years there had been in force in Tennessee certain special registration and ballot laws, which were operative only in counties containing a population of fifty thousand inhabitants or over, and in cities, towns and civil districts having a population of twenty-five hundred inhabitants or over; that Rhea County was not, prior to 1899, affected by the legislation in question, because it did not have a population of fifty thousand or upwards, and had no town, city or civil district within its borders containing a population of twenty-five hundred; that, not being subject to the operation of the statutes in question, the elections in Rhea County, as in other counties similarly situated, were governed by, and conducted in accordance with, the general election laws prevailing in the State of Tennessee; that in 1899 the legislature of Tennessee passed a law known as chapter 163 of 1899, by which the civil

districts or subdivisions theretofore existing in Rhea County were diminished in number, and so arranged as to cause the civil district in which the plaintiff lived and was entitled to vote to contain a population of over two thousand five hundred inhabitants, and therefore to become subject to the aforesaid special registration and election laws, if the redistricting law in question was valid. It was further averred that at the election held on November 6, 1900, for a member of Congress, the defendants, who were a majority of the election judges conducting such election, when the complainant presented himself to vote, insisted that he mark his ballot, and fold it in a particular way without assistance, as required by the special ballot law. It was asserted that this demand by the election officers was lawful if the special ballot law applied to the conduct of the election, but was unlawful if the election in Rhea County was not subject to such special law and was controlled by the general election law of the State. Averring that he was an illiterate person and unable to mark or fold his ballot, unassisted, and was therefore not able to comply with the provisions of the special ballot law referred to, it was alleged that the vote of plaintiff was rejected by the defendants, despite the insistence of the plaintiff that the election ought legally to have been conducted according to the requirements of the general law and not by those of the special law, for the reason that the redistricting act of 1899 was absolutely void.

The grounds upon which it was alleged that the act of 1899 redistricting Rhea County was void may be thus summarized: Because it was "class legislation in violation of the Federal Constitution," it being asserted that said law was enacted for partisan purposes, and that although there were other counties in the State similarly situated as was Rhea County, the civil districts as laid out by the county courts in such other counties, pursuant to statutory authority, were left undisturbed by the legislature. In other particulars, also, the act in question was averred to constitute special or class legislation. It was specially averred that, as prior to the adoption of the Fourteenth Amendment to the Constitution of the United States, plaintiff enjoyed

the elective franchise, by virtue of that amendment and of enumerated provisions of the state constitution "plaintiff became, and was possessed of, the right of suffrage as an immunity or privilege of citizenship, of which he could not be deprived by the enactment of chapter 163 (the law of 1899) under the circumstances aforesaid."

The defendants filed a demurrer questioning the sufficiency of the declaration upon various grounds.

After hearing upon the demurrer, the court filed an opinion in which it said that it clearly appeared from the declaration that the action did not really and substantially involve a Federal question, and that the court was without jurisdiction or power to entertain the suit. 108 Fed. Rep. 309. An entry was made sustaining the demurrer and dismissing the suit, and it was recited that the dismissal was solely because of the want of jurisdiction. A certificate of the judge, moreover, was filed, which is as follows:

"In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no Federal question was involved, and that the declaration, in my opinion, disclosed the infraction of no right arising under or out of the Federal laws or Constitution; and that treating the demurrer as presenting this question of jurisdiction, and acting also independently of the demurrer, and on the court's own motion, the suit is dismissed only for the reasons above stated; that is, that the controversy, not arising under the laws and Constitution of the United States, there is consequently no jurisdiction of the Circuit Court of the United States.

"This certificate is made conformably to act of Congress of March 3, 1891, chapter 517, and the opinion filed herein April 30, 1901, is made a part of the record, and will be certified and sent up as a part of the proceedings, together with the certificate."

Mr. Frederick Lee Mansfield for plaintiff in error.

Mr. Jerome Templeton for defendants in error.

Opinion of the Court.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

The sole question is, Did the Circuit Court err in dismissing the action, on the ground that it was not one within the jurisdiction of the court? An affirmative answer to this question is rendered necessary by the decision in *Wiley* v. *Sinkler*, 179 U. S. 58. In that case the action was brought in a Circuit Court of the United States against state election officers to recover damages in the sum of twenty-five hundred dollars for an alleged unlawful rejection of plaintiff's vote at a Federal election. A demurrer was filed to the complaint. One of the grounds of the demurrer was that the court had no jurisdiction of the action, because it did not affirmatively appear on the face of the complaint that a Federal question was involved. The demurrer, however, was sustained, not because of the want of jurisdiction, but solely upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The cause was brought directly to this court, under that provision of the act of March 3, 1891, which confers power to review the judgment or decree of a Circuit Court, among others, in any case involving the construction or application of the Constitution of the United States. In this court the contention was renewed that the Circuit Court was without jurisdiction, and this contention involved necessarily also a denial of the power of this court to review, since the right directly to do so was sustainable alone upon the ground that the cause was one involving the construction or application of the Constitution of the United States. The argument advanced to sustain the asserted want of jurisdiction was this, that as the Constitution of the United States did not confer the right of suffrage upon any one, but the same was a privilege which the elector enjoyed under the constitution and laws of the State in which he was entitled to vote, therefore the denial of the right to vote at an election for a member of Congress did not and could not involve the construction or application of the Constitution of the United States. The court, however, decided otherwise, and, speaking through Mr. Justice Gray, said that the case "involved the con-

struction and application of the Constitution of the United States;" that "the right to vote for members of Congress of the United States . . . has its foundation in the Constitution of the United States;" that "the Circuit Court of the United States has jurisdiction, concurrent with the courts of the State, of any action under the Constitution, laws or treaties of the United States, in which the matter in dispute exceeds the sum or value of $2000;" and that, the action being "brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States, the complaint, by alleging that the plaintiff was, at the time, under the constitution and laws of the State of South Carolina and the Constitution and laws of the United States, a duly qualified elector of the State, shows that the action is brought under the Constitution and laws of the United States." In concluding its examination of the question of jurisdiction, it was declared that "the Circuit Court, therefore, clearly had jurisdiction of this action." The conclusion thus expressed, by necessary implication, decided the power of this court to review, which would not have been obtained, unless jurisdiction of the Circuit Court had been found to rest on the constitutional right.

It is manifest from the context of the opinion in the case just referred to that the conclusion that the cause was one arising under the Constitution of the United States was predicated on the conception that the action sought the vindication or protection of the right to vote for a member of Congress, a right, as declared in *Ex parte Yarbrough*, 110 U. S. 655, 664, "fundamentally based upon the Constitution of the United States, which created the office of member of Congress, and declared that it should be elective, and pointed out the means of ascertaining who should be electors." That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the

United States had adopted, as the qualifications of electors for members of Congress, those prescribed by the State for electors of the most numerous branch of the legislature of the State.

It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim. It is obvious from an inspection of the certificate that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States.

