actions on all written contracts, sealed or unsealed, began to run against the coupons in suit from their respective maturities; and accordingly

AFFIRM THE JUDGMENT.

CLIFFORD, J.: I dissent from the opinion of the court, upon the ground that the case is governed by our prior decisions.

MURDOCK *v.* CITY OF MEMPHIS.

1. The second section of the act of Feb. 5th, 1867 (14 Stat. at Large, 385), "to amend" the Judiciary Act of 1789, operates as a repeal of the twenty-fifth section of that act; and the act of 1867, as it is now found in the Revised Statutes of the United States, § 709, is the sole law governing the removal of causes from State courts to this court for review, and has been since its enactment in 1867.
2. Congress did not intend, by omitting in this statute the restrictive clause at the close of the twenty-fifth section of the act of 1789 (limiting the Supreme Court to the consideration of Federal questions in cases so removed) to enact affirmatively that the court *should* consider all other questions involved in the case that might be necessary to a final judgment or decree.
3. Nor does the language of the statute, that "the judgment may be re-examined and reversed or affirmed on a writ of error . . . in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States," require the examination of any other than questions of Federal law.
4. The phrase above quoted has reference to the manner of issuing the writ, its return with the record of the case, its effect in removing the case to this court, and the general rules of practice which govern the progress of such cases to final judgment, and is not intended to prescribe the considerations which should govern this court in forming that judgment.
5. But the language of the statute in making the jurisdiction of this court dependent on the decision of certain questions by the State court against the right set up under Federal law or authority, conveys the strongest implication that these questions alone are to be considered when the case is brought here for revision.
6. This view is confirmed by the course of decisions in this court for eighty years, by the policy of Congress, as shown in numerous statutes, conferring the jurisdiction of this class of cases in courts of original jurisdiction, viz , the District and Circuit Courts, whether originally or by removal from State courts, when it intends the whole case to be tried, and by the manifest purpose which caused the passage of the law.

7. In construing the act of 1867 as compared with the act of 1789, the court declares itself to be of opinion that it is not so closely restricted to the face of the record in determining whether one of the questions mentioned in it has been decided in the State court, and that it may, under *this* statute, look to the properly certified opinion of the State courts when any has been delivered in the case.
8. And it holds the following propositions as governing its examination and its judgments and decrees in this class of cases, under the statute as now found in the recent revision of the acts of Congress:
   1. That it is essential to the jurisdiction of this court over the judgment or decree of a State court that it shall appear that one of the questions mentioned in the statute must have been raised and presented to the State court; that it must have been decided by the State court against the right claimed or asserted by the plaintiff in error, under the Constitution, treaties, laws, or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case.
   2. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.
   3. If it finds that it was rightly decided, the judgment must be affirmed.
   4. If it was erroneously decided, then the court must further inquire whether there is any other matter or issue adjudged by the State court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.
   5. But if it be found that the issue raised by the question of Federal law must control the whole case, or that there has been no decision by the State court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will either render such judgment here as the State court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require.

ERROR to the Supreme Court of Tennessee; the case being thus:

The Constitution of the United States after vesting the judicial power of the United States "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," ordains 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 under their authority," &c.

Statement of the case.

On the 24th of September, 1789, at the first Congress of the United States, after the adoption of the Constitution, Congress passed the "act to establish the judicial courts of the United States;"* the great act commonly called the Judiciary Act. The twenty-fifth section of it gave to this court whatever power was given in the act at all to re-examine, reverse, or affirm the final judgments or decrees in suits in the highest courts of law or equity of the States.

On the 5th of Feb., 1867, after the late rebellion had been suppressed,—and just before the adoption of the fourteenth amendment to the Constitution, which declares that "no State shall make or enforce any law which shall abridge the privileges or *immunities* of citizens of the United States"—but while more or less disorganization of things remained in the Southern States, Congress passed an act entitled "An act to *amend* an act to establish the judicial courts of the United States."† This act was in two sections. The first section gives to the courts of the United States, and the several judges thereof, within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

The second—the one alone much concerning this case,—was on the same subject as the twenty-fifth section of the old act.

The twenty-fifth section of the old act and the second section of the new one are here juxtaposited verbatim in columns.

THE TWENTY-FIFTH SECTION OF THE ACT OF 1789.	THE SECOND SECTION OF THE ACT OF 1867.
That a final judgment or decree in any suit, in the highest court *of law or equity* of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States,	That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is

* 1 Stat. at Large, 25.

† 14 Id. 485.

and the decision is against their validity; or 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 such their validity, *or where is drawn in question the construction of any clause* of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or *exemption* specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a *Circuit Court*, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, *instead of remanding the cause for a final decision, as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.*

against their validity, or 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 such 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*, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed *in a court of the United States;* and the proceeding upon the reversal shall also be the same, *except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution or remand the same to an inferior court.*

Statement of the case.

The published proceedings of the two houses of Congress show that the bill, which subsequently became a law, was reported by a committee which had been instructed "to inquire and report what legislation was necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States, under the joint resolution of Congress of March 3d, 1865, and the liberty of all persons under the operation of the constitutional amendment abolishing slavery." The bill, so far as the point now under consideration is concerned, was not the subject of special comment. The effect of it was declared by the member of the House of Representatives who reported it from the committee, to be "to enlarge the privilege of the writ of habeas corpus."* In the Senate an inquiry was made "whether the second section was drawn *on the same principle* as the twenty-fifth section of the Judiciary Act of 1789." The reply was, "It is a little broader than the Judiciary Act. It is of a similar character."†

Thus, apparently it happened that the fact that Congress had passed the act of 1867, was hardly noted for some time within the precincts of this bar—where the venerable Judiciary Act of 1789 was in some sort regarded as only less sacred than the Constitution, and most unlikely to be wished to be altered—and that the less studious observers considered that the new section was but a careless transcript of the old one. However, the more careful readers were early awakened by possibilities of meanings in the second section of the new act which would have far-reaching effects. Mr. Phillips in his work on Practice,‡ in this court, early observed that the new act "in some of its provisions and omissions seems to have been intended to work a change in the exercise of the jurisdiction of the court." So in the case of *Stewart* v. *Kahn*,§ the difference between the two acts was enforced by *Mr. S. M. Johnson*, counsel, on one side of the case who claimed for it vast effects.

* Congressional Globe, first session 39th Congress, part 5, page 4151.

† Ib. page 4229.

‡ Page 128.

§ A.D. 1870, 11 Wallace, 500.

A careful reading of the act shows, indeed, to every one certain verbal changes. Thus:

1st. By the old act, this court could not proceed to final judgment and award execution, except in cases where the cause "had been once remanded before."

By the new act, this limitation is omitted, and the court is authorized in all cases at their discretion, to render judgment and award execution.

2d. By the old law the jurisdiction is vested in cases where is drawn in question the *construction* of any clause of the Constitution, or treaty, or statute, or commission.

In the new, we have the use of these other words, "or where any right, title, privilege, or immunity is claimed," under the Constitution, &c.

3d. By the old law it was required that what is called "the Federal question" must "appear on the face of the record."

In the new, the words making this requisition are omitted.

4th. By the old law, "no other error could be assigned or regarded as ground of reversal, than such as immediately related to the validity or construction of the Constitution, treaties, statutes, commissions, or authorities in dispute."

In the new, the words putting this limitation on the jurisdiction disappear, and makes an argument plausible that Congress or the draughtsman of the act had meant to say that if a Federal question once existed in the case, and this court so got jurisdiction of the case, then it was bound to go on and decide every question in it, though these questions were questions of local law, and such as, in numberless cases, the court had decided that, under the old section and in consequence of the now omitted language at the close of it, could not be passed on here.

Referring to this last change, its operation seemed so important and its bearing on the twenty-fifth section so direct,

in a matter oftener discussed and decided by this court than any question ever submitted to it; that it was difficult for some persons to conclude that the legislator who drew the bill, and the legislature that adopted it, did not comprehend that the bill was effecting a radical change in the exercise of the jurisdiction of the court.

However, it was obvious that as long as in the cases brought up here, either,

1st. No Federal question at all existed in the case, OR,

2d. The Federal question, where one did exist, had been *wrongly* decided in the court below,—and there was no local question on which the case might have been disposed of—

There was no necessity to pass upon the effect of the concluding sentences of the new section. The case would come within both the old and new. The necessity to consider the effect of the new act would, however, arise on the first occasion when some case should come before the court, in which (1st), there was a Federal question, (2d), where that question had been rightly decided, and (3d), where there were, besides, local questions which would dispose of the case, and which the plaintiff in error alleged had been wrongly adjudged below. Such a case now seemed to be here.

The case was thus:

Murdock filed a bill in one of the courts of chancery of Tennessee, against the city of Memphis, in that State. The bill and its exhibits made this case:

In July, 1844,—Congress having just previously authorized the establishment of a naval depot in that city, and appropriated a considerable sum of money for the purpose—the ancestors of Murdock—by ordinary deed of bargain and sale, without any covenants or declaration of trust on which the land was to be held by the city, but referring to the fact of "the location of the naval depot lately established by the United States at said town"—conveyed to the city certain land described in and near its limits "for the location of the naval depot aforesaid."

Statement of the case.

By the same instrument (a quadrupartite one) both the grantors and the city conveyed the same land to one Wheatley, in fee, in trust for the grantors and their heirs, "in case the same shall not be appropriated by the United States for that purpose."

