
 United States v. Chicago.

*185] *THE UNITED STATES, COMPLAINANTS, v. THE CITY
OF CHICAGO.

Although the motion under argument in the Circuit Court was addressed to its discretion, yet if the questions which arose and upon which the judges differed involved the right of the matter, this court will entertain those questions.¹

So, also, where the questions are several in number, and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point.²

The corporate powers of the city of Chicago have no right to open streets through property belonging to the United States, adjacent to the city, although the ground had been laid out in lots and streets by the government.

Their right was limited to that part which, by a sale of the government, had become private property.

The fact, that streets had been laid out by an agent of the government, did not amount to a dedication of them to public use, so as to vest the control over them in the city.

The United States, having been the proprietor of all the land and reserved a part for military purposes, hold this part by a different title than where land is purchased by them in a State.³

THIS case came up, on a certificate of division in opinion, from the Circuit Court of the United States for the District of Illinois.

In 1839, soon after the decision of the Supreme Court in *Wilcox v. Jackson*, 13 Pet., 498, deciding that southwest fractional quarter-section ten, township thirty-nine north, range fourteen east, in the Chicago land district, having been selected and used for military purposes, was not subject to preëmption, the Secretary of War, in virtue of the authority vested in him, directed the sale of a portion thereof.

The act under which the Secretary of War derived this authority is the act of the 3d of March, 1819, entitled "An act authorizing the sale of certain military sites," which enacts, "that the Secretary of War be, and he is hereby, authorized, under the direction of the President of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found, or become, useless for military purposes. And the Secretary of War is hereby authorized, on the payment of the consideration agreed for into the Treasury of the United States, to make,

¹ CRITICISED. *United States v. Rosenberg*, 7 Wall., 582. CITED. *Daniels v. Railroad Co.*, 3 Wall., 255.

How., 43.

² See note to *Nesmith v. Sheldon*, 6

³ CITED. *Union Pacific R'y Co. v. Burlington &c. R. R. Co.*, 1 McCrary,

456.

execute, and deliver all needful instruments conveying and transferring the same in fee; and the jurisdiction which had been specially ceded for military purposes to the United States by a State over such site or sites shall thereafter cease."

Mr. Birchard, then Solicitor of the Treasury, was appointed by the Secretary of War to make the sale, and to cause the land to be surveyed and platted, as an addition to Chicago. A plat was accordingly made, dividing the land into blocks and lots, with intersecting streets. This plat, together with a *description of the same, was recorded in the office of the recorder of Cook county, under the title of [*186 "Fort Dearborn addition to Chicago."

By this plat, several streets then existing in Chicago were prolonged, and laid out through all the property which belonged to the government. Lots were also laid off upon both sides of the projected streets. But a portion of the property was expressly reserved from sale, and marked by dotted lines lettered "Line of reservation." Within the reserved line, there were many public buildings belonging to the United States.

On the 11th of April, 1845, the following proceedings were had by the Common Council of the city of Chicago:—

"Alderman Ogden, from committee on the judiciary, reported in favor of the petition of E. Bowen and others, for the removal of obstructions at the north end of Michigan Avenue. Received and laid on the table. And,

"On motion of Alderman Scammon, it was ordered, that the street commissioner be directed forthwith to open the street (Michigan Avenue), and remove the obstructions therefrom; and that the city attorney be directed to prosecute all persons offering any resistance to the street commissioner whilst opening said street."

The city of Chicago was incorporated by an act of the Legislature of Illinois on the 4th of March, 1837. See Session Laws, 1836-37, p. 50. By the first section it is enacted, "That the district of country in the county of Cook, in the State aforesaid, known as the east half of the southeast quarter of section thirty-three, in township forty, &c., . . . and fractional section ten, excepting the southwest fractional quarter of section ten, occupied as a military post, until the same shall become private property, &c., . . . in township thirty-nine north, range number fourteen east, of the third principal meridian, in the State aforesaid, shall hereafter be known by the name of the city of Chicago."