True, it has been repeatedly held that, on error from a state court to this court, where the Federal question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error should be dismissed. *New Orleans Waterworks Co.* v. *Louisiana*, *ante*, 336, and authorities cited. This doctrine, however, relates to questions arising on writs of error from state courts where, aside from the Federal status of the parties to the action or the inherent nature of the Federal right which is sought to be vindicated, jurisdiction is to be determined by ascertaining whether the record raises a *bona fide* Federal question. In that class of cases not only this court may, but it is its duty to, determine whether in truth and in fact a real Federal question arises on the record. And it is true, also, as observed in *New Orleans Waterworks Co.* v. *Louisiana*, *supra*, that a similar principle is applied in analogous cases originally brought in a court of the United States. *McCain* v. *Des Moines*, 174 U. S. 168; *St. Joseph & Grand Island Railroad* v. *Steele*, 167 U. S. 659. But the doctrine referred to has no application to a case brought in a Federal court where the

very subject-matter of the controversy is Federal, however much wanting in merit may be the averments which it is claimed establish the violation of the Federal right. The distinction between the cases referred to and the one at bar is that which must necessarily exist between controversies concerning rights which are created by the Constitution or laws of the United States, and which consequently are in their essence Federal and controversies concerning rights not conferred by the Constitution or laws of the United States, the contention respecting which may or may not involve a Federal question depending upon what is the real issue to be decided or the substantiality of the averments as to the existence of the rights which it is claimed are Federal in character. The distinction finds apt illustration in the decisions of this court holding that suits brought by or against corporations chartered by acts of Congress are cases *per se* of Federal cognizance. *Osborn* v. *U. S. Bank*, 9 Wheat. 817; *Texas & Pacific R. R.* v. *Cody*, 166 U. S. 606. It may not be doubted that if an action be brought in a Circuit Court of the United States by such a corporation, there would be jurisdiction to entertain it, although the averments set out to establish the wrong complained of or the defence interposed were unsubstantial in character. The distinction is also well illustrated by the case of *Huntington* v. *Laidley*, 176 U. S. 668, where, finding that jurisdiction obtained in a Circuit Court, this court held that it was error to dismiss the action for want of jurisdiction because it was deemed that the record established that the cause of action asserted was not well founded.

It follows that the court below erred in dismissing the action for want of jurisdiction. Of course, in reaching this conclusion we must not be understood as expressing any opinion as to the sufficiency of the declaration.

The judgment of the Circuit Court is reversed and the action is remanded for further proceedings, in conformity with this opinion; and it is so ordered.

UNITED STATES *v.* COPPER QUEEN MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 218. Argued April 11, 14, 1902.—Decided May 19, 1902.

In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and the court cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did.

THE case is stated in the opinion of the court.

Mr. Marsden C. Burch for the United States.

Mr. William Herring and *Mr. John C. Chaney* for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The government has brought this case here by writ of error for the purpose of reviewing a judgment of the Supreme Court of Arizona, affirming a judgment entered upon the verdict of a jury in favor of the defendant. The action was to recover $183,000, being the alleged value of about 5,900,000 feet of timber, said to have been wrongfully cut and taken by the defendant from the surveyed and unsurveyed public lands of the United States in a cañon in the Chiricahua Mountains, sixty miles from the town of Wilcox on the Southern Pacific Railroad Company, in the Territory of Arizona.

The answer joined issue upon the allegations of the complaint, and also set up that the timber was cut by one Ross from public mineral lands of the plaintiff, and was so cut and removed from those lands under the authority of the act of Congress of June 3, 1878, 20 Stat. 88, the material portion of which reads as follows:

"That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either

of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agriculture, mining or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations."

The answer further set up that Ross had good right and lawful authority to cut and remove the timber, and that it was cut and removed from such lands in good faith, and at the time that he so cut and removed the timber Ross was a citizen of the United States of America and a *bona fide* resident of the Territory of Arizona.

A trial was had in the District Court before a judge and jury, and upon the close of the evidence counsel for the government made a motion that the court instruct the jury to find on the evidence a verdict for the government, which was refused and an exception taken.

Among other things the court charged the jury as follows:

"It is also incumbent upon the defendant, in order to avail itself of the permission granted by said act of June 3, 1878, and in order to justify its purchase and consumption of said timber, to show by a preponderance of the evidence that Daniel D. Ross, at the time of the cutting and removal of said timber from the lands of the plaintiff, was a citizen of the United States and was a *bona fide* resident of the Territory of Arizona. And should the evidence in this case fail to establish that, at the time of the cutting and removal of said timber, the said Daniel D. Ross was a citizen of the United States, and a *bona fide* resident of the Territory of Arizona, you must find for the plaintiff, without regard to the mineral or non-mineral character of the land."

The jury found a verdict for the defendant, after which a motion for a new trial was made and denied by the trial judge. An appeal from the judgment entered upon the verdict was then taken to the Supreme Court of the Territory, where it was affirmed.

It thus appears that the judge held, and so charged the jury, that Ross, who did the cutting, must have been not only a *bona fide* resident of the Territory, but also a citizen of the United States, and if he were not, then the plaintiff was entitled to a verdict. The Government now says there was no evidence in the case that Ross was a citizen of the United States, nor any tending to show he was a *bona fide* resident of Arizona at the time the cutting was done, and that unless Ross were such citizen and also a *bona fide* resident of the Territory, his cutting of the timber was wrongful and the Government was entitled to a verdict. The verdict must be regarded as a finding that Ross was a citizen of the United States and a *bona fide* resident of the Territory when the cutting was done. If he were, there is no question made about his right to cut. The motion on the part of the Government at the close of the evidence to direct a verdict for the Government upon all the evidence, and the exception to the refusal of the court so to do, would raise the question whether there was any evidence of the citizenship of Ross and of his residence in the Territory when the cutting was done, upon which to base a verdict, were it not that the bill of exceptions lacks an essential statement for that purpose.

It does not appear from the bill that it contains all the evidence given upon the trial. It may be that it does, but we cannot, in the absence of any statement in the bill to that effect, presume it does for the purpose of reversing the judgment herein, upon the assumption that the proper construction of the act of Congress requires such citizenship as well as residence. When this court is asked to reverse a judgment entered upon a verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement or there must be a stipulation of counsel declaring that the bill contains all the evidence given upon the trial so that the

record shall affirmatively show the fact. *Russell* v. *Ely*, 2 Black, 575, 580. In the cited case the court, after remarking that the bill of exceptions did not purport to give all that a certain witness had testified to, said that according to a well-known rule the court under such a condition of the record was bound to presume that there was that in the witness's testimony which justified the instruction. It was then added by the court: "What purports to be the entire deposition of Baker is sent up by the clerk of the District Court, and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless encumbrance of the transcript, and an expense to the litigating parties." The court thus refused to look at the deposition which purported to be the entire deposition of the witness because it was not made a part of the bill of exceptions.

In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and we cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did.

So, in *Texas & Pacific Railroad Company* v. *Cox*, 145 U. S. 593, 606, which was an action to recover damages against the company for the death of plaintiff's husband, resulting from the negligence of the company, it was remarked, in regard to the evidence in the case, that "The bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed."

It is true there is printed herein, together with the bill of exceptions, the statement that a motion for a new trial was made, and the remarks of the court are set forth upon his denial of the motion. The court said that if the verdict were to be set aside, it would have to be based solely upon the failure of evidence to show that Ross was a citizen of the United States, but the court also remarked that at the time when he gave the

instruction to the jury, that Ross must have been not only a *bona fide* resident of the Territory but a citizen of the United States, when the cutting of the timber was done, he believed it to be a true expression of the law applicable to the case under the pleadings. It is plain that in the view of the judge when the case was submitted to the jury, he thought there was evidence upon which a jury might find the fact of the citizenship of Ross. His subsequent statement made upon the refusal to grant a new trial, which inferentially, perhaps, admits that there was not sufficient evidence to show that Ross was such citizen, leaves a foundation for the belief that there was room upon the evidence for a difference of opinion in regard to that fact. However that may be, the record is in such a state that we cannot say that all the evidence given upon the trial is contained in the bill of exceptions, and, therefore, we cannot say that there was no evidence of the residence, and of the citizenship of Ross, upon which the verdict of the jury might be sustained. If there were evidence that Ross was a citizen and a *bona fide* resident, it is admitted that the verdict could not be disturbed by this court. There may have been evidence upon both propositions sufficient to sustain the verdict.