On the 14th of September, 1844, the city of Memphis, in consideration of the sum of $20,000 paid by the United States, conveyed the said land to the United States with covenant of general warranty; there being, however, in this deed to the United States no designation of any purpose to which the land was to be applied, nor any conditions precedent or subsequent, or of any kind whatsoever.

The United States took possession of the land for the purpose of the erection of a naval depot upon it, erected buildings, and made various expenditures and improvements for the said purpose; but in about ten years after, by an act of August 5th, 1854,* transferred the land back to the city. The act was in these words:

"All the grounds and appurtenances thereunto belonging, known as the Memphis Navy Yard, in Shelby County, Tennessee, be, and the same is hereby, ceded to the mayor and aldermen of the city of Memphis, *for the use and benefit of said city.*"

There was no allegation in the bill that the city was in any way instrumental in procuring this transfer or the abandonment of the site as a naval depot; on the contrary, it is averred that the city authorities endeavored to prevent both.

The bill charged that by the failure of the United States to appropriate the land for a naval depot, and the final abandonment by the United States of any intention to do so, the land came within the clause of the deed of July, 1844, conveying it to Wheatley in trust; or if not, that it was held by the city in trust for the original grantors, and the prayer sought to subject it to said trusts.

The answer, denying the construction put upon the deed of 1844, which established a trust, asserted that the land had been appropriated by the United States as a naval depot

* 10 Stat. at Large, 586.

within the meaning and intent of the deed of July, 1844, and that the subsequent perpetual occupation of it was not a condition subsequent; and consequently that the abandonment of it as a naval depot was not a breach of a condition such as divested the title so conveyed by the deed.

It pleaded the statute of limitations. It also demurred to the bill as seeking to enforce a forfeiture for breach of condition subsequent.

The court sustained the demurrer, and also decreed that the city had a perfect title to the property against the complainants both under the act of Congress and the statute of limitations, and dismissed the bill. The Supreme Court of Tennessee affirmed this decree.

That court was also of opinion, and so declared itself to be, that the act of Congress "cedes the property in controversy in this cause to the mayor and aldermen of the city of Memphis, for the use of the city only, and not in trust for the complainant; and that the complainant takes no benefit under the said act."

The complainant thereupon sued out a writ of error to this court.

The case was first argued January 21st, 1873.

Messrs. W. I. Scott and J. B. Hieskell, for the plaintiff in error:

1. *Is there a Federal question, so that the court can take jurisdiction?* There is such a question. The ancestor of Murdock conveyed to the city and Wheatley on condition, or more properly speaking perhaps, in trust. Neither party could discharge himself of the trust. When the city conveyed to the United States, the United States took the land fettered with a trust. When the United States reconveyed to the city, they, of necessity, conveyed in trust. The fact that the deed said that it conveyed to the city "for its own use" does not alter the case. If a trustee, in fraud of a declared trust, conveys to another for the use of that other, that other holds not for his own use but for the *cestui que trust.* Therefore, we set up and claim a right under the

act of Congress. No right arose to us but for that act. When the act reconveyed the property to the city there was an abandonment, a breach of the trust or condition on which the property had been conveyed. The grantors or their heir, the present complainant, took it. There is, therefore, a Federal question, and that question has been decided against us.

2. *That question was decided wrongly*, as our remarks just made show.

Whether the new act changes the old twenty-fifth section or not the judgment below must be reversed, and the case remanded.

3. But, however our second point may be — that is to say, whether the Federal question was decided wrongly or rightly, and conceding that it was decided rightly—then although in consequence of the closing sentence of the old twenty-fifth section,* no question of law merely local could formerly be considered here, yet that closing part being now left off, the restriction on this court to consider this class of questions is removed; and it being once shown that there is a Federal question in the case to give this court jurisdiction, the court must re-examine, affirm, or reverse the decision of the State court on these local questions as well as on the Federal question. This, doubtless, was what was meant by Mr. Justice Swayne in *Stewart* v. *Kahn*, where, distinguishing between changes merely verbal throughout the section and the great omission at its close, that learned justice says:†

"The section is to a great extent a transcript of the twenty-fifth section of the prior act. There are several alterations which are not material, but at the close of the second section there is a *substantial* omission."

[The learned counsel on an assumption of the correctness of this position, then went on to argue that the decision of the court below on the pleas of the statute of limitations, &c., was erroneous.]

* *Supra*, p. 593.

† 11 Wallace, 502.

Argument for the defendant in error.

Messrs. W. T. Otto, B. M. Estes, J. M. Carlisle, and J. D. McPherson, contra:

1. *There is no Federal question, and consequently no jurisdiction in this court to pass on anything.* If there was a trust in the case, it was made not by the act of Congress, but by the deed of the grantors. No title, right, or privilege was specially set up or claimed by the complainant under the act, and the act is mentioned in his bill only as an item in the history of things, indicating the time when his right, if he had one, arose. The decree that the complainant took no benefit under the act does not bring the case within the twenty-fifth section, because it is not stated that the complainant ever claimed any title under it, and the language does not necessarily imply that he did. The language of the court means simply that the city took title under the act of Congress for its own use, and not in trust for any one else.

2. *If there was a Federal question, the question was rightly decided.* It was rightly decided for many reasons. One is enough, and that is that there was no breach of condition or trust, but on the contrary performance or execution. If there was any condition or trust, it was that the property should be conveyed to the United States for the purpose of a naval depot. It was so conveyed. The condition—if there was a condition—was performed; the trust—if there was a trust—was executed when the United States established the navy yard upon the land in question. *Mead* v. *Ballard*,* is in point. There a grant was made "upon the express understanding and condition" that an institution should be permanently located upon the granted premises, and that on failure of such location within a year from the date of the deed, and on repayment of the purchase-money without interest, the premises should revert to, and become the property of, the owners. The building was erected within the time named. It was afterwards burned, and the trustees then erected other buildings upon some contiguous property. This court held that the condition was performed

* 7 Wallace, 290.

Argument for the defendant in error.

when the trustees passed a resolution locating the building on the premises, with the intent that they should be the permanent place of business of the corporation, and that it did not operate as a covenant to build and rebuild, or keep the building on the land for an indefinite time.

3. *If it was not rightly decided the matter is unimportant.* The record shows that there were other questions, exclusively of State cognizance, sufficient to dispose of the case. The demurrer having been to the whole bill, and being sustained, disposed of the case. The defendants pleaded the statute of limitations, and the case being heard on the merits, the court decided that the defendants had a good title under it. This disposed of the whole case. The writ of error should, therefore, be dismissed.*

The position taken by opposing counsel as to the effect of the re-enactment of Feb. 5th, 1867, is radical in the extreme. It would subvert every principle which has ever governed this court in reference to the adjudications by State courts on State law. What is quoted from *Stewart* v. *Kahn* was said extra-judicially. Besides, there may be "a substantial omission" in the new act, and many such omissions, and yet no such far-reaching effect as is here claimed for them follow; an effect, so far as concerns State jurisprudence, which is revolutionary. CURIA ADVISARI VULT.

As appeared by the final judgment given in the case, the court, upon advisement, was of the opinion,

1st. That there was a Federal question involved.

2d. That it was decided rightly.

Accordingly the case, when thus under advisement, presented the exact conditions referred to, *supra*, p. 596, and under which it would become necessary carefully to consider the effect of the act of Feb. 5th, 1867. It became necessary, therefore, to pass upon the third point above discussed by counsel; discussed, however, not so fully as the primary points of their case, nor otherwise than as points

* Gibson *v.* Chouteau, 8 Wallace, 314.

which *might* arise. The court accordingly now, March 10th, 1873, ordered the case to be reargued on the following propositions:

"1. Does the second section of the act of February 5th, 1867, repeal all or any part of the twenty-fifth section of the act of 1789, commonly called the Judiciary Act?

"2. Is it the true intent and meaning of the act of 1867, above referred to, that when this court has jurisdiction of a case, by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree?

"If this question be answered affirmatively, does the Constitution of the United States authorize Congress to confer such a jurisdiction on this court?"

And it invited argument, oral or by brief, from any counsel interested in cases where these questions were important.

The case was now, April 2d and 3d, 1873, *reargued by the same counsel for the plaintiff in error as before; Mr. P. Phillips, in addition*, as amicus curiæ, *expressing his views orally, and the late Mr. B. R. Curtis, in the same character, having submitted some observations in print.**

I. *The old twenty-fifth section is repealed.*

The two laws differ in the following particulars:

1. In defining the cases over which the appellate power shall extend.

2. In the regulations each prescribes for the exercise of this appellate power.

The later statute was manifestly intended to cover and provide for the subject-matter of the earlier law, and to qualify the provisions of the earlier law not only by omission, but by addition and alteration. In such a case the later repeals the earlier act by necessary implication.

* There were also at the time before the court briefs in other cases, where the questions about the effect of the new act were discussed. In the report now made of what was said at the bar the points made by the counsel separately are, of course, presented only as a whole; no attempt being made to assign to each what he chiefly or alone may have pressed.

Argument in favor of the extended jurisdiction.

II. *If the act of* 1789 *be repealed, does the act of* 1867 *authorize the Supreme Court of the United States to review all questions in the record, or is the jurisdiction confined to the Federal questions?*

1. The language of the act declares that the "judgment or decree may be re-examined, and reversed or affirmed, in the Supreme Court of the United States, upon a writ of error (and in proper cases upon an appeal), *in the same manner and under the same regulations* as if it had been passed in a court of the United States." And the "*writ* shall have the same effect as if the judgment or decree" had so passed.