The inhabitants are incorporated by the name of the city

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of Chicago, and the corporation is authorized to take, hold, purchase, and convey such real and personal estate as the purposes of the corporation may require.

The twenty-fourth section prescribes the duties of the street commissioner,—“to superintend the making of all public improvements ordered by the Common Council, and to make contracts for the work and materials which may be necessary for the same, and shall be the executive officer to carry into effect the ordinances of the Common Council relative thereto,” &c.

The powers of the Common Council over streets are conferred by the thirty-seventh, thirty-eighth, fortieth, and forty-
*187] third *sections. The thirty-seventh enacts, that “the said Common Council shall have the exclusive power to regulate, repair, amend, and clear the streets and alleys of said city, bridges, side and cross walks, and of opening said streets, and of putting drains and sewers therein, and to prevent the encumbering of the same in any manner, and to protect the same from encroachments and injury,” &c.

The thirty-eighth enacts, that “the Common Council shall have power to lay out, make, and assess streets, alleys, lanes, highways, in the said city, and make wharves and slips at the end of streets on property belonging to said city; and to alter, widen, contract, straighten, and discontinue the same; but no building exceeding the value of one thousand five hundred dollars shall be removed in whole or in part without the consent of the owner. They shall cause all streets, alleys, lanes, or highways laid out by them to be surveyed, described, and recorded in a book to be kept by the clerk, and the same, when opened and made, shall be public highways.” The remainder of the section prescribes the manner in which the damages shall be assessed to the owners of land taken.

The fortieth enacts, that “the Common Council shall have power to cause any street, alley, lane, or highway in said city to be graded, levelled, paved, repaired, macadamized, or gravelled,” &c.

And the forty-third enacts, that “the land required to be taken for the making, opening, or widening of any street, alley, lane, or highway, shall not be so taken and appropriated until the damages assessed therefor shall be paid or tendered to the owner or his agent.”

A few days after the passage of the ordinance by the Common Council, directing the street commissioner to open Michigan Avenue, the United States filed their bill of complaint in the Circuit Court, setting their case fully forth, and praying for a writ of injunction against the city of Chicago,

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its officers, agents, servants, counsellors, and solicitors, to restrain them from entering upon the unsold and reserved portion of the southwest fractional quarter-section ten aforesaid, embraced within the dotted lines of the small map, marked "Line of reservation," for the purpose of opening "Michigan Avenue," or the other proposed streets, or from committing any waste or spoil upon said land, buildings, or inclosures.

The district judge granted the injunction, and on hearing a motion for its continuance in the Circuit Court, the opinions of the judges were opposed upon the following points:—

1st. Whether the corporate powers of the city of Chicago have a right to open the streets through that part of the ground laid out in lots and streets, but not sold by the government.

*2d. Whether the corporate powers of the city are not limited to that part of the plat which, by sale of [*188 the government, has become private property.

3d. Whether the streets laid out and dedicated to public use by Birchard were not, by his surveying the land into lots and streets, making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby made the ground embraced by said streets "private property," so as to authorize said city of Chicago to keep said streets open.

The cause was argued by *Mr. Toucey* (Attorney-General), on behalf of the United States, no counsel appearing for the city of Chicago.

Mr. Toucey presented the following points:—

1st. The city of Chicago has no jurisdiction within Fort Dearborn.

2d. There was no dedication of any street within the fort.

3d. The fort being reserved, there was no power to dedicate a street within it.

4th. The State of Illinois has no power to remove the buildings of the United States within the fort, or to make a highway there.

