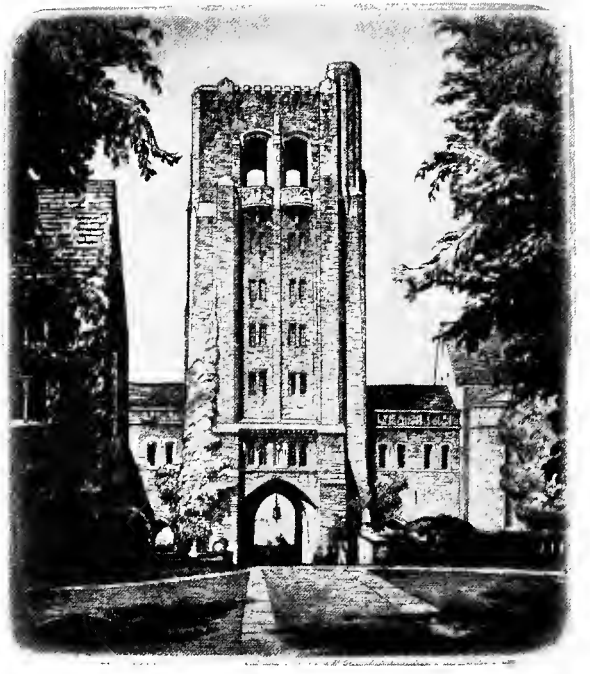

THE

LAW OF THE FEDERAL JUDICIARY:

A TREATISE

ON THE

PROVISIONS OF THE CONSTITUTION, THE LAWS OF CONGRESS, AND THE JUDICIAL DECISIONS RELATING TO THE JURISDICTION OF, AND PRACTICE AND PLEADING IN THE FEDERAL COURTS.

BY

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PREFACE.

"The Law of the Federal Judiciary" consists, first, in the provisions of the Constitution which grant and define the judicial power of the United States; secondly, in the legislation of Congress in pursuance thereof, and for the purpose of carrying the same into effect; and, thirdly, in the decisions of the Federal courts, especially those of the Supreme Court, settling the construction of these constitutional provisions and this legislation, and stamping with their authority certain general principles of law which, though not statutory enactments, and not sources of jurisdiction, rest on judicial precedents, and in these courts have the practical force and effect of law.

The design of this treatise is, in an analytic and orderly manner, to present these elements of Federal law as an aid and guide to pleading and practice in the courts of the United States. The treatise is comprised in seven Parts, as follows:

Part I, consisting of a single chapter, explains that provision of the Constitution which declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The investiture of the power is the subject here considered.

Part II, embracing nine chapters, examines and explains the several clauses of the Constitution which specify the "cases" and "controversies" to which the judicial power of the United States is extended. Reference, in the preparation of this Part, was necessarily had to the legislation of Congress; yet its primary and main idea is to expound these constitutional clauses.

The subject of Part III, containing eight chapters, is the machinery, judicial and auxiliary, together with the Federal law of evidence, established by Congress for the purpose of putting the judicial power of the United States into practical operation. The courts of the United States, with the laws regulating their organization, sessions, and jurisdiction, original and appellate, and also the auxiliary agencies annexed thereto, are considered in these chapters.

Part IV, embracing three chapters, and covering one hundred and fifty pages of the work, treats of the Removal of Causes from State to Federal courts, either before trial and judgment or decree, or after final judgment or decree in the highest State court in which a decision in the cause could be had. The constitutionality of such removal, the cases in which and the Federal courts to which the removal may be had, and the laws regulating the mode thereof, form the subject-matter of these chapters.

The general question of relation between Federal and State jurisprudence is examined in the three chapters of Part V, considered with reference to exclusive and concurrent jurisdiction, to Federal and State writs of *habeas corpus*, and also the administration of State laws by the courts of the United States.

Federal jurisprudence and the common law form the subject of the two chapters of Part VI, with special reference to the question whether the United States, as such, have any common law for the guidance of Federal courts in civil and criminal causes; and, if so, to what extent, and on what basis, this law furnishes their rule in the administration of justice.

The four chapters of Part VII are devoted to Federal Equity Jurisprudence: the first giving a statement of equity in general; the second setting forth the laws that regulate equity as a branch of Federal jurisprudence; the third presenting a general outline of English Chancery Practice when the Constitution was adopted; and the last being mainly a reprint of the Rules of Equity established by the Supreme Court to regulate equity procedure in the Circuit Courts of the United States.

Such is the outline of the contents of this volume. The field is a wide one, and the matters to be considered are alike numerous and various. The difficulty of bringing these matters into a single volume of convenient size is apparent at sight; and yet this is what the author has attempted, and, with what degree of success, it is for the public to judge. He is aware of no other treatise on the subject that seeks to cover so much ground.

The Rules of the Supreme Court, those regulating appeals from the Court of Claims, those of Equity Procedure in the Circuit Courts, and those of Admiralty Procedure in the District Courts, will be found in the chapters which respectively treat of the subject to which they refer. And, as to "Forms," it was not judged expedient to increase the size of the volume by inserting them, inasmuch as they are given in several works usually found in lawyers' libraries.

Free use in all parts of this volume has been made of side headings, as calls to attention, and the means of facilitating access to its contents. The index has been made so full that the reader can readily find any subject in the volume which he may wish to examine. This, with the side headings and the table of cases, makes the contents easily accessible.

The critical reader, upon comparing some of the chapters of this volume, will perhaps notice occasional repetitions of the same matter. This grows out of the plan adopted in the construction of the work, and the desire of the author to make each Part as complete as possible by itself, without reference to any other Part. Removal of causes, for example, from State courts to the Supreme Court of the United States has many things in it that are common to it and the removal of causes to the Supreme Court from the inferior Federal courts; and yet there are so many peculiarities connected with the former removal not thus common, that it was deemed expedient to consider it in a distinct chapter by itself, and in the same to give *all* the law on the subject, though some parts of this law, being equally applicable to the latter removal, are presented in another connection.

The power of the Federal courts to issue writs of *scire facias*, *habeas corpus*, *ne exeat*, injunction, and all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law, either granted to these courts in common, or in certain cases exclusively to the Supreme Court, together with the provisions of law regulating the same, is considered in the chapters on the District and Circuit Courts, in that on the Supreme Court, and in chapter second of Part V, especially in the last two of these chapters.

While the author, in the preparation of this volume, has sought information from all sources at his command, he desires here to make special mention of Bump's "Federal Procedure," which is substantially a digest of Title XIII of the Revised Statutes of the United States, and has greatly aided the author in his search for the proper cases to sustain and illustrate legal principles. Frequent references are made to that most admirable book.

This work is the result of the study which, from the simple love of the study, and in connection with editorial labors that specially demanded this kind of research, has been pursued for several years; and if it shall be accepted by the legal profession, as of value, the author's highest hope will be realized.

SAMUEL T. SPEAR.

BROOKLYN, October, 1883.

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THE FEDERAL JUDICIARY.

PART I.

FEDERAL JUDICIAL POWER.

CHAPTER I.

THE INVESTITURE OF THE POWER.

1. Powers of Government.—The powers of government bestowed by the Constitution of the United States are of three classes, being legislative, executive, and judicial.

The first class of powers is vested in "a Congress of the United States," consisting of two legislative bodies, namely, "a Senate and House of Representatives." The former is "composed of two Senators from each State, chosen by the legislature thereof for six years." The latter is "composed of members chosen every second year by the people of the several States." The actual electors of these members in each State are those persons who have "the qualifications requisite for electors of the most numerous branch of the State legislature," and the number of such members apportioned to each State is fixed by the rule of population.

The Senate represents the States as such; and in this body the several States are entitled to an equal representation. The House of Representatives represents the people as individuals; and inasmuch as the States differ in population, they also differ in the number of members to which they are entitled in this House.

The second class of powers is "vested in a President of the United States of America," who holds "his office during the term of four years." The provision for his election is as follows: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." These electors choose the President by "a majority of the whole number of electors appointed." In the event of their failure to make a choice, the power of choosing the President devolves upon the House of Representatives.

The third class of powers is vested in the judicial department of the Government; and this consists of "one Supreme Court" and "such inferior courts as the Congress may from time to time ordain and establish." The judges of these courts are appointed by the President, with the advice and consent of the Senate, and "hold their offices during good behavior," and, for their services, receive a compensation which cannot "be diminished during their continuance in office."

A National Legislature, a National Executive, and a National Judiciary, therefore, form the three co-ordinate departments which, taken collectively, constitute the Government of the United States. Their respective functions are distinct and separate, and the agents for the performance of these functions are also distinct and separate. The members of Congress cannot at the same time be United States judges, and these judges, while holding their office, cannot be members of Congress.

2. The Grant of Judicial Power.—The Constitution, in article 3, section 1, expressly declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." It also provides, in article 1, section 8, that Congress shall have power "to constitute tribunals inferior to the Supreme Court," and power "to make all laws which shall be necessary and proper for carrying into execution" the powers expressly delegated to Congress, and "all other powers vested by this Constitution in the Government of the United States, or in

any department or officer thereof." These grants of power to Congress enable it to pass the laws necessary to give effect to the judicial power bestowed by the Constitution.

3. The Nature of Judicial Power.—What is judicial power? Mr. Abbott answers this question by saying that the phrase, as "used in relation to the distribution of the functions of governments," means "the authority to determine the rights of person or property, by arbitrating between adversaries, in specific controversies, at the instance of a party thereto." (Abb. U. S. Pr., vol. 1, p. 22.)

The generic part of this definition is given by the term "authority;" yet this term, standing by itself, does not distinguish judicial power from power that is legislative or executive. The kind of authority that is judicial in its nature relates to and acts upon "rights of person or property," not created by this authority, but existing under law. This authority, in "specific controversies" between parties, determines these rights, as they thus exist, and does so "at the instance of a party thereto." These qualities distinguish judicial power from that which is simply legislative or executive.

The agency by which judicial power is exercised is called a court, whether with or without a jury. Courts have no existence and no function independently of law. They are the creatures of law. Law precedes them and governs them. Their function is to expound and administer law in application to the cases and controversies which may come before them in due course of legal procedure.

Chief Justice Marshall, in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 866, said: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion—a discretion to be exercised in discerning the course prescribed by law; and when that is discovered, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law."

Mr. George Ticknor Curtis, in his chapter on "What con-

stitutes judicial power," says: "It is apparent that, in order to make a case for judicial action, there must be parties to come into court, who can be reached by its process and be bound by its power—parties whose rights admit of ultimate decision by a tribunal to which they are bound to submit; and also that the question to be acted upon should be capable of final determination in the judicial department of the government, without the revision or control of either the executive or the legislature." (Curtis's Comm. p. 96.)

It is a general principle of law that the judgments and decrees of courts in the exercise of judicial power are not reviewable or reversible by legislative or executive authority. If reviewed at all, the work must be done by a higher court. The reprieving and pardoning power, as granted to executive authority, is not designed to vacate or contradict this principle. It is simply a provision of law to extend the clemency of government to convicted criminals in extraordinary cases. It by no means makes the executive authority a tribunal of general review and correction.

The framers of the Constitution evidently intended that the Judicial Department, provided for in the instrument, should be clothed with a full and complete competency to exercise judicial power, in all its forms and with all its necessary incidents, on all the subjects placed within its scope. The phrase, as used in the Constitution, must, hence, be taken in its most comprehensive sense, including *all* the exercises of this power within the limits defined, whether in civil or criminal cases, and whether in the form of original or appellate jurisdiction. The phrase embraces all the incidental powers, in the conduct of trials and the issuing of writs and orders, which are necessary to make the power practically effective.

Congress, in the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), which provided for the organization of the courts of the United States, declared that these courts "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." The power to issue writs, to grant orders, to hear and determine motions, to judge of their own jurisdiction, to supervise and control the administrative officers of courts, to preserve decorum in the process of trials, to punish for

contempts of court, to enforce judgments and decrees, to administer oaths, to examine witnesses, &c., belongs, of necessity, to the exercise of judicial power. Such powers were included in the general grant of judicial power. The design was to provide for the establishment of courts fully qualified to expound and administer law, by hearing litigated cases and rendering authoritative judgments on all subjects and between all parties coming within the sphere of their jurisdiction.

4. Limitation of Judicial Power.—The Constitution does not make its grant of judicial power in unlimited terms. While it says that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," it also specifies the "cases" and "controversies" to which this power shall extend, and beyond which, by obvious implication, it shall not extend. The power is to be vested in and exercised by courts, not by Congress, and not by the President; and the enumeration of the "cases" and "controversies" to which it is applicable is, of itself, a limitation. It defines the power with reference to its sphere of action; and Congress has no authority to extend it by law beyond this sphere.

Chief Justice Marshall, referring, in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 819, to the second section of the third article 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 or which shall be made under their authority," said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."

There is then a party before the court, with his declaration or complaint in due form of law, invoking its action and asking for an appropriate remedy under the Constitution, or a law, or a

treaty of the United States. Courts never decide anything in the absence of cases or controversies brought before them in the manner prescribed by law. Though open for litigants, they wait for the litigants to appear before judicially acting; and whether they can then afford the relief sought depends on the merits of the case and the extent of their jurisdiction.

It should be borne in mind, also, that not all cases and controversies which may have their basis in the Constitution, or a law, or treaty of the United States, are necessarily judicial in their character. There are many questions of a legal nature, in the settlement of which facts are to be ascertained, and in respect to which judgment is to be exercised upon the provisions of law applicable to them, but which do not come within the scope of the judicial power provided for in the third article of the Constitution. They do not belong to the "cases" and "controversies" specified in this article. They are rather political than judicial in their nature, and hence it is not the province of courts, as such, to determine them. Some of them are to be determined by the Executive Department, and others by Congress.

Congress has, in some instances, assigned to Federal courts duties which, though of a *quasi*-judicial nature, do not come within the judicial power granted in the Constitution. The Act of March 23d, 1792 (1 U. S. Stat. at Large, 243), made it the duty of the judges of the Circuit Courts, to examine into the claims of persons asking for pensions, and to report them to the Secretary of War. The judges of the Circuit Court for the district of New York, declared that the function was not judicial; yet they consented to execute the act "in the capacity of commissioners," and not as judges. The judges of the Circuit Court for the district of Pennsylvania were unanimously of the opinion that they could not proceed under the act, "because the business directed by this act is not of a judicial nature," and because their judgments "might, under the same act, have been revised and controlled by the legislature, and by an officer in the Executive department." The Circuit Court for the district of North Carolina assigned substantially similar reasons why the Court could not execute "that part of the act which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States." (*Hayburn's Case*, 2 Dall. 409, note.)

Congress, by the Act of March 3d, 1849 (9 U. S. Stat. at Large, 788), taken in connection with previous acts referred to in this act, directed the judge of the District Court for the northern district of Florida, to adjudicate certain claims for injuries suffered by the inhabitants of Florida, by the operations of the American army in Florida, which claims were to be paid if the Secretary of the Treasury should, on a report of the evidence, deem payment equitable.

The Supreme Court of the United States, in *The United States* v. *Ferreira*, 13 How. 40, held that the authority here conferred was not "authority to exercise any of the judicial power of the United States, under the Constitution," and that the judge having acted simply as a commissioner, no appeal would lie from his award to the Supreme Court. "His decision," said Chief Justice Taney, "is not the judgment of a court of justice," but simply "the award of a commissioner." The function performed was no exercise of the judicial power granted in the Constitution. The subject-matter arose under a law of the United States, yet it was not judicial in its nature.

The judicial power to be exercised by the Federal courts, as courts, is limited to such "cases" and "controversies" as admit of final settlement by these courts, when brought before them in accordance with the provisions of law. The mere circumstance that questions of fact and of law are to be considered and determined, does not necessarily make the case a judicial one. The executive officers of the Government are often called upon to pass judgments upon law and facts, in matters that come within the sphere of their duties; and yet, in so doing, they are not acting as courts of justice, or exercising any part of the judicial power referred to in the Constitution. If Congress appropriates money for the payment of specified claims, upon certain conditions, and makes the President the judge of the presence of these conditions, he does not, in acting under such a law, perform a judicial function. A case may grow out of his action which would be judicial in its nature, and which a court of justice would be competent to settle; but the action itself is not such.

5. Regulations of Judicial Power.—The Constitution, in its third article, and in the fourth, fifth, sixth, seventh, eighth and

eleventh amendments, qualifies its grant of judicial power by the following regulations:

(1.) That "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed in any State, the trial shall be at such place or places as the Congress may by law have directed."

(2.) That "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

(3.) That "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(4.) That "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger."

(5.) That no person shall "be subject, for the same offense, to be twice put in jeopardy of life or limb," or "be compelled in any criminal case to be a witness against himself," or "be deprived of life, liberty or property without due process of law," or have his property "taken for public use without just compensation."

(6.) That "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," and also the right "to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

(7.) That "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-ex-

amined in any court of the United States, than according to the rules of the common law."

(8.) That "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

(9.) That "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

These qualifications and regulations relate exclusively to the judicial power granted in the Constitution, and vested in the courts of the United States, and, consequently, have no reference whatever to judicial power possessed and exercised under State authority. The Supreme Court of the United States has so construed them. (*Barron* v. *The Mayor of Baltimore*, 7 Pet. 243; *Livingston's Lessee* v. *Moore*, 7 Pet. 469; *Fox* v. *The State of Ohio*, 5 How. 410; *Pervear* v. *The Commonwealth*, 5 Wall. 475; *Twitchell* v. *The Commonwealth*, 7 Wall. 321; and *Edwards* v. *Elliott*, 21 Wall. 535.)

The jury system is annexed to the courts of the United States in the trial of all crimes, except in cases of impeachment; and the right of trial by jury is preserved in all suits at common law where the value in controversy exceeds twenty dollars. Jurors in these cases must be summoned to render verdicts upon questions of fact; and, except in certain specified cases, no person can be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. The Constitution, especially in the amendments thereto, adopts some of the leading principles of the common law relating to the exercise of judicial power. Courts cannot disregard these principles without violating the Constitution. They are fundamental rules, either limiting jurisdiction or regulating judicial procedure.

6. The Source of Judicial Power.—The judicial power, referred to in the Constitution, is exclusively that of the "United States," in distinction from that of the several States. The title "The United States," or "The United States of America," as occurring in the Constitution, was not invented by the framers of this instrument. It was already in use in application to the union or confederacy of the thirteen original States established by the Articles of Confederation. These Articles were adopted

by the legislatures of these States. The "league of friendship" which they created was, however, after a short trial, found insufficient; and this led to the efforts "to form a more perfect Union" under a Constitution, which should be accepted and operate as "the supreme law of the land."

The theory of those who framed and of the people in adopting the Constitution, is well expressed in its preamble, which reads thus: "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." This may be regarded as the *enacting* clause of the Constitution; and, as such, it contains five particulars.

The words, "We, the people of the United States," present the enacting authority. The people of the several States, and, taken in the aggregate, of the United States, here assume their own inherent and original sovereignty to establish a Constitution for their own government.

The purpose of this Constitution, as decreed by the people, is stated in the six recitals which specify the objects to be attained by it.

The enacting act is indicated by the words "do ordain and establish." This is not the language of a compact or mere agreement between sovereign States, but the language of authority by which "the people of the United States" declared their will.

The thing enacted is "this Constitution," which means the seven articles drafted by the Federal Convention, and subsequently submitted to the people for their ratification or rejection. The term "Constitution" is the strongest term in the English language to designate the fundamental law of a government.

The territorial scope of the Constitution is stated by the words "for the United States of America." It was to operate as a Constitution over all the territory embraced in this designation.

The third article of the Constitution relates to the Judicial Department of the Government, to be organized under it; and contemplated in the light of the preamble, it may be read as follows: "We, the people of the United States, do ordain that the judicial power granted in this article, and to be exercised in

the name and by the authority of the people of the United States, shall extend to the cases and controversies herein specified, and shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The people who ordained and established the Constitution, ordained and established the judicial power granted and defined therein. It is properly called "the judicial power of the United States," since it not only came from the people of the United States, but, by their authority, operates among and upon them. It is *their* judicial power, being lodged by them in the proper agents for its exercise. The Constitution is the expression of their will on this subject, as it is on every other subject to which it refers.

Mr. Justice Story, in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324, said: "The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the people of the United States." Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, said: "The Government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

Neither the States, as such, nor the State governments, as such, adopted the Constitution. The adoption was the act of the people, through conventions elected by them, to be the organs of expressing their will; and this is a fundamental distinction between the Constitution and the Articles of Confederation that were superseded by it. These Articles were simply a league or alliance between sovereign States, established by the authority of their respective legislatures. The Constitution, however, goes directly back to the people themselves for its source and authority. The Supreme Court, whenever it has had occasion to refer to the subject, has uniformly based its authority, not upon State legislatures, but upon the people of the United States, regarded as a political unit, and enacting for themselves a fundamental law.

7. The Depositary of the Power.—The depositary of the judicial power granted in the third article of the Constitution is, "one Supreme Court," and "such inferior courts as the Congress may from time to time ordain and establish." The same Constitution authorizes the President, with the advice and consent of the Senate, to appoint "the judges of the Supreme Court," and of any inferior courts which may be established by Congress.

The theory of the Constitution is that there must be one and but one Supreme Court. It expressly ordains the existence of such a court. Congress may provide for its organization, fix the number of its judges, and make regulations for its procedure; but the court itself must exist as the Supreme Court of the United States. The supremacy of this court makes it the final and conclusive authority in all cases and controversies within its jurisdiction, that come before it for settlement. There is no higher court to review its decision.

The Constitution, moreover, directly confers and defines the jurisdiction of the Supreme Court as it does not that of any other court. Having enumerated the cases and controversies to which the judicial power of the United States shall extend, it proceeds to say: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." The jurisdiction of this court, in one or the other form, is thus made potentially as broad as the judicial power of the United States.

As to other courts, inferior to the Supreme Court, in which a portion of the judicial power of the United States is directed to be vested, the whole question of their organization, number, relation to each other, and the apportionment of judicial power among them, is left to the legislative discretion of Congress. Whether, in a particular court, the jurisdiction shall be original or appellate, or original in some cases and appellate in others, and to what cases and controversies it shall extend in particular courts, is for Congress to determine. These courts are exclusively the creatures of law, and can exercise judicial power only as it is conferred by law. The Constitution specifies in general terms the subjects upon which, and the parties between whom, the power

may act, and limits the jurisdiction to these subjects and parties, and then leaves the distribution of the power in the hands of Congress, with the exception of its provisions in regard to the Supreme Court.

Congress, however, has no authority for conferring any portion of this power upon State courts. It must be conferred by Congress upon courts organized under its authority, if at all, which is not true of State courts. This doctrine was stated in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, and in *Houston* v. *Moore*, 5 Wheat. 1. If State courts exercise jurisdiction in any of the cases or controversies to which the judicial power of the United States extends, it is not in virtue of any direct authority conferred upon them by Congress. Congress may omit to exclude them from this jurisdiction, and this leaves the question whether they can exercise any portion of it or not, to be determined by State authority.

8. The Duty of Vesting the Power.—The Constitution says that "the judicial power of the United States *shall be vested*," &c. The words, "shall be vested," were in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, regarded as mandatory, making it the duty of Congress to vest in the courts of the United States, *all* the judicial power granted in the Constitution, and, consequently, to provide for the organization of the Supreme Court, and ordain and establish other courts, and clothe them with such jurisdiction that, as the result, all the judicial power specified in the Constitution will be actually vested in the courts of the United States.

Mr. Justice Story, in stating the opinion of the court in this case, said: "If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others." Mr. Justice Story hence concludes that "the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created

under its authority." Chancellor Kent adopts this view. (Kent's Comm., Lect. 14.)

This may be a duty imposed by the Constitution upon Congress; yet there is no way, through any other department of the Government, to enforce its performance. The performance of the duty depends entirely upon the will of Congress, and if it should choose to leave a part of the judicial power of the United States in the dormant state, by not vesting it in courts, there would be no power to compel it to do otherwise. As a matter of fact, the question has been treated by Congress as if the authority to create courts and confer jurisdiction upon them, within the prescribed limits, were to be exercised "from time to time" in its legislative discretion.

It is, of course, conceivable that Congress might, by simple omission to act, defeat the purpose of the Constitution. This, however, is a peril, so far as it is one at all, against which it is not possible to provide. The Constitution assumes that Congress will, in the exercise of its legislative power, pass the necessary laws for carrying into effect the judicial power of the United States, and that the President and the Senate will so exercise the appointing power as to furnish the requisite judges for the same purpose, just as it assumes that the States will appoint electors to choose the President and Vice-President of the United States.

9. Territorial Courts.—The judicial power, conferred in the third article of the Constitution upon the General Government, has no application to courts organized by Congress in the Territories of the United States. Chief Justice Marshall, referring to these courts in *The American Insurance Company* v. *Canter*, 1 Pet. 511, 546, said:

"These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. * * * In legislating for them

Congress exercises the combined powers of the General and of a State government."

Mr. Justice Nelson, referring, in *Benner* v. *Porter*, 9 How. 235, to the territorial courts of Florida, said: "The territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal Government could be deposited. They were incapable of receiving it. (1 Pet. 546.) Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of the State."

Chief Justice Chase, in *Clinton* v. *Englebrecht*, 13 Wall. 434, said: "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution on the General Government. The courts are legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States."