2. In order rightly to ascertain the force of this provision, we must not lose sight of the matter omitted. The restriction expressly interposed in the former act was placed there because it was considered that without such express language no restriction could be implied from the previous clause of the enactment. Hence, in the former act the prohibition was inserted in positive terms. Now, in the revising act, it is omitted, and the conclusion is that the restriction no longer exists.

As early as the case of *Durousseau* v. *The United States*,* Marshall, C. J., used this language:

"Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigned to it. . . . And in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act; they are given by the Constitution. But they are limited and regulated by the judicial act."

It is evident that Marshall, C. J., had reference to the express limitation contained in the last clause of the twenty-fifth section of the act of 1789. For in *Osborn* v. *The Bank*,† he gives the opinion of the court, that under the Constitution extending the "judicial power to all CASES in law and

* 6 Cranch, 314; and see Gelston *v.* Hoyt, 3 Wheaton, 326.
† 9 Id. 820.

equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority, that the judicial department receives jurisdiction to the full extent of the Constitution, laws, &c."

3. When a party asserts his right before a court in the forms prescribed by law, it then becomes a "case" to which this judicial power extends.

This includes the right of both parties to the litigation; and the case may be said to "arise," whenever its correct decision depends upon the construction of said Constitution, laws or treaties.

If the Constitution had intended to limit the jurisdiction, as is done by the twenty-fifth section, the appropriate language for this purpose has not been used. The power is not extended merely to "questions," but to "cases."

The limitation of the twenty-fifth section being virtually repealed by its omission in the act of 1867, denotes clearly the intention of Congress that when a Federal question exists, the full constitutional power should be exercised, and that the court should decide the "case," and this necessarily includes all questions presented by it.

4. The phraseology of the acts supports our views. It is not that the judgment or decree may be examined, but *re*-examined. There can be no re-examination of a matter that has not been theretofore examined; and this right to *re*-examine, that is to examine over again the judgment or decree, would have involved as full and complete an examination as had before been given, if it were not that this *re*-examination was confined and made partial by the limitation imposed.

The conclusion is, that Congress, by allowing to this court this power, had in contemplation that it should dispose of the whole case.

5. Again. The *writ* cannot have the same effect as if the judgment or decree had been rendered or passed in a court of the United States, unless all the errors were passed upon; and as there is no longer any prohibition of errors that may be assigned or regarded, but the express prohibition here-

tofore existing is annulled, it follows that this statute must have effect according to its language, and it must be considered that the legislature, in removing the express qualification, leaving the antecedent unqualified, intended to commit it to its literal interpretation.

6. In addition. The act of 1867 authorizes this court in its discretion "to proceed to final decision and award execution, or remand the same (*i. e.*, the cause) to an *inferior* court." The highest court of the State is thus treated as an "inferior court;" and power is given to pass it by entirely, as if the judgment had been rendered in a Circuit Court of the United States. This tends to show that full and adequate capacity was meant to be given to this court to re-examine the whole case.

7. Finally. The new statute was passed just after the overt acts of opposition had been suppressed by the force of Federal arms, but while it was uncertain how far the *spirit* of opposition, though covert, yet remained both alive and active. The use, in the new act, of the new word "immunities," comes plainly from the fourteenth amendment then first before the nation, and it clearly points to the purpose of that amendment; an amendment meant to extirpate all power of mischief in even that spirit of opposition. The new act shows an apprehension that Federal justice would be obstructed by local and State animosities and revenges, and that Federal questions might really be passed on in State courts, but the proof of adjudication artfully suppressed *on the record*. For this reason it was that the new act omits the provision in the old twenty-fifth section, "that no other error shall be assigned or regarded as ground of reversal than such as appears *on the face of the record*." And for a kindred reason—that is to say, to place the whole jurisprudence of the country under the protection of this great Federal tribunal of the nation, and to let all citizens feel everywhere and always, as a fixed reality, the fact that the Constitution of the United States and the laws of Congress passed in pursuance thereof, ARE the "supreme law of the land"—for these reasons we say, and that every ques-

tion passed on by the State courts might be open to reconsideration here, was the other part of the clause omitted from the new act, that no other error shall be assigned or regarded as ground of reversal than such as . . . *immediately respects the beforementioned questions of validity or construction of said Constitution, treaties, statutes, commissions, or authorities in dispute.*

Contemporaneous acts of Congress enforce this view. During and just after the rebellion, Congress, for the political causes to which we have referred as supporting our view, gave to the Circuit and District Courts of the United States jurisdiction over many questions which it had previously left to the exclusive control of the State courts.*

[III. The learned counsel then argued that the second section of the new act was constitutional.]

Messrs. W. T. Otto, B. M. Estes, J. M. Carlisle, and J. D. McPherson, contra:

Conceding, for the argument, that the act of 1867 covers the whole subject-matter of the old twenty-fifth section upon every other point, we insist that the "subject-matter" of the last clause of the old section is not covered or affected thereby, and that this clause is yet in force. There is nothing in the act of 1867 repugnant to this last clause of the old section, and the subject-matter thereof is in no wise covered by the new section. It is not only possible, but it is easy to reconcile the two and give effect to both.

The title of the act is, "An act to *amend* an act to establish the judicial courts of the United States." The intention of Congress was then to "*amend*," not to "*repeal*," and at most, the effect of the new act is to strike out all of the old section, except the last clause, and to insert the new enactment in the stead of the part stricken out.† This construction accords with well-settled rules, and is favored by the argument that it is not to be supposed that Congress

* See these acts referred to, *infra*, p. 631.—REP.

† United States *v.* Palmer, 3 Wheaton, 610; Hadden *v.* Collector, 5 Wallace, 107.

intended, without express language to that effect, to abrogate a salutary provision which had been in force and well understood for three-quarters of a century, and which at least was supposed to be a part of a judicial *system* which had the Constitution for its chief corner-stone.

In *Wood* v. *United States*,* the law of repeals by implication is thus rightly stated:

"It is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy."

The intention of the act of 1867 was to enlarge somewhat the provisions of the old twenty-fifth section, but not to repeal it. If this construction is not adopted, the conclusion is inevitable, that the main object of Congress in passing the second section of the new act was to annul the last clause of the old twenty-fifth section, and *that it sought to do so by a most singular means.*

The repugnancy between the two sections, which opposing counsel assert, is not real. If the clause with the exception and the clause without the exception cannot stand together, then the clause with the exception, as it stood in the twenty-fifth section of the Judiciary Act, was repugnant in itself, and that section was composed of inconsistent and irreconcilable provisions. This construction cannot be entertained.

II. *Is the intent and meaning of the act of* 1867 *that the court shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree, when it has once got jurisdiction of a case by reason of any Federal question in it?*

The way in which the act of 1867 was introduced into

* 16 Peters, 362; and see White *v.* Johnson, 23 Mississippi, 68; Ellis *v.* Paige, 1 Pickering, 45; Nichols *v.* Squire, 5 Id. 168; Bartlet *v.* King, 12 Massachusetts, 545.

Congress and passed through it,* confirms the idea that the answer to this question must be a negative one. No purpose was avowed to empower or require this court, on a writ of error to a State court, to pass upon any question in the record which turns upon the common law of a State or the interpretation of its constitution or statutes, when neither is in conflict with the National authority. It is to be presumed that no such purpose existed. The intent to vest a general revisory power, which, since the adoption of the Constitution, has never been exerted over the State tribunals, should be expressed in clear and unmistakable terms.

It is not expressly given by the second section. The provision in each section touching the "effect" of the writ of error and the omission of the last clause of the old section, coupled with the assumed fact that it either limited some power conferred by that provision, or prescribed the mode of exercising it, are the only grounds upon which the enlarged jurisdiction has been asserted. That provision obviously relates only to the mode of removing the record to this court, and to the regulations by which that object is accomplished. The clause, if divisible, declares: First, that no other error shall be assigned, or regarded as a ground of reversal, than such as appears on the face of the record. Second, that the error, when assigned, shall immediately respect the questions mentioned in the section.

The word "suit" occurs both in the old and in the new section. The word means the prosecution of some demand in a court of justice, and applies to a judicial proceeding, either at law or in equity, in which a party pursues a remedy which the law affords him.† The omission in the act of 1867, of the words "of law or equity," is entirely unimportant. An appeal is the only mode by which a cause of an equitable nature or in admiralty can be brought from an inferior court of the United States for revision, and it extends to matters of fact as well as of law; while a "final judgment or decree in any suit" in a State court can only be

* See this matter stated, *supra*, p. 594.—REP.

† Weston *v.* The City Council of Charleston, 2 Peters, 449.

"re-examined" here on a writ of error. That writ is of common-law origin, and "lies only for matters of law arising upon the face of the proceeding."* The re-examination on the return of the writ would, therefore, necessarily, and without any limiting words, be confined to such matters.

Congress, by the twenty-fifth section, gave a legislative interpretation to the only clauses of the Constitution which can be construed to give this court control over the action of the State courts. The concluding words were inserted to define that control, not to restrain it within narrower limits than the Constitution had imposed; and this was done to relieve the subject from all controversy, and to allay apprehensions which then widely prevailed as to the judicial branch of the government.

The judiciary clause was adopted by the Convention at Philadelphia with apparent unanimity and without prolonged discussion. It, with other leading features of the Constitution, was vehemently assailed before the public, and in the State conventions, by many of the conspicuous statesmen of that day.