The judgment must, therefore, be

Affirmed.

SOUTHWESTERN COAL COMPANY *v.* McBRIDE.

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

No. 230. Argued April 21, 1902.—Decided May 19, 1902.

The act of Congress, approved June 28, 1898, known as the Curtis Act, did not operate to deprive the lessors of coal mines in the Choctaw Nation of royalties due and owing to them for coal mined under valid leases, prior to that date.

THIS litigation was begun in the United States Court for the Indian Territory, Central Judicial District, sitting at Atoka, by

the filing of a bill in equity on behalf of Hyram Y. McBride, a citizen of the Choctaw Nation. The defendants named in the bill were the National Bank of Denison, the Southwestern Coal and Improvement Company (hereafter referred to as the Coal Company) and J. A. Randell, as administrator of the estate of G. G. Randell, deceased. The Coal Company is an appellant in this court, while McBride and Randell are the appellees. It was averred in the bill that on April 6, 1894, the complainant (McBride) was the owner of a three twenty-seconds share in a certain coal or mining interest situated in the town of Coalgate, Indian Territory, which coal claim was being operated, under royalty contracts, by the Coal Company; that, to secure an indebtedness due by the complainant to the National Bank of Denison, complainant had executed and delivered a mortgage upon his aforesaid share; and that, under the assumed authority of a power of sale contained in the mortgage and pursuant to a combination between the bank and one G. G. Randell, a purported sale of said share of complainant was made to said Randell, but that said pretended sale, for various stated reasons, was illegal and void. It was further averred that from the time of said pretended sale the Coal Company had failed to make payments of royalties due upon said share of complainant, and was liable to account therefor. The prayer of the bill was, in substance, that the sale in question be declared a nullity and that the various defendants account to complainant in respect to the royalties received and retained.

The bank filed its answer, and therein disclaimed having any interest in the unpaid royalties claimed by complainant and Randell, as administrator of G. G. Randell. In its answer the Coal Company, among other things unnecessary to be stated, admitted that it had withheld payments from March 1, 1897, of royalties on the coal mining share referred to in the complaint, and averred that the amount of said unpaid royalties aggregated $2617.29. The Coal Company also further specifically pleaded in its answer as follows:

"Defendant Coal Company further states that on the 28th day of June, 1898, the President of the United States approved an act entitled 'An act for the protection of the people of the

Statement of the Case.

Indian Territory, and for other purposes,' and which said act of Congress is commonly known as the 'Curtis bill,' and by section sixteen of said act it was provided that it should be unlawful for any person, after the passage of said act, except as otherwise provided therein, to claim, demand or receive for his own use, or the use of any one else, any royalty on coal, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor, whatsoever.

"And that by virtue of the provisions of said act of Congress hereinabove referred to, on and after the 28th day of June, 1898, no royalties accrued to any person upon this said interest claimed by the plaintiff in said mines; and that by virtue of the provisions of said act of Congress, hereinabove referred to, the royalty which accrued upon said interest so claimed by the plaintiff in said mines and which said Coal Company had not paid over to said defendant bank in accordance with plaintiff's instructions, is no longer due and payable to the said plaintiff or any person claiming under him, and cannot be claimed, demanded or received by the plaintiff, or any other person; and that by virtue of section eighteen of said act of Congress, hereinabove referred to, any person claiming, demanding or receiving any of the royalties which the plaintiff claims accrued upon the interest claimed by him in said coal mines, becomes guilty of a misdemeanor, which is punishable by a fine of not less than one hundred dollars ($100.00,) and is liable to forfeit possession of the property in question."

A written stipulation was thereafter entered into between the complainant and the defendant Randell, administrator, wherein it was agreed that the complainant was entitled to $900 of the sum admitted by the Coal Company to be unpaid, and that the said defendant administrator was entitled to the remainder, or the sum of $1717.29. Upon the pleadings in the cause and the stipulation referred to, a motion for judgment against the Coal Company for $2617.29 was filed on behalf of the complainant and said defendant administrator. The motion was granted, and a judgment was entered accordingly. An

appeal was taken to the Court of Appeals for the Indian Territory, and that court affirmed the judgment. 54 Southwestern Rep. 1099. The judgment of affirmance was in favor of McBride and Randell, administrator, against the Coal Company and the sureties on its supersedeas bond (Clarence W. Turner and Homer B. Spaulding,) for the amount of the original judgment, with interest and costs. An appeal was then prosecuted by the Coal Company, and Turner and Spaulding to the United States Circuit Court of Appeals for the Eighth Circuit. That court affirmed the judgments, (104 Fed. Rep. 1007,) and the cause was then appealed to this court.

Mr. James Hagerman for appellant. *Mr. Clifford L. Jackson* and *Mr. Joseph M. Bryson* were on his brief.

No counsel appeared for appellee.

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

The sole question presented for the consideration of the courts below and necessary to be passed upon by this court was, and is, Did the act of Congress, approved June 28, 1898, known as the Curtis Act, operate to deprive the lessors of coal mines in the Choctaw Nation of the royalties due and owing to them for coal mined under valid leases prior to the date named? The question necessarily requires a construction of section 16 of the act, which reads as follows:

"Sec. 16. That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand or receive, for his own use or for the use of any one else, any royalty on oil, coal, asphalt or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as

may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong: *Provided*, That where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him: *Provided, further*, That nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her or their allotment."

A particular consideration of section 18 of the act, referred to in the answer of the Coal Company, is not required, as the section merely provided for the punishment of any person convicted for violating any of the provisions of sections 16 and 17 of the act.

On the part of the appellants it is contended that the section in question is retrospective in its operation and inhibits the collection of royalties due and owing at the time of the approval of the Curtis Act, even though such royalties, had the statute in question not been passed, might lawfully have been collected by the lessors to whom it had been agreed the same should be paid. The Circuit Court of Appeals, however, sustained the contention that the provisions of the section in question had only a prospective operation, and in so doing we think no error was committed. We adopt the reasoning of the court below on the subject. The court said (104 Fed. Rep. 473):

"The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If Congress had intended to deprive lessors of the royalties due and owing to them at the date of the act it would have used appropriate

language to express that intention, and would necessarily have made some provision for the disposition of such royalties. But it is clear from the language of the act that it does not deal with royalties already paid, or already due and owing to lessors under leases for coal already mined. . . . Congress, by the Curtis Act, neither attempted nor intended to interfere with the rights of lessors to royalties due them under their leases at the date of the passage of the act."

It is asserted in the brief of counsel for the appellants that the contract under which the royalties in question became due was made under authority of a tribal law of the Choctaw Nation, and we are asked to assume that the authority to make the lease in question was not either directly or indirectly conferred by Congress, and that in consequence the contract was of no validity by reason of section 2116 of the Revised Statutes, wherein, among other things, it is declared that "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." We do not decide this contention, in view of the fact that it does not appear to have been raised or considered in the courts below, and it is besides entirely inconsistent with the answer of the Coal Company, wherein it is substantially conceded that the lease in question was valid in its inception, and that the unpaid royalties would have been due and owing to the lessor or his assigns, but for the effect of the alleged nullifying provisions of section 16 of the Curtis Act.

Judgment affirmed.

McFADDIN *v.* EVANS-SNIDER-BUEL COMPANY.