This settles the question that territorial courts, though established by the authority of Congress, are not the courts contemplated in the third article of the Constitution, and not recipients of the power there conferred. The provisions of this article have no relation to them, and furnish no authority for their existence. Whether their judges shall be appointed by the President, or elected by the people, and whether they shall hold office during good behavior, or for a limited term, are questions for Congress to determine by law.

The same doctrine is equally applicable to courts organized in the District of Columbia, over which Congress has the power of "exclusive legislation in all cases whatsoever;" to military courts established by Congress in the exercise of its power with reference to the army and navy of the United States, and the militia when called into the public service; and to consular courts which by treaties may be established in foreign countries. The authority for the establishment of these courts may, of course, be traced to the Constitution, but not to the provisions contained in its third article. They form no part of the judicial system there

contemplated, but are the result of other powers granted in the Constitution.

The single purpose of this chapter has been to examine and explain that clause of the Constitution which declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." This clause either vests the power or authorizes Congress to do so.

PART II.

THE EXTENT OF FEDERAL JUDICIAL POWER.

CHAPTER I.

CASES IN LAW AND EQUITY.

1. Enumeration of Cases and Controversies.—The Constitution having, in article 3, section 1, provided for the investiture of the judicial power of the United States in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish, proceeds, in section 2 of the same article, to state as follows the several cases and controversies to which this power shall extend:

(1.) "All cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

(2.) "All cases affecting ambassadors, other public ministers, and consuls."

(3.) "All cases of admiralty and maritime jurisdiction."

(4.) "Controversies to which the United States shall be a party."

(5.) "Controversies between two or more States."

(6.) Controversies "between a State and citizens of another State."

(7.) Controversies "between citizens of different States."

(8.) Controversies "between citizens of the same State, claiming lands under grants of different States."

(9.) Controversies "between a State or the citizens thereof and foreign States, citizens or subjects."

This enumeration fixes the limit within which the power must act, and beyond which it cannot extend. The cases and controversies specified, and these only, come within its scope. The Constitution, in granting the power, at the same time establishes

its limitation. It is a settled rule, in interpreting this instrument, that no power can be exercised by the Government of the United States, except that which has been granted by the Constitution, either in express terms, or by necessary implication.

The tenth amendment declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The General Government is supreme in its constitutional sphere, but beyond this sphere it has no power whatever, and can exercise none except by usurpation. This is alike true of all its departments, whether legislative, executive, or judicial.

2. Classification of Cases and Controversies.— Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 378, said that "the second section of the third article of the Constitution defines the extent of the judicial power of the United States," and that "jurisdiction is given to the courts of the Union in two classes of cases." The first of these classes comprehends all the enumerated cases in which the "jurisdiction depends on the character of the cause, whoever may be the parties." This, without any exception, and without "regard to the condition of the party," includes "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." The other class embraces those cases in which "jurisdiction depends entirely on the character of the parties," of which the Chief Justice cites "controversies between two or more States, between a State and citizens of another State, and between a State and foreign States, citizens or subjects," as examples.

Mr. George Ticknor Curtis arranges these cases and controversies into three classes. The first class, founded on the subject-matter, without reference to the character of the parties, includes all cases arising under the Constitution, laws, and treaties of the United States, and all cases of admiralty and maritime jurisdiction. The second class, founded on the character and relation of the parties, without reference to the subject-matter of the controversy, includes controversies to which the United States may be a party, and those between two or more States, or between a State and citizens of another State, or between citizens of different States, or between a State or the citizens thereof and foreign

States, citizens or subjects. The third class, in which the jurisdiction seems to have reference both to the nature of the controversy and the character of the parties, embraces all cases affecting ambassadors, other public ministers and consuls, and controversies between citizens of the same State, claiming lands under grants of different States. (Curtis's Comm. pp. 3, 4.)

Mr. Pomeroy's arrangement of these cases and controversies is into two general classes, which he respectively styles "the necessary and supplementary or expedient." The first class, being based upon the intrinsic nationality and supremacy of the General Government, without which that nationality and supremacy would be but a name, comprehends all cases in law and equity arising under the Constitution, laws, and treaties of the United States, all cases affecting ambassadors, other public ministers and consuls, all cases of admiralty and maritime jurisdiction, controversies to which the United States shall be a party, and controversies between two or more States. The other class embraces controversies between a State and citizens of another State, or between citizens of different States, or between citizens of the same State, claiming lands under grants of different States, or between a State or the citizens thereof and foreign States, citizens or subjects. (Pomeroy's Const. Law, 3d ed., pp. 506, 515.)

The framers of the Constitution, with an exceedingly sagacious foresight, selected the cases, as to the subject-matter involved therein, whoever might be the parties, and also the cases and controversies, as to the parties thereto, whatever might be the subject-matter in dispute, which, in their judgment, should come within the cognizance of the judicial power of the United States, not only as expressing and enforcing the supremacy of the General Government, but also as the means of justice and internal harmony. The problem before them was to construct a judicial system, not for an absolutely consolidated nation, in which all judicial power should proceed from the same authority, but for a nation embracing in its bosom a number of separate States, independent and sovereign, except as limited by the Constitution. The two objects to be gained were, to assert the national supremacy on the one hand, and to provide for internal harmony on the other. The powers of the Federal judiciary were planned with reference to both objects; and the experience of nearly a century shows that the details of the plan were wisely conceived.

The first class of cases in the enumeration embraces "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority. To the consideration of this class the remainder of this chapter will be devoted.

3. The Meaning of a Case.—The Supreme Court of the United States has had occasion to expound the word "cases," as it occurs in this clause of the Constitution. The following statement presents the result of this exposition:

(1.) Chief Justice Marshall, in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 819, said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

Mr. Justice Story, referring to this language, says: "In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union." (Story's Const. sec. 1646.) This supposes a legal proceeding, with a party before the court seeking to prosecute and enforce an alleged right on some one of the grounds specified in the clause.

(2.) Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 379, referred to the theory that "a case, arising under the Constitution or a law, must be one in which a party comes into court to demand something conferred on him by the Constitution or a law," and then proceeded to say: "We think the construction too narrow. A case in law or equity consists of the right of one party, as well as of the other, and may be truly said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." The obvious meaning is, not that a case exists when there is no proceeding pending before the court, but that, when there is a proceeding pending, it is sufficient to constitute a case in the sense of the

Constitution, if a correct decision in the matter depends upon the construction of the Constitution, or a law, or treaty of the United States. This fact makes it a case. The right of either party, and of one as well as the other, in these circumstances, constitutes a case to which the judicial power of the United States is applicable.

(3.) Mr. Justice Strong, in *Tennessee* v. *Davis*, 10 Otto, 257. 264, said: "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted." They may exist in any one of these forms; and when they thus exist, Federal jurisdiction attaches to them. (*The Railroad Co.* v. *Mississippi*, 12 Otto, 135.)

(4.) It is sufficient to constitute a case for cognizance by a Federal court if it involves but a single ingredient or question dependent on the Constitution, or a law, or treaty of the United States, although it may, at the same time, involve other questions that depend on the general principles of law.

Chief Justice Marshall, in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 823, considered this point, and came to the following conclusion: "We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it."

Mr. Justice Swayne, in *The Mayor* v. *Cooper*, 6 Wall. 247, 252, said: "Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exists, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction." That element makes a case in the sense of the Constitution.

(5.) So, also, a case may arise by implication of law, as well as by express enactment. Chief Justice Marshall, in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 865, said: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress

to imply, without expressing, this very exemption from State control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the Government in administerting this security."

If, then, a Federal officer should, in a State court, be called in question for acts done under the laws of the United States, and should invoke the protection of a Federal court authorized by law to act in the premises, a case would be presented to that court under the laws of the United States. These laws, by necessary implication, intend to protect Federal officers in discharging the duties which they assign to them, and do not intend to permit State courts to interfere with them in or for the performance of such duties; and it is the province of duly authorized Federal courts to administer the protection, when appealed to for this purpose. This is one of the leading points decided in *Tennessee* v. *Davis*, 10 Otto, 257.

4. Cases in Law and Equity.—The clause under consideration divides the cases, arising in the manner specified, into two classes, one of which is spoken of as cases in "law," and the other as cases in "equity." The judicial power of the United States extends alike to both classes.

The distinction between these classes was well known and well established when the Constitution was adopted. The Constitution did not create the distinction or change it. It rather recognized it as an existing fact, not only in the courts of England, but also in the State courts of this country, and established it in the jurisprudence of the United States. England had her law courts, in which legal rights were ascertained and determined by proceedings according to the common law, including trial by jury. She also had her High Court of Chancery, in which equitable rights were considered, and equitable remedies administered,

without trial by jury, and according to methods which had become the standard practice of that court.

Both of these systems of jurisprudence had been transferred to this country, and both were familiar to the framers of the Constitution. Their design was to incorporate both into the judicial system of the United States, leaving Congress to determine the question whether both should be administered by the same courts, or whether there should be two classes of courts—one to determine cases "in law," and the other to decide cases "in equity."

Mr. Justice Story, in *Parsons* v. *Bedford*, 3 Pet. 433, 447, referred to the Seventh Amendment to the Constitution, in which the phrase "common law" occurs, and then proceeded to say: "This phrase 'common law,' found in this clause, is used in contradistinction to equity and admiralty and maritime jurisprudence. * * * By 'common law' they meant what the Constitution denominated in the third article 'law,' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered."

The term "law" and the phrase "common law," as thus used, then mean precisely the same thing, and both have reference to legal remedies in distinction from such remedies as are applicable to cases of equity. So also the term "equity," used by way of distinction from "law" or "common law," refers to equitable cases and remedies, as distinguished from those that are simply legal.

Congress, in the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), though not creating two sets of courts, one for law and the other for equity, nevertheless, recognized the distinction between the two classes of cases. The eleventh section of the act gave to the Circuit Courts jurisdiction in "suits of a civil nature at common law or in equity;" and the twelfth section provided that "the trial of issues of fact in the Circuit Courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury." So also the sixteenth section declared "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." The thirty-fourth section also declared

"that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

This legislation carries upon its face the broad stamp of a distinction between the two classes of cases. Though jurisdiction of both was vested in the same courts, neither class was confounded with the other.

The Act of May 8th, 1792 (1 U. S. Stat. at Large, 275), provided, in its second section, that the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits, in those of common law, should be the same as established by the Judiciary Act of 1789, and that in suits of equity and those of admiralty and maritime jurisdiction, they should be according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, except as otherwise provided by law. Here equity and law or the common law are placed in contrast with each other.

In *Robinson* v. *Campbell*, 3 Wheat. 212, 223, Mr. Justice Todd, having referred to the provisions in the Judiciary Act of 1789 and of the Act of May 8th, 1792, and also to the fact that some of the States do not recognize any distinction between law and equity, said that "the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles."

In *Bennett* v. *Butterworth*, 11 How. 669, 675, Chief Justice Taney said: "The Constitution, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim is an equitable one, he must proceed according to the rules which this court has prescribed, under the authority of the Act of August 23d 1842, regulating proceedings in equity, in the courts of the United States." (5 U. S. Stat. at Large, 516.)

In *Fenn* v. *Holme*, 21 How. 481, 488, Mr. Justice Daniel

laid down the principle that the practice in State courts could "in no wise affect the jurisdiction of the courts of the United States, who, both by the Constitution and by the acts of Congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decision appropriate to each."

The two systems of jurisprudence,—the one of law relating to legal rights and furnishing legal remedies, and the other of equity, in which equitable rights are considered and determined,—are then established by the Constitution of the United States, and, unless the Constitution shall in this respect be altered, must be perpetuated in and administered by the courts of the United States, no matter whether these systems are blended or kept separate in State courts. They alike rest upon "the supreme law of the land," and no policy that may be adopted by the States, can affect the distinction between them, or the application of each to its appropriate cases.

5. Criminal Cases.—There are but three provisions of the Constitution which directly and expressly authorize Congress to provide for the punishment of crime. The first provision gives the authority "to provide for the punishment of counterfeiting the securities and current coin of the United States;" the second gives the authority "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;" and the third gives Congress "power to declare the punishment of treason."

Congress, however, in the exercise of the various legislative powers granted to it, has ample authority, within the scope of these powers, to pass laws for the government of the people; and this clearly implies an authority to enforce these laws by penalties, and also to establish courts and vest in them jurisdiction to try and punish offenders against the laws of the United States. The Judiciary Act of 1789 did not itself establish a penal code, but it did provide for the organization of courts, and gave to the District and Circuit Courts cognizance of crimes and offenses cognizable under the authority of the United States. The Crimes Act of April 30th, 1790 (1 U. S. Stat. at Large, 112), specified a list of such offenses and prescribed their punishment. Subsequent legislation has enlarged the list, and the result is a criminal code

under the authority of the General Government, with jurisdiction vested in the Federal courts to administer it. This code, as in force on the 1st of December, 1873, is chiefly compiled in Title LXX of the Revised Statutes of the United States.

There is no doubt that the phrase "cases in law," includes criminal cases as well as those of a civil nature, and that the judicial power of the United States extends to such cases. The courts of the United States are, however, not courts of general, but of limited jurisdiction, and have no authority to try and punish offenses, except as it is conferred by the laws of Congress, and except as these offenses have been specified by law. They possess no common law jurisdiction over offenses. Congress must in every instance designate the crime and fix its punishment, in order to make it a case cognizable by a Federal court. (*The United States* v. *Hudson & Goodwin*, 7 Cranch, 32; *The United States* v. *Coolidge*, 1 Wheat. 415; *Wheaton* v. *Peters*, 8 Pet. 591; and *The State of Pennsylvania* v. *The Wheeling Bridge Co.* 13 How. 518.)

6. Cases under the Constitution.—This class of cases depends upon the Constitution itself, and hence arises under it and grows out of its provisions. Some of these provisions are grants of power to the General Government, legislative, executive, or judicial. They authorize certain things to be done, and the power to do these things is derived from this authority. Congress, for example, is authorized to pass laws, not on all subjects, but only such as lie within the limits of the grant. If the question, in a suit between two parties, should arise, whether a given law of Congress is within or beyond these limits, then it would be the right and the duty of the court to decide that question, and, in so doing, to determine the validity of the law by the Constitution itself. The Constitution is always the paramount authority, and as binding upon courts as it is upon Congress. An enactment of Congress not in pursuance of the Constitution, is really no part of the supreme law of the land, and no rule for the guidance of a court.

The Supreme Court of the United States, in *Marbury* v. *Madison*, 1 Cranch, 137, held that "an act of Congress, repugnant to the Constitution, is not law," and that "when the Constitution and an act of Congress are in conflict, the Constitution

must govern the case to which both apply." On this ground it held that a part of the thirteenth section of the Judiciary Act of 1789 was inoperative, since it attempted to confer upon the Supreme Court an original jurisdiction not conferred by the Constitution. This part of the section was in conflict with the Constitution in the sense of exceeding the limits fixed by it, and for this reason the court refused to give effect to it, holding the Constitution to be the paramount authority. The same principle has been adopted by the court in subsequent cases.

Some of the provisions of the Constitution, instead of being grants of power to Congress, are express restrictions upon its power. The Constitution, for example, says that "no bill of attainder, or *ex post facto* law shall be passed;" that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken;" that "no tax or duty shall be laid on articles exported from any State;" and that while Congress may fix the punishment of treason, "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." These are examples of restriction placed upon the powers of Congress; and if a law should be passed coming in conflict with such restrictions, and a suit or prosecution should be commenced in a Federal court under the law, then the validity of the law would be called in question; and it would be the duty of the court to give effect to the Constitution and disregard the law.

It is the province of courts to pass upon such questions, when they arise in the course of judicial proceedings and affect the rights of parties litigating before them, no matter whether they relate to the powers of Congress or those of the executive or judicial departments of the Government. The Constitution itself is always the paramount rule for the guidance of courts, and they must for themselves judge of its meaning.

So, also, the Constitution, in some of its provisions, imposes restriction upon the powers of the States. It forbids them to coin money; to emit bills of credit: to make paper money a legal tender; to pass any bill of attainder; to enact *ex post facto* laws, or laws impairing the obligation of contracts; to lay, without the consent of Congress, any imposts or duties on imports or exports, except what may be absolutely necessary for executing inspection laws; to lay any tonnage duties; to make or enforce laws

abridging the privileges or immunities of citizens of the United States; to deprive any person of life, liberty, or property, without due process of law; and to deny to any person within their jurisdiction the equal protection of the laws. These are restrictions upon State power, directly imposed by the Constitution itself; and should the question of their violation by State authority arise in a Federal court, in a suit there pending, it would be the province of the court to decide this question, and also to treat State laws as of no force if in conflict with the Constitution.

Another and very important provision of the Constitution declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The general meaning of this clause is, that the rule in respect to the fundamental rights of citizenship which each State adopts for her own citizens, must be impartially applied to the citizens of other States, whenever her jurisdiction acts upon them, so that as regards these rights there shall be no discrimination against the latter. (*Corfield* v. *Coryell*, 4 Wash. 371; *Ward* v. *Maryland*, 12 Wall. 418; *Paul* v. *Virginia*, 8 Wall. 168; *The Slaughter House Cases*, 16 Wall. 36; *Lemmon* v. *The People*, 20 N. Y. 608; *Crandall* v. *The State*, 10 Conn. 340; and Serg. Const. Law, 2d ed., p. 393.) Each State, having made a rule for its own citizens, must not exclude the citizens of other States from its benefits. The denial of any right thus guaranteed would raise a question under the Constitution which, in a proper suit involving the matter, a Federal court would be authorized to determine.

The same would be true in respect to the denial of any other right which the Constitution confers or protects. Mr. Justice Story says that cases arising under the Constitution "are such as arise from the powers conferred, or privileges granted, or rights claimed, or protection secured, or prohibitions contained in the Constitution itself, independent of any particular statute enactment." (Story's Const. Law, sec. 1647.) This comprehensive statement covers the whole field of such cases.

7. Cases under the Laws of the United States.—The laws of Congress, enacted in pursuance of the Constitution, are a part of "the supreme law of the land," superior in rank to State constitutions and State laws. All cases and questions that grow out of these laws, whether relating to a right secured, a power be-

stowed, a duty imposed, or a crime forbidden, that are judicial in their nature, come within the scope of the judicial power of the United States; and if they arise before a Federal court, then they are to be determined by that court, in the exercise of the jurisdiction conferred by Congress. These laws furnish the rule for the guidance of the Federal courts in all matters to which they apply. Far the larger part of the questions with which these courts have to deal, and which it becomes their duty to decide, grows out of, and depends upon, the legislation of Congress.

If the question be whether a law of Congress is constitutional, then, of course, the law must be tested by the Constitution itself. But if there be no question as to the constitutionality of such a law, as is the fact in most cases, then the sole inquiry relates to its meaning and application to the case before the court. It not infrequently happens that, in the case pending, the validity of a State constitution or law is called in question, on the ground of an alleged conflict with a law of the United States, and when this is a fact, it becomes the duty of the court to decide this question of validity, and in all cases give effect to the latter law. When the case involves no such conflict, alleged or real, then the whole question is simply one of construction and application.

8. Cases under Treaties.—The Constitution makes the treaties of the United States a part of "the supreme law of the land," placing them in this respect upon the same footing as that which is assigned to the laws of Congress. Having the character of supreme laws, they are binding upon the Federal courts as such; and all questions arising under them in a judicial proceeding, and affecting the rights of the parties litigating before the court are, so long as the treaties continue in force, to be decided according to their provisions.

The construction of treaties, considered as laws affecting rights as between parties, is exclusively a judicial function. (*Wilson* v. *Wall*, 6 Wall. 83.) This function, however, has nothing to do with the question that relates to the competency of the contracting parties to make a treaty, since this belongs to the President and the Senate. (*Doe* v. *Braden*, 16 How. 635; and *Fellows* v. *Blacksmith*, 19 How. 366.)

Treaties, though binding between the contracting governments, from the date of their signature, unless they otherwise

stipulate, are not laws affecting private rights until they are ratified and proclaimed. (*Davis* v. *The Police Jury of Concordia*, 9 How. 280; *The United States* v. *Arredondo*, 6 Pet. 691; and *Haver* v. *Yaker*, 9 Wall. 32.)

So, also, treaties that are not self-executing, but require legislation to carry them into effect, are not laws for the guidance of courts until the necessary legislation has been supplied by Congress. (*Foster* v. *Neilson*, 2 Pet. 253; *Turner* v. *The American Baptist Missionary Union*, 5 McLean, 344.)

Treaties made with the Indian tribes of this country, considered as laws, stand on the same footing with treaties made with foreign nations. (*Worcester* v. *The State of Georgia*, 6 Pet. 515.) Mr. Justice McLean, in *Turner* v. *The American Baptist Missionary Union*, 5 McLean, 344, said: "It is contended that a treaty with Indian tribes has not the same dignity and effect as a treaty with a foreign and independent nation. This distinction is not authorized by the Constitution. Since the commencement of the Government, treaties have been made with the Indians and the treaty-making power has been exercised in making them. They are treaties within the meaning of the Constitution, and as such are the supreme law of the land."

State constitutions and laws in conflict with a treaty of the United States, are thereby abrogated, and have no validity; and the Federal courts are bound so to decide, in cases that raise the question. (*Ware* v. *Hylton*, 3 Dall. 199; *Owings* v. *Norwood's Lessee*, 5 Cranch, 344; *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 603; and *Worcester* v. *The State of Georgia*, 6 Pet. 515.)

Cases in law or equity, arising under the treaties of the United States, are such, and such only, as involve rights that directly grow out of or are directly protected by these treaties. If this be not the fact then no case exists under a treaty. (*Owings* v. *Norwood's Lessee*, 5 Cranch, 344; *Henderson* v. *Tennessee*, 10 How. 311; *Gill* v. *Oliver's Executors*, 11 How. 529; and *Verden* v. *Coleman*, 1 Black, 472.)

If there be a conflict between a treaty of the United States and a law of Congress, and the question of such conflict arises in a suit pending before a Federal court, then, under the general principle that *leges posteriores priores contrarias abrogant*, the one or the other will furnish the rule of decision, accordingly as it

is the *last* expression of authority. The law, if enacted subsequently to the treaty, will be the rule for deciding the case; and so the treaty, if self-operative without the aid of legislation, and made subsequently to the enactment of the law, will be the rule. Both being an exercise of sovereign authority, and both having the same rank as laws, either may repeal the other, considered simply as a law to guide and control the action of a court in a case to which both apply. (*The United States* v. *The Schooner Peggy*, 1 Cranch, 103; *The Cherokee Tobacco Case*, 11 Wall. 616; *Ropes et al.* v. *Clinch*, 8 Blatch. 304; and *Taylor et al.* v. *Morton*, 2 Curtis, 454.)

The judicial cognizance granted in the cases considered in this chapter, enables the General Government to act directly upon the people, as individual persons subject to its authority, and expound and enforce its own laws through the agency of its own courts. The cognizance is not only independent of State courts, but co-extensive with the Constitution, laws, and treaties of the United States; and any question arising under them, or one of them, being capable of becoming the subject-matter of a suit, and actually becoming such, whether civil or criminal, and whether in law or equity, may be considered and determined in the courts of the United States. Any such question arising in and determined by the highest court of a State may, by writ of error, be carried to the Supreme Court of the United States.

The appellate jurisdiction of the Supreme Court over the judgments and decrees of the inferior Federal courts, and its revisory jurisdiction over State courts, in all cases involving the construction and application of the Constitution, laws, or treaties of the United States, make that court the key-stone in the judicial arch of our political system. The decisions rendered by it are final and conclusive. Its authority is supreme, and this gives in all parts of the Union harmony to the judicial administration of "the supreme law of the land."

CHAPTER II.

AMBASSADORIAL AND CONSULAR CASES.

1. Diplomatic Agents.—It has, from the earliest times, been the practice of nations to hold intercourse with each other through the medium of official representatives. The sovereign authority of one nation in this way speaks to that of another. Complaints and demands are thus made and answered. Treaties are thus negotiated. Indeed, the whole correspondence between sovereign nations is conducted through diplomatic or representative agents. And, in modern times especially, permanent or resident embassies are established between the principal nations of the earth. Their mutual convenience and good understanding are thereby promoted.

These agents may differ in rank, and in the delicacy and importance of the duties confided to them, yet they all act for and by the authority which they represent. The law of nations assigns the highest rank to ambassadors. Other diplomatic agents, though not less representative in their character, are known as envoys, ministers resident, *chargés d'affaires*, &c. Whatever may be their relative rank, as among themselves, they are public ministers, and, as such, speak and act for the governments appointing them, and investing them with their official character.

2. Diplomatic Rights.—The general principle respecting the rights, privileges, and immunities of these diplomatic agents, as established by the law of nations, is thus stated by Mr. Wheaton, in his Elements of International Law:

"From the moment a public minister enters the territory of the State to which he is sent, during the time of his residence, and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign State by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is

supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal *status* and rights of property, whether derived from contract, inheritance, or testament. His children, born abroad, are considered as natives. This exemption from the local laws and jurisdiction is founded upon mutual utility, growing out of the necessity that public ministers should be entirely independent of the local authority, in order to fulfill the duties of their mission. The act of sending the minister, on the one hand, and of receiving him on the other, amounts to a tacit compact between the two States that he shall be subject only to the authority of his own nation." (Lawrence's Wheaton, p. 392.)