George Mason wrote that "the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States."† In the Virginia convention he said that he was "greatly mistaken if there be any limitation whatever with respect to the nature or jurisdiction of these (Federal) courts."‡ Indeed, the historical fact is familiar that the enemies of the Constitution maintained that it established a consolidated government, and that the judiciary of the States would be overruled and absorbed. Jay, the Pinckneys, Hamilton, Marshall, Madison, and other friends of the Constitution answered the objections and insisted that, by no just rule of construction could such extraordinary and dangerous powers be justly ascribed to it. None of these great men intimated that the action of the State courts could be revised by the judiciary department, except on questions purely Federal.

* 3 Blackstone's Commentaries, 407.
† Elliott Debates, 475.
‡ 3 Id. 521.

Argument against the extended jurisdiction.

That masterpiece of legislation which we call the "Judiciary Act" originated in the Senate. It was reported by a committee, one of whom became Chief Justice of the United States,* and another a justice of this court.† Five of them had been deputies to the Convention which framed the Constitution.‡ As the Senate then sat with closed doors we have no record of its debates; but, in the House of Representatives, no member maintained that the judicial power of the United States, when exerted over the consummated proceedings of a State court, extended beyond the determination of the Federal questions involved.

The authors of the Judiciary Act and the Congress which passed it belonged to that party which held that the Federal authority, exerted to the fullest limits consistent with the Constitution, was indispensable to the peace and unity of the country, and doubtless they all meant to extend it as far as, constitutionally, they could. The twenty-fifth section was at one time denounced as unconstitutional by one class of statesmen and by courts, and attempts have been made by State laws to defeat its operation. The jurisdiction under it, however, has been so wisely and beneficently exercised, and has done so much to perpetuate, in its vigor and purity, the Constitution of the country, that it has finally commanded general acquiescence. No serious effort has been made in Congress to alter its essential provisions or impair their efficacy, nor, unless such be the effect of the act of 1867, to give them a broader scope. It may be justly regarded as an extemporaneous and authoritative exposition of the limits of the Federal power in its bearing on the legislative and judicial action of the States. Marshall, C. J., in *Cohens* v. *Virginia*,§ remarks:

* Oliver Ellsworth. † William Paterson.

‡ Oliver Ellsworth, William Paterson, Caleb Strong, Richard Bassett, William Few, who with William Maclay, Richard Henry Lee, and Paine Wingate, were the Senate committee, appointed, April 8th, 1789, to bring in a bill to organize the judiciary of the United States, were members of the Convention which framed the Constitution, although the names of neither Strong nor Ellsworth appear among those of the signers of it.

§ 6 Wheaton, 264.

Argument against the extended jurisdiction.

"Congress seems to have intended to give its own construction of this part of the Constitution in the twenty-fifth section of the Judiciary Act, and we perceive no reason to depart from that construction."

The clause should then be held as declaratory of a rule of the common law as well as of a constitutional provision. From its absence from the second section no intention of Congress to extend the jurisdiction beyond its ancient limits can be inferred.

If the decision of the Federal question by the highest State court is correct, the judgment is affirmed. It is difficult to perceive why action should be taken here on any other matter in controversy which has no direct necessary bearing upon this material and controlling question. It will never be required in disposing of a suit, unless the court should assume to act upon the questions which turn exclusively upon the common law of a State or the interpretation of its constitution and laws.

This court has habitually accepted "as a rule of decision" the adjudications of the State courts on such questions in all cases arising within the respective States. It has held that "a fixed and received construction" of the statutes of a State in its own courts makes a part of the statutes. It adopts the local law of real property as ascertained by the decisions of the State courts, whether those decisions are grounded on the construction of the statutes or on the unwritten law of the State. When those courts revoke their former decisions, it follows the latest settled adjudications. This doctrine has been maintained in an unbroken series of decisions, commencing with *McKeen* v. *De Lancey's Lessee.** It is not to be presumed that Congress, with a full knowledge of the history and traditions of the court, intended to confer jurisdiction over the State tribunals upon any question where their decisions had been theretofore regarded as conclusive—a jurisdiction demanded by no public necessity, and productive of no good results.

* 5 Cranch, 22.

Argument against the extended jurisdiction.

1. As to the necessity for such extended jurisdiction. It is true that an inferior court of the United States, having exclusive original cognizance of suits by reason of their subject-matter, is fully authorized to pass upon any question arising in their progress, or involved in their adjudication; although such question may not depend upon a principle of Federal jurisprudence. Otherwise, the rights asserted could not be judicially enforced, as the injured party can resort to no other power. *Osborn* v. *The Bank of the United States*, cited on the other side, maintains substantially this doctrine. It does not refer to the limits of the revisory power of this court or to the effect of the last clause of the twenty-fifth section. That power extends, with such exceptions and under such regulations as Congress may provide, to judgments and decrees rendered by any Federal tribunal in suits which are brought therein, or which, pursuant to the legislation of Congress, are removed thereto, and may correct all errors in matter of law, and sometimes of fact. But the relations which the State courts sustain to this court are not those of an inferior court of the United States. Congress cannot impose duties upon them, nor invest them with judicial power. They were created by the several States to interpret and give effect to their respective constitutions and laws, and to administer justice according to law. Nothing in their history, in the character of their jurisprudence, or in the condition of the country—and these may be considered in construing the act of 1867—shows the least necessity for empowering this court to supervise the exercise of their jurisdiction over so much of the matter in controversy, as must be determined by the State law, simply on the ground that the record presents a question decided adversely to the party, who claims a right derived from, or protected by, the Constitution and laws, or a treaty of the United States. Human ingenuity may be challenged to offer a reason why "the judgment or decree" of the State court should be reversed here upon a point having no relation to, or connection with, the question, in the absence of which

this court would confessedly have no jurisdiction whatever of the suit.

2. As to the results. The effects and consequences of the interpretation of the act for which the plaintiff in error asks, present a legitimate subject of inquiry. However wisely and justly the jurisdiction which he claims for this court might be exercised, its inevitable tendency would be to impair that control over their domestic concerns, which the States and their tribunals have hitherto possessed. The other results are too obvious to require to be presented.

The second section of the act of 1867 presents with the utmost clearness and precision every question which in the progress of a cause in the State courts can be decided adversely to the National authority. It was to vindicate that authority, which is, by universal acknowledgment, supreme within the limits of the Constitution, and to secure uniformity in the interpretation of that instrument, and of the laws and treaties of the United States, that Congress provided a resort to this, from a State court. Any broader interpretation of the section would do violence to its reason, spirit, and intention.

The answer to the second proposition should, therefore, be in the negative.

[III. The learned counsel then argued that the Constitution did not authorize Congress to confer on this court such a jurisdiction as was claimed for it by the opposing side.]

On the 22d of June, 1874 (some time after all this argument was concluded), Congress passed its great act of that date, embracing "the statutes of the United States, general and permanent in their nature, in force on the 1st of December, 1873, as revised and consolidated by commissioners appointed under an act of Congress;" the act commonly known as that making the "Revised Statutes of the United States." In these Revised Statutes, the act of Feb. 5th, 1867, makes section 709, but the concluding clause of the act of September 24th, 1789, "but no other errors," &c., makes no part of the Revised Statutes.

Opinion of the court.—Preliminary remarks.

Mr. Justice MILLER (now, January 11th, 1875) delivered the opinion of the court.

In the year 1867 Congress passed an act, approved February 5th, entitled an act to amend "An act to establish the judicial courts of the United States, approved September the 24th, 1789."* This act consisted of two sections, the first of which conferred upon the Federal courts and upon the judges of those courts additional power in regard to writs of habeas corpus, and regulated appeals and other proceedings in that class of cases. The second section was a reproduction, with some changes, of the twenty-fifth section of the act of 1789, to which, by its title, the act of 1867 was an amendment, and it related to the appellate jurisdiction of this court over judgments and decrees of State courts.

The difference between the twenty-fifth section of the act of 1789 and the second section of the act of 1867 did not attract much attention, if any, for some time after the passage of the latter. Occasional allusions to its effect upon the principles long established by this court under the former began at length to make their appearance in the briefs and oral arguments of counsel, but were not found to be so important as to require any decision of this court on the subject.

But in several cases argued within the last two or three years the proposition has been urged upon the court that the latter act worked a total repeal of the twenty-fifth section of the former, and introduced a rule for the action of this court in the class of cases to which they both referred, of such extended operation and so variant from that which had governed it heretofore that the subject received the serious consideration of the court. It will at once be perceived that the question raised was entitled to the most careful examination and to all the wisdom and learning, and the exercise of the best judgment which the court could bring to bear upon its solution, when it is fairly stated.

The proposition is that by a fair construction of the act of

* 14 Stat. at Large, 385.

1867 this court must, when it obtains jurisdiction of a case decided in a State court, by reason of one of the questions stated in the act, proceed to decide every other question which the case presents which may be found necessary to a final judgment on the whole merits. To this has been added the further suggestion that in determining whether the question on which the jurisdiction of this court depends, has been raised in any given case, we are not limited to the record which comes to us from the State court—the record proper of the case as understood at common law—but we may resort to any such method of ascertaining what was really done in the State court as this court may think proper, even to *ex parte* affidavits.