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

No. 217. Argued April 10, 11, 1902.—Decided May 19, 1902.

The judgment of the Circuit Court of Appeals, sustaining the act of February 3, 1897, which provided that "section 4742 of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: Provided that if the mortgagor is a non-resident of the Indian Territory, the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated," is sound as applicable to this case.

The plain purpose of Congress was to give effect to mortgages of non-residents, which had been, before the passage of the act, recorded in the judicial district in which the property was situated at the time the mortgages were executed.

The act as so construed and applied was a valid exercise of Congressional power, and in circumstances like those of the present case, cannot be justly impugned as depriving the attaching creditor of property within the meaning of the Constitution.

The power of a legislature to pass laws giving validity which was before ineffectual, is well settled.

In the United States Court for the Northern District of the Indian Territory, in April, 1897, an issue was tried between the Evans-Snider-Buel Company, a corporation organized under the laws of the State of Illinois, and William McFaddin & Son. One J. R. Blocker was the owner and in possession of 6775 head of cattle pasturing in the Indian Territory. McFaddin & Son were judgment creditors of Blocker, and, as such, levied an attachment on said cattle. The Evans-Snider-Buel Company filed a proceeding by way of interpleader in the attachment suit, claiming to have a prior lien on said cattle by means of certain mortgages given by said Blocker, who, as shown by the mortgages themselves, as well as the testimony in the case, was a

resident of Bexar County, Texas, in which county some of the mortgages relied on had been duly executed and recorded. The cattle in question were grazing in the Creek Nation, Indian Territory, and the mortgages were again recorded in the Northern District of the Indian Territory, at Muskogee and in the Creek Nation. The cattle at the time of the levy were in the possession of Blocker, the mortgagor.

After the filing of the interpleader, and on January 29, 1897, a judgment was entered against the defendant Blocker, in the sum of $55,875.71, and sustaining the attachment. There were several trials in the case, but at the last trial in the Northern District, where the plaintiffs, McFaddin & Son, for the second time lost their suit, it was agreed that in case the judgment should be reversed by the United States Court of Appeals for the Indian Territory, judgment should be rendered against the Evans-Snider-Buel Company, the interpleader. The judgment was reversed by that court, and, pursuant to said agreement, on the 4th day of January, 1900, judgment was entered against the interpleader and its bondsmen for the sum of $72,250.35. From that judgment the interpleader prosecuted its writ of error to the United States Court of Appeals for the Eighth Circuit.

At the time the attachment was levied upon the cattle in controversy the following laws in relation to the registration of chattel mortgages were in force in the Indian Territory, being sections 4742 and 4743 of Mansfield's Digest:

"Sec. 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and if for personal property, in the county in which the mortgagor resides.

"Sec. 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property, from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Opinion of the Court.

As before stated, the attachment in this case was sustained on the 29th day of January, 1897. On February 3, 1897, Congress amended the law above quoted by an enactment which reads as follows:

"Section 4742 of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated." Stat. 1896–7, p. 510.

On November 19, 1900, the United States Circuit Court of Appeals for the Eighth Circuit filed an opinion and judgment, Sanborn, J., dissenting, reversing the judgment of the United States Court of Appeals in the Indian Territory, and affirming the judgment of the United States Court for the Northern District of the Indian Territory. Whereupon a writ of error was allowed and the cause brought to this court.

Mr. William T. Hutchings for plaintiffs in error. *Mr. J. P. Clayton* and *Mr. Napoleon B. Maxey* were on his brief.

Mr. H. M. Pollard and *Mr. U. M. Rose* for defendant in error. *Mr. W. E. Hemingway* was on their brief.

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

The controversy in this case is between mortgagee creditors and judgment creditors of John R. Blocker. The mortgages were given to secure the payment of notes executed by Blocker to the amount of about $130,000, which were held by the Evans-Snider-Buel Company, and represented money that had been advanced by that company to Blocker to enable him to purchase the cattle embraced in the mortgage. The mortgages were

recorded, within a day or two after their execution, in the clerk's office of the United States Court for the Northern District of the Indian Territory, that being the district in which the mortgaged property was situated.

William McFaddin & Son had obtained a judgment against Blocker in Jefferson County, Texas, in May, 1887, and on June 17, 1896, they sued out an attachment on that judgment in the United States Court for the Northern District of the Indian Territory, and levied on the cattle described in the mortgages.

It is not denied that McFaddin & Son had actual knowledge of the existence of the mortgages at the time they sued out their writ of attachment. Indeed, it appears that the description of the cattle was taken by their attorneys from the record of the mortgages before the attachment was issued.

But it is claimed that, under the laws of the State of Arkansas, in force by act of Congress in the Indian Territory, as construed by the Supreme Court of Arkansas, the mortgages as recorded did not constitute a lien on the property described as against third parties, although they had actual notice of their existence, and that as McFaddin & Son had levied their attachment and obtained judgment against Blocker before the act of Congress of February 3, 1897, validating the mortgages and their record, was passed, such legislation was invalid and ineffectual to postpone the lien of the attachment and judgment to the lien of the mortgages.

Elaborate arguments, oral and written, have been advanced, *pro* and *contra*, on the propositions that an attaching creditor is not a purchaser for value; that an unrecorded deed or mortgage creating a lien will take precedence over a subsequent attachment; that notice to a subsequent purchaser of an unrecorded mortgage is conclusive evidence of *mala fides* on his part; that a chattel mortgage, not fraudulent as to creditors, made in good faith to secure an honest debt, is at common law superior to a subsequent attachment of the same property by a creditor of the mortgagor; that actual notice is equivalent in law to constructive notice. But as we are of opinion that the judgment of the Circuit Court of Appeals, sustaining the validity

of the act of February 3, 1897, as applicable to the present case, is sound, we do not consider it necessary to discuss the other propositions urged upon us by the counsel of the defendants in error.

The Fifth Amendment to the Federal Constitution, which declares that "no person shall be deprived of life, liberty or property without due process of law," is a limitation on the power of Congress, and the question is open whether the act in question, held applicable by the Circuit Court of Appeals to the present case, deprived the plaintiffs in error of property within the meaning of that Amendment.

We think it is impossible to successfully contend that the act of Congress, when it in terms declared that "all mortgages of personal property in the Indian Territory *heretofore* executed and recorded in the judicial district thereof in which the property was situated *at the time they were executed*, are *hereby* validated," can be construed as intended to apply only to mortgages made *after* the passage of the act, and had no retroactive effect. Such a construction was adopted by the Court of Appeals of the Indian Territory, and was approved by the dissenting judge in the Circuit Court of Appeals for the Eighth Circuit. But the language of the enactment is too express to permit such a view. The plain purpose of Congress was to give effect to mortgages of non-residents which had been, *before* the passage of the act, recorded in the judicial district in which the property was situated at the time the mortgages were executed.

We think, therefore, that the trial court and the Circuit Court of Appeals were right in holding that the act of February 3, 1897, was applicable to the mortgages of the defendants in error, and we are to inquire whether the act, as so construed and applied, was a valid exercise of Congressional power.

The contention on behalf of the plaintiffs in error is that by the judgment in default against Blocker on January 29, 1897, they obtained a vested interest in the cattle seized under the writ of attachment, which could not be impaired by the subsequent legislative enactment of February 3, 1897.