I. The city has no jurisdiction within the fort. The part sold became private property. The lots were sold by their numbers, and were, in fact, bounded on the streets. The title passed to the centre of the streets, subject to the easement. The adjoining proprietors own to the centre, subject to the way, as if it had been laid out by public authority. This is the legal presumption, liable to be rebutted. English authorities: *Goodtitle v. Alker*, 1 Burr., 143; *Pring v. Pearsey*, 7 Barn. & C., 306; *Stevens v. Whistler*, 11 East, 51;

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Cook v. Green, 11 Price, 136. Maine: *Howard v. Hutchinson*, 1 Fair., 335. New Hampshire: *Makepeace v. Worden*, 1 N. H., 16. Massachusetts: *United States v. Harris*, 1 Sumn., 21; *Adams v. Emerson*, 6 Pick., 57. Connecticut: *Peck v. Smith*, 1 Conn., 103; *Watrous v. Southworth*, 5 Id., 305; *Hart v. Chalker*, Id., 311; *Chatham v. Brainard*, 11 Id., 60. New York: *Cortelyou v. Van Brundt*, 2 Johns., 357; *Gedney v. Earl*, 12 Wend., 98; *Willoughby v. Jencks*, 20 Id., 96. Virginia: *Bolling v. Mayor*, 3 Rand., 563. South Carolina: *Witler v. Harvey*, 1 McCord, 67.

When the highway is dedicated, the title of the land remains in him who dedicates, and will pass to his grantee. The public take an easement only. *Lade v. Shepherd*, 2 Str., 1044; *Cincinnati v. White*, 6 Pet., 437; *Barclay v. Howell's Lessee*, *Id., 513; *Hobbs v. Lowell*, 19 Pick. (Mass.), *189] 408, Shaw, C. J.; *Pearsall v. Post*, 20 Wend. (N. Y.), 126, 131, 132, Cowen, J.

The jurisdiction of the city extends as far as the line of private property, which is the line of reservation on the plat, the present boundary-line of the fort. It has none beyond. See the act incorporating the city of Chicago, Illinois Session Laws, 1836-37, p. 50. The streets outside of the fort were effectually dedicated when the lands were sold, the streets opened, accepted by the public, and used as public streets. *Cincinnati v. White*, 6 Pet., 431; *Barclay v. Howell's Lessee*, Id., 498; *New Orleans v. United States*, 10 Pet., 662.

II. There was no dedication of any street within the fort. The present fort is the part not sold. It was expressly reserved by the United States when the sales commenced. The whole interest is in the United States. The proposed streets within the fort or line of reservation have not been opened, nor dedicated, nor lots sold on them. They are covered in part by the necessary buildings of the fort. The United States own them, and the land on both sides; and the Executive Department retained to the line of reservation for the purposes of the government, before any of the land beyond that line had been disposed of. The first act of dedication or disposition had not taken place. The map recorded, without any other act done, would be immaterial. If the sale had been entirely countermanded, the recorded survey would have been a dead letter; it is so now within the line where they were countermanded, or not authorized. The plan of Birchard was disallowed to the extent of the present fort. That order was effective, and is to be taken as the order of the President. A dedication is founded upon user. Dedication is the act of giving up land to the public. It must be enjoyed

in pursuance of the gift. An enjoyment for a less period than that prescribed by the statute of limitations may suffice, if accompanied by other decisive acts. Maps, plans, declarations, are evidence. Dedication is applicable only to the creation of public rights. Private rights are measured by the grant. Mercer Street, 4 Cow. (N. Y.), 542.

III. The fort being reserved, there was no power to dedicate a street within it. This was a military post, and under the control of the War Department. By the act of Congress of the 3d of March, 1819, (3 Stat. at L., 520,) the Secretary had power to sell a military site, become useless for military purposes, and give a deed in fee. But the act does not authorize the Secretary to lay out a road through a fort reserved from sale. It does not authorize him to encumber it, when retained as useful for military purposes, or to divert it from those purposes. It must be condemned as useless for military purposes *before it can be sold. Here is executive [*190 responsibility; and when upon that responsibility the site is retained, and not sold, there can be no conveyance. None is authorized. But if that were otherwise, before any sale he ordered the fort, block-house, powder-magazine, mess-hall, shops, and other necessary buildings, with the land where they stood, to be reserved. The subordinate had no authority to come with his sales within the line of reservation. It is to be presumed that he conformed to his instructions, in the absence of proof to the contrary. It is, indeed, admitted that the fort was reserved from sale to the line of reservation.