When the case standing at the head of this opinion came on to be argued, it was insisted by counsel for defendants in error that none of the questions were involved in the case necessary to give jurisdiction to this court, either under the act of 1789 or of 1867, and that if they were, there were other questions exclusively of State court cognizance which were sufficient to dispose of the case, and that, therefore, the writ of error should be dismissed.

Counsel for plaintiffs in error, on the other hand, argued that not only was there a question in the case decided against them which authorized the writ of error from this court under either act, but that this court having for this reason obtained jurisdiction of the case, should re-examine all the questions found in the record, though some of them might be questions of general common law or equity, or raised by State statutes, unaffected by any principle of Federal law, constitutional or otherwise.

When, after argument, the court came to consider the case in consultation, it was found that it could not be disposed of without ignoring or deciding some of these propositions, and it became apparent that the time had arrived when the court must decide upon the effect of the act of 1867 on the jurisdiction of this court as it had been supposed to be established by the twenty-fifth section of the act of 1789.

Opinion of the court.—First question: The 25th section is repealed.

That we might have all the aid which could be had from discussion of counsel, the court ordered a reargument of the case on three distinct questions which it propounded, and invited argument, both oral and written, from any counsel interested in them. This reargument was had, and the court was fortunate in obtaining the assistance of very eminent and very able jurists. The importance of the proposition under discussion justified us in delaying a decision until the present term, giving the judges the benefit of ample time for its most mature examination.

With all the aid we have had from counsel, and with the fullest consideration we have been able to give the subject, we are free to confess that its difficulties are many and embarrassing, and in the results we are about to announce we have not been able to arrive at entire harmony of opinion.

The questions propounded by the court for discussion by counsel were these:

1. Does the second section of the act of February 5th, 1867, repeal all or any part of the twenty-fifth section of the act of 1789, commonly called the Judiciary Act?

2. Is it the true intent and meaning of the act of 1867, above referred to, that when this court has jurisdiction of a case, by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree?

3. If this question be answered affirmatively, does the Constitution of the United States authorize Congress to confer such a jurisdiction on this court?

1. The act of 1867 has no repealing clause nor any express words of repeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission in the latter of two important provisions found in the former. It will be perceived by this statement that there is no repeal by positive new enactments inconsistent

Opinion of the court.—First question: The 25th section is repealed.

in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion.

A careful comparison of these two sections (set forth in parallel columns, *supra*, pp. 592, 593.—REP.) can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform.*

The result of this reasoning is that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place. What of the statute of 1789 is embraced in that of 1867 is of course the law now and has been ever since it was first made so. What is changed or modified is the law as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved.

This view is strongly supported by the consideration that the revision of the laws of Congress passed at the last session, based upon the idea that no change in the existing law should be made, has incorporated with the Revised Statutes nothing but the second section of the act of 1867. Whatever might have been our abstract views of the effect of the act of 1867, we are, as to all the future cases, bound by the law as found in the Revised Statutes by the express language of Congress on that subject; and it would be labor lost to consider any other view of the question.

* United States *v.* Tynen, 11 Wallace, 88; Henderson Tobacco, Ib. 652; Bartlet *v.* King, 12 Massachusetts, 537; Cincinnati *v.* Cody, 10 Pickering, 36; Sedgwick on Statutes, 126.

2. The affirmative of the second question propounded above is founded upon the effect of the omission or repeal of the last sentence of the twenty-fifth section of the act of 1789. That clause in express terms limited the power of the Supreme Court in reversing the judgment of a State court, to errors apparent on the face of the record and which respected questions, that for the sake of brevity, though not with strict verbal accuracy, we shall call Federal questions, namely, those in regard to the validity or construction of the Constitution, treaties, statutes, commissions, or authority of the Federal government.

The argument may be thus stated: 1. That the Constitution declares that the judicial power of the United States shall extend to *cases* of a character which includes the questions described in the section, and that by the word *case*, is to be understood all of the case in which such a question arises. 2. That by the fair construction of the act of 1789 in regard to removing those cases to this court, the power and the duty of re-examining the whole case would have been devolved on the court, but for the restriction of the clause omitted in the act of 1867; and that the same language is used in the latter act regulating the removal, but omitting the restrictive clause. And, 3. That by re-enacting the statute in the same terms as to the removal of cases from the State courts, without the restrictive clause, Congress is to be understood as conferring the power which that clause prohibited.

We will consider the last proposition first.

What were the precise motives which induced the omission of this clause it is impossible to ascertain with any degree of satisfaction. In a legislative body like Congress, it is reasonable to suppose that among those who considered this matter at all, there were varying reasons for consenting to the change. No doubt there were those who, believing that the Constitution gave no right to the Federal judiciary to go beyond the line marked by the omitted clause, thought its presence or absence immaterial; and in a revision of the statute it was wise to leave it out, because its presence im-

plied that such a power was within the competency of Congress to bestow. There were also, no doubt, those who believed that the section standing without that clause did not confer the power which it prohibited, and that it was, therefore, better omitted. It may also have been within the thought of a few that all that is now claimed would follow the repeal of the clause. But if Congress, or the framers of the bill, had a clear purpose to enact affirmatively that the court *should consider* the class of errors which that clause forbid, nothing hindered that they should say so in positive terms; and in reversing the policy of the government from its foundation in one of the most important subjects on which that body could act, it is reasonably to be expected that Congress would use plain, unmistakable language in giving expression to such intention.

There is, therefore, no sufficient reason for holding that Congress, by repealing or omitting this restrictive clause, intended to enact affirmatively the thing which that clause had prohibited.

We are thus brought to the examination of the section as it was passed by the Congress of 1867, and as it now stands, as part of the revised statutes of the United States.

Before we proceed to any criticism of the language of the section, it may be as well to revert for a moment to the constitutional provisions which are supposed to, and which do, bear upon the subject. The second section of the third article, already adverted to, declares that "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."

Waiving for the present the question whether the power thus conferred extends to all questions, in all cases, where only one of the questions involved arises under the Constitution or laws of the United States, we find that this judicial power is by the Constitution vested in one Supreme Court and in such inferior courts as Congress may establish. Of these courts the Constitution defines the jurisdiction of none but the Supreme Court. Of that court it is said, after giving

it a very limited original jurisdiction, that "in all 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 may prescribe."

This latter clause has been the subject of construction in this court many times, and the uniform and established doctrine is, that Congress having by the act of 1789 defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated.*

It is also to be remembered that the exercise of judicial power over cases arising under the Constitution, laws, and treaties of the United States, may be original as well as appellate, and may be conferred by Congress on other courts than the Supreme Court, as it has done in several classes of cases which will be hereafter referred to. We are under no necessity, then, of supposing that Congress, in the section we are considering, intended to confer on the Supreme Court the whole power which, by the Constitution, it was competent for Congress to confer in the class of cases embraced in that section.

Omitting for the moment that part of the section which characterizes the questions necessary to the jurisdiction conferred, the enactment is, that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit can be had (when one of these questions is decided), may be re-examined, and reversed or affirmed, in the Supreme Court of the United States, upon a writ of error . . . in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been passed or rendered in a court of the United States.

It is strenuously maintained that as the office of a writ of error at the common law, and as it is used in relation to the

* Wiscart *v.* Dauchy, 3 Dallas, 321; Durousseau *v.* United States, 6 Cranch, 307; The Lucy, 8 Wallace, 307; Ex parte McCardle, 6 Id. 318; S. C. 7 Id. 506.

inferior courts of the United States when issued from this court, is to remove the whole case to this court for revision upon its merits, or at least upon all the errors found in the record of the case so removed, and as this statute enacts that these cases shall be re-examined in the same manner, and under the same regulations, and the writ shall have the same effect as in those cases, therefore *all* the errors found in a record so removed from a *State* court must be reviewed so far as they are essential to a correct final judgment on the whole case.

The proposition as thus stated has great force, and is entitled to our most careful consideration. If the invariable effect of a writ of error to a Circuit Court of the United States is to require of this court to examine and pass upon all the errors of the inferior court, and if re-examination of the judgment of the court in the same manner and under the same regulations, means that in the re-examination everything is to be considered which could be considered in ence to the Circuit Court, and nothing else, then the infera writ which is drawn from these premises would seem to be correct.

But let us consider this.

There are two principal methods known to English jurisprudence, and to the jurisprudence of the Federal courts, by which cases may be removed from an inferior to an appellate court for review. These are the writ of error and the appeal. There may be, and there are, other exceptional modes, such as the writ of certiorari at common law, and a certificate of division of opinion under the acts of Congress. The appeal, which is the only mode by which a decree in chancery or in admiralty can be brought from an inferior Federal court to this court, *does* bring up the whole case for re-examination on all the merits, whether of law or fact, and for consideration on these, as though no decree had ever been rendered. The writ of error is used to bring up for review all other cases, and when thus brought here the cases are *not* open for re-examination on their whole merits, but every controverted question of fact is excluded from consideration, and only

such errors as this court can see that the inferior court committed, and not all of these, can be the subject of this court's corrective power.