The same general statement, as to the law of nations, is found in the writings of Grotius, Rutherforth, Wicquefort, Bynkershoek, Vattel, Martens, Kluber, Foelix, and Phillimore. Mr. Wheaton extends this exemption from the local jurisdiction to the family, servants, and suite of the public minister, and also his personal effects and movables, and the dwelling in which he resides. It includes his couriers and messengers, if provided with passports from their own governments, attesting their official character.

As to what may be done in the event that a public minister commits an offense against the State in which he temporarily resides, Mr. Wheaton remarks:

"In case of offenses committed by public ministers, affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person, if justice should be refused by his own sovereign. But the circumstances which would authorize such a proceeding are hardly capable of a precise definition, nor can any general rule be collected from the examples to be found in the history of nations, where public ministers have thrown off their public character, and plotted against the safety of the State to which they were accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity." (Id., pp. 395, 396.)

3. Consular Agents.—Consuls, on the other hand, are not public ministers, and, under the law of nations, not entitled to their special rights and privileges. They do not perform diplomatic functions. They are commercial agents of the government appointing them, residing in foreign countries, and charged with the duty of promoting the commercial interests of the State, and especially of its citizens or subjects in these countries. In regard to them, Mr. Wheaton says: "They are to be approved and admitted by the local sovereign, and, if guilty of illegal or improper conduct, are liable to have the *exequatur* which is granted them withdrawn, and may be punished by the laws of the State where they reside, or sent back to their own country, at the discretion of the government which they have offended. In civil and criminal cases they are subject to the local law, in the same manner with other foreign residents owing a temporary allegiance to the State." (Id., p. 423.) Mr. Phillimore states the same doctrine in regard to consuls. (Phillimore's International Law, vol. II, p. 241.)

4. Constitutional Provision.—The framers of the Constitution anticipated that the United States would be one among the nations of the earth. They hence provided that the President should have power, with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, and also that he should receive ambassadors and other public ministers who might be sent to this country by foreign governments. They provided, in article three, section two, of the Constitution, that the judicial power of the United States shall extend to "all cases affecting ambassadors, other public ministers and consuls."

The terms "ambassadors," and "other public ministers," are intended to include public ministers of all grades, as to rank. The term "consuls," includes consuls of all grades. Both classes of terms are to be interpreted by the law of nations.

The clause relating to these persons applies exclusively to public ministers and consuls appointed by other countries, and temporarily resident as such within the United States. Cases arising in this country and affecting them are assigned to the judicial power of the General Government; and in respect to all these cases the Constitution expressly declares that the Supreme Court shall have original jurisdiction. The test of the jurisdiction, so far as it can be exercised at all, is not that the public minister or consul must

necessarily be a party on the record, but that the case, whatever it is, affects the public minister or consul, within the meaning of the Constitution. If this be the fact, then the case comes within the judicial power of the United States, whether the minister or consul be a party on the record or not.

It deserves to be noticed that, in the matter of jurisdiction, the Constitution makes no distinction between a public minister and a consul. It is enough in respect to either, that a case arises which affects one or the other. The jurisdiction depends in part upon the party affected, and in part upon the fact that the party is affected.

5. Statutory Provisions.—The first legislation of Congress, in giving effect to the provision of the Constitution in relation to public ministers and consuls, is found in the thirteenth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), which, as reproduced in section 687 of the Revised Statutes of the United States, declares that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings *against* ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have, consistently with the law of nations, and original but not exclusive jurisdiction of all suits brought *by* ambassadors or other public ministers, or in which a consul or vice-consul shall be a party." The same act, as reproduced in section 563 of the Revised Statutes, gives to the District Courts of the United States jurisdiction "of all suits against consuls or vice-consuls," except for certain offenses specified, and, as reproduced in section 629 of these Statutes, gives to the Circuit Courts "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable therein."

The jurisdiction thus exclusively conferred upon the Supreme Court, in suits *against* ambassadors or other public ministers, or their domestics or domestic servants, is such, and such only, "as a court of law can have consistently with the law of nations." This limitation, according to the doctrine as stated by Mr. Wheaton, excludes all jurisdiction in suits *against* public ministers, or their domestics or domestic servants, since no such jurisdiction can be exercised in consistency with the law of nations.

The original jurisdiction of the Supreme Court is extended to "all suits brought *by* ambassadors or other public ministers." There is nothing in the law of nations which forbids them to bring suits in the courts of the country to which they are sent, and nothing in this law to prevent these courts from taking jurisdiction in such cases. The jurisdiction of the Supreme Court in these cases is original, but not exclusive, and may be concurrently exercised with other courts of the United States, if jurisdiction is vested in the latter courts, and, for aught that appears, concurrently with State courts.

So, also, the jurisdiction of the Supreme Court is extended to all suits "in which a consul or vice-consul shall be a party," whether as plaintiff or defendant. The jurisdiction here is original, but not exclusive, and hence may be exercised concurrently with the Circuit and District Courts of the United States, so far as these courts possess such jurisdiction. The law of nations imposes no limitation as to suits, whether against or by consuls or vice-consuls.

The Judiciary Act of 1789, which gave the jurisdiction as above stated, was followed by the Act of April 30th, 1790 (1 U. S. Stat. at Large, 112), containing certain provisions, which, as reproduced in the Revised Statutes, read as follows:

"Section 4063. Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested and imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void."

"Section 4064. Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as a party or as an attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations, and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court."

"Section 4065. The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is

issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the Marshal of the District of Columbia, who shall, upon the receipt thereof, post the same in some public place in his office."

The purpose of Congress, in these provisions of the Act of April 30th, 1790, was to give statutory form to the law of nations, by declaring all writs and processes void which involve the arrest of public ministers or their servants, or the seizure of their goods and chattels, and by punishing those who procure or execute such writs or processes. The act does not expressly forbid suits commenced merely by summons, where there is no arrest of person or seizure of goods; yet even such suits are contrary to the established principles of the law of nations. They imply that the court has jurisdiction over the minister or his servant, and may, if necessary, enforce process against him, or against his goods and chattels, which, according to the law of nations, is not permissible. This law gives to the public minister and his servants a complete immunity from the local jurisdiction, whether civil or criminal, unless he forfeits the privileges annexed by the law to his official character.

The eighth paragraph of section 711 of the Revised Statutes, as contained in the first edition of these Statutes, made the jurisdiction of the Federal courts exclusive of State courts "in all suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls." This entire paragraph was ordered to be stricken out by the Act of February 18th, 1875. (18 U. S. Stat. at Large, 318.) It could not have been the intention of Congress to imply, by striking out the paragraph, that State courts might exercise jurisdiction in all these cases. Such an implication would repeal the exclusive jurisdiction of the Supreme Court in suits against public ministers or their servants, as provided for in section 687 of the Revised Statutes. The effect of striking out the paragraph is, that the Revised Statutes do not, as formerly, expressly exclude the jurisdiction of State courts in suits against consuls or vice-consuls.

6. Cases affecting Public Ministers.—It is but seldom that the courts have had occasion to expound the clause of the Consti-

tution relating to ambassadors or other public ministers. Cases calling for the exposition have seldom arisen.

The Circuit Court for the Eastern District of Pennsylvania certified the case of *The United States* v. *Ortega*, 11 Wheat. 467, to the Supreme Court, on the ground that the judges of the court were divided in opinion as to whether the Circuit Court had "jurisdiction of the matter charged in the indictment, inasmuch as it is a case affecting an ambassador or other public minister." Ortega had been indicted for offering violence to the *chargé d'affaires* of the King of Spain. Mr. Justice Washington, in stating the opinion of the court, said: "This is not a case affecting a public minister, within the plain meaning of the Constitution. It is that of a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations and that of the United States offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States and the individual whom they seek to punish, but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution or in the costs attending it." The court therefore certified to the Circuit Court that it had jurisdiction of the matter charged in the indictment.

Chief Justice Marshall, in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 854, made the following remarks in regard to this clause of the Constitution:

"If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary or his servant is arrested. The minister does not, by the mere arrest of his secretary or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister it must be dismissed, not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers it was intended, for reasons which all comprehend, to give the

national courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties."

The Judiciary Act of 1789 gave jurisdiction to the Supreme Court in suits brought against or by public ministers. This made them parties on the record, either sued or suing. Chief Justice Marshall gives a wider import to the word "affecting," as used in the Constitution. If a suit is brought against the secretary or servant of a public minister, the privileges and immunities of the minister may be so involved and invaded as to be affected, even though the minister himself is not directly a party on the record; and in this case the secretary or servant would be entitled to assert his privilege in virtue of his relation to the minister. "It was intended," says Chief Justice Marshall, "to give the national courts jurisdiction over all cases by which they [public ministers] were in *any* manner affected." If their rights, privileges, and exemptions, or those of others holding such relations to them as to be entitled to the same rights, are in any way involved, then they are affected in the sense of the Constitution, whether they are actual parties to the suit or not. If no such fact exists, then they are not affected. The Federal jurisdiction is made to depend partly upon the person, and partly upon the fact that he is affected by the proceeding.

As to the question whether a given person is a public minister, it was held, in *The United States* v. *Ortega*, 4 Wash. 531, that his reception and recognition as such by the President of the United States are conclusive evidence to this effect before a court. In *The United States* v. *Benner*, Bald. 234, it was held that the certificate of the Secretary of State, under the seal of office, that a person has been recognized by the Department of State as a foreign minister, is full evidence that he has been received as such by the President of the United States. In *Ex parte Cabrera*, 1 Wash. 232, it was held that the laws of the United States which punish those who violate the privileges of a foreign minister, are equally obligatory upon the State courts as upon those of the United States, and that it is equally the duty of each to quash the proceedings against any one having such privileges. The mode of

redress for a person thus privileged from arrest was, in *Lyell* v. *Goodwin*, 4 McLean, 29, held to be by a motion to the court from which the process issued.

7. Cases affecting Consuls.—The Constitution extends the judicial power of the United States to all cases affecting consuls, although they do not by the law of nations possess the special privileges of public ministers; and in all these cases the Supreme Court is clothed with original jurisdiction. Consuls in this respect stand on the same footing with such ministers.

The Judiciary Act of 1789, as we have seen, gave the Supreme Court original but not exclusive jurisdiction of all suits "in which a consul or vice-consul shall be a party," whether as plaintiff or defendant. This provision is continued in section 687 of the Revised Statutes of the United States. So, also, the Judiciary Act gave to the District Courts, exclusively of the courts of the several States, jurisdiction of "all suits against consuls or vice-consuls," except for offenses above a certain grade. This provision is continued in section 563 of the Revised Statutes, with the omission of the words which declare the jurisdiction to be exclusive of the State courts.

The general doctrine adopted by the courts is that jurisdiction in all suits and proceedings *against* consuls belongs exclusively to the courts of the United States. Mr. Justice Story says: "And in cases against ambassadors and other foreign ministers and consuls the jurisdiction has been deemed exclusive" in these courts. (Story's Const. sec. 1660.) Mr. Bishop says: "Consuls are neither indictable nor pursuable civilly in the State courts, but only in those of the United States." (Bishop's Criminal Law, 6th ed., vol. I, sec. 181.)

Chief Justice Tilghman, in *The Commonwealth* v. *Kosloff*, 5 Serg. & Rawle, 545, quashed an indictment found by the grand jury for the city and county of Philadelphia against Kosloff, who was Consul General of Russia, not on the ground that he was by the law of nations entitled to an exemption from criminal prosecution, but because the jurisdiction to find and try the indictment was exclusively vested in the courts of the United States. State courts, as he held, have no jurisdiction to deal with offenses committed by foreign consuls.

Mr. Justice Thompson, in stating the opinion of the court in *Davis* v. *Packard*, 7 Pet. 276, said:

"As an abstract question, it is difficult to understand on what ground a State court can claim jurisdiction of civil suits against foreign consuls. By the Constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls. * * * But if the question was open for consideration here, whether the privilege claimed was not waived by omitting to plead it in the Supreme Court [of the State], we should incline to say it was not. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered. It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our Constitution and law seems to put consuls on the same footing in this respect."

The judgment of the New York Court of Errors was reversed on the ground that, by the showing of the record, it had "decided that the character of Consul General of the King of Saxony did not exempt the plaintiff in error from being sued in the State court."

There is no doubt, however, that the laws of this country may, in both civil and criminal suits, be administered against foreign consuls by the Federal courts. They are not entirely exempt from the local jurisdiction because they are not pursuable in State courts. In *St. Luke's Hospital* v. *Barclay & Bunch*, 3 Blatch. 259, which was a suit in equity, the defendants took the ground that, being consuls of Great Britain, and acknowledged as such by the United States, they were in this capacity exempt from suit in a Circuit Court of the United States. Judge Betts decided that, being aliens, they were "amenable to the jurisdiction of the Circuit Court in a suit in favor of citizens," and also that "their consular character exempts them only from the jurisdiction of State courts." He said that, "by the law of nations, consuls are subject to the ordinary jurisdiction of the tribunals of the country to which they are accredited," and that there was no legal impediment "to actions by citizens against consuls in the Circuit Courts of the United States." Being aliens, they could, under the Judiciary Act, be sued in these courts by citizens, and the fact that they were consuls in no way affected the jurisdiction.

In *Graham* v. *Stucken*, 4 Blatch. 50, it was held by Mr. Jus-

tice Nelson that, although the Supreme Court has original jurisdiction in a case "in which a consul or vice-consul shall be a party," the jurisdiction is not exclusive in that court, but may be exercised by a Circuit Court of the United States, in a suit brought against a foreign consul by a citizen. (*Bixby* v. *Janssen*, 6 Blatch. 315.)

In *The United States* v. *Ravara*, 2 Dall. 297, the Circuit Court of the United States for the District of Pennsylvania held that it had jurisdiction to try Joseph Ravara, who was a consul from Genoa, on an indictment charging him with sending threatening letters to the British minister and others, for the purpose of extorting money. It was claimed on behalf of Ravara that, on account of his official character, the jurisdiction to try him was vested exclusively in the Supreme Court. The Circuit Court, however, held that it had jurisdiction in the case of foreign consuls charged with offenses, and in its charge to the jury said "that the offense was indictable, and that the defendant was not privileged from prosecution in virtue of his consular appointment."

Consuls then, being aliens, may be sued by citizens in the Circuit Courts of the United States, and may be criminally prosecuted in Federal courts having jurisdiction to try their offenses. Though not amenable to State courts, they have no exemption from civil suits or criminal prosecutions in the courts of the United States. If the matter involved in a civil suit against a consul depends upon a law or treaty of the United States, or upon the law of a State, then the Federal court will administer the one or the other as a rule of decision, according to the facts in the case. If, in a criminal prosecution, the offense charged against a consul be against a law of the United States, then the offender would be tried and punished under this law.

How then would the matter stand if the offense of a consul be simply against a State law? If State courts have no jurisdiction in civil suits or criminal prosecutions against consuls, then, in the case supposed, the jurisdiction must be exercised by a Federal court, or not at all, and if so exercised, it must apply the criminal law of the State applicable to the case. Mr. Justice Strong, in stating the opinion of the court in *Tennessee* v. *Davis*, 10 Otto, 257, 271, said: "The Circuit Courts of the United States have all the appliances which are necessary for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there

is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case."

This language would seem to cover the case of a consul who is simply an offender against State law, provided the Federal court has obtained jurisdiction of the case. The supposition is not admissible that consuls, because exempt from the jurisdiction of State courts, are exempt from all jurisdiction if they violate the laws of a State.

There is nothing in the Constitution or any law of Congress, or in the law of nations, which prevents a foreign consul from bringing suits in the courts of the State in which he resides, if he so elects, or to prevent these courts from taking jurisdiction in such cases. That State courts may take such jurisdiction was held in *Sagory* v. *Wissman*, 2 Ben. 240. The fact that the Federal courts have jurisdiction in a case in which a consul or a vice-consul is a party, whether as plaintiff or defendant, does not necessarily exclude the jurisdiction of a State court, in a case in which a foreign consul brings the suit. Indeed, there is no reason, in the Constitution, or the laws of Congress, or in the law of nations, why a foreign minister may not bring a suit in a State court. The fact that he cannot be sued in such a court does not prove that he cannot sue in it.

What is intended by the Constitution and the law is, that all proceedings *against* foreign ministers and consuls, allowable by the law of nations, shall be confined exclusively to the courts of the United States, and that these courts shall be available to them for the purpose of bringing suits. It is no part of this intention to deny to them the privilege of resorting to State courts if they so choose.

Though foreign consuls have no diplomatic functions to perform, they are nevertheless sent to the United States as commercial agents of the governments appointing them; and, as to cases "affecting" them, the Constitution classes them with public ministers, and gives the same judicial power that it gives as to cases "affecting" such ministers. The framers of the Constitution judged it expedient that the judicial power of the United States should be alike extended to both classes of cases.

CHAPTER III.

ADMIRALTY AND MARITIME CASES.

SECTION I.

CONSTITUTIONAL PROVISION.

1. The Power Granted.—The judicial power of the United States is, by a distinct and separate clause of the Constitution, extended to "all cases of admiralty and maritime jurisdiction." This grants and establishes the jurisdiction as a part of the jurisprudence of the United States, but does not define either its nature or extent. The question as to what are "cases of admiralty and maritime jurisdiction," within the meaning of the Constitution, was left to be determined by Congress, or by the Federal courts, or by both.

The special character of the jurisdiction is indicated by the terms "admiralty" and "maritime." The former of these terms was borrowed from the title of the court by which the jurisdiction was exercised in England, and the latter was derived from the locality on which it operates. Mr. Justice Story says that the word "maritime" was added to the word "admiralty," in order to guard against too narrow a construction of the latter term. (Story's Const. sec. 1666.)

The jurisdiction does not depend at all upon the character or citizenship of the parties to the suit, but does depend wholly upon the subject-matter of the controversy, considered relatively to the locality of the acts or occurrences involved therein, or relatively to the nature of the contract which, in connection with locality, forms the subject of this controversy. Locality is the primary question which determines the presence or absence of this jurisdiction.

2. The Jurisprudence intended.—This form of jurisprudence was, at the time of the adoption of the Constitution, not only practiced by State courts under State authority, but existed,

in some form and to some extent, in most of the countries of the civilized world having a maritime commerce, and had so existed from the earliest times. Codes of laws had been established and special courts organized, having reference to rights and duties, liabilities and wrongs, instrumentalities and agencies connected with and growing out of commerce as conducted by vessels in navigating the seas.

Chief Justice Taney, in *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 454, remarks: "Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding." This necessity, common to the trading nations of the earth, at a very early period, created such courts, and has ever since perpetuated them.

The framers of the Constitution were familiar with the facts and the general character of "admiralty and maritime jurisdiction," especially as existing in England and in this country; and when they used this phrase, without explaining it, they meant by it that system of jurisprudence to which by common usage the phrase was attached, and which was understood in this country when the Constitution was adopted. They did not invent the language. It was already in use, and usage had given to it an intelligible meaning. Mr. George Ticknor Curtis remarks on this point: "The principle which defines the jurisdiction granted in these few comprehensive words is, that it embraces what was known and understood in the United States, as admiralty and maritime jurisdiction, at the time when the Constitution was adopted." (Curtis's Comm. page 33.)

3. Procedure not Prescribed.—The clause conferring this jurisdiction does not prescribe the precise mode of proceeding in admiralty, or exclude the power of Congress to regulate the proceeding in any manner that it shall deem expedient. In *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 460, Chief Justice Taney said: "The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall pro-

ceed according to ancient or established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power, as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, is subject to the regulation of Congress, except where that power is limited by the terms of the Constitution or by necessary implication from its language."

This was said in answer to the objection that the Act of February 26th, 1845 (5 U. S. Stat. at Large, 726), had provided, in the cases and upon the condition specified, for the trial of issues of fact by a jury. While it is true that a jury trial is not ordinarily an incident of the jurisdiction, it is competent, as the Chief Justice declares, for Congress to make it such whenever it shall think proper. There is nothing in the Constitution to exclude this exercise of its legislative power.

4. Distinct from Cases in Law or Equity.—The cases coming within this jurisdiction, as referred to in the Constitution, are not identical with, or embraced in, the cases of law and equity referred to in the same instrument, as arising under the Constitution, laws, or treaties of the United States. They belong to a different category, and are provided for by a distinct and specific grant of judicial power. Referring to this point in *The American Insurance Co.* v. *Canter*, 1 Pet. 511, 545, Chief Justice Marshall said:

"The Constitution 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; to all cases affecting ambassadors or other public ministers or consuls; to all cases of admiralty and maritime jurisdiction. The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them is, we think, conclusive against their identity. * * * A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."

5. Not Dependent on the Commercial Power.—Nor does admiralty and maritime jurisdiction, being granted by the Consti-

tution itself, depend upon the power of Congress to regulate commerce. It has no necessary connection with commercial regulations by this power. The function of Congress in relation to it is not to create it, but rather to bestow it upon courts organized under its authority, and thus give effect to the constitutional provision on this subject. Chief Justice Taney, in *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 452, said:

"Nor can the jurisdiction of the courts of the United States be made to depend on the regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. * * * The power [to regulate commerce] is as extensive upon land as upon water. And if the admiralty jurisdiction, in matters of contract and tort, which the courts of the United States may lawfully exercise on the high seas, can be extended to the lakes under the power to regulate commerce, it can, with the same propriety and upon the same construction, be extended to contracts and torts on land, when the commerce is between different States. And it may embrace also the vehicles and persons engaged in carrying it on. It would be in the power of Congress to confer admiralty jurisdiction upon its courts, over the cars engaged in transporting passengers or merchandise from one State to another, and over the persons engaged in conducting them, and deny to the parties the trial by jury."

Mr. Justice Clifford, in *The Belfast*, 7 Wall. 624, 640, said: "Congress may regulate commerce with foreign nations and among the several States, but the judicial power, which, among other things, extends to all cases of admiralty and maritime jurisdiction, was conferred upon the Federal Government by the Constitution, and Congress cannot enlarge it, not even to suit the wants of commerce, nor for the more convenient execution of its commercial regulations." (*The Steamer St. Lawrence*, 1 Black, 522.)

Congress may pass laws regulating commerce in the locality to which admiralty and maritime jurisdiction applies, and the courts of the United States, in the exercise of this jurisdiction, may administer these laws in the admiralty cases to which they are applicable. Yet this does not derive the jurisdiction from the commercial power of Congress, or make it dependent upon that power. The jurisdiction depends upon the Constitution, and what Congress does is simply to vest it in courts, not in the exercise of its commercial power, but of its power to pass all laws necessary and proper for carrying into execution the judicial power of the

United States. A law that simply regulates commerce does not of itself confer admiralty and maritime jurisdiction upon any court; and Congress cannot by such regulations enlarge the jurisdiction beyond the limits fixed in the Constitution.

SECTION II.

LOCALITY OF THE JURISDICTION.

1. The English Doctrine.—The doctrine held by the admiralty courts of England, at the time of the adoption of the Constitution, and subsequently thereto, was that this jurisdiction operates only upon the high seas, and upon navigable rivers connected therewith, as far inland as high-water mark, and does not extend inland beyond this mark. English writers and decisions on the subject confined the jurisdiction to tide-waters. And in regard to this construction, Chief Justice Taney, in *The Genesee Chief* v. *Fitzhugh*, 2 How. 443, 454, 455, remarked:

"And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter and depart with cargoes. In England, therefore, tide-water and navigable water were synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters."

The Chief Justice adds that, "at the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here." Far the greater part of the navigable waters of the original thirteen States were tide-waters to the head of navigation.

2. Early Decisions of the Supreme Court.—The Supreme Court of the United States, in its earlier decisions, accepted and

followed the English doctrine on this subject, and hence held that the jurisdiction as given in the Constitution, and in the Judiciary Act of 1789, conferred by Congress upon the District Courts of the United States, was limited to the high seas and to tide-waters connected therewith.

In *The Thomas Jefferson*, 10 Wheat. 428, which came before the Supreme Court in 1825, it was held that "the District Court has not admiralty jurisdiction of a suit for wages earned on a voyage upon the Missouri river, above the ebb and flow of the tide." In *The Steamboat Orleans* v. *Phœbus*, 11 Pet, 175, 183, decided in 1837, Mr. Justice Story, in stating the opinion of the court, said: "But the case is not one of a steamboat engaged in maritime trade. Though in her voyages she may have touched at one terminus of them, in tide-waters, her employment has been substantially on other waters. The admiralty has not any jurisdiction over vessels employed on such voyages, in cases of disputes between part owners. The true test of its jurisdiction in all cases of this sort is, whether the vessel be engaged substantially in maritime navigation, or in interior navigation and trade, not on tide-waters. In the latter case there is no jurisdiction."

In *The United States* v. *Coombs*, 12 Pet. 72, 76, decided in 1838, Mr. Justice Story, referring to this jurisdiction, said: "Our opinion is, that in cases purely dependent upon the locality of the act done, it is limited to the sea and to tide-waters, as far as the tide flows, and that it does not reach beyond high-water mark. It is the doctrine which has been repeatedly asserted by this court, and we see no reason to depart from it."

In *Waring* v. *Clarke*, 5 How. 441, decided in 1846, there was a doubt on the part of some of the judges of the court, whether the collision on the Mississippi river was within the ebb and flow of the tide; yet the majority of the court were of the opinion that such was the fact, and accordingly held that a case of collision on this river "within the ebb and flow of the tide, is within the admiralty and maritime jurisdiction of the courts of the United States, though also *infra corpus comitatus*."