But it is to be observed that the only issues determined by

that judgment were those between McFaddin & Son, the attaching creditors, and Blocker, the judgment debtor. Thereby any controversy as to the indebtedness and the existence of proper grounds of attachment were, as to those parties, concluded. But this judgment by default did not preclude the Evans-Snider-Buel Company from denying the right of the attaching creditors to a lien prior to that of the mortgages. That was an issue that was still pending and undetermined when the act of February 3, 1897, was approved. Accordingly, when the issue between the two classes of creditors came on to be tried in the United States Court for the Northern District of the Indian Territory the only question was as to the priority of the respective liens. It was not denied that the mortgages constituted valid liens as against Blocker, the mortgagor, nor was it denied that the mortgages had been recorded in the district in which the mortgaged property was situated, before the attachment was levied on the mortgaged property. That the money secured by the mortgages was advanced to Blocker and used by him in the purchase of the cattle, and that the attaching creditors had actual knowledge of the existence of the mortgages before they sued out the writ of attachment, were also admitted facts.

What was claimed was, that the record of the mortgages was ineffective as notice thereof to the attaching creditors, because the mortgagor was a non-resident of the Indian Territory when the mortgages were given, and that, under the registry law then in force, the mortgages of a non-resident, though in fact recorded, did not constitute liens as against third parties.

To this contention the mortgagees pleaded the curative act of February 3, 1897, whereby it was provided that mortgages of non-residents of the Indian Territory should be recorded in the judicial district in which the property was situated, and that all mortgages of personal property in the Indian Territory theretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed were thereby validated.

As we have already stated, the trial court and the Circuit Court of Appeals of the Eighth Circuit held that the act of

February 3, 1897, was applicable to the case in hand, and, as a valid exercise of power, was decisive of the controversy.

The condition of the plaintiffs in error is very different from that of a purchaser for a valuable consideration without notice of an alleged prior incumbrance. It cannot be said that they parted with any money or other valuable consideration in reliance upon the disclosures of the registry record. The indebtedness of Blocker to them had accrued years before; and if the record did not, under the decisions of the Arkansas Supreme Court, give them constructive notice of the existence of the mortgage debts, it is admitted to have given them the actual knowledge upon which they proceeded in suing out the writ of attachment. The judgment in their favor in the attachment suit, though conclusive as against Blocker, gave them no property rights in the cattle as against the mortgagees, and if their attempt to appropriate the mortgaged property is defeated, they are in no worse position than if the defendants in error had not advanced the money with which the cattle were purchased. If the problem were made to turn upon the equities between the two classes of creditors, the solution would be an easy one. With the legal title to the property in the common debtor, no court of equity would prefer the lien of a mere attachment to that of a prior mortgage given to secure the money advanced to purchase the property, if the attachment creditor had actual knowledge of the existence and nature of the mortgage.

And we agree with the Circuit Court of Appeals, that while it is not necessary to enter into the question of the comparative equities of the parties, yet, when the validity of the curative act is to be passed upon, that, in circumstances like those of the present case, the act cannot be justly impugned as depriving the attaching creditor of property within the meaning of the Constitution.

In *Freeborn* v. *Smith*, 2 Wall. 160, the facts were these: Smith had obtained a judgment against Freeborn in the Supreme Court of the Territory of Nevada. To this judgment a writ of error went from this court, under the law organizing the Territory, and the record of the case was filed in this court, December term, 1862. After the case was thus removed the Territory

was admitted by act of Congress, March, 1864, into the Union as a State. The act admitting the Territory contained, however, no provision for the disposal of cases then pending in this court on writ of error or appeal from the territorial courts. Motion was made, in behalf of the defendants in error, to dismiss the writ, on the ground that the territorial government having been extinguished by the formation of a state government in its stead, and the act of Congress which extinguished it having, in no way, saved the jurisdiction of the court as previously existing, nothing further could be done here. It was urged that the territorial judiciary had fallen with the government of which it was part; and that the jurisdiction of this court had ceased with the termination of the act conferring it. It being suggested, on the other side, that a bill was pending in Congress supplying the omissions of the act of March, 1864, the hearing of the motion for dismissal was suspended till it was seen what Congress would do. Congress finally acted, and on February 27, 1865, passed an act providing that all cases of appeal or writ of error theretofore prosecuted, and then pending in the Supreme Court of the United States from the Supreme Court of the Territory of Nevada, might be heard and determined by the Supreme Court of the United States, and providing for mandatory process, etc. The motion to dismiss the writ for want of jurisdiction was then renewed, on the ground that the amendatory act was a retrospective enactment interfering with vested rights, and as an attempt to confer on this court jurisdiction to review a judgment which, by law, at the time of its passage, was final and absolute. This court, through Mr. Justice Grier, thus disposed of the contention:

"It is objected to the act of February 27, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act, interfering directly with vested rights; that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise.

"But we are of opinion that these objections are not well

founded. . . . What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. . . . Such acts are of a remedial nature, and are the peculiar subject of legislation. They are not liable to the imputation of being assumptions of judicial power."

The power of a legislature to pass laws giving validity to past deeds which were before ineffectual is well settled. Thus in *Watson* v. *Mercer*, 8 Pet. 100, the title to land in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to the husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of May 30, 1785. It was fatally defective as to the wife, in not having been acknowledged by her in conformity with the provisions of the statute of Pennsylvania of 1770, touching the conveyance of real estate by *femmes covert*. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises, and recovered. The Supreme Court of the State affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledgment of Margaret Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the Supreme Court of the State, and that judgment of affirmance was affirmed by this court.

Watson v. *Mercer* was cited and followed by this court in *Randall* v. *Kreiger*, 23 Wall. 137, where it was held that it was

competent for the legislature to validate a defective power of attorney to convey land.

Similar principles were recognized in *Terry* v. *Anderson*, 95 U. S. 628; *Freeland* v. *Williams*, 131 U. S. 405; *Baker's Executors* v. *Kilgore*, 145 U. S. 487; *Louisiana* v. *New Orleans*, 109 U. S. 285. The case of *Green* v. *Abraham*, 43 Ark. 420, was cited in the opinion of the Circuit Court of Appeals. There a mortgage improperly acknowledged had been placed of record, which by reason of the defective acknowledgment was not notice to subsequent purchasers or lienors. Afterwards the mortgaged property was attached under a writ against the mortgagor, and thereafter the legislature validated the record of the mortgage. The mortgagee having proceeded in replevin to recover the attached property from one who claimed it under the attachment, it was held by the Supreme Court of Arkansas that the interest of the attaching creditor in the attached property was not vested, but could be, and that it was in fact displaced by the subsequent enactment validating the record of the mortgage.

Without pursuing the subject further, our conclusion is that no property rights of the plaintiffs in error were impaired by the act of February 3, 1897. Their judgment against Blocker remained unaffected, and the lien of the writ of attachment was not destroyed, but continued to hold any surplus that might have remained after the satisfaction of the mortgage liens. They have no just ground in constitutional law to complain of the action of Congress in giving legal effect to the equitable lien of the mortgages.

Approving the careful opinion of the Circuit Court of Appeals for the Eighth Circuit, reported in vol. 105 Fed. Rep. 293, the judgment of that court is

Affirmed.

MR. JUSTICE GRAY and MR. JUSTICE WHITE took no part in the decision.

See volume 186 for decisions without opinions for the time covered by this volume.

INDEX.

ALIENS.