IV. The State of Illinois has no power to remove the buildings of the United States within the fort, or to make a highway there. The site of Fort Dearborn, in the judgment of the Executive, is wanted as a military post. The reservation is conclusive on this point. If private property, it could be taken under the Constitution, upon making compensation, and applied to this use. But the United States already own the land, and have applied it to this use. The road having never been opened, the State cannot now condemn the land to any other public use than that to which it is applied by the government, thereby causing an interference or collision. A State cannot open a convenient highway through a powder-magazine, or into the entrenchments of a fort, which exist by order of a government supreme within its sphere.

If, then, the city has no jurisdiction within the limits of Fort Dearborn; or if this street was never dedicated to the public by the Secretary of War, or his subordinate; or if neither had authority to dedicate it; or if the State of Illinois

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has no authority to open a road in this fort in either case, the injunction must be sustained, to restrain the city from demolishing the buildings of the fort to open a road there; and corresponding answers must be given to the questions submitted by the court below.

Mr. Justice WOODBURY delivered the opinion of the court.

This case comes before us on a certificate of a division of opinion between the judges of the Circuit Court in the District of Illinois.

A preliminary question has arisen as to our jurisdiction, which first deserves attention.

The proceedings in the court below were a bill, filed on the 19th of April, 1845, by the United States against the city of Chicago, to obtain an injunction not to lay out certain streets through land belonging to the United States, which the city was preparing to open.

*191] Before the return day a temporary injunction was issued, and when the term arrived, a motion was made to continue that injunction till the merits of the bill were decided. No answer had been put in to the merits, but a hearing was had on affidavits as to the motion, and in that hearing the division of opinion occurred which is now before us.

Two leading objections have been suggested to our jurisdiction over the matter. One is, that the division arose, not in a hearing of the merits, but of a preliminary motion, resting in the discretion of the court; and the other is, that several questions are certified, covering the whole case rather than a single point.

In respect to the first objection, we do not propose to decide whether the grant of a preliminary and temporary injunction is a matter of discretion merely, rather than of right. Because, whichever it may be, the questions of division presented here are not those on matters of mere discretion in the court below, but involve the right of the United States in the land proposed to be laid out as a street by the city. The adjudged cases, where a certificate has not been sustained on account of some discretion connected with the subject, are chiefly those where the question presented involved merely a matter of discretion, rather than arising in the consideration of a motion or point, which was one of discretion. (*Smith v. Vaughan*, 10 Pet., 366; *Packer v. Nixon*, 10 Pet., 411.) It must be obvious, that, in deciding a matter of discretion, a point may arise which is one of right and very material.

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Other cases not sustained were decided on the ground that they occurred after the merits of the cause were decided, and in proceedings subsequent thereto, whether discretionary or not. (*Bank of United States v. Green*, 6 Pet., 28; *United States v. Daniel*, 6 Wheat., 548; *Devereaux v. Marr*, 12 Wheat., 212; 5 Cranch, 11, 187; 4 Wash. C. C., 333.) The act of Congress seems to reach only matter arising in the progress of the cause, and not afterwards, because the proviso is, "that nothing herein contained shall prevent the cause from proceeding," &c., and hence implies it must be in the progress of the cause. See Act of Congress, April 29th, 1802, 2 Stat. at L., 159, 160; 6 Wheat., 548. But the present question, occurring before a final decision, comes expressly within the words of the law,—“that whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point” of disagreement shall be certified, &c. (2 Stat. at L., 159.) And this provision, manifestly, is broad enough to cover any material question of right thus arising, whether the subject on hearing was one of discretion or of right.