These cases settled the construction of the Constitution, at least for the time being, as to the admiralty and maritime jurisdiction of the courts of the United States, considered with reference to the question of locality. They confined the jurisdiction to the high seas and to tide-waters connected therewith.

3. The Jurisdiction Granted to District Courts. — The ninth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), gave to the District Courts of the United States exclusive cognizance of certain crimes, committed within their respective districts or upon the high seas, and also "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

It was in the interpretation of the power here granted, that the Supreme Court limited the jurisdiction, in the earlier cases, to the high seas and tide-waters. It is worthy of notice that this section says nothing about tide-waters as fixing the limit beyond which the jurisdiction cannot extend. It includes the seizures specified within admiralty and maritime jurisdiction, and makes the navigability of waters "from the sea by vessels of ten or more tons burthen," and not the ebb and flow of the tide, the test of admiralty jurisdiction. Waters thus navigable from the sea, and so far as thus navigable, were deemed by Congress as within the admiralty and maritime jurisdiction conferred by the Constitution, without reference to the ebb and flow of the tide. This certainly was a different test from the one adopted by the Supreme Court in the earlier cases.

4. Extension of the Jurisdiction to Lakes.—Congress, by the Act of February 26th, 1845 (5 U. S. Stat. at Large, 726), provided that the District Courts of the United States shall have "the same jurisdiction in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation, between ports and places in different States and Territories, upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide-waters, within the admiralty and maritime jurisdiction of the United States."

This act secured "to the parties the right of trial by jury of all the facts put in issue in such suits where either party shall require it," and also "the right of a concurrent remedy at the common law where it is competent to give it, and of any concurrent remedy which may be given by the State laws where such steamer or other vessel is employed in such business of commerce and navigation." It also provided that the remedies, forms of process, and modes of proceeding, shall be the same as are or may be used by the District Courts in cases of admiralty and maritime jurisdiction, and that the maritime law of the United States, so far as the same is or may be applicable in such cases, shall constitute the rule of decision, in the same manner, to the same extent, and with the same equities, as now apply in cases of admiralty and maritime jurisdiction.

The act was entitled "an Act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same." The object of the act was to give a wider scope to the admiralty and maritime jurisdiction of the United States, as to the locality of its operation, than had been previously recognized and admitted. As tide-waters did not embrace the great lakes of the United States, the act was plainly inconsistent with the doctrine which had been laid down by the Supreme Court, and this fact raised serious doubts as to its constitutional validity.

5. Constitutionality of the Act of 1845.—In 1851, six years after the passage of this act, the case of *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, which was a case of collision on Lake Ontario, came before the Supreme Court under the provisions of the act; and this raised the question whether the court should reaffirm or revise and modify its previously declared doctrine as to the locality of the admiralty and maritime jurisdiction of the United States. Chief Justice Taney, in stating the opinion of the court, delivered an elaborate argument, the object of which was to show that the admiralty jurisdiction granted by the Constitution extends to the navigable lakes and rivers of the United States, without reference to the ebb and flow of the tides of the ocean, and that Congress had power to pass the Act of February 26th, 1845, not as a regulation of commerce, which it was not and did not purport to be, but under the provision of the Constitution that extends the

judicial power of the United States to "all cases of admiralty and maritime jurisdiction," which provision Congress was authorized to carry into effect.

The Supreme Court, in this case, reconsidered, revised and corrected its former opinion, and held that the admiralty and maritime jurisdiction, conferred by the Constitution, is not, as in England, confined to tidal waters, but extends to the public navigable lakes and rivers of the United States, on which commerce is carried on between States and Territories, or with foreign nations. This decision adopted navigability and the public use of the waters for commercial purposes, rather than the mere ebb and flow of the tide, as the true criterion in respect to such jurisdiction. The same view has been repeatedly affirmed by the court in subsequent cases, and is now the settled law on the subject.

In *Jackson* v. *James*, 20 How. 296, it was held that "the admiralty jurisdiction of the courts of the United States is not dependent upon the ebb and flow of the tide," and that it is not "defeated because the place of the transaction was within the body of the county of a State." (*The Transportation Co.* v. *Fitzhugh*, 1 Black, 574; *The Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; and *The Insurance Co.* v. *Dunham*, 11 Wall. 1.) In the last of these cases it was said that admiralty jurisdiction "extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide."

This construction of the territorial extent of the jurisdiction was, in *The Eagle*, 8 Wall. 15, regarded as rendering the Act of February 26th, 1845, practically "obsolete and of no effect," with the exception of the provision giving to either party the right of trial by jury when requested, since, under the construction, the admiralty powers of the District Courts, as conferred by the ninth section of the Judiciary Act of 1789, extend to all the navigable waters of the United States, including the waters expressly mentioned in the act, and all other navigable waters.

So, also, the words, "including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas," which formed a part of the ninth section of the Judiciary Act of 1789, were, in the light of the decision in

The Genesee Chief v. *Fitzhugh*, *supra*, regarded in *The Eagle*, *supra*, as "no longer of any force." The general jurisdiction in admiralty exists without regard to these words, and hence they have "become useless and of no effect." They are entirely omitted in the re-statement of this jurisdiction, in the Revised Statutes of the United States. (Sec. 563.)

6. Navigable Rivers and Lakes.—If, then, navigability, and not the ebb and flow of the tide, be the test of admiralty jurisdiction in the United States, so far as the question of locality is concerned, what waters are for this purpose to be deemed navigable? The case of *The Daniel Ball*, 10 Wall. 557, answers this question as follows:

"The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law, which are navigable in fact. Rivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the ordinary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from navigable waters of the States, when they form in their ordinary condition, by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries, in the customary modes in which commerce is conducted by water."

This definition of navigable waters was repeated in *The Montello*, 11 Wall. 411, 415, with the following remark: "If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such a highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State, and the acts of Congress, to which reference is made in the libel, for the enrollment and license of vessels, have no application."

In *Nelson* v. *Leland*, 22 How. 48, it was held that "the admiralty jurisdiction extends to the Yazoo river, although it is wholly within the State of Mississippi, and the stage of the water is sometimes too low for practicable navigation." This occasional non-navigableness of the river was not regarded as destroying its

general character as a navigable river of the United States. Nor does the fact that the river lies wholly within the boundary of a State destroy its character as such, or withdraw admiralty jurisdiction over it. (*Jackson* v. *James*, 20 How. 296.)

There is no doubt and no dispute as to whether the great lakes of the United States, that serve as the highways of commerce between States, or between States and Territories, or with foreign nations, and the waters by which these lakes are connected, are, under the test of navigability, to be deemed public waters, and within the admiralty jurisdiction established by the Constitution. Some of these lakes are inland seas, and all of them are connected by rivers with the ocean. They are the highways of a vast inter-State commerce, as well as of commerce with foreign nations.

7. Canals.—It is difficult to see why those canals of the country, which are also highways of commerce, inter-State and international, by their connection with rivers and lakes, should not come within admiralty jurisdiction. It is true that they are artificial water-ways; yet, navigability and commercial use being assumed as the test of this jurisdiction, then the canal which connects Lake Erie with the Hudson river, and, through this river, with the ocean at New York, and on which a vast inter-State and foreign commerce is conducted, as really meets the conditions of the test as the Mississippi river or the great lakes of the country. The fact that it is an artificial water-way does not affect it in this respect. It makes no difference with the use or the reason for admiralty jurisdiction.

Mr. Benedict, referring to the commerce transported by canals, says: "The vessels in which it is carried on, called sometimes canal-boats, and sometimes lake-boats, have a tonnage of one hundred and fifty to two hundred and fifty tons, and they must be registered or enrolled and licensed as vessels of the United States, and by those connected navigable waters, in such vessels, the productions of the mines, the forests, the soil, and the manufactures of vast regions yet to be settled and improved, are to find their way to the markets of the world. * * * In view of the proportions which this commerce must assume, I can see no valid reason for denying those waters, navigable from the sea by vessels of ten or more tons burthen, the character of navigable waters, and

such vessels the maritime character of vessels." (Benedict's Admiralty, p. 124.)

There has been some diversity in the decisions of courts on this question. In *The Ann Arbor*, 4 Blatch. 205, which was a libel *in rem* against the canal-boat Ann Arbor, for a breach of contract of affreightment in respect to certain tubs of butter, shipped by that craft from Rome (N. Y.), on the Erie Canal, to the city of New York, Mr. Justice Nelson said: "I am also inclined to think that the canal-boat is not a ship or vessel, upon the North river, or other navigable waters within the admiralty jurisdiction, subject to maritime liens in the admiralty, for breaches of contract of affreightment. Those boats are exclusively adapted to canal navigation. Of themselves they have no power as respects navigation upon public waters, any more than a raft, an ark, or a mud-scow." This opinion was expressed in 1858.

On the other hand, in *The E. M. McChesney*, 15 Blatch. 183, which was a proceeding *in rem* against the canal-boat for oats shipped therein from Buffalo to New York city by the Erie Canal, a part of which was stolen from the boat while on her passage, it was held by the District Court "that the admiralty had jurisdiction to enforce such a contract, although part of the service was to be performed on the Erie Canal," and although the boat "was built to navigate the canal and had no means of locomotion in herself." Chief Justice Waite, before whom this case came in 1878 on appeal, sustained the decree of the court below. He remarked: "The well considered opinion of the district judge, in which I fully concur, makes it unnecessary for me to attempt to add to what he has so well said."

Judge Choate, in *Malony* v. *The City of Milwaukee*, 1 Fed. Rep. 611, said: "Without going at large into the discussion of the reasons for and against the jurisdiction, it is enough for the disposition of the point in this case to say that, upon a careful perusal of the opinions delivered by the Supreme Court which touch upon the question, it seems to me that the test established for determining the jurisdiction in admiralty, in a case of alleged maritime tort not on tide-water, is whether the place in which it was committed is upon the navigable waters of the United States, and that an artificial water-way or canal opened by a State to public use, for purposes of commerce, and while in fact used as a highway of commerce between the States of the Union, and be-

tween foreign countries and the United States, is navigable water of the United States within the meaning of that term as used to define and limit the jurisdiction of admiralty courts." The same doctrine was held in *The Oler*, 2 Hughes, 12; and *The Avon*, 1 Brown, 170.

The kind of water-craft employed, and the manner of propulsion, whether by steam, wind, or horse power, are immaterial questions, provided the business or employment is that of commerce, and the water upon which the craft moves or is moved is navigable by itself, or by its connection with other waters, for the purposes of commerce between the States of the Union, or with foreign nations. These conditions being present, the fact that the craft is called a canal-boat, or that its main or even exclusive use is upon a canal, furnishes no reason why it should not be subject to admiralty jurisdiction. (*The General Cass*, 1 Brown, 334; and *The Kate Tremaine*, 5 Ben. 60.)

The better opinion then would seem to be that canals which, though artificial water-ways, serve the purposes of international commerce, or those of commerce with foreign nations, and the craft used thereon for these purposes, whether self-propelled or not, and in whatever manner propelled, are in respect to these purposes subject to the admiralty jurisdiction of the United States, in common with lakes and rivers, harbors, bays, and wharves that serve the same purposes. No good reason can be assigned why this should not be the fact.

8. State Jurisdiction.—It follows from this construction of admiralty jurisdiction that it may and often does operate upon localities that lie within the limits of States, and are subject to State authority. How far then is the latter authority affected by the admiralty and maritime jurisdiction of the United States, when, as to its locality, operating within the limits of States?

Chief Justice Marshall, in stating the opinion of the court in *The United States* v. *Bevans*, 3 Wheat. 336, took the ground that the jurisdiction in admiralty and maritime cases, as granted by the Constitution, is not to be understood as a cession of the waters to the United States "on which these cases may arise." The general jurisdiction of the State over the place, as he maintained, subject to this particular grant of judicial power to the United States, "adheres to the territory" which is a part of the State by

being within its limits, "as a portion of sovereignty not yet given away." Congress can legislate to carry admiralty jurisdiction into effect, but in so legislating it is limited to this single purpose. The Federal Government, by its admiralty powers, acquires no general jurisdiction over a place or waters within the boundaries of a State, beyond the scope and proper exercise of these powers. "The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction."

In *Smith* v. *The State of Maryland*, 18 How. 71, it was claimed that the law of that State which undertook to regulate the catching of oysters in any of the waters thereof, and under which a vessel was forfeited to the State for a violation of the law, was repugnant to that clause of the Constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Mr. Justice Curtis, in stating the opinion of the court, referred to the doctrine laid down in *The United States* v. *Bevans*, *supra*, and then added that "this clause in the Constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States." He further said: "As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution."

Chief Justice Waite, in stating the opinion of the court in *McCready* v. *Virginia*, 4 Otto, 391, said: "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. * * * The title thus held is subject to the paramount right of navigation, the regulation of which in respect to foreign and inter-State commerce has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation."

The Constitution simply assigns to the judicial power of the United States the cases designated as "cases of admiralty and maritime jurisdiction," with the right of Congress to vest this jurisdiction exclusively in Federal courts; and when any of these cases arise upon waters within the limits of a State, then the jurisdiction attaches to them through the agency of the proper courts, and is competent to dispose of them, while the general sovereignty of the State over persons and things within its own territory is, with this exception, untouched and unimpaired, so far as this particular form of jurisdiction is concerned. The fact that it operates within a State, or is by Congress made exclusive of any similar jurisdiction by State Courts, is no objection to it.

The jurisdiction has its basis in the Constitution of the United States, which is "the supreme law" in every State and over every State. No State rights are interfered with in those cases in which the locality of the jurisdiction is within a State. This results simply from the fact that the cases there arise, and that, under the Constitution and the laws of Congress, the jurisdiction attaches to them as fully as its does to cases which arise upon the high seas where the State has no jurisdiction.

SECTION III.

THE SUBJECTS OF THE JURISDICTION.

The locality of the jurisdiction being the high seas and public navigable waters of the United States, and the jurisdiction being limited thereto, it necessarily follows that the specific subjects embraced in it, and to which it is therefore applicable, designated in the Constitution as "cases of admiralty and maritime jurisdiction," must all bear some relation to this locality. They must be things done where the jurisdiction operates, or contracts there to be fulfilled. Whatever may be their specific character, they hold and must hold some relation to the place of the jurisdiction. It is for this reason that they are admiralty and maritime cases. These cases are divisible into three subordinate classes.

1. Criminal Cases.—Admiralty jurisdiction is a criminal as well as a civil jurisdiction, and, as such, takes cognizance of

crimes, and administers therefor the proper punishment. There is no doubt that the Constitution includes crimes in the general terms which grant this jurisdiction; and upon this fact is based the power of Congress to provide for the punishment of a large class of offenses committed upon the high seas. In so doing it carries into effect this branch of the judicial power of the United States.

Title LXX, chapter 3, of the Revised Statutes of the United States, designates the various crimes, with their punishment, which come within the admiralty and maritime jurisdiction of the General Government. These crimes are specified, not only by their titles, but also with reference to the places where they are committed, among which are mentioned the high seas, or any arm of the sea, or any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State. The two things that mark these crimes, as to the place of commission are, that they are committed within the admiralty jurisdiction of the General Government, and out of the jurisdiction of any particular State. If committed in places within admiralty jurisdiction, but not out of the jurisdiction of any particular State, they would not come within the terms of the statute.

The well settled principle is that the courts of the United States can take no cognizance of any crimes, whether committed within admiralty jurisdiction or not, except as Congress shall have expressly conferred the authority by law, specifying the crimes to be tried by them, and the punishment to be inflicted. In *The United States* v. *Wilson*, 3 Blatch. 435, it was held that the Federal courts "cannot take cognizance of criminal offenses of any grade, without the express appointment or direction of positive law;" and in *The United States* v. *Bevans*, 3 Wheat. 336, the same doctrine was stated by Chief Justice Marshall. (*The United States* v. *Barney*, 5 Blatch. 294; *The United States* v. *Lancaster*, 2 McLean, 431; and *The United States* v. *Taylor*, 1 Hughes, 514.)

The courts of the United States are therefore limited, in the trial and punishment of admiralty crimes, to those that have been expressly designated by legislative enactment. There is no doubt that Congress has power to bring all the waters subject to admiralty jurisdiction, whether within the jurisdiction of a particular

State or not, within the scope of criminal jurisprudence; but Federal courts have no power to carry this jurisprudence beyond the actual legislation of Congress giving them the requisite authority. (*The United States* v. *Bevans*, 3 Wheat. 336; and *The United States* v. *Wiltberger*, 5 Wheat. 76.)

Section 563 of the Revised Statutes of the United States provides that the District Courts shall have jurisdiction "of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section 5,412." These excepted cases have no relation to admiralty jurisdiction.

The criminal jurisdiction granted by this section to District Courts is qualified by three circumstances: 1. The crimes must be cognizable under the authority of the United States. 2. The crimes must be committed within their respective districts, or upon the high seas. 3. The crimes must not be punishable with death.

In respect to the term "high seas," it was held, in *The United States* v. *Wilson*, 3 Blatch. 435, that "Congress, in its criminal legislation, uses the term *high seas* in its popular and natural sense, in contradistinction to mere tide-waters, flowing in ports, havens and basins, that are land-locked in their position, and subject to territorial jurisdiction." (*The United States* v. *Grush*, 5 Mason, 290; *The Schooner Harriet*, 1 Story, 251; and *Thomas* v. *Lane*, 2 Sumner, 1.) The case was dismissed by Judge Betts on the ground that the offense charged in the indictment was not committed on the "high seas," and the prisoner ordered to be handed over to "the proper State authority."

The Revised Statutes of the United States, in section 5,339, speak of murder as being committed "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State." This plainly distinguishes between the "high seas" and other waters that are within admiralty jurisdiction. Tide-waters in havens, basins, bays, and rivers, though connected with the "high seas," do not constitute a portion of those seas. It results from this construction that no jurisdiction is given, in section 563 of the Revised Statutes, to

District Courts, over offenses not committed within their respective districts, nor upon the high seas.

Section 629 of these Statutes, in paragraph twenty, provides that the Circuit Courts shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts, of crimes and offenses cognizable therein." This gives to the Circuit Courts all the jurisdiction over crimes possessed by the District Courts, and extends their jurisdiction to such other crimes and offenses as by express statute are made cognizable under the authority of the United States. Congress has not seen fit to give to either class of courts a criminal jurisdiction in admiralty that, as to locality, is co-extensive with the jurisdiction granted in civil causes of admiralty. The policy of Congress, where the waters, though within admiralty jurisdiction, are also within the jurisdiction of a particular State, has been to leave the trial and punishment of crimes to the courts of that State, proceeding under State authority.

Murder, for example, if committed within the admiralty and maritime jurisdiction of the United States, and also within the jurisdiction of a particular State, is not declared to be an offense against the United States, and is not cognizable under the authority thereof. It is an offense against the State within whose jurisdiction it was committed, and is left to be dealt with by the courts of that State. Judge Betts, in *The United States* v. *Wilson*, 3 Blatch. 435, said: "It is no doubt within the competency of Congress to bring all waters, subject to Federal jurisdiction, within the scope of its criminal jurisprudence. This is manifestly the doctrine declared by the Supreme Court, in the case of *The United States* v. *Bevans*, 3 Wheat. 336, and in *The United States* v. *Wiltberger*, 5 Wheat. 76. But the power is regarded as dormant, unless exercised by direct enactments of law."

The procedure of the District and Circuit Courts, when sitting as courts of admiralty in criminal cases, is the same as that of courts of common law in the trial and punishment of crimes. This results from certain provisions of the Constitution. This instrument says: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when

not committed in any State, the trial shall be at such place or places as the Congress may by law have directed."

The Fifth Amendment to the Constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger."

The Sixth Amendment provides as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

These provisions of the Constitution apply to all criminal trials in the courts of the United States, whether proceeding as courts of admiralty or courts of common law. The fact that the crimes come within admiralty jurisdiction, and are tried by the courts in the exercise of this jurisdiction, does not make it any the less necessary to comply with these constitutional requirements.

2. Civil Causes.—Section 563 of the Revised Statutes of the United States, in paragraph eight, provides that the District Courts shall have cognizance "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." This jurisdiction is declared to be exclusive, except in the particular cases in which jurisdiction of such causes is given to the Circuit Courts. As to what are such "civil causes" the statute is silent. This question is left to be determined by courts in exercising the jurisdiction and explaining its subject-matter, and especially by the Supreme Court of the United States, as the final authority on the subject.

(1.) *Specification of Civil Causes.*—Mr. Justice Story, in *De Lovio* v. *Boit*, 2 Gallison, 398, having in view this class of causes, and referring to the words used in the Constitution, said that these

words "include jurisdiction of all things done upon or relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation and to damages and injuries upon the sea." Referring to the jurisdiction in "maritime contracts," he further said: "All civilians and jurists agree that, in this appellation are included, among other things, charter-parties; affreightments; marine hypothecations; contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and *quasi*-contracts respecting averages, contributions, and jettisons; and, what is more material to our present purpose, policies of insurance."

The direct question before the court in this case, which was answered in the affirmative, was whether a marine insurance policy is a contract coming within the admiralty and maritime jurisdiction of the United States. The affirmative answer to this question was sustained by a very exhaustive examination of maritime law.

Mr. Justice Clifford, in *The Belfast*, 7 Wall. 624, 637, gave the following enumeration of civil causes of admiralty jurisdiction:

"The principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures. Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable, are not maritime any more than those made to be performed on land. Nor are torts cognizable in the admiralty unless committed on waters within the admiralty and maritime jurisdiction, as defined by law."

In *Ex parte Easton*, 5 Otto, 68, 72, Mr. Justice Clifford said:

"Wide differences of opinion have existed as to the extent of the admiralty jurisdiction; but it may now be said, without fear of contradiction, that it extends to all contracts, claims and services essentially maritime, among which are bottomry bonds, contracts of affreightments and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the seas, the claims of

material-men, and others for the repair and outfit of ships belonging to foreign nations or to other States, and the wages of mariners; and also to civil marine torts and injuries, among which are assaults or other personal injuries, collision, spoliation and damage, illegal dispossession or withholding of possession from the owners of ships, controversies between part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance."

Mr. Benedict gives a full and detailed statement of the civil causes which have been recognized by courts as coming within admiralty jurisdiction, citing authorities in explanation of this jurisdiction in particular cases. (Benedict's Admiralty, pp. 147–191.)

(2.) *The General Principle.*—The general principle that underlies all cases of admiralty jurisdiction is that the jurisdiction rests upon a contract essentially maritime in its nature, whether express or implied, or upon the locality of the facts or occurrences which form the subject-matter of controversy between the parties. No case, not presenting one or the other of these features, comes within the limits of this jurisdiction.

All these cases relate, either directly or indirectly, to ships or vessels, or some species of water-craft, considered as the instruments of navigation, and, through navigation, of commerce and the transportation of passengers. The ship or vessel in its uses, in what is implied in or necessary to these uses, and in the liabilities connected therewith, manifestly forms the central point of admiralty and maritime jurisdiction, as well as of the laws which it applies. A ship or vessel is an instrument of locomotion in water, and not on the land or in the air; and to such instruments are attached the great interests of commerce and travel by water, and, through and in connection with them, these interests become subject to the regulation of maritime law. The law is called maritime because the sea is prominently the place of its operation. It is the law of the sea in distinction from a law that operates simply upon the land.

(3.) *Maritime Law.*—All civilized nations, having a commerce with each other conducted by water, have had occasion to use ships for this purpose, and, from the earliest times, they have had a law for the sea and the navigable waters connected therewith, as

well as courts to administer it. The purpose of this law is to subject this branch of human affairs to the regulations, restraints, and protection of justice. This purpose being common to all nations, and the facts to be dealt with being to a large extent similar in all, the general principles of maritime law throughout the civilized world have presented a corresponding similarity. They all relate to ships or vessels as the instruments of commerce upon the sea and its connected navigable waters, and, to a very considerable extent, embrace the same remedial rules.

To these principles, especially as recognized and established in England and this country when the Constitution was adopted, the framers thereof referred when they declared that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." They did not define or explain this language, but assumed that the words, like "cases in law and equity," or "suits at common law," would be understood by courts when it became necessary to apply them, and especially that the Supreme Court of the United States would, as the occasion should arise, authoritatively determine their meaning for the whole country.

On this point, Mr. Justice Bradley, in *The Lottawanna*, 21 Wall. 558, 574, remarks: "The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction." He adds that the Constitution does not define the system, or "attempt to draw the boundary line between maritime law and local law," or "lay down any criterion for ascertaining that boundary."

What the Constitution does is to adopt, in general terms, the system of maritime law as a distinct branch of jurisprudence, leaving the meaning of these terms and their application to be determined by legal and judicial construction. It is worthy of notice that it extends the judicial power of the United States to "*cases*," that is to say, to the *subjects* or recognized matters to which admiralty and maritime jurisdiction is applicable, but does not declare what courts shall exercise this jurisdiction in the first instance, or what shall be the extent of the power exercised by these

courts, and does not prescribe any particular form or mode of procedure.

Chief Justice Taney, in *Meyer* v. *Meyer* (*The Steamer St. Lawrence*), 1 Black, 522, 526, remarks:

"Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal Government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our Government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no State can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just consideration of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government."