1. The power to exclude or expel aliens is vested in the political departments of the Government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations, except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene. And this is true of the privilege of transit. *Fok Yung Yo* v. *United States*, 296.
2. By the treaty between the United States and China, of 1894, the privilege of transit across the territory of the United States could only be enjoyed subject to such regulations of the Government of the United States as might be necessary to prevent the privilege from being abused. *Ib.*
3. The treaty, in recognizing the privilege and providing that it should continue, proceeded on the ground of its existence and continuance under governmental regulations, and no act of Congress was required to carry it into effect. *Ib.*
4. Under existing regulations the action of the collector of customs in refusing transit cannot be interfered with by the courts. *Ib.*
5. *Fok Yung Yo ante*, 296, followed. *Lee Gon Yung* v. *United States*, 306.

APPEAL.

Where the decree of a Circuit Court and the order allowing an appeal both state that the bill was dismissed for want of jurisdiction, no separate certificate is necessary, and the appeal may be taken at any time within two years. *Excelsior Pipe Company* v. *Pacific Bridge Co.*, 282.

CASES DISTINGUISHED.

See CONSTITUTIONAL LAW, 3.

CLAIMS AGAINST THE UNITED STATES.

1. The facts and law of this case were so fully and satisfactorily discussed in the Court of Claims that its opinion might well be adopted as that of this court. *United States* v. *Borcherling*, 223.
2. That court held that the claimant Borcherling was entitled, on the facts shown, to recover from the United States the sum of seven thousand and nine hundred dollars, and this court holds that the conclusions of that court were correct and affirms the judgment. *Ib.*
3. Section 19 of the act of May 28, 1896, c. 252, providing that " the terms of office of all commissioners of the Circuit Courts heretofore appointed shall expire on the thirtieth day of June, 1897, . . . and said com-

missioners shall then deposit all the records and other official papers appertaining to their offices in the office of the clerk of the Circuit Court, by which they were appointed," not having authorized the filing of the writings in question, and no provision having been made for compensating the clerk for the service of receiving them and retaining them in his custody, the Court of Claims erred in awarding judgment in favor of the claimant. *United States* v. *Van Duzee*, 278.

COAL MINES.

1. It is within the power of a state legislature to provide for the appointment of inspectors of mines and the payment of their fees by the owners of the mines. *St. Louis Coal Company* v. *Illinois*, 203.
2. A law providing for the inspection of coal mines is not unconstitutional by reason of its limitation to mines where more than five men are employed at any one time. *Ib.*
3. Where the law provided for an inspection of coal mines at least four times a year, it was held not to be objectionable by reason of the fact that a discretion was invested in the inspectors to cause the mines to be inspected more than four times a year, and as often as they might deem it necessary and proper. *Ib.*
4. A law providing that the fees for each inspection shall not be less than six nor more than ten dollars is not rendered unconstitutional by the fact that, within these limits, the fees for each inspection are fixed by the inspector. *Ib.*
5. The act of Congress, approved June 28, 1898, known as the Curtis Act, did not operate to deprive the lessors of coal mines in the Choctaw Nation of royalties due and owing to them for coal mined under valid leases, prior to that date. *Southwestern Coal Company* v. *McBride*, 499.

CONSTITUTIONAL LAW.

1. Giving to the statute of Tennessee the same meaning that was given to it by the Supreme Court of that State, which this court is bound to do, it is *held* that it violates the interstate commerce clause of the Constitution of the United States. *Stockard* v. *Morgan*, 27.
2. All the cases cited in the opinion of the court deny the right of a State to tax people representing owners of property outside the State for the privilege of soliciting orders within it, as agents of such owners, for property to be shipped to persons within the State. *Ib.*
3. *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, distinguished from this case. *Ib.*
4. Although a State has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the State. *Ib.*
5. The seventh section of the act of Pennsylvania of April 27, 1855, is as follows: "That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within

that period by the owner of the premises, subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable: *Provided*, That the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county the duplicate of any receipt therefor, proved by oath or affirmation to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity, or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed: *Provided*, That this section shall not go into effect until three years from the passage of this act." *Held*, that this was not an act or law impairing the obligation of contracts within the meaning of the Constitution of the United States. *Wilson* v. *Iseminger*, 55.

6. By the act of March 18, 1886, the city of Vicksburg was authorized to provide for the erection and maintenance of a system of waterworks and the contract made in accordance with its provision was within the power of the city to make, and the subsequent legislation, state and municipal, set forth in the bill, impair the contract rights of the water company, within the protection of the Constitution of the United States unless the city can point to some inherent want of legal validity in the contract. *Vicksburg Waterworks Co.* v. *Vicksburg*, 65.
7. It is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable; and the exercise of such jurisdiction is for the benefit of both parties, in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights. *Ib.*
8. This cause presents a controversy so arising under the laws and Constitution of the United States as to give the Circuit Court jurisdiction. *Ib.*
9. As the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument. *Kansas* v. *Colorado*, 125.
10. Where a State on behalf of her citizens and in vindication of her alleged rights as an individual owner files a bill against another State to obtain relief in respect of being wholly deprived by the direct action of the latter of the water of a river accustomed to flow through and across her territory, and the consequent destruction of her property, and of the property of her citizens and injury to their health and comfort, the original jurisdiction of this court may be exercised. *Ib.*
11. If it is a case of circumstances in which a variation between them as

stated by the bill and those established by the evidence, might either incline the court to modify the relief or to grant no relief at all, the court, even though it sees that the granting or modified relief would be attended with considerable difficulty, will not support a demurrer. *Ib.*

12. The general rule is that the truth of material and relevant matters, set forth with requisite precision, are admitted by demurrer, but in a case of great magnitude, involving questions of grave and far-reaching importance, that rule will not be applied, and the case will be sent to issue and proofs. *Ib.*
13. The legislation of the State of Connecticut, in respect to the taxation of shares of stock in a local corporation, held by non-residents, which is set forth in the statement of facts, is not in conflict with paragraph 1 of section 2 of article IV of the Federal Constitution, or the Fourteenth Amendment to that Constitution. *Travellers' Insurance Co.* v. *Connecticut*, 364.
14. The court below erred in dismissing this action, for want of jurisdiction, as the right which it was claimed had been unlawfully invaded, was one arising under the Constitution and laws of the United States; and although it has been held that, on error from a state court to this court, where the Federal question asserted to be contained in the record, is manifestly lacking all color of merit, the writ of error should be dismissed, that doctrine relates to questions arising on writs of error from state courts, where, aside from the Federal status of the parties to the action, on the inherent nature of the Federal right which is sought to be vindicated, jurisdiction is to be determined by ascertaining whether the record raises a *bona fide* Federal question. *Swafford* v. *Templeton*, 487.

See COAL MINES;
INSURANCE, 1.

CORPORATION.

1. The Tulare irrigation district, in California, issued and sold its bonds for the purpose of constructing its irrigation works. The proceeds were used for that purpose by the corporation, and the works were by means thereof constructed. The corporation then refused to pay the bonds, and denied its liability on them upon the ground that it was never legally organized as a corporation, and hence had no legal right to issue any bonds. *Held*, on the authority of *Douglas County Commissioners* v. *Bolles*, 94 U. S. 104, that common honesty demanded that a debt thus incurred should be paid; and that there was nothing in the facts in this case to set aside the application of that principle; that if anything could constitute a *de facto* corporation the defendant is one and that, being thus a *de facto* corporation, none but the State can question its existence. *Tulare Irrigation District* v. *Shepard*, 1.
2. Under the circumstances stated in the opinion of the court, the landowner is estopped from setting up the defence of the want of notice, as against the plaintiff in this case. *Ib.*
3. That the State has power to forfeit the charter of a corporation for an

abuse of its priviliges, is recognized as law in Louisiana. *New Orleans Waterworks Co.* v. *Louisiana*, 336.