Now, one of the first things apparent on the face of this statute is that decrees in chancery, and in admiralty also, if a State court shall entertain jurisdiction of a case essentially of admiralty cognizance, are to be removed into this court from the State courts by this writ of error as well as judgments at law. And such has been the unquestioned practice under the act of 1789 from its passage until now. But this writ cannot bring a decree in chancery or admiralty from the Circuit Court to this court for review. It has no such effect, and we dismiss every day cases brought here by writ of error to a Circuit Court, because they can only be brought here by appeal, and the writ of error does not extend to them.*

Unless, therefore, we have been wholly wrong for eighty years, under the act of 1789, and unless we are prepared to exclude chancery cases decided in the State courts from the effect of this writ, it cannot, literally, have the same effect as in cases from a court of the United States; and if we could hold that the writ would have the same effect in removing the case, which is probably all that is meant, still the case when removed cannot literally be examined in the same manner, if by manner is meant the principle on which the judgment of the court must rest. For chancery cases, when brought here from the Circuit Courts, are brought for a trial *de novo* on all the evidence and pleadings in the case.

It is, therefore, too obvious to need comment, that this statute was designed to bring equity suits to this court from the State courts by writ of error, as well as law cases, and that it was not intended that they should be re-examined in the same manner as if brought here from a court of the United States, in the sense of the proposition we are considering.

But passing from this consideration, what has been the manner in which this court re-examines the judgments of

* The San Pedro, 2 Wheaton, 132; McCollum *v.* Eager, 2 Howard, 61; Minor *v.* Tillotson, Ib. 392; Benton *v.* Lapier, 22 Id. 118.

the Circuit Courts on writs of error, as touching the errors into which it will look for reversal? For it is this *manner* which is supposed to require an examination of all errors, whether of Federal law or otherwise under this statute. It requires but slight examination of the reports of the decisions or familiarity with the practice of this court, to know that it does not examine into or decide all the errors, or matter assigned for error, of the most of the cases before them. Many of these are found to be immaterial, the case being reversed or affirmed on some important point which requires of itself a judgment without regard to other matters. There are errors also which may be sufficiently manifest of which the appellate court has no jurisdiction, as in regard to a motion for a new trial, or to quash an indictment, or for a continuance, or amendment of pleadings, or some other matter which, however important to the merits of the case, is within the exclusive discretion of the inferior court.

Nor does it seem to us that the phrase "in the same manner and under the same regulations, and the writ shall have the same effect" is intended to furnish the rule by which the court shall be guided in the considerations which should enter into the judgment that it shall render. That the writ of error shall have the same effect as if directed to a Circuit Court can mean no more than that it shall transfer the case to the Supreme Court, and with it the record of the proceedings in the court below. This is the effect of the writ and its function and purpose. When the court comes to consider the case it may be limited by the nature of the writ, but what it shall review, and what it shall not, must depend upon the jurisdiction of the court in that class of cases as fixed by the law governing that jurisdiction.

So the regulations here spoken of are manifestly the rules under which the writ is issued, served, and returned; the notice to be given to the adverse party, and time fixed for appearance, argument, &c. Another important effect of the writ and of the regulations governing it is that when accompanied by a proper bond, given and approved within the prescribed time, it operates as a supersedeas to further pro-

ceedings in the inferior court. The word manner also much more appropriately expresses the general mode of proceeding with the case, after the writ has been allowed, the means by which the exigency of the writ is enforced, as by rule on the clerk, or mandamus to the court, and the progress of the case in the appellate court; as filing the record, docketing the case, time of hearing, order of the argument, and such other matters as are merely incident to final decision by the court. In short, the whole phrase is one eminently appropriate to the expression of the idea that these cases, though coming from State instead of Federal tribunals, shall be conducted in their progress through the court, in the matter of the general course of procedure, by the same rules of practice that prevail in cases brought under writs of error to the courts of the United States.

This is a different thing, however, from laying down rules of decision, or enacting the fundamental principles on which the court must decide this class of cases. It differs widely from an attempt to say that the court in coming to a judgment must consider this matter and disregard that. It is by no means the language in which a legislative body would undertake to establish the principles on which a court of last resort must form its judgment.

There is an instance of the use of very similar language by Congress in reference to the removal of causes into this court for review which has uniformly received the construction which we now place upon this.

By the Judiciary Act of 1789, there was no *appeal*, in the judicial sense of that word, to this court in any case. Decrees in suits in equity and admiralty were brought up by writ of error only, until the act of 1803; and as this writ could not bring up a case to be tried on its controverted questions of fact, the nineteenth section of the act of 1789 required the inferior courts to make a finding of facts which should be accepted as true by the appellate court. But by the act of March 3d, 1803,* these cases were to be brought

* 2 Stat. at Large, 244.

to this court by appeal, and to give this appeal full effect the nineteenth section of the act of 1789 was repealed, and upon such appeal the court below was directed to send to this court all the pleadings, depositions, testimony, and proceedings. In this manner the court obtained that full possession and control of the case which the nature of an appeal implies. And it is worthy of observation that Congress did not rely upon the mere legal operation of the word appeal to effect this, but provided in express terms the means necessary to insure this object.

But to avoid the necessity of many words as to the mode in which the case should be brought to this court and conducted when here, it was enacted "that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error." Here is language quite as strong as that we have had under consideration, and strikingly similar both in its purport and in the purpose to be served by it. Yet no one ever supposed that when the court came to consider the judgment which it should render on such an appeal it was to be governed by the principles applicable to writs of error at common law. It was never thought for a moment, notwithstanding the use of the word "restrictions," that the court was limited to questions of law apparent on the record; but the uniform course has been to consider it as a case to be tried *de novo* on all the considerations of law and of fact applicable to it. There are many decisions of this court showing that these words have been held to apply alone to the course of procedure, to matters of mere practice, and not at all affording a rule for decision of the case on its merits in the conference-room.*

There is, therefore, nothing in the language of the act, as far as we have criticized it, which in express terms defines the extent of the re-examination which this court shall give to such cases.

But we have not yet considered the most important part

* Villabolos *v.* United States, 6 Howard, 81; Castro *v.* United States, 3 Wallace, 46; Mussina *v.* Cavazos, 6 Id. 355.

of the statute, namely, that which declares that it is only upon the existence of certain questions in the case that this court can entertain jurisdiction at all. Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been *decided* in the State court. Nor is it sufficient that such a question was raised and was decided. It must have been decided in a certain way, that is, against the right set up under the Constitution, laws, treaties, or authority of the United States. The Federal question may have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the Federal law, but if the right claimed under it by plaintiff in error has been conceded to him, this court cannot entertain jurisdiction of the case, so very careful is the statute, both of 1789 and of 1867, to narrow, to limit, and define the jurisdiction which this court exercises over the judgments of the State courts. Is it consistent with this extreme caution to suppose that Congress intended, when those cases came here, that this court should not only examine those questions, but all others found in the record? —questions of common law, of State statutes, of controverted facts, and conflicting evidence. Or is it the more reasonable inference that Congress intended that the case should be brought here that *those questions* might be decided and *finally* decided by the court established by the Constitution of the Union, and the court which has always been supposed to be not only the most appropriate but the only proper tribunal for their final decision? No such reason nor any necessity exists for the decision by this court of other questions in those cases. The jurisdiction has been exercised for nearly a century without serious inconvenience to the due administration of justice. The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly.

Let us look for a moment into the effect of the proposition contended for upon the cases as they come up for consideration in the conference-room. If it is found that no such question is raised or decided in the court below, then all will concede that it must be dismissed for want of jurisdiction. But if it is found that the Federal question was raised and was decided against the plaintiff in error, then the first duty of the court obviously is to determine whether it was correctly decided by the State court. Let us suppose that we find that the court below was right in its decision on that question. What, then, are we to do? Was it the intention of Congress to say that while you can only bring the case here on account of this question, yet when it is here, though it may turn out that the plaintiff in error was wrong on that question, and the judgment of the court below was right, though he has wrongfully dragged the defendant into this court by the allegation of an error which did not exist, and without which the case could not rightfully be here, he can still insist on an inquiry into all the other matters which were litigated in the case? This is neither reasonable nor just.

In such case both the nature of the jurisdiction conferred and the nature and fitness of things demand that, no error being found in the matter which authorized the re-examination, the judgment of the State court should be affirmed, and the case remitted to that court for its further enforcement.

The whole argument we are combating, however, goes upon the assumption that when it is found that the record shows that one of the questions mentioned has been decided against the claim of the plaintiff in error, this court has jurisdiction, and that jurisdiction extends to the whole case. If it extends to the whole case then the court must re-examine the whole case, and if it re-examines it must decide the whole case. It is difficult to escape the logic of the argument if the first premise be conceded. But it is here the error lies. We are of opinion that upon a fair construction of the whole language of the section the jurisdiction con-

ferred is limited to the decision of the questions mentioned in the statute, and, as a necessary consequence of this, to the exercise of such powers as may be necessary to cause the judgment in that decision to be respected.

We will now advert to one or two considerations apart from the mere language of the statute, which seem to us to give additional force to this conclusion.

It has been many times decided by this court, on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court by pleadings, prayer for instruction, or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on its merits.* Heretofore these merits have been held to be to determine whether the propositions of law involved in the specific Federal question were rightly decided, and if not, did the *case* of plaintiff in error, on the pleadings and evidence, come within the principle ruled by this court. This has always been held to be the exercise of the jurisdiction and re-examination of the case provided by the statute. But if when we once get jurisdiction, everything in the case is open to re-examination, it follows that every case tried in any State court, from that of a justice of the peace to the highest court of the State, may be brought to this court for final decision on all the points involved in it.

That this is no exaggeration let us look a moment.