(4.) *The Maritime Law of the United States.*—The maritime law of the civilized nations, though similar in its general principles, purposes, and reasons, is not precisely the same in all nations as to its various details, especially in those aspects of it which relate to the condition and local laws of a particular country, and do not concern other countries. This general maritime law is not the law of any nation, except by its own adoption, and except so far as it may be adopted. It is in this respect like the common law, or the civil law, or international law, dependent on local adoption for its local operation and authority. Each nation may modify it in a way to suit its own necessities and wants.

On this point, Mr. Justice Bradley, in *The Lottawanna*, 21 Wall. 558, 573, remarks:

"It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and

the same in every particular; but that whilst there is a general correspondence between them, arising from the fact that each adopts the essential principles and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each State adopts the maritime law, not as a code having any independent and inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it."

That the United States have a maritime law, and that this law is one and the same in all parts of the country, admits of no doubt. As to the subjects embraced in this law, and the rules and regulations with reference to these subjects, by which the rights of parties in particular cases are to be determined, the legislation of Congress, within the sphere of its powers relating to commerce and to ships as the instruments thereof, and the decisions of the Supreme Court in regard to "cases of admiralty and maritime jurisdiction," must be taken as an authoritative statement and exposition. The "best guides as to the extent of the admiralty jurisdiction of the Federal courts," says Mr. Justice Clifford, in *The Belfast*, 7 Wall. 624, 636, "are the Constitution of the United States, the laws of Congress, and the decisions of this Court."

The Constitution designates the "cases," or subjects to which the jurisdiction is applicable. Congress, by law, organizes the courts, confers upon them their authority, and, so far as it shall deem expedient, prescribes regulations for their observance. The Supreme Court is the final authority in settling all questions as to the meaning and application of the Constitution and the law. And thus we have a maritime law of the United States, and for the United States, alike authoritative and uniform in all parts thereof.

It is quite true that Congress cannot, any more than the Supreme Court, originate admiralty and maritime jurisdiction, since this is granted, and, as to its subjects, defined by the Constitution; yet Congress, in the exercise of its commercial power, which "embraces the largest portion of the ground covered by" this jurisdiction, may pass a great variety of laws in respect to commerce, in respect to ships and vessels as the instruments thereof, and in re-

spect to the rights and duties of seamen and ship-masters, which laws, being constitutional, furnish a rule for the guidance of the Federal courts in the exercise of their admiralty jurisdiction. This is precisely what Congress has done; and, so far as it has thus legislated, the laws of Congress are a part of the maritime law of the United States. (*The Lottawanna*, 21 Wall. 558, 577.)

3. Prize Causes.—These causes, though generally placed under the head of civil causes of admiralty, are, nevertheless, sufficiently distinct from the ordinary character of such causes to make a class by themselves.

Section 563 of the Revised Statutes of the United States, having, in paragraph eight, given jurisdiction to the District Courts of "all civil causes of admiralty and maritime jurisdiction," proceeds to declare that these courts "shall have exclusive and original jurisdiction of all prizes brought into the United States, except as provided in paragraph six of section 629." Jurisdiction, in the section here referred to, is given to the Circuit Courts, "of all proceedings for the condemnation of property taken as prize in pursuance of section 5308."

Section 695 of the Revised Statutes provides that "an appeal shall be allowed to the Supreme Court from all final decrees of any District Court in prize causes, when the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, and shall be allowed, without reference to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance," and that "the Supreme Court shall receive, hear, and determine such appeals, and shall always be open for the entry thereof."

So, also, these Statutes, in Title LIV, supply a series of statutory regulations in respect to "all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States." Some of these regulations relate to the rights and duties of the captors, and others relate to the powers and duties of the prize court.

The term "prize," in maritime law, means the apprehension and detention at sea of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo. (1 C. Rob. Adm. 228.)

Such captures of ships, or cargoes, or both, as prize, are either made or adopted by the authority of the Government, in the time of war and in the exercise of belligerent rights; and this distinguishes them from acts of piracy upon the high seas. They are not, by the law of nations, regarded as acts of robbery. They are, rather, one of the methods of prosecuting war.

The property of an enemy, whether it be used in actual hostility or not, is liable to such capture as the means of weakening his strength; and so the property of neutral owners, if engaged in violating a blockade, or if it be contraband of war, or if in any way used in aid of the enemy, may be captured by the other belligerent power, and appropriated as prize, in the exercise of the rights of war. This is a settled principle of international law.

It was formerly held that the title to the property was vested in the captor, when the capture was complete, and the *spes recuperandi* was gone. This, however, in the modern practice of nations, is not deemed sufficient to settle the question. The mere fact of capture does not necessarily prove that the capture is lawful, or that the captured property is forfeited, and to be condemned as a prize under the laws of war.

The question whether a capture is lawful is essentially a judicial question, and is to be determined by a proceeding before a prize court, which gives to all parties interested an opportunity to be heard. It is the duty of the captor, if possible, to bring the property into the country to which he belongs, and by whose authority he makes the capture, that the rightfulness of the act may be settled by the proper court of that country, which, in the United States, is the District Court. The Government under whose authority the capture was made, or by whose authority it has been adopted, claims the exclusive right of determining the question of its lawfulness, and, if lawful, of making such a disposition of the property as it shall see fit; and this right it exercises through a prize court. (*L'Invincible*, 1 Wheat. 238.)

The law governing the decision in prize causes, except as to the disposition and distribution of the property, if the capture was lawful, is not the local or municipal law of any country, but rather the law of nations in application to belligerent rights. Captures, in order to be lawful, must be "made in the cases and upon the grounds recognized by the laws of war." The question is not simply one of individual and private rights, but also one of

national rights, since every nation claims the right to protect property lawfully sailing under its own flag. If the captured property is forfeited under the recognized laws of war, then the court condemns it as lawful prize, and makes that distribution of it which the local law directs. If, on the other hand, it is not, in the opinion of the court, thus forfeited, then its duty is so to decree, and order its restoration to its proper owners.

The captors themselves, though they in the first instance obtain possession, have no title to the property, except as they derive it from the authority of the government in whose name they made the capture, or by whose authority the capture was adopted. Hence, in all cases in which it is practicable, the property must be brought within the jurisdiction of this government, and the questions of fact and those of law involved must be determined by a prize court, in the mode provided by law for this purpose.

The occasion for the exercise of the belligerent right of capture arises only from the state of war which itself furnishes the occasion for the adjudications of a prize court; and fortunately for the Government of the United States, its usual condition has been that of peace with the other nations of the earth. Though fully equipped with prize courts in the admiralty powers of the District Courts, it has had but little judicial business of this kind to perform. Prize cases in the United States are few in comparison with the "civil causes of admiralty and maritime jurisdiction," which have come before the District Courts; and these cases have arisen in "the maritime ports and harbors" of the country.

SECTION IV.

THE FORMS OF ADMIRALTY PROCEDURE.

Proceedings in admiralty are divided into two general classes. The first class embraces proceedings *in rem*. The second class embraces proceedings *in personam*. A brief explanation of these classes will form the subject of this section.

1. Proceedings in Rem.—The general characteristic of all proceedings *in rem* is, that they are brought against the *thing* itself, the ship, its tackle and furniture, and not against its owner or

master. The thing itself is ordered to be seized and held subject to the decree of the court. The process of the court is confined to the specific thing which is seized and impleaded, and has no relation to other property which may belong to the owner or master of the ship, or to persons, unless some one in the character of a claimant of the property seized "intervenes and assumes the responsibilities of the controversy." In the sense of being the thing proceeded against, the thing seized is the defendant. The suit, in its essential substance, is really against all parties having or claiming any rights or interests in the thing seized; and hence the decree of the court, in disposing of the case, is valid against all the world. (Benedict's Admiralty, pp. 218, 257.)

The party bringing the suit is technically known as the libellant; and his petition or complaint to the court, which in many respects is analogous to a complaint in an equity suit, is called a libel. This libel, being addressed to the proper District Court, or the judge thereof, and signed by the libellant, specifies the ship or thing to be seized, and the particular cause or causes for the seizure sought to be obtained. It prays that, in view of the recital of facts, a process in due form of law may be issued against the thing authorizing its seizure by the proper officer of the court, and that all parties claiming any right or title therein may be cited to appear and answer upon oath such interrogatories as may be appended to the libel, and that the court would be pleased to decree to the libellant the relief asked and such further relief as law and justice may require.

Such is the substance of the libel in a proceeding *in rem*, varying in its recital of facts according to the facts of each particular case. It must, of course, upon its face, make out a case that comes within the admiralty and maritime jurisdiction of the court.

This libel is the basis upon which the process for arrest or seizure is issued; and no such seizure can be ordered until the libel is filed in the office of the clerk of the court. The first of the admiralty rules prescribed by the Supreme Court declares that "no mesne process shall issue from the District Courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue."

The foundation of a proceeding *in rem* is the existence of a

maritime lien against the thing seized, created by law, and arising either *ex contractu* or *quasi ex emtractu*, or *ex delicto* or *quasi ex delicto*. The object of the proceeding is to enforce this lien or right.

In *The Pacific*, 1 Blatch. 567, it was held, by Mr. Justice Nelson, that "a maritime contract depends upon its subject-matter, and, when entered into for the conveyance of goods or persons in a particular ship, it binds the ship," and that "her obligation results directly from the contract, and not from the performance, and the liability of the owner and that of the ship attach at the same time."

Mr. Justice Field, in *The Rock Island Bridge*, 6 Wall. 213, 215, said: "A maritime lien, unlike a lien at common law, may, in many cases, exist without the possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages; and when the lien arises from torts committed at sea, it travels with the thing, wherever it goes, and into whosesoever hands it may pass. The only object of the proceeding *in rem* is to make this right, where it exists, available—to carry it into effect. It subserves no other purpose. The lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise."

The same doctrine, in substance, was stated by Mr. Justice Story in *The General Smith*, 4 Wheat. 438.

"A maritime lien," said the Privy Council in *The Bold Buccleugh*, 7 Moore, 284, "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding *in rem* may be had, it will be found to be equally true that, in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

The question whether a maritime lien exists, as the foundation for a proceeding *in rem*, is a question of maritime law, particularly of the country in which the case arises, and is to be determined by the application of this law to the facts set forth in each case. Mr. Justice Field, in *The Rock Island Bridge*, *supra*, said: "A maritime lien can only exist upon movable things

engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind."

The doctrine stated by Mr. Justice Story in *The General Smith*, 4 Wheat. 438, was that "in respect to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State, and no lien is implied unless it is recognized by that law." This doctrine was followed and reaffirmed in *The Lottawanna*, 21 Wall. 558.

It was held, in *The United States* v. *The Steamship Missouri*, 9 Blatch. 433, that where Congress establishes a lien by express statute against a ship for a violation of the revenue laws of the United States, the lien may be enforced in admiralty by a proceeding *in rem* against the ship for a recovery of the penalty.

In *Ex parte McNeil*, 13 Wall. 236, it was held that "the statutes of the several States regulating the subject of pilotage are, in view of the numerous acts of Congress recognizing and adopting them, to be regarded as constitutionally made, until Congress by its own acts supersedes them," and that "although a State statute cannot confer jurisdiction on a Federal court, it may yet give a right to which, other things allowing, such a court may give effect." The State law in this case gave a lien on the ship for the tender of pilotage services; and this, not being in conflict with any law of the United States, was held to be enforceable by an admiralty proceeding in the proper Federal court.

Judge Deady, in *Holmes* v. *The O. & C. Ry. Co.* 5 Fed. Rep. 75, held that "when a passenger on the railway ferry-boat plying across the Wallamet river, between East Portland and Portland, was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the District Court by the administrator of the deceased to recover damages given therefor" by a statute of the State of Oregon. The judge, while conceding that "a State cannot enlarge the jurisdiction or control the process of the national courts," claimed that "it may increase the cases in such courts by enlarging the class of persons and things included in their jurisdiction." He said that "if a right is of admiralty juris-

diction, it is cognizable in the District Courts without reference to the residence of the parties or the origin of the right."

Chief Justice Chase, in *The Sea Gull*, Chase's Decisions, 145, held that "the process to enforce the remedy for a wrong done or an injury incurred by the death of a person, may be either *in personam* or *in rem*," and that "a husband can recover by a proceeding *in rem* against the vessel which caused the death of his wife, for the injury suffered by him thereby." In *The Highland Light*, Id. 150, he held that the statute of Maryland furnished "a clear right and plain remedy, and the right may be enforced in this court by an admiralty process." "The right," he said, "is quite separate from the remedy. The rights, like that of a statute lien upon a vessel for repairs in home ports, may be enforced in admiralty by its own processes. It is not necessary to pursue the statutory remedy in order to enforce the statutory right. It is clear, therefore, that for an injury, such as that proved in this case, the wife and son of the man killed may have redress in admiralty." This was said with reference to the statute of Maryland giving the right for a tort committed on the navigable waters of that State.

The general principle of law would seem to be that where a maritime lien exists, whether growing out of a maritime contract or a maritime tort, and whether founded upon a statute of the United States, or upon a right given by the statute of a State, it may be enforced in a District Court of the United States by a proceeding *in rem*. "The origin of the right" does not determine the question of jurisdiction.

This proceeding, however, is strictly an admiralty proceeding; and when the cause is cognizable in a District Court of the United States, no State law can confer jurisdiction upon a State court to enforce a maritime lien by a proceeding *in rem*. In *The Moses Taylor*, 4 Wall. 411, it was held that "a statute of California, which authorizes actions *in rem* against vessels for causes of action cognizable in the admiralty, to that extent attempts to invest her courts with admiralty jurisdiction." On this ground the decision of the State court was reversed, and the cause remanded with directions to dismiss the action for want of jurisdiction.

In *The Hine* v. *Trevor*, 4 Wall. 555, it was held that "State statutes which attempt to confer upon State courts a remedy for marine torts and marine contracts, by proceedings strictly *in rem*,

are void, because they are in conflict with the act of Congress, except as to cases arising on the lakes and their connecting waters." This exception which depended on the Act of February 26th, 1845 (5 U. S. Stat. at Large, 726), was, in *The Eagle*, 8 Wall. 15, 26, regarded as practically obsolete and of no effect.

In *The Belfast*, 7 Wall. 624, it was held that State legislatures cannot confer jurisdiction upon State courts to enforce maritime liens "by a suit or proceeding *in rem*, as practiced in admiralty courts." The jurisdiction of the latter courts in such proceedings is, therefore, exclusive of any concurrent jurisdiction by the former.

Judge Hughes, in *Stewart* v. *The Potomac Ferry Co.*, 12 Fed. Rep. 296, held that what was known as "the original vessel-lien law," as last amended on March 12th, 1878, under which an attachment could be sued out from a State court against a steamboat or other vessel, if the steamboat or vessel be found within the jurisdiction of the State, is, in effect, an attempt, by a State statute, to give "for a maritime cause of action a proceeding *in rem* specifically against a ship as the debtor or offender," and is, therefore, inconsistent with "the third classification of causes in section 711 of the Revised Statutes of the United States, giving cognizance to the admiralty courts, exclusive of State courts, of all civil causes of admiralty and maritime jurisdiction." He admitted that since "the decision of the United States Supreme Court in *The Steamboat Co.* v. *Chase*, 16 Wall. 522, common law suits are maintainable against ships of commerce for causes of action arising at common law," and that "a State has power to annex to suits for such causes of action auxiliary remedies, like foreign attachment, for the purpose of subjecting property of non-residents to the payment of debts due her own citizens."

But this does not, in the opinion of Judge Hughes, authorize a State to "give a special lien upon a ship for a cause of action peculiarly of admiralty cognizance, and provide a remedy by attachment for its enforcement specifically and directly against the particular vessel as the debtor or offender." The proceedings in this case, taken under "the Virginia-vessel-lien-law," were regarded as "substantially a libel *in rem* and *in personam* in admiralty," and, on this account, not within the jurisdiction of the State court, according to the well-settled doctrine of the Supreme Court of the United States. The proceeding *in rem* is not a common law rem-

edy, and, in all civil causes of admiralty and maritime jurisdiction, belongs exclusively to the Federal courts, and hence the authority for such proceedings cannot by State laws be conferred upon State courts.

2. Proceedings in Personam.—This class of suits is brought against persons, and not against ships or vessels, for some cause within the admiralty jurisdiction of the court. The process, as in a case at common law, acts upon the person sued, and the decree of the court acts upon "his property generally, without regard to its relation to the matter in controversy." In principle there is no difference between such a suit and an ordinary action at common law. The court is different and the procedure different, yet the nature of the action is substantially the same in both cases. (Benedict's Admiralty; and *Duryee* v. *Elkins*, 1 Abb. Ad. 529.)

The libel, or petition of the complainant, in a proceeding *in personam*, being addressed to the proper court or judge thereof, and signed by the libellant, specifies the party against whom the suit is brought, and also the causes of the action in detail. It prays for a process of monition, summoning this party to appear before the court at the place and time designated therein, and answer thereto according to the course in admiralty courts. It asks for the relief named in the libel, and such other and further relief as justice may require. If interrogatories are appended to the libel it asks that the party may be required to answer the same. If a warrant of arrest is sought, this is included in the libel; and if an attachment upon the goods, chattels, and credits of the defendant is desired, this also is included.

As in the proceeding *in rem*, so also in that *in personam*, no process, for these purposes, or any of them, can issue until the libel is filed in the office of the clerk of the court.

This form of proceeding was in common use in the English admiralty courts long prior to the proceeding *in rem*. The usual course of admiralty practice, in the earlier periods, was not to arrest and seize the vessel, "except in cases where the owners or master were absent, or where a mere question of privilege or preference was to be decided." (Benedict's Admiralty, p. 111; and *The Merchant*, 1 Abb. Ad. 1.)

The jurisdiction in admiralty does not depend upon the question whether the proceeding is *in rem* or *in personam*, but upon

the question whether the subject-matter of the suit comes within the admiralty and maritime jurisdiction of the United States. "If the cause is a maritime cause, subject to the admiralty cognizance, jurisdiction is complete over the person as well as the ship. It must in its nature be complete, for it cannot be confined to one of the remedies on the contract, when the contract in itself is within its cognizance." (Benedict's Admiralty, p. 111; *Andrews* v. *Wall*, 3 How. 568; *Cutler* v. *Rae*, 7 How. 729; *The New Jersey Steam Nav. Co.* v. *The Merchants' Bank*, 6 How. 344; and *Davis* v. *Child*, 2 Ware, 78.)

If a ship or the proceeds thereof, subject to a maritime lien, have, by assignment or otherwise, passed into the hands of third parties, an action *in personam* may be brought against these parties. (*Sheppard* v. *Taylor*, 5 Pet. 575.)

3. Proceeding by Either Method.—Where the cause of action gives the right to proceed *in rem* against the ship or vessel, or *in personam* against the master or owner, the libellant may bring his suit in either form, at his own election. The admiralty rules, prescribed by the Supreme Court, provide for this right in suits by material-men, in suits for mariners' wages, in suits for pilotage, in suits for damages by collision, in suits for hypothecation, in suits on bottomry bonds with certain qualifications, and in suits for salvage services. The libellant may bring his action according to either method in these cases, subject to the qualification named in suits on bottomry bonds.

The seventeenth of these rules, however, provides that "in all suits for an assault or beating on the high seas, or elsewhere within admiralty and maritime jurisdiction, the suit shall be *in personam* only." This expressly excludes the proceeding *in rem*.

The general rule of admiralty is that, where the cause gives jurisdiction to the court, the court may exercise that jurisdiction in either way, and hence that either way is available to the libellant.

4. Joinder of the two Proceedings.—Mr. Benedict says that "in certain cases the proceedings *in rem* and the proceedings *in personam* may be united in the same suit, for the purpose of more complete justice." He adds that "wherever the libellant's cause of action gives him, at the same time, a lien or privilege

against the thing and a full personal right against the owner, he may by a libel, properly framed, proceed against the person and the thing, and compel the owner to come in and submit to the decree of the court against him personally, in the same suit, for any possible deficiency." (Benedict's Admiralty, pp. 219, 234.)

Judge Conkling, on the other hand, thinks this to be an "extremely questionable" position. (2 Conk. U. S. Adm. 42.) Mr. Justice Story, in *The N. C. Bank* v. *N. S. Co.*, 2 Story, 16, which case was decided in 1841, said: "In case of collision, the injured party may proceed *in rem* or *in personam*, or successively in each way until he has full satisfaction; but I do not understand how the proceedings can be blended in one libel." (*The Ann*, 1 Mass. 512; and *The Cassius*, 2 Story, 99.)

The question is simply one of procedure; and in regard to it the admiralty rules, adopted by the Supreme Court in 1845, furnish the guide to the District Courts, certainly so in all the cases to which they apply. These rules are as follows:

Rule 12.—"In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." Here is a provision for either mode of proceeding in this class of suits, but none for their combination in the same suit.

Rule 13.—"In all suits for mariners' wages the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone *in personam*." This provides for a combination of the two modes of proceeding against "the ship, freight, and master," but for no other combination of the proceedings.

Rule 14.—"In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone *in personam*." Here also is a provision for combining the proceedings against "the ship and master," not including the freight.

Rule 15.—"In all suits for damage by collision the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*," This gives the right of joinder of the two proceedings against "the ship and master," but extends the right no further. There cannot under this rule be a joinder of proceedings against the ship and the owner, unless the owner happens also to be the master of the

ship. (*The Clatsop Chief*, 8 Fed. Rep. 163, 165; *The Zodiac*, 5 Fed. Rep. 223; *The Richard Doane*, 2 Ben. 111; and *Newell* v. *Norton and Ship*, 3 Wall. 257.)

Rule 16.—This relates to suits for assault and battery, and limits the libellant to a proceeding *in personam* alone, necessarily excluding the proceeding *in rem*.

Rule 17.—"In all suits against the ship and freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign court for supplies or repairs or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam*." In regard to this rule Mr. Benedict remarks: "In these cases money is borrowed by the master, on the responsibility of the owner, and the ship is mortgaged for security. The ship, the master, and the owner are all liable for the debts, and may on principle be joined in the action." (Benedict's Admiralty, p. 232.)

Rule 18.—"In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrong-doer." This confines the suit to a proceeding *in rem*, except in the cases specified.

Rule 19.—"In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the person at whose request and for whose benefit the salvage service has been performed." In *The Sabine*, 11 Otto, 384, it was held that "salvors cannot in the same libel proceed *in rem* against a vessel and *in personam* against the consignees of her cargo."

Rule 20.—"In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or a majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others, to obtain security for the return of the ship from any voyage undertaken

without their consent, or by one or more part owners against the others, to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit."

These provisions specify the cases, with the mode of remedy, enumerated in the admiralty rules adopted by the Supreme Court. As to other cases not thus specified, yet within admiralty jurisdiction, they prescribe no rule for the District Courts. Mr. Benedict expresses the opinion that they are not "exclusive of any other joinders of persons or property which may be authorized by sound principle." On this point he says: "All rights against the thing to recover a demand, are in the nature of a mortgage or hypothecation. The thing is pledged either by operation of law, or by the act of the parties, and the rule of the civil law was, that the party had his choice to proceed against the party, or the thing, or both. The specification of particular causes of action, in Rules 12 to 20, inclusive, is therefore presumed not to exclude other causes of action, but to be intended only to lay down a rule in those enumerated cases, leaving others to the operation of analogous principles, or of the general rule." (Benedict's Admiralty, pp. 233, 234.)

The two forms of proceeding rest on the same ground as to the general question of jurisdiction; and, though in some respects different, they are not so different, or so incompatible with each other, as to preclude their combination in the same suit where this will best serve the purposes of justice. (*Manro* v. *Almeida*, 10 Wheat. 473; and *The Zenobia*, Abb. Ad. 52.) Where both forms are combined, the libel prays for a process against the ship or vessel, and also against the party named in respect to whom the suit is a proceeding *in personam*.

SECTION V.

THE REMEDY AT COMMON LAW.

The ninth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), which gave to the District Courts their jurisdiction in civil causes of admiralty, saved "to suitors in all cases, the right of a common law remedy, where the common law is competent to

give it." This provision is reproduced and continued in section 563 of the Revised Statutes of the United States.

The right here reserved or saved is to "suitors," or the parties bringing suits; and it is so saved in their behalf "in all cases," with the qualification specified. That qualification, is that "suitors," instead of bringing a suit in admiralty, may resort to "a common law remedy" for the relief sought, "where the common law is competent to give it." In such cases they are not excluded from the remedy at common law, and hence not confined to the remedy in admiralty. They have the right of seeking relief by either remedy, as they themselves shall elect. Such is the obvious meaning of the language.

This language has been the subject of judicial construction. Mr. Justice Nelson, in stating the opinion of the court, in *The New Jersey Steam Nav. Co.* v. *The Merchants Bank*, 6 How. 344, 390, said: "The saving clause was inserted probably from abundant caution, lest the exclusive terms in which the power is conferred on the District Courts, might be deemed to have taken away the concurrent remedy which had before existed. This leaves the concurrent power where it stood at common law."

Referring to this saving clause in the Judiciary Act of 1789, in *Waring* v. *Clarke*, 5 How. 441, 461, Mr. Justice Wayne said: "The saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction, chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court, and in that way release himself and his property from all the responsibilities which a court of admiralty can impose upon both, as a security and indemnity for injuries of which a libellant may complain,—securities which a court of common law cannot give." The clause does not make the jurisdiction of common law courts, exclusive in such cases, but simply permits it to be concurrent with that of the District Courts of the United States.