*The second ground of objection, that these ques- [*192
tions are several in number, and so material as to de-
cide the whole cause, might prevail, if they had not arisen at
one time, at one stage in the cause, and involved little beyond
one point. Because, if they are several in number and apply
to different stages of the trial, and relate to independent
points, they are generally not proper. *United States v. Bailey*,
9 Pet., 267; *Nesmith v. Sheldon*, 6 How., 43; *White v. Turk*,
12 Pet., 238; *United States v. Stone*, 14 Pet., 524; *Saunders*
v. Gould, 4 Pet., 392; *Grant v. Raymond*, 6 Pet., 218.

That these three questions require an opinion virtually on
only one point, namely, the right of the United States to the
place proposed to be opened as a street, is manifest, when we
see that the decision of this one way disposes of them all, and
of the whole case. And the principle embraced in the other
branch of this objection, to acting on several points which
dispose of the whole case, is, not that the whole case may not
properly be disposed of by our decision on what is certified,
but that the decision must in substance be, not on several
questions arising in various stages of the cause, and some of
them anticipated and presented, so as to cover the whole case.
Leland v. Wilkinson, 10 Pet., 294.

There has justly been a leaning in this court to decline
jurisdiction in cases of decisions below where it is doubtful;
because the power vested here in such cases, it is believed,
was meant to be much more restricted than is often practised,

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and is in the most favorable view rather an anomaly. But by considering questions, if certified here, only when real divisions of opinion occur on them, and at one and the same time, no danger exists of extending this branch of our jurisdiction beyond what Congress intended. On the contrary, it is divisions of opinion *pro forma*, and from courtesy to counsel, and on a variety of points, and at times, some not then having actually arisen, but being anticipated, which appear to transcend the original design of vesting such a power here.

We have, therefore, for several years, declined to consider a certificate of such a variety of points so arising. (See cases before cited.) And although an indulgence has sometimes been given to certificates, where, in important cases, a division was certified *pro forma* (*Jones v. Van Zandt*, 5 How., 224), yet we do not feel justified in repeating it.

To proceed to a consideration of the principal matter involved in these questions, it will be necessary first to advert briefly to some of the admitted facts in the case.

The United States became the owners of the land occupied by Fort Dearborn, near Chicago, in the State of Illinois, under *193] *the original cession of the Northwest Territory. It was occasionally a station for troops from 1804 to 1824, when the whole fractional quarter-section on which the fort stood was reserved by the General Land Office for military purposes, on the application of the Secretary of War. See *Wilcox v. Jackson*, 13 Pet., 502. In that case, which is better known as the Beaubean claim, this court decided that this was a legal appropriation of that quarter-section of land to a public purpose, and exempted it from the rules as to the mass of public lands and their usual liabilities.

From that time till A. D., 1839, it was occasionally occupied as a fort by the United States, and a light-house was erected on it under the authority of Congress, when the Secretary of War, thinking that a portion of the same might be sold without injury to the public interests, proceeded, with the approbation of the President, to make such a sale, under the act of Congress of March 3d, 1819. (3 Stat. at L., 520.)

He did this by an agent, who first made a plan of the whole quarter-section, calling it "Fort Dearborn addition to Chicago," and laying it down in lots, without exhibiting on it any buildings or reservations. But he did not sell the whole, the government not then concluding to part with the fort, or land and buildings immediately contiguous. On that plan certain streets were also laid down running into the whole quarter-section. The sales, however, being made of only the

lots and land outside of what was reserved, the United States allowed the proposed streets only so far as there laid down to be opened by the city of Chicago, and used by the adjoining owners, in conformity to the plan. And when the city undertook to open the streets within the line of reservation, and where no sales of land had been made, and where opening them would prostrate some of the public buildings, and materially injure and impair the public uses of the station, the United States applied for the injunction before named.

On the motion to continue the temporary injunction till the bill was answered and heard, the judges being opposed in opinion on the right of the city to open streets on the public land of the United States situated like this, the three questions certified were in form:—

“1st. Whether the corporate powers of the city of Chicago have a right to open the streets through that part of the ground laid out in lots and streets, but not sold by the government.