4. In Louisiana a corporation is liable to be proceeded against for taking illegal rates by *quo warranto* to the suit of the State. *Ib.*

COURTS OF THE UNITED STATES.

1. The District and Circuit Courts of the United States are always open for the transaction of some business which may be transacted under the orders of the judge in his absence, and on such transaction rest the plaintiff's claims in this case, which the court sustain as business which could be transacted by the clerk in the absence of the judge, following the departmental construction of the statutes. *United States* v. *Finnell*, 236.

2. Of course if that construction were obviously or clearly wrong it would be the duty of the court to so adjudge; but if there simply be doubt as to the soundness of that construction, the action of the Government in conformity with it for many years should not be overruled except for cogent reasons. *Ib.*

DAMAGES.

The obligee in a bond which supersedes an order confirming a sale of real estate, and directing the immediate execution of a deed and delivery of possession thereof to the purchaser, is entitled, after that order has been affirmed on the appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond, and the appeal in which it was allowed. *Woodworth* v. *Northwestern Life Ins. Co.*, 354.

EQUITY.

1. The time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. *New York City* v. *Pine*, 93.

2. A failure to pursue statutory remedies is not always fatal to the rights of a party in possession, and if full and adequate compensation is made to the plaintiff, sometimes the possession of the defendant will not be disturbed. *Ib.*

3. A court of equity may take possession and finally end a controversy like the present by securing the payment of adequate compensation in lieu of a cessation of the trespass. *Ib.*

See CONSTITUTIONAL LAW, 7.

EVIDENCE.

In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and the court cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might

rightfully have found the verdict which they did. *United States* v. *Coffee Queen Mining Company*, 495.

INSURANCE.

1. The classification of life and health insurance companies separately from fire, marine and inland insurance companies, and mutual benefit and relief organizations doing business through lodges and mutual benefit associations, made by the State of Texas in respect of insurance, is not so arbitrary and destitute of reasonable basis as to be obnoxious to constitutional objection. *Fidelity Mutual Life Insurance Co.* v. *Mettler*, 308.
2. In an action on a life insurance policy it is not necessary to prove the fact of death beyond a reasonable doubt. A verdict for the party in whose favor the weight of evidence preponderates will be sustained. *Ib.*
3. The inference of death may arise from disappearance under circumstances inconsistent with a continuation of life. *Ib.*
4. The belief of the family of an assured that he is dead is not admissible on the trial of an action on a policy of insurance on his life as independent evidence of the fact of his death, but the entertainment of such belief may be proven as tending to show innocence of fraud. And, in this case, the evidence which was admitted cannot be presumed, the entire record considered, to have had any influence whatever on the verdict except from the point of view in which it was admissible. *Ib.*
5. No other objection urged constituted reversible error or requires particular mention. *Ib.*

JURISDICTION.

1. The question involved in this case upon the merits is, in substance, whether the plaintiff is entitled to the alluvion caused by the recession of the Mississippi River to the extent of many hundred feet east of the point where it flowed in 1852, at the time when the plaintiff's predecessor took title to the property by virtue of a patent from the United States. The trial court held she was, and the Supreme Court of the State of Missouri held she was not. In the opinion of this court the case involves no Federal question, and it is dismissed on the ground of lack of jurisdiction. *Sweringen* v. *St. Louis*, 38.
2. In an action of ejectment against private individuals, the jurisdiction of the Circuit Court cannot be maintained on the ground that by averments that plaintiffs were ousted in violation of the treaty of October 21, 1803, and of the Fifth Amendment, the provisions of which it was the duty of the Federal Government to observe, it appeared that the case arose under the Constitution, or laws, or treaties of the United States. *Filhiol* v. *Maurice*, 108.
3. The rule reiterated that this court has no jurisdiction under the third division of section 709 of the Revised Statutes unless the party seeking the writ of error has unmistakably invoked for the protection of an asserted right, title, privilege or immunity, the Constitution, or some treaty, statute, commission, or authority, of the United States. *Michigan Sugar Company* v. *Michigan*, 112.
4. Where a party, drawing in question in this court a state enactment as

invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a State denied to him a right or immunity under the Constitution of the United States, did not raise such question or specially set up or claim such right or immunity in the trial court, this court cannot review such final judgment and hold that the state judgment was unconstitutional, or that the right or immunity so claimed had been denied by the highest court of the State, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court, as required by the state practice. *Erie Railroad Company* v. *Purdy*, 148.

5. If, upon examining the record, this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed in the trial court, then the jurisdiction of this court would not have been defeated by the mere failure of the highest court of the State to dispose of the question so raised, or to pass upon the right or immunity so claimed. *Ib.*
6. The defendant in error moved to dismiss the action on the ground that no Federal question was decided by the Supreme Court of Iowa. *Held*, that the motion should be overruled, as the plaintiff explicitly based his right of action on Rev. Stat. §§ 5197, 5198, and as the judgment of the trial court, and that of the Supreme Court of the State, denied such right, this court therefore has jurisdiction. *Talbot* v. *Sioux City First National Bank*, 172.
7. In these statutes relating to illegal interest, it is the interest charged, and not the interest to which a forfeiture might be enforced that the statute regards as illegal, and if interest greater than the legal rate is charged, it may be relinquished, and recovery had at the legal rate. *Ib.*
8. Matters within the pleadings in this case having been left undetermined by the court below, and the cause having been detained for the purpose of thereafter passing upon them, and for the entry of a further decree, the decree entered below was not final, and this court is without jurisdiction to pass upon it. *Covington* v. *Covington First National Bank*, 270.
9. If a bill be brought to enforce or set aside a contract, though such contract be connected with a patent, it is not a suit under the patent laws, and the jurisdiction of the Circuit Court can only be maintained upon the ground of diversity of citizenship. *Excelsior Pipe Co.* v. *Pacific Bridge Co.*, 282.
10. Although the bill be an ordinary bill for the infringement of a patent, of which the Circuit Court would have jurisdiction, if the answer show that it is really a suit upon a contract the court should dismiss the bill. *Ib.*
11. Where a bill is filed by a licensee (the license being set up merely to show the title of the plaintiff to the patent) against the patentee and another party to whom the patentee has granted a conflicting license, the jurisdiction of the court is not ousted by reason of allegations in the answer that the plaintiff had forfeited all his rights under the license by failure to comply with its terms and conditions, by reason of which the license had been revoked by the patentee. *Ib.*

12. The authority of the Government in prescribing regulations in respect of transit being unqualified, and the existing regulations not open to constitutional objection, the court below could not interfere by *habeas corpus* with the collector's orders, and its ruling on an offer of evidence, the entire record considered, was not erroneous. *Lee Gon Yung* v. *United States*, 306.

13. In order to warrant the exercise by this court of jurisdiction over the judgments of state courts, there must be some fair ground for asserting the existence of a Federal question, and in the absence thereof a writ of error will be dismissed, although the claim of a Federal question was plainly set up; and where by the record it appears that such a claim, although set up, had no substance or foundation, the fact that it was raised was not sufficient to give this court jurisdiction. *New Orleans Waterworks Co.* v. *Louisiana*, 336.

14. Upon a careful review of all questions, the court is of opinion that no Federal question exists in this record, and that the court is without jurisdiction in this case. *Ib.*

15. The original jurisdiction, vested by the Constitution in this court over controversies in which a State is a party, is not affected by the question whether the State is a party plaintiff or party defendant. *Minnesota* v. *Hitchcock*, 373.