In *The Hine* v. *Trevor*, 4 Wall. 556, it was held that State statutes which attempt to confer upon State courts a remedy for marine torts and marine contracts, by proceedings strictly *in rem*, "do not come within the saving clause of the Act of 1789, con-

cerning a common law remedy." Mr. Justice Miller, referring in this case to the ninth section of the Judiciary Act, said: "But it could not have been the intention of Congress, by the exception in that section, to give to the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated."

Mr. Justice Clifford, in *Leon* v. *Galceran*, 11 Wall. 185, 191, said: "Suitors, by virtue of the saving clause in the ninth section of the Judiciary Act, conferring jurisdiction in admiralty upon the District Courts, have the right of a common law remedy in all cases where the common law is competent to give it, and the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property." He added: "Common law remedies are not competent to enforce a maritime lien by a proceeding *in rem*, and consequently the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts."

Mr. Justice Field, in *The Moses Taylor*, 4 Wall. 411, 431, remarked: "The case before us is not within the saving clause of the ninth section. That clause only saves to suitors the right of a common law remedy, where the common law is competent to give it. It is not a remedy in the common law courts, but a common law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."

In *The Belfast*, 7 Wall. 624, 644, Mr. Justice Clifford said: "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court, to enforce such a lien by a suit or proceeding *in rem*, as practiced in the admiralty courts. Observe the language of the saving clause under consideration. It is to suitors, and not to the State courts, nor to the Circuit Courts of the United States. Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party

under that provision may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State courts, or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case."

In *The Steamboat Company* v. *Chase*, 16 Wall. 522, the following doctrine was held by the court: "A statute of a State giving to the next of kin of a person crossing upon one of its public highways with reasonable care, and killed by a common carrier, by means of a steamboat, an action on the case for damages for the injury caused by the death of such person, does not interfere with the admiralty jurisdiction of the District Courts of the United States, as conferred by the Constitution and the Judiciary Act of September 24th, 1789; and this is so, even though no such remedy, enforceable through the admiralty, existed when the said act was passed, or has existed since."

The action in this case was originally brought in a court of Rhode Island, and the right to the action against *The Steamboat Company*, as a common carrier, was given by a special statute of that State enacted in 1853. The wrongful act for which the suit, under the State statute, was brought, was committed on public waters within admiralty jurisdiction; and the action not being *in rem*, but simply an action on the case for the recovery of damages, the Supreme Court of the United States held that it was within the jurisdiction of the State court, and that the State statute was not inconsistent with the admiralty jurisdiction of the District Courts as bestowed by Congress.

The conclusion to be drawn from these cases is, that if the suitor proposes to proceed *in rem*, by filing a libel against a ship or vessel, for the purpose of enforcing a maritime lien, he must bring his action in a District Court of the United States, since this form of proceeding is practicable only in such a court. If he proposes to proceed *in personam*, by filing his libel, not against the ship, but against its master or owner, then he may bring his action in the same court. If, however, he does not choose to avail himself of admiralty jurisdiction at all, then he may resort to a common law remedy, if the common law is competent to give him such a remedy, and for this purpose may bring a personal action in a State court against the master or owner of the ship, or

may bring such an action in the Circuit Court of the United States, provided the parties are such as to give that court jurisdiction of the case.

SECTION VI.

ADMIRALTY RULES.

Congress, by the Act of September 29th, 1789 (1 U. S. Stat. at Large, 93), provided that, until further provision shall be made, "the forms and modes of proceedings in causes of equity and of admiralty and maritime jurisdiction, shall be according to the course of the civil law."

By the second section of the Act of May 8th, 1792 (1 U. S. Stat. at Large, 275), Congress further provided that the proceedings in cases "of equity and in those of admiralty and maritime jurisdiction" shall be "according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law," and that these rules shall be subject to any alterations, additions, or regulations which "the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any Circuit or District Court."

The substance of these provisions is reproduced in section 913 of the Revised Statutes of the United States. Section 917 of these Statutes reproduces the substance of section six of the Act of August 23d, 1842, relating to the same subject. (5 U. S. Stat. at Large, 516.)

The Supreme Court, proceeding under the authority thus granted, has prescribed the following rules for the guidance of the Federal courts in the exercise of their admiralty and maritime jurisdiction in civil cases.

Rule No. 1.

The Process.—No mesne process shall issue from the District Courts in any civil cause of admiralty and maritime jurisdiction, until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

RULE No. 2.

Suits in personam.—In suits *in personam*, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*, or by a warrant of arrest of the person of the defendant, with a clause therein that, if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of garnishees named therein, or by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

RULE No. 3.

Bail for Appearance.—In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

RULE No. 4.

Attachments.—In all suits *in personam*, where goods and chattels, or credits and effects are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

RULE No. 5.

Bonds and Stipulations.—Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the

court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

RULE No. 6.

Reduction of Bail.—In all suits *in personam*, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given upon motion, and due proof thereof.

RULE No. 7.

Warrant of Arrest.—In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

RULE No. 8.

The Ship's Tackle, &c.—In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

RULE No. 9.

Cases of Seizure.—In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the District Court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

RULE No. 10.

Perishable Property.—In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into the court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in the court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

RULE No. 11.

Delivery of Ship to Claimant.—In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him, upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of, as it may deem most for the benefit of all concerned.

RULE No. 12.

Material-men.—In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*.

RULE No. 13.

Mariners' Wages.—In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone *in personam*.

RULE No. 14.

Pilotage Suits.—In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone *in personam.*

RULE No. 15.

Collisions.—In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam.*

RULE No. 16.

Assault and Battery.—In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

RULE No. 17.

Hypothecations.—In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam.*

RULE No. 18.

Bottomry Bonds.—In all suits on bottomry bonds, properly so-called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrong-doer.

RULE No. 19.

Salvage.—In all suits for salvage, the suit may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

RULE No. 20.

Petitory and Possessory Suits.—In all petitory and possessory suits between part owners or adverse proprietors, or by the

owners of a ship, or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others, to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others, to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

RULE No. 21.

Enforcement of Final Decree.—In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof, out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

RULE No. 22.

Seizures for Violations of Law.—All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information or libel of information shall also propound, in distinct articles, the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest, to appear and show cause at the return day of the process, why the forfeiture should not be decreed.

RULE No. 23.

Libels in Instance Cases.—All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and if the libel be *in rem*, that the property is within the district; and if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the

defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

RULE No. 24.

Amendments to Libels.—In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

RULE No. 25.

Security for Costs.—In all cases of libels *in personam*, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

RULE No. 26.

Verification of Claim.—In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made, is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

RULE No. 27.

Answer Verified.—In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation, and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

RULE No. 28.

Exceptions to Answer.—The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

RULE No. 29.

Failure to Answer.—If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

RULE No. 30.

Further Answer.—In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso*, against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

RULE No. 31.

Criminating Answer.—The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel, which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offense.

RULE No. 32.

Interrogatories in Answers.—The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation, to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

RULE No. 33.

Inability to Answer.—Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

RULE No. 34.

Intervention of Another Party.—If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the cause of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by the order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein, as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final de-

cree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

RULE No. 35.

Stipulations.—The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

RULE No. 36.

Exceptions.—Exceptions may be taken to any libel, allegation, or answer, for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found.

RULE No. 37.

Attachment and Garnishment.—In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

RULE No. 38.

Property Brought into Court.—In all cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and, if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and, upon failure of the party to comply with the order, may award an attachment or other compulsive process, to compel obedience thereto.

RULE No. 39.

The Suit Abandoned.—If, in any admiralty suit, the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

RULE No. 40.

Rescinding of the Decree.—The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

RULE No. 41.

Sales of Property.—All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

RULE No. 42.

Deposit of the Moneys.—All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn, and the date thereof.

RULE No. 43.

Intervention for Proceeds.—Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene *pro interesse suo* for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear

and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

RULE No. 44.

Reference to Commissioners.—In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

RULE No. 45.

Appeals.—All appeals from the District to the Circuit Court must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specially made in the particular suit; or in case no such rule or order be made, then within thirty days from the rendering of the decree.

RULE No. 46.

Cases not provided for.—In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits of admiralty.

RULE No. 47.

Bail on Arrest.—In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made upon similar or analogous process issuing from the State courts.

Imprisonment for Debt.—And imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished upon similar or analogous process issuing from a State court.

RULE No. 48.

Limitation of Rule No. 27.—The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

Repeal of Rules.—All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

RULE No. 49.

Further proof on Appeal.—Further proof, taken in a Circuit Court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a Circuit Court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles travel; provided that the court, in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

RULE No. 50.

Oral Evidence on Appeal.—When oral evidence shall be taken down by the clerk of the District Court, pursuant to the above mentioned section of the act of Congress, and shall be transmitted to the Circuit Court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

RULE No. 51.

New Facts in Answer.—When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the District Court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

RULE No. 52.

The Records on Appeals.—The clerks of the District Courts shall make up the records to be transmitted to the Circuit Courts on appeals, so that the same shall contain the following:

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and if any sale has been made, the orders, warrants, and reports relating thereto.

4. The libel, with exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made and so much of the report as shows what results were arrived at by the assessor are to be stated.

10. The final decree.

11. The prayer for an appeal and the action of the District Court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:

1. The continuances.

2. All motions, rules, and orders not excepted to, which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some ex-

ception to a deposition in the District Court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases, it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

[Hereafter, in making up the record to be transmitted to the Circuit Court on appeal, the clerk of the District Court shall omit therefrom any of the pleading, testimony, or exhibits which the parties, by their proctors, shall, by written stipulation agree, may be omitted; and such stipulation shall be certified up with the record. Amendment promulgated May 2d, 1881.]

The clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

Rule No. 53.

Costs on Cross-libels.—Whenever a cross-libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

Supplementary rules of practice in admiralty, under the Act of March 3d, 1851, entitled "An Act to limit the liability of ship-owners, and for other purposes."

Rule No. 54.

Libel against a Ship.—When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he

or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the said act above recited, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

RULE No. 55.

Proof of Claims.—Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expenses), shall be divided *pro rata* amongst the several claimants, in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

RULE No. 56.

Party or Parties Defendant.—In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their

liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

RULE No. 57.

The filing of the Libel.—The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

RULE No. 58.

Rules applicable to Circuit Courts.—All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of the United States where such cases are or shall be pending in said courts upon appeal from the District Courts.

(Promulgated March 30th, 1881.)

CHAPTER IV.

CONTROVERSIES OF THE UNITED STATES.

The Constitution extends the judicial power of the United States to "controversies to which the United States shall be a party."

1. The Nature of these Controversies. — It will be observed that in this and the ensuing clauses, which contain grants of judicial power, the term "controversies" is used instead of the word "cases." The word "cases" is employed in the first three grants, and the word "controversies" is used in reference to the other six. The Constitution, in stating the original and appellate jurisdiction of the Supreme Court, applies the term "cases" comprehensively to all these specific grants of judicial power.

Mr. Tucker regards the term "cases" as including all cases, whether civil or criminal; and in respect to the term "controversies," he makes the following remarks:

"The word 'controversies,' as here used, must be understood merely as relating to such as are of a *civil* nature. It is probably unknown in any other sense, as I do not recollect ever to have heard the expression *criminal controversy*. As here applied, it seems particularly appropriated to such disputes as might arise between the United States and any one or more States, respecting territorial or fiscal matters, or between the United States and their debtors, contractors, and agents. This construction is confirmed by the application of the word in the ensuing clauses, where it evidently refers to disputes of a *civil* nature only, such, for example, as may arise between two or more States, or between citizens of different States, or between a State and citizens of another State." (1 Tuck. Black. Comm. App. 420, 421.)

Mr. Justice Iredell, in *Chisholm* v. *Georgia*, 2 Dall. 419, 431, 432, observes: "It cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government, are uniformly to be considered of a local nature, and to be decided by its particular laws. The word 'controversy,' in-

deed, would not, naturally, justify any such construction." Mr. Curtis remarks: "The word 'controversies' seems to embrace only civil suits, for, where all suits, civil or criminal, are evidently intended, the Constitution employs the term 'cases.'" (Curtis's Comm. 58.)

The meaning of the constitutional clause evidently is, that the judicial power shall extend to civil "controversies to which the United States shall be a party." Criminal prosecutions, in the name and by the authority of the United States, are fully provided for in the clause which refers to cases arising under the Constitution, laws, or treaties of the United States.

The controversies here referred to as those to which "the United States shall be a party," must admit of judicial settlement, and hence the term must be limited in its application to such as can be determined in a court or justice. It has no reference to controversies that are purely diplomatic, or such as belong exclusively to the political department of the Government, or such as relate to the prerogatives and duties of the President of the United States, as defined by the Constitution or the law. Such controversies are not judicial in their nature.

In *The State of Mississippi* v. *Johnson*, 4 Wall. 475, an attempt was made to restrain President Johnson from executing the reconstruction laws of Congress in that State. The court, however, held that "the President of the United States cannot be restrained by injunction from carrying into effect an act of Congress, alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed," and that "it makes no difference whether such incumbent of the Presidential office be described in the bill as President, or merely as a citizen of a State."

A similar attempt was made in *The State of Georgia* v. *Stanton*, 6 Wall. 50, to enjoin the Secretary of War and other officers who represent the Executive authority of the United States, from carrying into execution certain acts of Congress; and the case was dismissed on the ground that it "calls for a judgment upon a political question, and will therefore not be entertained by this court." The matter in both of these cases was not judicial, and hence the court had no jurisdiction over it.

2. The United States a Party.—The language of the Constitution is, that the judicial power shall extend to "controversies

to which the United States shall be a party." This says nothing about any other party. It is sufficient if a civil controversy be presented to a court, and the United States be a party thereto. This makes the case contemplated in the Constitution, as coming within the scope of the judicial power of the United States.

There can be no doubt that this clause of the Constitution includes civil controversies in which the United States shall appear as plaintiff or petitioner, and hence, that, with proper legislation by Congress, in the establishment of courts, and in the bestowment of the necessary jurisdiction, the General Government may bring suits in its own courts for the judicial enforcement of its claims. It was the design of those who framed the Constitution, not only that the Government organized under it should have courts, but that it should be able to use these courts in asserting its own claims against other parties.

Mr. Justice Story remarks: "A sovereign without the means of enforcing civil rights, or compelling the performance, either civilly or criminally, of duties on the part of the citizens, would be a most extraordinary anomaly. It would prostrate the Union at the feet of the States. It would compel the National Government to become a suppliant for justice before the judicature of those who were by other parts of the Constitution placed in subordination to it." (Story's Const. sec. 1674.)

It does not, however, follow, because the judicial power extends to "controversies to which the United States shall be a party," that the General Government may be sued in its own courts, and, hence, be made a "party" in the sense of being a defendant. The general maxim of law is, that a sovereign State cannot, without its own consent, be made amenable to suits brought against it. This immunity is assumed to inhere in the very nature of sovereignty, and to be founded on important public considerations. The United States, as an organized body politic, form a sovereign nation within the sphere of its powers; and, hence, without their consent given by a law of Congress, they are not suable in any court, whether State or Federal.

Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 412, said that "the universally received opinion is that no suit can be commenced or prosecuted against the United States," and that "the Judiciary Act does not authorize such suits." The same doctrine has on several occasions been referred to by the Supreme

Court of the United States, as an established principle. (*The United States* v. *Clarke*, 8 Pet. 436; *Same* v. *McLemon*, 4 How. 286; *Hill* v. *The United States*, 9 How. 386; *Nations* v. *Johnson*, 24 How. 195; *The Siren*, 7 Wall. 152; and *The Davis*, 10 Wall. 15.)

The States of the Union, as sovereign bodies politic, within the sphere of their reserved rights, possess the same immunity from suits brought against them, except as they have surrendered this immunity and consented to be sued. A State can, under the Constitution, be sued by another State in the Supreme Court of the United States, and, before the adoption of the Eleventh Amendment, it could be sued in that court by citizens of another State, or by citizens or subjects of a foreign State. But this liability to suit was, in *Chisholm* v. *Georgia*, 2 Dall. 419, placed expressly on the ground that the people of the several States, in adopting the Constitution, had given their consent to such liability, and made it a part of the fundamental law of the land.

The United States may, through the legislative action of Congress, give a similar consent; and this, as will appear in the sequel, is the fact within certain defined limits. But, without such consent, the principle of non-suableness is alike applicable to the several States and to the United States. (*The Railroad Co.* v. *Tennessee*, 11 Otto, 337; and *The Railroad Co.* v. *Alabama*, 11 Otto, 832.) There is no dispute in the courts of this country as to this principle of law.

3. Officers and Agents of the United States.—The question, however, has arisen whether the same immunity from suits attaches to the officers and agents of the United States when, as such, they hold property in the name of and for the United States. The Supreme Court of the United States, in *The United States* v. *Lee*, and *Kaufman & Strong* v. *Lee*, 27 Albany Law Journal, 10—cases not yet regularly reported—has recently, in a very elaborate opinion by Mr. Justice Miller, answered this question in the negative.

The property in dispute was the property known as the Arlington estate, which was by Mr. George Washington Park Custis devised to his daughter, the wife of General Robert E. Lee, and, after her death, to her son, George W. P. C. Lee, and was situated in the county of Alexandria, in the State of Virginia. This prop-

erty, consisting of about eleven hundred acres, was, some twenty years since, sold by commissioners for taxes alleged to be due to the United States and unpaid. At this sale the property was bid in by the commissioners for the United States; and, through the title thus acquired, the General Government, through its officers, has held it and appropriated it to public uses.

Mr. Lee, claiming that his title by the will of his grandfather Custis had not been legally divested, brought a suit in the Circuit Court for the county of Alexandria, in Virginia, against Kaufman & Strong and others, as officers of the United States holding the property, for its recovery. The suit was not against the United States *eo nomine*, but against the officers and agents of the Government. The action thus commenced in a State court was removed into the Circuit Court of the United States for the district of Virginia, where the issue was tried. The result was a verdict in favor of Mr. Lee, declaring that the tax sale had not legally transferred the property to the United States, and hence that the lawful title thereto was still vested in him.

The case was then by writ of error removed to the Supreme Court of the United States; and this court sustained the judgment of the court below as to the validity of the title of Mr. Lee and the invalidity of the tax sale and the certificate thereof under which the United States held the property. The court said that "the United States acquired no title under tax sale proceedings."

It was, however, claimed that, although "what is set up in behalf of the United States is no title at all," still the court could render no judgment in favor of Mr. Lee against the defendants in the action, "because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses."

To this claim Mr. Justice Miller replied as follows:

"This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the Government. The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied."

It is to the proof of this denial that Mr. Justice Miller devotes the larger part of the opinion; and for this purpose he cites a series of cases in which the court had sustained actions against the officers or agents of a State or of the United States to recover the possession of property held by them as such officers or agents, and in which neither the State, in the one case, nor the United States, in the other, were made a party defendant on the record, although one or the other was the real party in interest. (*The United States* v. *Peters*, 5 Cranch, 115; *Meigs* v. *McClung's Lessee*, 9 Cranch, 11; *Wilcox* v. *Jackson*, 13 Pet. 498; *Georgia* v. *Madrazo*, 1 Pet. 110; *Osborn* v. *The United States Bank*, 9 Wheat. 738; *Grisar* v. *McDowell*, 6 Wall. 363; *Brown* v. *Huger*, 21 How. 305; *Davis* v. *Gray*, 16 Wall. 204; *The Siren*, 7 Wall. 152; and *The Davis*, 10 Wall. 15.)

After commenting upon these cases, and explaining their analogy to the case pending before the court, Mr. Justice Miller proceeded to say:

"This examination of the cases in this court establishes clearly this result: That the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson*, *Brown* v. *Huger*, and *Grisar* v. *McDowell*, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

This case settles the question, even if it were previously in doubt, that although an individual cannot directly bring an original suit against the United States, and make the United States a defendant party on the record, he may bring such a suit against an officer or agent of the United States having the custody and possession of the property thereof, and that in such a suit the title of the United States to the property in dispute may be inquired

into and determined by the court, as in any other case where the court has lawful jurisdiction. The fact that the property is claimed by the United States, and held by officers or agents thereof, does not preclude such an inquiry. If it were otherwise, there would be no remedy for the private citizen, however unjustly he might be deprived of his property by the General Government. The mere fact of possession by the United States through the officers thereof, whether with or without due process of law, and whether with or without just compensation, would end the question, so far as courts are concerned.

4. Statutory Regulation.—The provision of the Constitution, under consideration, is not self-executing; and, hence, in order to become operative, it must be supplemented by legislation to carry it into effect. In what controversies can the United States appear as a party? What courts shall have cognizance of these controversies? Is the term "party," as here used, to be understood as comprehending both plaintiff and defendant, so that the United States may be either, suing in the one instance and being sued in the other? Congress must by legislation answer these questions, designating the controversies which, the United States being a party thereto, shall be submitted to the Federal tribunals, and also designating the tribunals that shall have cognizance of the same. Congress must create the courts and confer upon them the necessary jurisdiction, and these courts must carry the provision into effect under the regulations of law. All this is necessary to give to the provision operative force.

What, then, has been the legislation of Congress on this subject? The general answer to this question is that Congress has given to the Federal courts cognizance of suits brought *by* the United States against other parties, and that, with the exception of the Act of February 24th, 1855, establishing a Court of Claims, and other acts amendatory thereof, it has never authorized suits to be brought *against* the United States.

The Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), in its ninth section, provided that the District Courts shall have cognizance "of all suits for penalties and forfeitures incurred under the laws of the United States," and "of all suits at common law where the United States sue and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars." The

same act provided, in its eleventh section, that the Circuit Courts shall have original cognizance "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners."

So, also, Congress, by the Act of March 3d, 1815 (3 U. S. Stat. at Large, 244), provided that the District Courts shall have cognizance "of all suits at common law where the United States or any officer thereof, under the authority of any act of Congress, shall sue, although the debt or claim or other matter in dispute shall not amount to one hundred dollars."

These and other similar provisions of law, in their essential substance found in the Revised Statutes, contemplate the United States as the suing party, and were designed to give effect to the constitutional provision which extends the judicial power to "controversies to which the United States shall be a party" in the sense of being the plaintiff or petitioner. They do not authorize suits to be brought against the United States; and, if this authority had not been given by other legislation, no such suit could be entertained by any Federal court.

5. Judgments for the United States.—The non-suableness of the United States, unless with the consent of Congress, does not, however, preclude a writ of error for the review of a judgment rendered by an inferior court in favor of the United States. Chief Justice Marshall, after saying, in *Cohens* v. *Virginia*, 6 Wheat. 264, 412, that "no suit can be commenced or prosecuted against the United States," proceeds to say: "Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested that such a writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court."

The person against whom a judgment has been rendered by a lower court in favor of the United States does not, by suing out a writ of error to obtain a review of this judgment by a higher court, bring a suit against the United States. He simply removes the judgment, rendered in the suit brought against him, to an appellate court for the purpose of review. His relation to the

case as the defendant party, and the relation of the United States as the plaintiff, are not changed by the removal. It is the same case before a higher court for review.

6. The Right of Set-offs.—The non-suableness of the United States does not exclude other parties, in suits brought against them by the United States, from the right to claim the benefit of credits or set-offs against the United States. The Supreme Court, in *The United States* v. *The Bank of the Metropolis*, 15 Pet. 377, 392, spoke as follows on this point:

"When the United States, by its authorized officer, became a party to a negotiable paper, they have all the rights, and incur all the responsibilities of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued. But if the United States sue, and a defendant holds its negotiable paper, the amount of it may be claimed as a credit, if, after being presented, it has been disallowed by the accounting officers of the Treasury; and if the liability of the United States upon it be not discharged by some of those causes which discharge a party to commercial paper, it should be allowed by a jury as a credit against the debt claimed by the United States. This is the privilege of the defendant for all equitable credits given by the Act of March 3d, 1797."

The fourth section of the act here referred to is the basis of section 951 of the Revised Statutes, which reads as follows: "In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, except such as appear to have been presented to the accounting officers of the Treasury for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury, by absence from the United States, or by some unavoidable accident." (1 U. S. Stat. at Large, 512.)

Section 952 of the Revised Statutes, reproducing a part of the fifteenth section of the Act of July 2d, 1836 (5 U. S. Stat. at Large, 80), provides as follows: "No claim for a credit shall be allowed, upon the trial of any suit for delinquency against a postmaster, contractor or other officer, agent or employee of the Post-Office Department, unless the same has been presented to the

Sixth Auditor and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said Auditor a claim for such credit by some unavoidable accident."

These provisions of law are rules to regulate the action of courts in respect to credits and set-offs, claimed by parties against whom suits are brought in behalf of the United States. They recognize the right of such set-offs, subject to the limitations imposed by law.

7. Priority of the Claims of the United States. — Congress, by the fifth section of the Act of March 3d, 1797, and a clause of the sixty-fifth section of the Act of March 2d, 1799 (1 U. S. Stat. at Large, 515, 676), provided that the claims of the United States should, in the cases specified, have the precedence, as to payments over all other claims. This legislation, as reproduced in section 3466 of the Revised Statutes, is as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The fifth section of the Act of March 3d, 1797, was considered by the Supreme Court, in *The United States* v. *Fisher*, 2 Cranch, 358, and the doctrine laid down in this case was, that the provision "giving a preference to the United States in cases of insolvency, is not confined to persons accountable for public money, but extends to debtors of the United States generally."