“2d. Whether the corporate powers of the city are not limited to that part of the plat which, by sale of the government, has become private property.

*“3d. Whether the streets laid out and dedicated to public use by Birchard were not, by his surveying [*194 the land into lots and streets, making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby made the ground embraced by said streets ‘private property,’ so as to authorize said city of Chicago to keep said streets open.”

But, as has been explained, the whole of them in substance depend upon the extent and character of the rights of the United States in the place where the new streets were proposed to be opened. What, then, were those rights? 1st. The place was where the title of the government had never been parted with, after the original cession. 2d. It was where the land had been appropriated and legally set apart for a special public use. 3d. It was where the opening of these streets would essentially impair, if not destroy, that public use. 4th. It was where streets had never been opened and used, or actually dedicated in that way to purchasers of land there, or to the community in that neighbourhood. 5th. It was where the city charter, by its act of incorporation, did not extend, as the charter expressly excepted from its limits “the southwest fractional quarter of section ten, occupied as a military post, till the same shall become private property.”

Now, though this court possesses a strong disposition to sustain the rights of the States, and local authorities claiming under them, when clearly not ceded, or when clearly reserved,

yet it is equally our duty to support the general government in the exercise of all which is plainly granted to it and is necessary for the efficient discharge of the great powers intrusted to it by the people and the States. The erection of forts belongs to one of those powers, and the building and employment of light-houses belongs to another.

Under the circumstances of this case just recited, then, very clear facts or principles must exist, which impair the rights of the United States, before streets can be opened upon their soil, when situated, reserved, and used as this is.

It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain.

But that was not the condition of this quarter-section, being a part of the land originally ceded to the United States as the Northwest Territory, and afterwards specially set apart for their use for military purposes. Here the opening of these streets would, also, injure, if not destroy, the great objects of *195] the reservation. Nor was any compensation proposed or made, as in other cases, for condemning this land and damaging the buildings thereon. It seems, too, that, though land purchased within a State for ordinary purposes by the general government must yield to the local public demands, yet land, when held like this, at first by an original cession to that government, and afterwards appropriated for a specific public object, cannot easily be shown liable to be taken away for an ordinary local object, though public, and especially one under another government and by mere implication. (*United States v. Ames*, 1 Woodb. & M., 88.)

It must be for a public object, clearly superior or paramount, or to which preference is expressly given by law or the Constitution, in order to make the right clear to seize and condemn land so situated. *West River Bridge v. Dix*, 6 How., 543, 544, and cases there cited; 4 Gill & J. (Md.), 108, 150.

But the correctness of this proposition, being open to some debate, is not further explained, nor is it decided here, because not necessary to a disposition of the case.

On other grounds, the idea seems entirely untenable which is entertained by the city and presented in one of the questions, that, because streets had been laid down on the plan by the agent, parts of which extended into the land not sold, those parts had, by this alone, become dedicated as highways, and the United States had become estopped to object.

Persons who looked only at this plan, and did not know

that all of the quarter-section was not then to be sold, might be misled in their opinion or expectation how far some of the streets might extend. And if becoming purchasers, such persons might have given something more, under an impression that their lots were on a street which would be longer and more important.

But the bill avers, that the agent, at the time of the sale, gave notice that the lots within the line of reservation were not to be sold. How, then, could a right to open streets there pass, or purchasers be misled? The streets could not pass as an appurtenant to the side lots there; because they were not sold. The streets did not pass by any deed of them, or of any easement or servitude in them, as none was made. There had been, also, no condemnation of them for public ways.