Suppose a party is sued before a justice of the peace for assault and battery. He pleads that he was a deputy marshal of the United States, and in serving a warrant of arrest on plaintiff he gently laid his hands on him and used no more force than was necessary. He also pleads the general issue. We will suppose that to the special plea some response is made which finally leads to a decision against the defendant on that plea. And judgment is rendered against

* Rector *v.* Ashley, 6 Wallace, 142; Bridge Proprietors *v.* Hoboken Co., 1 Id. 116; Furman *v.* Nichol, 8 Id. 44; Armstrong *v.* Treasurer, 16 Peters, 281; Crowell *v.* Randell, 10 Id. 368.

him on the general issue also. He never was a deputy marshal. He never had a writ from a United States court; but he insists on that plea through all the courts up to this, and when he gets here the record shows a Federal question decided against him, and this court must re-examine the whole case, though there was not a particle of truth in his plea, and it was a mere device to get the case into this court. Very many cases are brought here now of that character. Also, cases where the moment the Federal question is stated by counsel we all know that there is nothing in it. This has become such a burden and abuse that we either refuse to hear, or hear only one side of many such, and stop the argument, and have been compelled to adopt a rule that when a motion is made to dismiss it shall only be heard on printed argument. If the temptation to do this is so strong under the rule of this court for over eighty years to hear only the Federal question, what are we to expect when, by merely *raising* one of those questions in any case, the party who does it can bring it here for decision on all the matters of law and fact involved in it. It is to be remembered that there is not even a limitation as to the value in controversy in writs to the State courts as there is to the Circuit Courts; and it follows that there is no conceivable case so insignificant in amount or unimportant in principle that a perverse and obstinate man may not bring it to this court by the aid of a sagacious lawyer raising a Federal question in the record—a point which he may be wholly unable to support by the facts, or which he may well know will be decided against him the moment it is stated. But he obtains his object, if this court, when the case is once open to re-examination on account of that question, must decide all the others that are to be found in the record.

It is impossible to believe that Congress intended this result, and equally impossible that they did not see that it would follow if they intended to open the cases that are brought here under this section to re-examination on all the points involved in them and necessary to a final judgment on the merits.

The twenty-fifth section of the act of 1789 has been the subject of innumerable decisions, some of which are to be found in almost every volume of the reports from that year down to the present. These form a system of appellate jurisprudence relating to the exercise of the appellate power of this court over the courts of the States. That system has been based upon the fundamental principle that this jurisdiction was limited to the correction of errors relating solely to Federal law. And though it may be argued with some plausibility that the reason of this is to be found in the restrictive clause of the act of 1789, which is omitted in the act of 1867, yet an examination of the cases will show that it rested quite as much on the conviction of this court that without that clause and on general principles the jurisdiction extended no further. It requires a very bold reach of thought, and a readiness to impute to Congress a radical and hazardous change of a policy vital in its essential nature to the independence of the State courts, to believe that that body contemplated, or intended, what is claimed, by the mere omission of a clause in the substituted statute, which may well be held to have been superfluous, or nearly so, in the old one.

Another consideration, not without weight in seeking after the intention of Congress, is found in the fact that where that body has clearly shown an intention to bring the whole of a case which arises under the constitutional provision as to its subject-matter under the jurisdiction of a Federal court, it has conferred its cognizance on Federal courts of original jurisdiction and not on the Supreme Court.

It is the same clause and the same language which declares in the Constitution that the judicial power shall extend to cases arising under the Constitution, laws, and treaties of the United States and to cases of admiralty and maritime jurisdiction. In this same act of 1789 the jurisdiction in admiralty and maritime cases is conferred on the District Courts of the United States, and is made exclusive. Congress has in like manner conferred upon the same court exclusive original jurisdiction in all cases of bankruptcy.

Opinion of the court.—Second question: The extent of jurisdiction.

Upon the Circuit Court it has conferred jurisdiction with exclusive reference to matters of Federal law, without regard to citizenship, either originally or by removal from the State courts in cases of conflicting titles to land under grants from different States.* In cases arising under the patent laws.† In suits against banking associations organized under the laws of the United States.‡ In suits against individuals on account of acts done under the revenue laws of the United States.§ In suits for damages for depriving, under color of State laws, any person of rights, privileges, or immunities secured to him by the Constitution or laws of the United States.‖

The acts referred to, and perhaps others not enumerated, show very clearly that when Congress desired a case to be tried on all the issues involved in it because one of those issues was to be controlled by the Constitution, laws, or treaties of the United States, it was their policy to vest its cognizance in a court of original jurisdiction, and not in an appellate tribunal.

And we think it equally clear that it has been the counterpart of the same policy to vest in the Supreme Court, as a court of *appeal* from the State courts, a jurisdiction limited to the questions of a Federal character which might be involved in such cases.

It is not difficult to discover what the purpose of Congress in the passage of this law was. In a vast number of cases the rights of the people of the Union, as they are administered in the courts of the States, must depend upon the construction which those courts gave to the Constitution, treaties, and laws of the United States. The highest courts of the States were sufficiently numerous, even in 1789, to cause it to be feared that, with the purest motives, this construc-

* 1 Stat. at Large, 89. † 16 Id. 206, 215. ‡ 13 Id. 116.
§ Act of March 2d, 1833, 4 Id 632, and act of July 13th, 1866, 14 Id. 176.
‖ Act of May 31st, 1870, 16 Id. 114; and act of April 20th, 1871, 17 Id. 13. See also for removal of cases of similar character from State courts, act of March 3d, 1863, 12 Id. 756; act of April 9th, 1866, 14 Id. 46; and act of May 31st, 1870, 16 Id. 144.

tion given in different courts would be various and conflicting. It was desirable, however, that whatever conflict of opinion might exist in those courts on other subjects, the rights which depended on the Federal laws should be the same everywhere, and that their construction should be uniform. This could only be done by conferring upon the Supreme Court of the United States—the appellate tribunal established by the Constitution—the right to decide these questions finally and in a manner which would be conclusive on all other courts, State or National. This was the first purpose of the statute, and it does not require that, in a case involving a variety of questions, any other should be decided than those described in the act.

Secondly. It was no doubt the purpose of Congress to secure to every litigant whose rights depended on any question of Federal law that that question should be decided for him by the highest Federal tribunal if he desired it, when the decisions of the State courts were against him on that question. That rights of this character, guaranteed to him by the Constitution and laws of the Union, should not be left to the exclusive and final control of the State courts.

There may be some plausibility in the argument that these rights cannot be protected in all cases unless the Supreme Court has final control of the whole case. But the experience of eighty-five years of the administration of the law under the opposite theory would seem to be a satisfactory answer to the argument. It is not to be presumed that the State courts, where the rule is clearly laid down to them on the Federal question, and its influence on the case fully seen, will disregard or overlook it, and this is all that the rights of the party claiming under it require. Besides, by the very terms of this statute, when the Supreme Court is of opinion that the question of Federal law is of such relative importance to the whole case that it should control the final judgment, that court is authorized to render such judgment and enforce it by its own process. It cannot, therefore, be maintained that it is in any case necessary for the security of the rights claimed under the Constitution, laws, or treaties of

the United States that the Supreme Court should examine and decide other questions not of a Federal character.

And we are of opinion that the act of 1867 does not confer such a jurisdiction.

This renders unnecessary a decision of the question whether, if Congress had conferred such authority, the act would have been constitutional. It will be time enough for this court to inquire into the existence of such a power when that body has attempted to exercise it in language which makes such an intention so clear as to require it.

The omitted clause of the act of 1789 declared that no other error should be regarded as a ground of reversal than such as appears on the face of the record and immediately respects the beforementioned questions.

It is probable that in determining whether one of those questions was actually raised and decided in the State court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry "to the face of the record."* What was the record of a case was pretty well understood as a common-law phrase at the time that statute was enacted. But the statutes of the States and new modes of proceedings in those courts have changed and confused the matter very much since that time.

It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana.† And though we have repeatedly decided that the opinions of other State courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question. We have been in the habit of receiving the certificate of the court signed by its chief justice or presiding officer on that point, though not as conclusive, and these opinions are quite

* Williams *v.* Norris, 12 Wheaton, 117; Rector *v.* Ashley, 6 Wallace, 142

† Grand Gulf Railroad Co. *v.* Marshall, 12 Howard, 165; Consin *v.* Blanc's Executor, 19 Id. 202.

as satisfactory and may more properly be treated as part of the record than such certificates.

But after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation.

It is proper, in this first attempt to construe this important statute as amended, to say a few words on another point. What shall be done by this court when the question has been found to exist in the record, and to have been decided against the plaintiff in error, and *rightfully* decided, we have already seen, and it presents no difficulties.

But when it appears that the Federal question was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, if there are no other issues decided in it than that. It often has occurred, however, and will occur again, that there are other points in the case than those of Federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.

Or it may be, that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment.

It may also be found that notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.

In the two latter instances there can be no doubt that the judgment of the State court must be reversed, and under the new act this court can either render the final judgment or decree here, or remand the case to the State court for that purpose.

But in the other cases supposed, why should a judgment be reversed for an error in deciding the Federal question, if the same judgment must be rendered on the other points

in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the Federal question?

We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the State court ruled correctly on them or not. We are of opinion that on these subjects not embraced in the class of questions stated in the statute, we must receive the decision of the State courts as conclusive.

But when we find that the State court has decided the Federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the Federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question. In the latter case the court would not be justified in reversing the judgment of the State court.

But this examination into the points in the record other than the Federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such have been decided, and their sufficiency to maintain the final judgment, as decided by the State court.

Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be reaffirmed, even in this court, if brought here again from the State court after it has corrected its error in the matter of Federal law.

Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

1. That it is essential to the jurisdiction of this court over

the judgment of a State court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State court.

2. That it must have been decided by the State court, or that its decision was necessary to the judgment or decree, rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States.

4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

5. If it finds that it was rightly decided, the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require.

Applying the principles here laid down to the case now before the court, we are of opinion that this court has jurisdiction, and that the judgment of the Supreme Court of Tennessee must be affirmed.

The suit was a bill in chancery brought by Murdock and

Opinion of the court.—The immediate case disposed of.

others against the city of Memphis to have a decree establishing their right in certain real estate near that city. The United States having determined to build a navy yard at Memphis, about the year 1844, or previous thereto, the city of Memphis, on the 14th day of September of that year, conveyed to the United States the land in controversy by an ordinary deed of general warranty, expressing on its face the consideration of $20,000 paid, and designating no purpose for which the land was conveyed. After retaining possession of the land for about ten years without building a navy yard, the United States abandoned that purpose, and by an act approved August 5th, 1854, ceded the property to the city of Memphis by its corporate name for the use and benefit of said city.

The plaintiffs in error, by their bill, allege that the title was originally conveyed to the city of Memphis, in trust, for certain purposes, including that of having a navy yard built on it by the United States; that when the title reverted to the city by reason of the abandonment of the place as a navy yard by the United States, and the act of Congress aforesaid, the city received the title in trust for the original grantors, who are the plaintiffs, or who are represented by plaintiffs. A demurrer to the bill was filed. Also an answer denying the trust and pleading the statute of limitations. On the hearing the bill was dismissed, and this decree was affirmed by the Supreme Court of the State. The complainants, in their bill, and throughout the case, insisted that the effect of the act of 1854 was to vest the title in the mayor or aldermen of the city in trust for them.

It may be very true that it is not easy to see anything in the deed by which the United States received the title from the city, or the act by which they ceded it back, which raises such a trust, but the complainants claimed a right under this act of the United States, which was decided against them by the Supreme Court of Tennessee, and this claim gives jurisdiction of that question to this court.

But we need not consume many words to prove that neither by the deed of the city to the United States, which

is an ordinary deed of bargain and sale for a valuable consideration, nor from anything found in the act of 1854,* is there any such trust to be inferred. The act, so far from recognizing or implying any such trust, cedes the property to the mayor and aldermen *for the use of the city.* We are, therefore, of opinion that this, the only Federal question in the case, was rightly decided by the Supreme Court of Tennessee.

But conceding this to be true, the plaintiffs in error have argued that the court having jurisdiction of the case must now examine it upon all the questions which affect its merits; and they insist that the conveyance by which the city of Memphis received the title previous to the deed from the city to the government, and the circumstances attending the making of the former deed are such, that when the title reverted to the city, a trust was raised for the benefit of plaintiffs.

After what has been said in the previous part of this opinion, we need discuss this matter no further. The claim of right here set up is one to be determined by the general principles of equity jurisprudence, and is unaffected by anything found in the Constitution, laws, or treaties of the United States. Whether decided well or otherwise by the State court, we have no authority to inquire. According to the principles we have laid down as applicable to this class of cases, the judgment of the Supreme Court of Tennessee must be

AFFIRMED.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice SWAYNE, dissenting:

I dissent from so much of the opinion of the court as denies the jurisdiction of this court to determine the whole case, where it appears that the record presents a Federal question and that the Federal question was erroneously decided to the prejudice of the plaintiff in error; as in that

* 10 Stat. at Large, 586.

state of the record it is, in my judgment, the duty of this court, under the recent act of Congress, to decide the whole merits of the controversy, and to affirm or reverse the judgment of the State court. Tested by the new law it would seem that it must be so, as this court cannot in that state of the record dismiss the writ of error, nor can the court reverse the judgment without deciding every question which the record presents.

Where the Federal question is rightly decided the judgment of the State court may be affirmed, upon the ground that the jurisdiction does not attach to the other questions involved in the merits of the controversy; but where the Federal question is erroneously decided the whole merits must be decided by this court, else the new law, which it is admitted repeals the twenty-fifth section of the Judiciary Act, is without meaning, operation, or effect, except to repeal the prior law.

Sufficient proof of the fact that the new law was not intended to be without meaning and effective operation is found in the fact that the provision in the old law which restricts the right of the plaintiff in error or appellant to assign for error any matter except such as respects one of the Federal questions enumerated in the twenty-fifth section of the Judiciary Act, is wholly omitted in the new law.

Mr. Justice BRADLEY, dissenting:

I feel obliged to dissent from the conclusion to which a majority of the court has come on the public question in this cause, but shall content myself with stating briefly the grounds of that dissent, without entering into any prolonged argument on the subject.

Meantime, however, it is proper to say that I deem it very doubtful whether the court has any jurisdiction at all over this particular case. The complainants claim the property in question under the terms, and what they regard as the true construction, of the trust-deed of July, 1844, whereby the property was conveyed to the city of Memphis "for the location of the naval depot;" and to Wheatley, trustee for

the grantors, "in case the same shall not be appropriated by the United States for that purpose." This deed was acknowledged on the 19th of September, 1844, and (probably at the same time) a deed dated 14th of September, 1844, was executed by the city to the United States, conveying the land in fee without any conditions or uses expressed. Operations for erecting and establishing a navy yard on the premises were commenced and were continued for several years, but were finally abandoned, and on the 5th of August, 1854, Congress, by an act, ceded the property to the city of Memphis for the use and benefit of the city. The defendants, the city of Memphis, claim both legal and beneficial title to the property under this act of Congress, and the Supreme Court of Tennessee sustained the claim—or, at least, did not sustain the adverse claim of the complainants. The claim of the complainants was not based on this act of Congress, but on the original deed of 1844, which limited the estate in the lands to their trustee "in case the same shall not be appropriated by the United States for that purpose," *i. e.*, the purpose of a navy yard. They claim that by the true construction of this clause a right to the land accrued to them, as well by an abandonment of the project of a navy yard as by its never being adopted. The conduct of the government in relation to the land, it is true, is claimed by them to be such as calls into operative effect the clause of the deed on which they rely. They construe that conduct as an abandonment of the enterprise. The act of cession by Congress to the city of Memphis is only one fact in a long chain of circumstances which they educe to show such abandonment.

It seems to me, therefore, that their claim is based entirely on the deed of 1844; and that the subsequent action of the government, so far as it has any effect in the case, is merely matter of evidence on the question of fact of abandonment; and that the failure of the government, from the beginning, to take any steps for establishing a navy yard on the land would have been no more a mere fact *in pais* to be proved in order to support the claim of the complainants, than were all the acts of the government which did, in fact,

take place. Proving that the government did not appropriate the land for a navy yard is a very different thing from setting up a claim to the land under an act of Congress.

I think, therefore, that in this case there was no title or right claimed by the appellants under any statute of, or authority exercised under, the United States; and consequently that there was no decision against any such title; and, therefore, that this court has no jurisdiction.

But supposing, as the majority of the court holds, that it has jurisdiction, I cannot concur in the conclusion that we can only decide the Federal question raised by the record. If we have jurisdiction at all, in my judgment we have jurisdiction of the *case*, and not merely of a *question* in it. The act of 1867, and the twenty-fifth section of the Judiciary Act both provide that a final judgment or decree in any suit in the highest court of a State, where is drawn in question certain things relating to the Constitution or laws of the United States, or to rights or immunities claimed under the United States, and the decision is adverse to such Constitution, laws, or rights, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error. Had the original act stopped here there could have been no difficulty. This act derives its authority and is intended to carry into effect, at least in part, that clause of the Constitution which declares that 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 under their authority—not to all *questions*, but to all *cases*. This word "cases," in the residue of the section, has frequently been held to mean suits, actions, embracing the whole cases, not mere questions in them; and that is undoubtedly the true construction. The Constitution, therefore, would have authorized a revision by the judiciary of the United States of all *cases* decided in State courts in which questions of United States law or Federal rights are necessarily involved. Congress in carrying out that clause could have so ordained. And the law referred to, had it

stopped at the point to which I have quoted it above, would clearly have been understood as so ordaining. But the twenty-fifth section of the Judiciary Act went on to declare that in such cases no other error should be assigned or regarded as a ground of reversal than such as immediately respected the question referred to as the ground of jurisdiction. It having been early decided that Congress had power to regulate the exercise of the appellate jurisdiction of the Supreme Court, the court has always considered itself bound by this restriction, and as authorized to reverse judgments of State courts only for errors in deciding the Federal questions involved therein.

Now, Congress, in the act of 1867, when revising the twenty-fifth section of the Judiciary Act, whilst following the general frame and modes of expression of that section, omitted the clause above referred to, which restricted the court to a consideration of the Federal questions. This omission cannot be regarded as having no meaning. The clause by its presence in the original act meant something, and effected something. It had the effect of restricting the consideration of the court to a certain class of questions as a ground of reversal, which restriction would not have existed without it. The omission of the clause, according to a well-settled rule of construction, must necessarily have the effect of removing the restriction which it effected in the old law.

In my judgment, therefore, if the court had jurisdiction of the case, it was bound to consider not only the Federal question raised by the record, but the whole case. As the court, however, has decided otherwise, it is not proper that I should express any opinion on the merits.

The case having been reargued, as well as argued originally, before the appointment of the CHIEF JUSTICE, he took no part in the judgment.