In *The United States* v. *Hoe*, 3 Cranch, 73, it was held that the United States have no lien on the estate of their debtor until suit brought, or a notorious insolvency or bankruptcy has taken place, or, being unable to pay all his debts, he has made voluntary assignment of all his property, or the debtor having absconded, concealed, or absented himself, his property has been attached by

process of law. At least one of these conditions must exist in order to establish the priority of the claim of the United States, as provided in the statute.

In *Prince* v. *Bartlett*, 8 Cranch, 431, it was held that "the insolvency necessary to give the United States a priority, must be a legal insolvency, and not a mere failure or inability to pay debts."

In *The United States* v. *Howland*, 4 Wheat. 108, it was held that, under the sixty-fifth section of the Act of March 2d, 1799, the United States are not entitled to a priority of payment over all other creditors, upon the ground that the debtor has made an assignment for the benefit of creditors, unless it is proved that he has made an assignment of *all* his property, and that the *onus probandi* on this question of fact is upon the United States.

In *Conrad* v. *The Atlantic Insurance Co.*, 1 Pet. 386, it was held that the priority of the United States "does not affect a mortgage of part of the debtor's property, made to secure a *bona fide* debt."

In *Brent* v. *The Bank of Washington*, 10 Pet. 596, it was held that the priority of the United States for debts due to them by an insolvent debtor, or by the estate of a deceased debtor, does not extend to affect the lien of an incorporated bank on the stock held by one indebted to the bank, when, by the charter of the bank, such lien is given.

In *Beaston* v. *The Farmers' Bank of Delaware*, 12 Pet. 102, it was held that, under the fifth section of the Act of March 3d, 1797, giving a right of priority of payment to the United States, in certain cases, a corporation may be included in the word person. Mr. Justice McKinley, in stating the opinion of the court, said that the construction of the statute by the court had established the following rules: "First, that no lien is created by the statute; secondly, the priority established can never attach while the debtor continues the owner and in possession of the property, although he may be unable to pay all his debts; thirdly, no evidence can be received of the insolvency of the debtor until he has been devested of his property in one of the modes stated in the section; and, fourthly, whenever he is thus devested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property."

In *The United States* v. *Herron*, 20 Wall. 251, it was held that a debt due to the United States, though by one who owes it

as a surety only, is not barred by the debtor's discharge under the Bankrupt Act of 1867, and that no general words in a statute can divest the Government of its rights or remedies.

In *Bayne et al. Trustees* v. *The United States*, 3 Otto, 642, it was held that a party who obtains from a disbursing officer public moneys without right thereto, and with full knowledge that they are such, becomes indebted to the United States, within the meaning of the fifth section of the Act of March 3d, 1797, and, in the event of his insolvency, the United States is entitled to priority of payment out of his assets.

These cases show the judicial construction given to the statute by the decisions of the Supreme Court of the United States.

Section 3467 of the Revised Statutes, reproducing a part of the sixty-fifth section of the Act of March 2d, 1799 (1 U. S. Stat. at Large, 676), provides as follows:

"Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It was held, in *Field* v. *The United States*, 9 Pet. 182, that, under this provision, if the assignees of an insolvent debtor have notice of a claim of the United States, they are not protected by an order of a State court to distribute the funds to other creditors; that if any of the property comes into their hands subject to liens, they must be satisfied out of that property, not out of the general fund; and that the assignees are liable only for funds received by them, not for promissory notes not yet payable.

Section 3468 of the Revised Statutes, reproducing a portion of the sixty-fifth section of the Act of March 2d, 1799 (1 U. S. Stat. at Large, 676), provides as follows:

"Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come into the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee, of such surety, pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and

effects of such insolvent or deceased principal as is secured to the United States, and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon." (*Thelusson* v. *Smith*, 2 Wheat. 396; and *Hunter* v. *The United States*, 5 Pet. 173.)

8. The Court of Claims.—As already stated, Congress, by the Act of February 24th, 1855, established a Court of Claims, and provided, in this act and in subsequent acts amendatory thereof, for bringing in this court a certain class of suits *against* the United States, thereby giving its consent to such suits. There was, prior to this legislation, for claimants against the United States, no court to which they could appeal, and at whose hands seek judicial relief. Congress was the only body before which they could bring their claims against the General Government.

Mr. Justice Story in his day spoke of this as a defect, and, in many instances, as involving wrong which it was the duty of Congress to correct. (Story's Const. sec. 1678.) The remedy supplied by Congress is in the Court of Claims, having a jurisdiction limited and defined by law. It is sufficient here to allude to this court, since its organization and powers will be the subject of a future chapter.

CHAPTER V.

CONTROVERSIES BETWEEN TWO OR MORE STATES.

1. Articles of Confederation.—The Articles of Confederation, which preceded and were superseded by the Constitution of the United States, provided, in the ninth article, that "the United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that may hereafter arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever." This authority was to be exercised by the creation of a tribunal in the manner specified, whose judgment was to be final and conclusive. The provision extended to all disputes, either then pending between two or more States, or that might thereafter arise.

The legislatures of the several States, in adopting these Articles, gave their consent that all such disputes and differences should be settled in this way. It is well known that, at the time and also when the Constitution was adopted, there were controversies pending between several of the States respecting the question of boundaries. New York and New Hampshire both claimed the territory which now forms Vermont. Connecticut claimed a portion of what is now a part of New York and Pennsylvania. Rhode Island and Massachusetts were disputing as to the boundary line between them. Some of these disputes were of long standing.

It was in view of this fact, and as a peaceful remedy therefor, that, in the compact made by the Articles of Confederation, a way was provided for settling all such disputes and all others that might arise between States. The matter was committed to a special court created in each case.

2. The Constitutional Provision.—The same theory led the framers of the Constitution to provide that the judicial power of the United States shall extend to "controversies between two or more States," and that in all cases "in which a State shall be party the Supreme Court shall have original jurisdiction." The Judi-

ciary Act of 1789 (1 U. S. Stat. at Large, 73), which established the judicial system of the United States on the basis of the Constitution, declared "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States or aliens, in which latter case it shall have origiual but not exclusive jurisdiction." This provision is continued in section 687 of the Revised Statutes of the United States.

The people of the several States, in adopting the Constitution, and by it extending the judicial power of the United States to "controversies between two or more States," and in giving in these cases original jurisdiction to the Supreme Court, waived their right as sovereign States to exemption from the operation of judicial power, and consented that such controversies should be authoritatively and finally determined by the supreme tribunal of the land. This consent enables the States to bring suits against each other in the proper court for the judicial settlement of controversies between them.

The consent, as remarked by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 380, is "given in a general law," which is the Constitution. "The States," says Mr. Justice Baldwin in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 720, "waived their exemption from judicial power, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases."

The Constitution, in declaring that "no State shall, without the consent of Congress, * * * enter into any agreement or compact with another State or with a foreign State," expressly excludes from the States all power to settle differences between themselves by the process of direct negotiation, without the previous consent of Congress. If, therefore, a controversy arises between two or more States, they must, in order to adjust it by mutual agreement or compact, obtain this consent. Failing to do so, they must resort to the judicial power vested in the Supreme Court, as the only tribunal authorized to determine the matter in dispute. A resort to the sword is out of the question. The United States could not, in consistency with their own safety, tolerate such a remedy for a moment. One of the objects of the Constitution is to "insure domestic tranquillity," and prevent the

States from ever assuming the belligerent attitude toward each other.

3. Jurisdictional Parties.—The jurisdiction, conferred by the Constitution and the law in these cases, depends wholly upon the parties to the suit, without regard to the subject-matter of the controversy. The controversy is described in the Constitution as "being between two or more States." The parties are States; and the jurisdiction of the Supreme Court to consider and determine the matter in dispute depends upon this fact.

The reference is to States as members of the Union. It was held in *The Cherokee Nation* v. *Georgia*, 5 Pet. 1, that an Indian tribe within the United States, though a State in the general sense, is not a foreign State, and not a State within the meaning of the third article of the Constitution, and hence that the Cherokee tribe of Indians could not sue the State of Georgia in the Supreme Court of the United States. So, also, in *Scott* v. *Jones*, 5 How. 343, 377, it was said by Mr. Justice Woodbury that, in order to give jurisdiction, a State "must be a member of the Union," and that, under the twenty-fifth section of the Judiciary Act of 1789, the Supreme Court has no jurisdiction to try the question whether a political body which passed a particular law was a State or not in this sense, since it is only the statute of a State which can be thus re-examined.

It is for Congress to admit new States into the Union, and for courts to take judicial knowledge of such admission, without undertaking to pass judgment upon the legitimacy of the process. A State recognized by Congress as a member of the Union, is one of the United States for all judicial purposes. The action of Congress is final and conclusive on this question of fact.

The Territories of the United States, though organized political communities, are not States in the constitutional sense, and the District of Columbia is not a State; and, hence, neither can sue or be sued under this provision of the Constitution. The provision has no application to either.

A State, in order to come within the operation of the provision, must not only be a member of the Union, but must also be a party in the record of the suit; and, hence, in a suit between two States, both must be such parties, the one as plaintiff or petitioner, and the other as defendant.

Chief Justice Marshall, in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 857, observed: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record." He also said that "in cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest, without having the right of exercising any jurisdiction in the case."

The record, in a suit between States, must, therefore, on its face, and simply from inspection, show that both States are parties, the one prosecuting a remedy against the other. If this be not shown, no jurisdiction will attach to the case.

4. The Process.—The Judiciary Act of 1789, which originally gave jurisdiction to the Supreme Court in cases where a State is a party, contained no specific process or procedure for bringing a suit against a State; and hence the Supreme Court, being vested with jurisdiction in such cases, assumed the right, without any further legislation, to "regulate and mold the process it uses in such manner as in its judgment will best promote the purposes of justice."

It was held in *Chisholm* v. *Georgia*, 2 Dall. 419, that, when a suit is brought against a State, the service of a summons on the Governor and Attorney-General of the State will be sufficient; and, in *Georgia* v. *Brailsford*, 2 Dall. 402, it was held that, when a State brings a suit, the bill should be filed by the Governor in behalf of the State. In *Grayson* v. *Virginia*, 3 Dall. 320, the Supreme Court adopted the following general order: "That when process at common law, or in equity, shall issue against a State, the same shall be served upon the Governor or chief executive magistrate and the Attorney-General of such State."

The doctrine laid down in *The Governor of Georgia* v. *Madrazo*, 1 Pet. 110, was that "where the chief magistrate of a State is sued, not by his name, but in his official character, and the claim is made upon him solely by reason of his holding the

office of Governor, and no decree could be made against him personally, the State must be considered as the real party on the record."

Chief Justice Taney, in *Kentucky* v. *Dennison*, 24 How. 66, 98, having adverted to prior cases before the Supreme Court, proceeded to say: "Where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State where the State is plaintiff, and he must be summoned or notified as the officer representing the State where the State is defendant."

In *The State of Pennsylvania* v. *The Wheeling Bridge Co.*, 13 How. 518, 560, Mr. Justice McLean, in answer to the objection that there was no evidence that the State of Pennsylvania had consented to the prosecution of the suit in its name, said: "This would seem to be answered by the fact that the proceedings were instituted by the Attorney-General of the State. He is its legal representative, and the Court cannot presume, without proof, against his authority." The resolution of the legislature of the State, directing the Attorney-General to institute these proceedings, was cited in support of his authority.

The fifth of the Rules of the Supreme Court, adopted by the court in 1796, when the case of *Grayson* v. *Virginia*, 3 Dall. 320, was pending before it, provides as follows: 1. That "when a process at common law, or in equity, shall issue against a State, the same shall be served upon the Governor or chief executive magistrate, and the Attorney-General of such State." 2. That "process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte*."

In *Huger* v. *South Carolina*, 3 Dall. 339, it was held that "leaving a copy of a subpœna, in a suit against a State, at the house of the Governor, is a sufficient service on him," and that this service of the subpœna being proved, the complainant is entitled to proceed *ex parte* in the event that the State fails to appear on the return day. The same doctrine was stated by Chief Justice Marshall, in *New Jersey* v. *New York*, 5 Pet. 284, 291.

So, also, if a State, having appeared in a suit brought against it, withdraws its appearance, the adverse party may then proceed *ex*

parte. (*Rhode Island* v. *Massachusetts*, 12 Pet. 657.) No State can either oust or escape the jurisdiction of the Supreme Court by disregarding its process.

5. The Matter in Dispute. — The Constitution designates the matter in dispute by the general term "controversies," evidently intending to make the grant of power so comprehensive as to apply to any subject of dispute between two or more States that is capable of being judicially determined. This term is a substitute for the phrase "disputes and differences," as used in the Articles of Confederation. The Judiciary Act of 1789 translates it by the words "all controversies of a civil nature." Such controversies, when brought before a court, are simply suits in law or equity, in which one party sets up the claim of legal or equitable rights against the other, and asks the court to afford the proper relief in the premises. The subject-matter comprehended in these controversies is as broad as these rights.

Mr. Justice Baldwin, in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721, said that, "though the Constitution does not in terms extend the judicial power to *all* controversies between two or more States, yet it in terms excludes none, whatever may be their nature or subject." Further on in the same opinion (p. 722) he said: "This court, in construing the Constitution as to the grants of powers to the United States, and the restrictions upon the States, has ever held that an exception of any particular case, presupposes that those which are not excepted are embraced within the grant or prohibition, and has laid it down as a general rule that, where no exception is made in terms, none will be made by mere implication or construction. (6 Wheat. 378; 8 Id. 489, 490; 9 Id. 206, 207, 216; and 12 Id. 438.)"

The term "controversies," therefore, covers the whole field of disputes and differences between States that possess a judicial character and admit of settlement by a court of justice, whatever may be the matter involved. It embraces, in the language of the Judiciary Act of 1789, "all controversies of a civil nature, where a State is a party." The Constitution makes no exception, whatever may be the subject in dispute, and none can be made by mere implication. The design of the framers of the Constitution was to provide, in the judicial power of the United States, the means of peacefully determining all controversies between the dif-

ferent States of the Union, and thus preclude all occasion for a resort to violence as a remedy for injustice. The provision that the Supreme Court shall have original jurisdiction in all cases "in which a State shall be party," was intended as a tribute of deference to the dignity of a State.

Nearly all the suits between States which the Supreme Court has had occasion to determine have, as to the matter in controversy, related to the question of their boundary lines, and, hence, have incidentally involved the question of State jurisdiction over the territory in dispute. The case of *New Jersey* v. *New York*, 5 Pet. 284, was that of a bill filed by the former State against the latter, "for the purpose of ascertaining and settling the boundary between the two States."

In the case of *Missouri* v. *Iowa*, 7 How. 660, the allegation of the complaining State was, that the defendant had obtruded on and claimed a portion of its territory, and wrongfully ousted its jurisdiction over the said territory, having actual possession thereof, and claiming it to be within its limits, contrary to the rights of the State bringing the suit. The Supreme Court examined this question, and determined the true boundary between the litigating States, and thus settled the controversy between them.

The case of *Florida* v. *Georgia*, 17 How. 478, was a controversy as to the boundary line between the two States. Chief Justice Taney, in stating the opinion of the court, said that "it is settled, by repeated decisions, that a question of boundary between States is within the jurisdiction" conferred by the Constitution on the Supreme Court; that such a question is "in its nature a political question, to be settled by compact made by the political departments of the government;" but that, "under our Government, a boundary between two States may become a judicial question, to be settled by this court;" and that the "decision, when pronounced, is conclusive upon the United States, as well as upon the States that are parties to the suit."

The same question was involved in *Alabama* v. *Georgia*, 23 How. 505.

The most notable of all the cases in the amplitude and length of the discussion by the Supreme Court, is that of *Rhode Island* v. *Massachusetts*, 12 Pet. 657. The matter in dispute was that of the true boundary line between the two States; and inasmuch as the jurisdiction of the court over such a question was denied, Mr.

Justice Baldwin, in stating the opinion of the court, said: "Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matter in controversy between the parties, who are two States of the Union, sovereign within their respective boundaries, save that portion of power which they have granted to the Federal Government, and foreign to each other for all but Federal purposes." The learned Justice traversed the whole question by an elaborate and exhaustive argument, leading to the conclusion adopted by the court, that "this court has jurisdiction of a suit in equity brought by one State against another, to determine a question of disputed boundary."

The question before the court, in *Virginia* v. *West Virginia*, 11 Wall. 39, was whether certain counties belonged to the former or the latter of these States. Both States claimed rightful jurisdiction over them, and, in order to determine this question, it became necessary to examine and construe the series of acts by which West Virginia was erected into a State out of a portion of the territory of Virginia, and by Congress admitted into the Union. It was claimed by one of the parties to this controversy that the court had no jurisdiction of the case, because it involved "the consideration of questions purely political."

Mr. Justice Miller, in answer to this claim, referred to various cases in which the court had passed judgment in controversies between States, and then proceeded to say; "We consider, therefore, the established doctrine of this court to be, that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated because, in deciding that question, it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding."

These cases settle the question of jurisdiction in the Supreme Court over controversies between two or more States, relating to the subject of boundary lines between them. The Constitution gives to this court original jurisdiction in such suits; and States have no sovereignty which exempts them from its operation. No State can oust or defeat the jurisdiction by omission to obey the summons of the court, or declining to appear at its bar. The court can proceed in its absence, after proper notice, and make a

decree that will bind the State, even though it should affect its political sovereignty over the territory which is the subject of the dispute.

The decree of the Supreme Court upon such a question cannot be lawfully resisted; and should a State attempt to defeat its operation by resistance, it would be the province and duty of the General Government to provide for carrying it into effect, if necessary, by force of arms. There can be no question that Congress has ample power to provide the means needful to give effect to the decisions of this court. These decisions are not mere opinions, but absolute and final laws in respect to the matter upon which they operate; and they must be obeyed whether they affect States or individuals. The whole physical power of the Government is pledged for their execution.

The jurisdiction of the Supreme Court in "controversies between two or more States," is by no means limited to the single question of boundary lines. It extends, as already remarked, to a controversy between States on any subject, that is judicial in its nature, and assumes the form of a suit in law or equity. There can be no doubt that a State can contract a debt and issue legal evidences of the same. If these evidences should become *bona fide* the property of another State, then the relation between the two States would be that of debtor and creditor. If the debtor State should omit to discharge the obligation at maturity, or attempt to repudiate it altogether, then the creditor State would, under the Constitution and the law, be entitled to invoke the original jurisdiction of the Supreme Court, by bringing a suit in that court for the enforcement of its claim. The case presented would be a controversy between two States, clearly judicial in its nature; and if the court can determine a controversy between States in respect to a boundary line, then manifestly it can determine one in respect to a debt obligation.

Moreover, a judgment or decree rendered by the court in such a case would be as authoritative and binding as in any other case. It would be the duty of the parties to abide by the judgment or decree; and if it were adverse to the defendant State, then that State must pay the debt which was the subject of the controversy. Judicial power extends to the *execution* of its own judgments or decrees; and Congress has power to pass all the laws necessary and proper to enable the courts of the United States to execute all the

judgments and decrees they have the right to render, as well against States as against individuals. No State can plead its sovereignty as a State against the constitutional power of Congress, or against decisions rendered by the Supreme Court of the United States.

There is no reason why Congress may not provide for a tax levy, if necessary, upon the inhabitants of a State, to be ordered by the court, for the satisfaction of a judgment or decree rendered by it in favor of one State against another. This would be simply passing a law for carrying into execution the judicial power of the United States; and any law necessary and proper to this end is within the legislative power of Congress. Jurisdiction, in order to be real and effective, must be able to command and control the proper means of its own execution.

6. Assignments to a State.—The legislature of New York, assuming that a State, being the assignee of a debt-obligation against another State, may bring a suit in the Supreme Court of the United States to enforce its payment, passed an act, on the 15th of May, 1880, authorizing the citizens of that State to assign such obligations to the State, and provided in the act for the institution of legal proceedings with a view to the enforcement of these obligations. (Session Laws of New York for 1880, vol. I, p. 440.) This act provides as follows:

"Section 1. Any citizen of this State, being the owner and holder of any valid claim against any of the United States of America, arising upon a written obligation to pay money, made, executed, and delivered by such State, which obligation shall be past due and unpaid, may assign the same to the State of New York, and deliver the assignment thereof to the Attorney-General of the State. Such assignment shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly indorsed upon such assignment before the delivery thereof. Every such assignment shall contain a guaranty, on the part of the assignor, to be approved by the Attorney-General, of the expenses of the collection of such claim, and it shall be the duty of the Attorney-General, on receiving such assignment, to require, on behalf of such assignor, such security for said guaranty as he shall deem adequate."

"Section 2. Upon the execution and delivery of such assignment, in the manner provided for in section one of this act, and furnishing the security as in said section provided, and the delivery of such claim to him, the Attorney-General shall bring and

prosecute such action or proceeding, in the name of the State of New York, as shall be necessary for the recovery of the money due on such claim, and the said Attorney-General shall prosecute such action or proceeding to final judgment, and shall take such proceedings after judgment as may be necessary to effectuate the same."

"Section 3. The Attorney-General shall forthwith deliver to the Treasurer of the State, for the use of such assignor, all moneys collected upon such claim, first deducting therefrom all expenses incurred by him in the collection thereof, and said assignor or his legal representatives shall be paid said money by said Treasurer upon producing the check or draft therefor of the Attorney-General to his or their order and proof of his or their identity."

"Section 4. This act shall take effect immediately."

The legislature of New Hampshire, on the 18th of July, 1879, passed a substantially similar act in respect to citizens of that State having debt obligations against any other State of the Union, past due and unpaid.

Suits in equity, under these acts, respectively, were brought by the State of New Hampshire and the State of New York, in the manner prescribed, in the Supreme Court of the United States, against the State of Louisiana. These suits, in *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 27 Alb. Law Jour. 228, were considered and determined at the same time, and both were dismissed as not coming within the jurisdiction of the court.

Chief Justice Waite, in delivering the opinion of the court, referred to the clauses of the Constitution which extend the judicial power of the United States to "controversies between two or more States," and "between a State and citizens of another State," and which provide that, in all cases "in which a State shall be a party, the Supreme Court shall have original jurisdiction." The Judiciary Act of 1789 gave to this court "exclusive jurisdiction of all controversies of a civil nature where a State is a party," with certain exceptions specified.

In this state of the law occurred the celebrated case of *Chisholm* v. *Georgia*, 2 Dall. 419, in which the Supreme Court held that it could entertain and determine a suit brought against a State by a citizen of another State. The provision of the Constitution under which this decision was made extends the judicial power of the United States to controversies "between a State and citizens of another State." This the court held to be sufficient to

sustain such a suit. The decision in this case led to the adoption of the Eleventh Amendment, which says: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Chief Justice Waite, having quoted this amendment, proceeded to say: "Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is whether they can sue in the name of their respective States after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens."

These suits, though formally in the name of the respective States, were, as Chief Justice Waite claimed, in reality and in legal effect, commenced and prosecuted by the owners of the bonds. They paid all the expenses and were to derive all the benefit from any recovery of money. The States, respectively, in these suits, are "nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them." Such being the facts, no State, simply as a formal assignee, can lend its name to its own citizens for the purposes of a suit against another State, when these citizens themselves cannot bring the suit. They cannot thus indirectly do what they are prevented from doing directly.

Chief Justice Waite concludes the opinion of the court in the following words:

"It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the Chisholm case, there is not even an intimation that if the citizen could not sue, his State could sue for him. The evident purpose of the amendment, so promptly proposed and finally

adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued; and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each of them is consequently dismissed."

This settles the question that, under the Constitution as it now is, the New Hampshire and New York plan of assignment and of suit on the basis of such assignment is not an available remedy for the repudiation of debts by States. It plainly cannot be such a remedy, except by an evasion and virtual nullification of the obvious intention of the Eleventh Amendment. If the Constitution had not been thus amended, the clause which extends the judicial power of the United States to controversies "between a State and citizens of another State," as construed by the Supreme Court in *Chisholm* v. *Georgia*, *supra*, would have enabled such citizens to bring the necessary suits in that court for the enforcement of their claims.

The amendment, however, took away this right and was designed to do so; and to suppose that a State, by accepting an assignment from its own citizens and making itself a collecting agent in their behalf, can, under the clause of the Constitution which enables one State to sue another, in effect re-establish the right thus taken away, is to make the Constitution inconsistent with itself. If one State can do this, then every other State can equally do it; and if all can do it, then the Eleventh Amendment, at the option of the States, may be made practically a dead letter.

The repudiation of debts by States has undoubtedly become an enormous evil, for which the American people should supply an adequate remedy. That remedy consists in so amending the Constitution that the judicial power of the United States will be able to compel the States to pay their debts due to citizens of other States, or to citizens or subjects of foreign States. This is the true remedy, and it is fully within the power of the people to supply it.

CHAPTER VI.

CONTROVERSIES BETWEEN A STATE AND CITIZENS OF ANOTHER STATE.

1. Constitutional Provision.—The Constitution, as it originally stood, provided, in its third article, that the judicial power of the United States shall extend to controversies "between a State and citizens of another State." The Judiciary Act of 1789 gave to the Supreme Court original but not exclusive jurisdiction "of all controversies of a civil nature, where a State is a party," and the suit is "between a State and citizens of other States." (1 U. S. Stat. at Large, 73.)