It is said, however, and justly, that land may be dedicated by the owner to highways, and without deed or much formality. Thus, if one allows his land long to be occupied by the public as a highway, such a dedication may be presumed. *McConnel v. The Trustees of Lexington*, 12 Wheat., 582. So if the actual user has not been long, but clearly acquiesced in. *Jarvis v. Dean*, 3 Bing., 447; 1 Campb., 262; *City of Cincinnati v. White*, 6 Pet., 431. So if one makes a [*196 map of land proposed to be sold, with streets contiguous and for the accommodation of side owners, and sells accordingly, it may generally be presumed that he thus dedicates the land contiguous for the streets. See *Matter of Thirty-second Street*, 19 Wend. (N. Y.), 128; *Wyman v. Mayor of New York*, 11 Id., 486; *Lewis Street*, 2 Id., 473; 8 Id., 85.¹ And certainly, if he allows them afterwards to be so occupied. 6 Pet., 431.

But here, as before shown, no such occupation had been allowed within the reserved line, nor any such sale made there of the contiguous lots. On the contrary, all the streets so laid down on the plan, where the lots contiguous were sold, have been allowed to be opened without opposition by the United States. And it is entirely unsupported by principle or precedent, that an agent, merely by protracting on the plan those streets into the reserved line and amidst lands not sold, nor meant then to be sold, but expressly reserved, could deprive the United States of its title to its real estate, and to its important public works. Nor, under such circumstances, have the purchasers of land elsewhere, or the city, any equitable ground of complaint, that the streets thus protracted on paper are not opened.

¹ CITED. *Irwin v. Dixon et al.*, 9 How., 31.

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Let the opinion of this court, then, be certified in conformity to these views, which will be, as applied to the questions formally, in the negative as to the first and third, and in the affirmative as to the second.

Mr. Justice CATRON, dissenting.

On a bill in equity being presented by the United States to the district judge, he granted an injunction against the city of Chicago, to restrain the corporation from running a street through the public property attached to a military post within the corporate limits. By the act of February 1st, 1807, injunctions granted by district judges in vacation only remain in force until the next term of the Circuit Court. Accordingly, at the next term a motion was made to continue the injunction granted by the district judge, and the judges were opposed in opinion whether an injunction should or should not be granted. The entire matters of law and fact arising on the face of the bill, and affidavits and documents introduced by the defendant to resist the motion, were sent up to this court, covered by three points, on which the judges assume to have been opposed. And the motion to renew the injunction is presented to us, as it was to the Circuit Court. And the question is, Have we any power to *197] grant the injunction? By the *Constitution, the judicial power is vested in the Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish. In cases affecting public ministers and consuls of other countries, and in cases where States are the parties, this court has original jurisdiction. In all other cases, the Constitution provides, 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. That is to say, with such exceptions to the exercise of appellate jurisdiction as Congress shall interpose; as that no cause shall come up, unless the matter in controversy exceeds the sum or value of two thousand dollars, nor shall a writ of error lie in a criminal cause, nor from a District Court, &c. That the original jurisdiction of the Supreme Court is limited to the two classes of cases above referred to was held by this court in *Marbury v. Madison*, 1 Cranch, 174. Is, then, the granting an injunction an exercise of original jurisdiction? It may be done out of court by the circuit judge; and so an expired injunction may be renewed at any time by him, the courts of equity being always open for such purpose by our present rules. This bill and affidavits are placed before us as they were before the Circuit Court, and for the

same purpose of founding an original motion on them, thereby to procure an order for the restraining writ to issue. We are asked to take an original incipient step, as the court below was, before any answer is filed, and before anything could be adjudged between the parties by the Circuit Court, so as to bind their rights.

What is appellate jurisdiction in the sense of the Constitution? Our practice under the thirteenth section of the Judiciary Act of 1789 has settled the meaning of the term. It is to reëxamine, and to reverse or affirm, the judgment, sentence, order, or decree of an inferior court,—to pass on that which has been adjudged. Here, nothing was adjudged in the court below.

From the threatening nature of this precedent, it is deemed improper to pass over it unnoticed, as I have done in other cases. If a division can be certified in this instance, so there may be in every other where an injunction is applied for in open court, and the judges see proper to send us the cause,—for as to real divisions, they hardly exist at present. The cases are sent here by agreement of counsel, with the assent of the Circuit Court, usually without any examination below.