16. A dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding. *Ib.*

17. The United States are to be taken, for the purposes of this case, as the real party in interest adverse to the State. *Ib.*

18. This court has jurisdiction of this controversy, and is called upon to determine the case on its merits. *Ib.*

19. Not only the technical rules of statutory construction, but also the general scope of the legislation in these matters, and the policy of the United States in respect to public schools, and also to Indians, concur in sustaining the contention of the Government that none of these ceded lands passed under the school grant to the State. *Ib.*

20. The court is of opinion that the claim of Minnesota to these lands cannot be sustained, and that the bill should be dismissed. *Ib.*

See CONSTITUTIONAL LAW, 8.

MORTGAGE.

1. The judgment of the Circuit Court of Appeals, sustaining the act of February 3, 1897, which provided that "section 4742 of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: "Provided that if the mortgagor is a non-resident of the Indian Territory, the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated," is sound as applicable to this case. *McFaddin* v. *Evans-Snider-Buel Co.*, 505.

2. The plain purpose of Congress was to give effect to mortgages of non-residents, which had been, before the passage of the act, recorded in the judicial district in which the property was situated at the time the mortgages were executed. *Ib.*
3. The act as so construed and applied was a valid exercise of Congressional power, and in circumstances like those of the present case, cannot be justly impugned as depriving the attaching creditor of property within the meaning of the Constitution. *Ib.*
4. The power of a legislature to pass laws giving validity which were before ineffectual, is well settled. *Ib.*

NAVY.

1. Section 7 of the act of March 3, 1899, c. 413, 30 Stat. 1004, in effect abolishes the rank of Commodore, at least as far as respects the active list of the line of the Navy, and lifts those in that rank to that of Rear Admiral. Clearly that was a special provision in respect to which the attention of Congress was at the time directed, and when in section 13 Congress prescribed a general rule for the salaries of naval officers, such general rule cannot be understood as repealing that special provision. *Rodgers* v. *United States*, 83.
2. That section fixed the amount of the salary but did not affect any general provisions of law affecting a difference between salary while at sea and while on shore. *Ib.*

PATENT FOR INVENTION.

1. Patent No. 404,414, issued Juue 4, 1889, to William R. Jones, for a "method of melting molten pig metal," is a good and valid patent, and was infringed by the defendant. *Carnegie Steel Company* v. *Cambria Iron Company*, 403.
2. The process described in the patent consisted of a large reservoir between the blast furnaces and the converters, in which should always be maintained a large quantity of metal, which should be drawn off in small quantities at a time and replenished by a like quantity of metal from the blast furnaces. *Ib.*
3. A process patent can only be anticipated by a similar process. A process patent is not anticipated by mechanism which might, with slight alterations, have been adapted to carry out that process, unless at least such use of it would have occurred to one whose duty it was to make practical use of the mechanism described. *Ib.*
4. A disclaimer may extend to a part of the specification as well as to a claim or one feature of a claim, though it would be otherwise if the purpose of the disclaimer had been to alter the description of the invention, or convert the claim from one thing into something else. *Ib.*
5. A stipulation of counsel entered into for the purpose of saving time may be repudiated where the facts subsequently developed show that with respect to a particular matter it was inadvertently signed, provided that notice be given in sufficient time to prevent prejudice to the opposite party. *Ib.*

See JURISDICTION, 11, 12, 13.

PENSIONS.

Section 4747 of the Revised Statutes, which provides that no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner, protects the fund only while in the course of transmission to the pensioner; but, when the money has been paid to him, it has enured wholly to his benefit, and is liable to seizure as opportunity presents itself. *McIntosh* v. *Aubrey*, 122.

PRACTICE.

1. In the exercise of original jurisdiction by this court the usual practice in equity cases is to hear applications for leave to file bills, *ex parte*, and, ordinarily, leave is granted as of course. *Washington* v. *Northern Securities Company*, 254.
2. But this is not an invariable rule, and where it is apparent on the face of the proposed bill that there is a defect of parties, which cannot be supplied without ousting the jurisdiction, leave will be denied. *Ib.*
3. Where the objection is one of jurisdiction over the subject-matter, and the case is of grave importance, leave to file will be granted that the fullest argument may be had. *Ib.*

PUBLIC LAND.

1. A Federal question was presented by the contentions of the plaintiff in error, and this court is of opinion, that while there was a lake abutting on or to the north of the lots, the plaintiff would take all land between the meander line and the water, and all accretions, it was competent for the defendant to show that there was not, at the time of the survey, nor since, any such lake, and to contend that, in such a state of facts there could be no intervening land, and no accretion by reliction. *French-Glenn Live Stock Co.* v. *Springer*, 47. *Same* v. *Colwell*, 54.
2. This was an appeal from a decree of the Court of Private Land Claims, confirming the title of the appellees to a tract of land in New Mexico. *Held*, that in the absence of any sufficient attack upon the record, or of any evidence on the part of the Government going to disprove or discredit the averments therein, it formed enough of a basis for the finding of the court below that there was a grant made as stated in its findings, and that such grant and the record thereof in the archives had been destroyed under the circumstances stated. *United States* v. *Pendell*, 189.
3. The treaty of December 30, 1853, between the United States and Mexico, and the act of Congress in support of it, were not intended to debar parol proof of the existence and of the contents of a grant which had been destroyed under the circumstances detailed, or that, under such circumstances, a presumption that the grant had been recorded could not be indulged. *Ib.*

4. In this case the evidence of possession was sufficient, in connection with the other evidence, upon which to base a presumption that the petitioner had a title to the land, which should be confirmed. *Ib.*
5. The terms of the act of March 3, 1891, 26 Stat. 854, (establishing the Court of Private Land Claims,) with reference to a proceeding like this, leave no room for doubt that it was the intent of Congress to require that, before a decision of the court in the premises, all those asserting claims in the land, adverse to the United States, should be made parties, and should be heard in support of their validity. *United States* v. *Green*, 256.
6. By the law in force at the time of the sale under consideration, a grant initiated in the manner in which the one in question is claimed to have been, could not exceed in the aggregate four sitios. *Ib.*
7. In its essential feature this case is like *Ely's Administrator* v. *United States*, 171 U. S. 220. *Ib.*
8. It may be presumed that the Mexican officials duly performed the duty imposed upon them of registering the fact of the making of a grant of public lands. *Ib.*
9. In *Cameron* v. *United States*, 148 U. S. 301, the matter passed upon was not the same as that which is present in the case at bar. *Ib.*

See JURISDICTION, 18 to 22.

STATUTE.

1. Where there are two statutes, the earlier special and the later general, (the terms of the general being broad enough to include the matter provided for in the special,) the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. *Rodgers* v. *United States*, 83.
2. In case statutes are alleged to be inconsistent with each other, effect must be given to both, if by any reasonable interpretation, that can be done; and like principles must control when the question is whether an act of Congress has been superseded in whole or in part by a subsequent treaty with a foreign nation. *United States* v. *Lee Yen Tai*, 213.

TRUST.

The property involved in this suit is improved real estate in the city of Washington; and the controlling question presented is, whether the sale of it under a deed of trust stands in the way of its redemption by Mrs. Hitz upon her paying the debt secured by the deed of trust. *Held:* As between the parties to the original cause the title to the real estate in question was bound by the filing of the cross-bill by Mrs. Hitz. The deeds which Mrs. Hitz sought to have set aside are valid and enforceable instruments. The sale by Tyler as trustee conferred no title as against Mrs. Hitz. Mrs. Hitz is entitled in this suit to redeem the property by paying such sum as may be due on account of the debt to secure which the deed to Tyler was made. *Hitz* v. *Jenks*, 155.