I, therefore, am of opinion, that we have no jurisdiction, and that the matter before us should be dismissed.

ORDER.

This cause came on to be heard on the transcript of the *record of the Circuit Court of the United States for [*198 the District of Illinois, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court,—1st. That the corporate powers of the city of Chicago have no right to open the streets through that part of the ground laid out into lots and streets, but not sold by the government. 2d. That the corporate powers of the city are limited to that part of the plat which, by sale of the government, has become private property. And 3d. That the streets laid out and dedicated to public use by Birchard, by his surveying the land into lots and streets, and making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby make the ground embraced by said streets “private property,” so as to authorize said city of

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Chicago to keep said streets open. Whereupon, it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

JENNET SMITH, CALVIN S. POWE, AND THOMAS A. POWE,
PLAINTIFFS IN ERROR, v. JOSEPH KERNOCHEN.

When a mortgagor and mortgagee are citizens of the same State, and the mortgagee assigns the mortgage to a citizen of another State for the purpose of throwing the case into the Circuit Court, it is necessary, in order to divest the court of jurisdiction, to bring home to the assignee a knowledge of this motive and purpose. Till then, he must be considered an innocent purchaser without notice.¹

If the assignment was only fictitious, then the suit would in fact be between two citizens of the same State, over which the court would have no jurisdiction.²

The question of jurisdiction, in such a case, should have been raised by a plea in abatement. Upon the trial of the merits, it was too late.³

A former suit in chancery between the original parties to the mortgage involving directly the validity of that instrument, in which suit a bill to foreclose was dismissed, upon the ground that the mortgage was void, was good evidence in an ejectment brought by the assignee claiming to recover by virtue of the same mortgage. The instrument had been declared void by a court of competent jurisdiction, and neither the parties nor their privies could recover upon it.⁴

There is no difference, upon this point, between a decree in chancery and a verdict at law. Either constitutes a bar to a future action upon the instrument declared to be void. The authorities upon this point examined.⁵

The highest court of the State of Alabama having decided that the original mortgagee (an incorporated company) violated its charter in the transaction which led to the mortgage, this court adopts its construction of a statute of that State.

THE Reporter finds the following statement of the case, prepared by Mr. Justice Nelson, and prefixed to the opinion of the court.

¹ CITED. *Perrine v. Town of Thompson*, 17 Blatchf., 20. *S. P. Jones v. League*, 18 How., 76; *Briggs v. French*, 2 Sumn., 252.

² DISTINGUISHED. *Manufacturing Co. v. Bradley*, 15 Otto, 180. CITED. *Deshler v. Dodge*, 16 How., 631; *Hawley v. Kepp*, 2 Flipp., 178; *Blackburn v. Selma &c. R.R. Co.*, Id., 538. *S. P. Willes v. Newberry*, 4 McLean, 226; *Starling v. Hawks*, 5 Id., 318; *Jones v. League*, 18 How., 76.

³ APPLIED. *Sheppard et al. v. Graves*, 14 How., 511. FOLLOWED. *Holmes*

v. Oregon &c. R. Co., 7 Sawy., 392; s. c., 9 Fed. Rep., 238. CITED. *De Sobry v. Nicholson*, 3 Wall., 423; *Williams v. Nottawa*, 14 Otto, 211; *Rae v. Grand Trunk R'y Co.*, 14 Fed. Rep., 402; *Ganse v. City of Clarksville*, 1 McCrary, 86 n. See note to *McKenna v. Fisk*, 1 How., 241.

⁴ CITED. *New Orleans &c. R. R. Co. v. City of New Orleans*, 14 Fed. Rep., 376; *S. P. Tyler v. Hyde*, 2 Blatchf., 308.

⁵ FOLLOWED. *Garton v. Botts*, 73 Mo., 276.