Whether the authority thus conferred was limited to suits by States against citizens of other States, or extended also to suits by such citizens against States, was a question for judicial construction. There was no doubt that it included the former class of suits. Did it also include suits of the latter class, so that citizens of a State might in the Federal courts bring suits against another State? There certainly is nothing in the language to exclude the supposition that a State might be made a defendant in a Federal court at the suit of a citizen of another State. The controversies described are "between a State and citizens of another State;" and this, in the absence of any words of limitation or qualification, implies that either party might be plaintiff or defendant.

The term "State," in both applications, means one of the United States, or a member of the Union, in distinction from a foreign State, an Indian tribe, a Territory of the United States, or the District of Columbia. The "citizens" of a State are citizens of the United States, having their domicile or residence in that State. (*Gasies* v. *Ballon*, 6 Pet. 761.)

The celebrated case of *Chisholm* v. *Georgia*, 2 Dall. 419, which was in 1793 considered and determined by the Supreme Court of the United States, involved the question whether, under the Constitution as it then was, a State is suable in that court by individual citizens of another State. The case before the court was that of a suit brought by the executor of Chisholm against the

State of Georgia. The State, being summoned by process duly served upon its Governor and Attorney-General, and having at first declined to enter an appearance before the court, subsequently addressed to the court a written remonstrance and protestation, denying its power to exercise jurisdiction in the cause, and refusing to participate in the argument of this question. The members of the court, having heard the argument in behalf of the plaintiff, gave their opinions *seriatim* upon this point; and the result was an affirmation of the jurisdiction of the court to entertain and determine a suit brought against a State by a citizen or citizens of another State.

Mr. Justice Cushing, in giving his opinion, said: "As controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further, if a State is entitled to justice in the Federal court against the citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them are as dear and precious as those of States. Indeed, the latter are founded upon the former, and the great end and object of them must be to secure and support the rights of individuals, or else vain is government."

It can hardly be doubted that this correctly expresses the view of those who framed the Constitution, and provided therein that the judicial power of the United States shall extend to controversies "between a State and citizens of another State."

2. The Eleventh Amendment.—This decision led Congress soon after to propose, and the State legislatures to ratify, the Eleventh Amendment to the Constitution, providing as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State." (1 U. S. Stat. at Large, 402.)

The construction placed upon this power by the Supreme Court, in the case of *Chisholm* v. *Georgia*, *supra*, had extended the power to such suits, and what the amendment did was to for-

bid this construction in the future. Its effect was to arrest all suits in law and equity against States by citizens of other States that had been commenced, and exclude the bringing of other similar suits at any future time. It dispossessed the Federal courts of all jurisdiction in such cases. It had the same effect in reference to suits in law or equity, commenced or prosecuted against one of the United States by citizens or subjects of a foreign State.

It was on this ground that the Supreme Court dismissed the case of *Hollingsworth* v. *Virginia*, 3 Dall. 378, which was a suit brought before the ratification of the amendment. The unanimous opinion of the court in this case was, "that, the amendment being constitutionally adopted, there could not be exercised any jurisdiction in any case, past or future, in which a State was sued by citizens of another State, or by citizens or subjects of a foreign State." The amendment uses the words "commenced or prosecuted," intending to exclude alike suits then pending and those that might be brought thereafter.

This is the *whole* effect of the amendment. No change was made in the Constitution in any other respect. It still remains true that suits may be brought in the Supreme Court by a State against the citizens of another State, by States against each other, by a foreign State against a State of the Union, and by the latter against the former. The design of the amendment, therefore, was not to relieve States from all liability to suits. The States at the time were heavily indebted, and the decision of the Supreme Court, in *Chisholm* v. *Georgia*, *supra*, led to the fear that numerous similar suits would be commenced and prosecuted, in that court. It was to prevent this result, rather than assert the general doctrine of State exemption from suits, that the amendment was proposed and adopted.

3. Suits in Admiralty.— The amendment expressly limits its prohibition to suits "in law and equity;" and if these suits do not include admiralty suits, then it would seem to follow that the States are still liable to such suits by citizens of another State, or by citizens or subjects of a foreign State, for anything that is cognizable under admiralty jurisdiction. Mr. Justice Story remarks, in regard to this point:

"It has been doubted whether this amendment extends to cases of admiralty and maritime jurisdiction, where the proceeding is

in rem, and not *in personam*. There the jurisdiction of the court is founded upon the possession of the thing; and if the State should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides, the language of the amendment is, that 'the judicial power of the United States shall not be construed to extend to any suit *in law or equity*.' But a suit in admiralty is not, correctly speaking, a suit in law or equity, but is often spoken of in contradistinction to both." (Story's Const. sec. 1689.)

Mr. Curtis says: "As the words of the amendment only prohibit 'suits in law or in equity' from being brought against a State by citizens of another State, or aliens, there can be little doubt that the Supreme Court of the United States, in a case of admiralty jurisdiction, would sustain, as a branch of its original jurisdiction, a suit by an alien against a State." (Curtis's Comm. p. 207, note.)

In *Ex parte Madrazzo*, 7 Pet. 627, which was a case of libel in admiralty against the State of Georgia, Chief Justice Marshall said: "The case is not a case where the property is in the custody of a court of admiralty, or brought within its jurisdiction, and in possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a State to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a State."

The reasoning here suggests that, if the case had been one for admiralty jurisdiction, the court would have taken cognizance of it and disposed of it upon its merits. The admiralty jurisdiction of the Supreme Court, or of any other court of the United States, does not appear to be affected at all by the Eleventh Amendment, since it is expressly confined to a "suit in law or equity," which is not in either case a suit in admiralty.

4. Appellate Review.—The Supreme Court of the United States, in *Cohens* v. *Virginia*, 6 Wheat. 264, had occasion to consider and determine the question whether, when a suit or prosecution is originally brought in and by a State against a private citizen, the Eleventh Amendment excludes the right of that court, in the exercise of its appellate jurisdiction, to re-examine by writ of error the judgment of a State court rendered against such citizen, if the case comes within the provision of law authorizing such re-examination.

Cohens claimed protection against an indictment found against him under the laws of Virginia, on the ground that the act for which he was indicted was authorized by a law of the United States, which, as he insisted, rendered the Virginia law of no effect. The case being carried to the Supreme Court of the United States, the question there arose whether the court had any jurisdiction; and, among the reasons assigned against the jurisdiction, it was claimed that the case, as pending before the court, was a suit against the State of Virginia by Cohens, and was hence excluded by the Eleventh Amendment.

Chief Justice Marshall, in delivering the opinion of the court, said that the amendment "was intended for those cases, and those only, in which some demand against a State is made by an individual, in the courts of the Union." "To commence a suit," he said, "is to demand something by the institution of a process in a court of justice; and to prosecute the suit is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same."

He further said; "If a suit, brought in one court and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced or prosecuted against a State. It is clearly, in its commencement, the suit of a State against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defense against a claim made by the State."

Further on in the same opinion, the Chief Justice remarked: "Where, then, a State obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court, for the purpose of inquiring whether the judgment violates the Constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted."

The argument and decision of the court in this case settled the question that the Eleventh Amendment "applies only to original suits against a State, and does not touch the appellate jurisdiction of the Supreme Court to re-examine, on appeal or writ of error, a judgment or decree rendered in any State in a suit brought originally by a State against any private citizen." (Story's Const. sec. 1684.) Such re-examination is not a suit commenced or prosecuted against a State, within the meaning of the Eleventh Amendment, and is, hence, not excluded by it.

5. States as Parties to Suits.—The case of *Osborn* v. *The United States Bank*, 9 Wheat. 738, brought before the Supreme Court another important question of constitutional construction. That question was this: When is a State to be judicially deemed a party to a suit, either for the purpose of bringing suits in a Federal court against a citizen or citizens of another State, or for the purpose of claiming exemption from suits in law or equity, sought to be brought against it by such citizen or citizens?

This case originated in a bill filed in the Circuit Court of the United States for Ohio, against Ralph Osborn, who was auditor of the State of Ohio, asking for an injunction to restrain him from proceeding to collect a tax from the Bank of the United States, as provided for by the laws of the State. A supplemental bill was subsequently filed, setting forth the fact that the sum of one hundred thousand dollars had by violence been taken from the branch bank of the United States at Chilicothe, by one Harper, employed by Osborn to collect the tax, and praying the court to order the restoration of this money.

The court, upon hearing the case, directed the money to be restored, and from this decree an appeal was taken to the Supreme Court of the United States. The appellants took the ground that the bill filed in the Circuit Court was a suit in equity against the State of Ohio, because it sought to restrain the officers of that State from executing one of its tax laws, and that for this reason, the Circuit Court, under the Eleventh Amendment, had no jurisdiction in the case. This raised the question whether the State of Ohio was in fact a party to this suit. That it had an interest in the suit was undoubted. Was it judicially a party? Was the suit, in being brought against the agents of the State, brought against the State, and the proceeding void for this reason?

Chief Justice Marshall, having examined this question at large, came to the following conclusion: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State by citizens of another State or by aliens."

The court held in this case that the State of Ohio, not being named in the record as a party, was not a party to the suit, and that the Circuit Court had jurisdiction over those who were parties on the record, and affirmed the decree of the Circuit Court ordering the restoration of the money to the bank from which it had been taken.

The doctrine sustained by this case is that a State, in order to be a party to a suit, must either sue or be sued in its political character as such, and that this fact must appear on the record. It must, in legal terms, be an actual plaintiff or petitioner bringing the suit in the one case, or an actual defendant sued as a State in the other case, and in either case hold such a relation to the proceeding that the judgment or decree of the court would be as binding upon it as it would, in like circumstances, be upon individuals. No State is or can be a party to a suit, within the meaning of the Constitution and the law, in cases in which jurisdiction depends upon the party, unless it be an actual plaintiff or petitioner or a defendant on the record of the suit.

The mere fact that a State has an interest in the result of a suit, or that its rights and powers may be incidentally drawn in question, or that a party to the suit is sued as an agent of the State for acts done as such agent, or that a State is a stockholder, even the sole stockholder, in a corporation that appears as a party suing or sued, will not, in the judicial sense, make the State a party to the controversy, or give or vacate jurisdiction for this reason. (*Fowler* v. *Lindsey*, 3 Dall. 411; *New York* v. *Connecticut*, 4 Dall. 1; *The United States* v. *Peters*, 5 Cranch, 115, 139; Kent's Comm. Lect. 15; and Story's Const. sec. 1685.)

In *The United States Bank* v. *The Planters' Bank of Georgia*,

9 Wheat. 904, the court laid down the doctrine that the fact that a State is a stockholder in a banking corporation will not impart thereto its own exemption from suits as secured by the Eleventh Amendment. On this point Chief Justice Marshall said:

"The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it. It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business to be transacted. * * * As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given in the incorporating act."

The same doctrine was stated in *The Bank of Kentucky* v. *Wister*, 2 Pet. 318. In this case the State of Kentucky was the "sole proprietor of the stock of the bank," and on this ground it was insisted in the court below "that the suit was virtually against a sovereign State." The Supreme Court, however, rejected this theory, and held that the bank could claim no exemption from suits against it in the courts of the United States, because the State was the sole owner of the stock.

These cases settle the principle that the Eleventh Amendment considered as giving to a State an exemption from liability to suits in the Federal courts, brought by citizens of another State or by citizens or subjects of a foreign State, has no application, unless the State itself, in its political character as such, is sought to be sued, and this fact is shown by the record.

6. Suits by States.—The Constitution as originally adopted, extended the judicial power of the United States to controversies "between a State and citizens of another State," and provided that, in all cases "in which a State shall be party, the Supreme Court shall have original jurisdiction." The Eleventh Amendment, in no way, affects the right of a State, under these provisions, to bring a suit in the Supreme Court of the United States against a citizen or citizens of another State.

The case of *Pennsylvania* v. *The Wheeling, &c., Bridge Company*, 13 How. 518, was a suit in equity brought by Pennsylvania, as the complainant, in the Supreme Court of the United States, praying for certain relief against the Bridge Company as a corporate citizen of Virginia, organized under the laws of the latter State, and claiming authority under the laws of the State to erect a bridge across the Ohio River at Wheeling. The ground of the complaint was that Pennsylvania, as the owner of public works, canals, and railways, which had been constructed at a large expense to the State, and from which a large revenue was received by the State, would be seriously injured by the erection of the bridge. The bill therefore prayed for an injunction against the erection of the bridge, as a public nuisance, and for general relief. In a supplemental bill subsequently filed, the State represented that the defendants had completed the bridge, and prayed that it might be abated as a public nuisance.

These proceedings were instituted by the Attorney-General of Pennsylvania under the express direction and authority of the legislature of the State; and the court held that he acted as the legal representative of the State, and hence that the State, for the purposes of the suit, was a party on the record. Mr. Justice McLean, in stating the opinion of the court, said:

"As this is the exercise of original jurisdiction by this court, on the ground that the State of Pennsylvania is a party, it is important to ascertain whether such a case is made out as to entitle the State to assume this attitude. * * * In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of the State are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the State prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case be made out the jurisdiction may be sustained. * * * The rights asserted and the relief prayed are considered in no respect different from those of an individual. From the dignity of the State the Constitution gives to it the right to bring an original suit in this court. And this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case. * * * Pennsylvania claims nothing connected with the exercise of sovereignty. It asks from

the court a protection of its property, on the same ground and to the same extent as a corporation or an individual may ask it. And it becomes an important question whether such facts are shown as require the extraordinary interposition of this court."

The court, holding that the Ohio river is a public navigable stream, was of opinion, in the light of the facts as ascertained, that the bridge obstructs its navigation, and "that the State of Pennsylvania has been and will be injured in her public works, in such manner as not only to authorize the bringing of this suit, but to entitle her to the relief prayed." A decree was made in accordance with this view.

Jurisdiction was sustained in this case on the ground that Pennsylvania, being a State and having not simply a remote and contingent, but a direct and proprietary interest in the matter of the controversy, had a right, under the Constitution of the United States, to bring an original suit in the Supreme Court, for the protection of that interest against injury by the defendants, who were citizens of another State. Not only was the State formally a party on the record, but the court examined into the merits of the case sufficiently to conclude that its interest in the controversy entitled it to appear as a plaintiff, and seek the protection of the court against an injury to its public works. It seems, then, as remarked by Mr. Curtis, that when a State is plaintiff against citizens of another State, the Supreme Court "will look into the nature of the controversy, and that the jurisdiction requires not merely that the State should be a nominal party, but that it should have a real, direct, and substantial interest." (Curtis's Comm. p. 84.)

The case of *The State of Florida* v. *Anderson et al.*, 1 Otto, 667, was a bill in equity filed in the Supreme Court by the State of Florida, in behalf of the State and the trustees of the internal improvement fund of the State, against Holland, Anderson, and others, who were citizens of Georgia. It was an original suit by a State against citizens of another State, and the court took jurisdiction of the controversy, and made a decree in the premises. On the question of jurisdiction, Mr. Justice Bradley, in stating the opinion of the court, said:

"The first question which naturally presents itself is, whether the State of Florida has such an interest in the subject-matter of the suit, and in the controversy respecting the same, as to give it

a standing in court. It is suggested that the trustees of the internal improvement fund are the only parties legally interested, and that they have no right to bring an original bill in this court. To this it may be answered, in the first place, that the State has a direct interest in the subject-matter (the railroad in question) by reason of holding, as it does, the four millions of bonds which are a statutory lien upon the road. In the next place, the interest of the State in the internal improvement fund is sufficiently direct to give it a standing in court, whenever the interests of that fund are brought before a court for inquiry. * * * It is apparent that the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration, and that the State remains in every respect the beneficial proprietor, subject to the guaranties which have been made to the holders of railroad bonds secured thereby. The residuary interest in the fund belongs to the State. * * * Now, to protect its interests, it is competent for the State, seeking equitable relief against citizens of another State, to file an original bill in this court. The reference to the trustees in the bill cannot affect the jurisdiction of the court, inasmuch as they are not the litigants before it."

Jurisdiction was sustained in this case on the ground that Florida, being a State, had a constitutional right to bring an original suit in the Supreme Court, and that the State had a direct interest in the subject-matter of the controversy, for whose protection it was entitled to file a bill in that court.

The case of *Pennsylvania* v. *The Quicksilver Company*, 10 Wall. 553, was dismissed by the Supreme Court, on the ground that the declaration of the bill, filed by Pennsylvania, setting forth that the Company is "a body politic in the law of, and doing business in the State of California," was not a sufficient averment that the Company was a corporation created by the laws of California. It was admitted in the argument that the corporation was created under the laws of Pennsylvania. It was hence a corporate citizen of that State, and not of California, although its office and business were located in the latter State. The case, therefore, was not a controversy between a State and a citizen of another State, and, consequently, the court had no jurisdiction over it.

7. State Contracts.—States, as political sovereignties, have the power to make contracts with the citizens of other States; and as the Constitution originally stood, these contracts, according

to the decision in *Chisholm* v. *Georgia*, 2 Dall. 419, could be enforced by original suits in the Supreme Court. The Eleventh Amendment, in depriving these citizens of all power to bring suits in any Federal court against a State, completely destroyed this remedy, and left the States in possession of the debt-contracting power, with this constitutional exemption from liability to suits in law or equity. It placed the citizens of foreign States in the same predicament. As to the direct enforcement of contracts between a State and its own citizens, the Constitution never gave any jurisdiction to the Federal courts.

There is, however, a provision in the Constitution which forbids the States to pass any law "impairing the obligation of contracts;" and this provision, as the Supreme Court has repeatedly declared in the exercise of its appellate jurisdiction over the judgments and decrees of State courts, extends not only to contracts between individuals, but also to those made by States with individuals. (*The Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518; and *Stone* v. *Mississippi*, 11 Otto, 814.)

The Supreme Court has frequently explained this constitutional provision, in each instance with reference to the particular case pending before it; but, in no case has it either declared or implied that a State can, by a legal proceeding in a Federal court, be compelled to discharge its contracts with the citizens of other States, or the citizens of subjects of foreign States, or with its own citizens. If, therefore, a State neglects or refuses to pay debts due to any of these parties, they cannot judicially enforce the claim in the courts of the State without its consent, and they cannot do so at all in the courts of the United States. The prohibition against impairing the obligation of contracts is not an adequate remedy against State repudiation. It does not enable the Federal courts to compel a State to pay debts to any of these parties.

If the States of the Union were nations, owing debts to the citizens or subjects of foreign nations, then the latter, under the law of nations, would have the right to compel them by force, if necessary, to pay these debts. In regard to this point, Mr. Phillimore says:

"The right of interference on the part of a State, for the purpose of enforcing the performance of justice to its citizens from a foreign State, stands upon an unquestionable foundation, when the

foreign State has become itself a debtor of these citizens. It must, of course, be assumed that such State has, through the medium of its proper and legitimate organs, contracted such debts. * * * The debt so contracted with foreign citizens, whether in an individual or corporate capacity, constitutes an obligation of which the country of the lenders has a right to require and enforce the fulfillment. Whether it will exercise that right or not is a matter for the consideration of its private domestic policy." (Phillimore's International Law, vol. II, p. 8.)

Vattel, in his Law of Nations, lays down the same doctrine. Lord Palmerston, in 1848, being then the Secretary of State for Foreign Affairs, addressed a circular to the British representatives in foreign States, in which he claimed the right of the British Government to interfere in behalf of "the unsatisfied claims of British subjects who are holders of public bonds and money securities of those States," and directed these representatives to communicate this view to these respective States. There is nothing unreasonable or unjust in the doctrine that a government should interpose its power for the protection of its own citizens or subjects, and demand that foreign governments owing debts to them should honestly discharge this obligation.

It is to be remembered, however, that the States of this Union, while they have the debt-contracting capacity, are, nevertheless, not nations, but simply integral parts of a nation. They send no ambassadors to foreign nations, and receive none from them. They make no treaties, and can neither declare war nor make peace. They are not known in the family of nations, and have no international rights, and are subject to no international responsibilities. Any attempt on the part of foreign nations to compel them to pay debts due from them to the citizens or subjects of those nations, would be instantly resisted by the United States. Nor would the United States permit any State of the Union to resort to the law of force for the purpose of compelling other States to pay debts due from them to its citizens.

The result then, is, that the States of this Union have no international responsibility in respect to the payment of debts due to the citizens or subjects of foreign nations, and that no State can afford to its own citizens any remedy in respect to debts due to them from other States, while the courts of the United States have no power to protect either class of citizens against acts of

State repudiation. The States are free to contract debts, and just as free from any law to compel their payment.

Such is the position of a debtor State of this Union, and such is the position of its creditors, being citizens of other States or aliens. Whether the former, having made a contract with the latter, shall repudiate or fulfill that contract, is left to its own uncontrolled and uncontrollable pleasure. That pleasure, as the history of the States shows, has, to a most lamentable extent, been a fraudulent pleasure. State debts, that were just, legal claims, have been repudiated by millions. Constitutions and laws have been altered for this purpose, and when this has not been done, the repudiation has been as practically effective by the mere omission of payment. The public conscience has, by these acts of State repudiation, been demoralized, and the whole people of the United States have been disgraced in the eyes of the world.

There may be some inconveniences and evils in making a State suable in the courts of the United States by citizens of other States, and by citizens or subjects of foreign States. But it may well be doubted whether these inconveniences and evils are at all as serious as those entailed by exemption from this liability. If the Eleventh Amendment had never been adopted, and the Constitution had been left as it was before it was thus amended, and if the construction placed upon it in *Chisholm* v. *Georgia*, 2 Dall. 419, had become the settled and established law of the land, so that all the States, in contracting debts, would have understood that the payment of these debts could be enforced by law, the policy of the States in reference to the contraction of debts would have been more cautious and conservative, and their record would have been much more honorable. The Eleventh Amendment opened the way for a great abuse; and some of the States—happily, not all of them—have not had sufficient honor to keep them from perpetrating this abuse.

CHAPTER VII.

CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES.

1. Constitutional Provision.—The Constitution, in article 3, section 2, provides that the judicial power of the United States shall extend to controversies "between citizens of different States."

The Judiciary Act of 1789 gave to the Circuit Courts of the United States original cognizance "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," and "the suit is between a citizen of the State where it is brought and a citizen of another State." (1 U. S. Stat. at Large, 73.) This provision is continued in section 629 of the Revised Statutes of the United States.

Congress, by the Act of March 3d, 1875, provided that the Circuit Courts of the United States shall have original cognizance "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," and "there shall be a controversy between citizens of different States," subject to the following qualifications: 1. That "no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court." 2. That "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," with certain exceptions named in the act. 3. That neither of these courts shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. (18 U. S. Stat. at Large, 470.)

The object of this legislation is to carry into effect the clause of the Constitution which extends the judicial power of the United States to controversies "between citizens of different States."

2. Who are Citizens?—The Fourteenth Amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Being citizens of the United States, they are *ipso facto* citizens of the particular State in which their domicile is established. This was a fact before the adoption of the Fourteenth Amendment. Chief Justice Marshall, in *Gassies* v. *Ballon*, 6 Pet. 761, said: "The defendant in error is alleged in the proceeding to be a citizen of the United States, naturalized in Louisiana and residing there. This is equivalent to the averment that he is a citizen of that State. A citizen of the United States, residing in any State of the Union, is a citizen of that State."

In *Prentiss* v. *Barton*, 1 Brock. 389, it was held that "a citizen of the United States residing permanently in any State is a citizen of that State." (*Cooper* v. *Galbraith*, 3 Wash. 546; *Gardner* v. *Sharp*, 4 Wash. 609; *Butler* v. *Farnsworth*, 4 Wash. 101; and *Read* v. *Bertrand*, 4 Wash. 514.)

State citizenship, as thus ascertained by residence in a particular State, supposes the party to be at the same time a citizen of the United States. Chief Justice Taney, in *The Dred Scott Case*, 19 How. 393, 405, having said that, before the adoption of the Constitution, each State had the right to bestow the privileges of citizenship upon whom it pleased, proceeded to say: "Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them."

Citizenship in a State of this purely local character, unaccompanied with citizenship of the United States, would not, according to this statement, confer "the rights and privileges secured to a citizen of a State under the Federal Government." The person who possessed only this local citizenship, would not be a citizen at all in the sense of the Constitution.

As to the question of residence or domicile, Mr. Wharton says: "Domicile is residence as a final abode. To constitute it, there must be: 1, residence, actual or inchoate; 2, the non-existence of

any intention to make a domicile elsewhere." (Wharton's Conflict of Laws, 2d. ed. sect. 21.)

In *Byrne* v. *Holt*, 2 Wash. 282, it was held that "a party who resides in a State with his family and carries on business there is a citizen of that State." If, however, "a party merely abides without his family in a State temporarily for a special purpose, with the *animo revertendi* always contiuuing, he does not thereby become a citizen of the State." (*Cooper* v. *Galbraith*, 3 Wash. 546; *Gardner* v. *Sharp*, 4 Wash. 609; and *Read* v. *Bertrand*, 4 Wash. 514.)

In *Shelton* v. *Tiffin*, 6 How. 163, 185, Mr. Justice McLean said: "Where an individual has resided in a State for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such State, unless the contrary appear. And this presumption is strengthened where the individual lives on a plantation and cultivates it with a large force, as in the case of Shelton, claiming and improving the property as his own. On a change of domicile from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring the right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient."

Removal from one State to another, under circumstances implying the *animum manendi*, or purpose to remain, is a transfer of citizenship from the former to the latter State, provided the person so removing was a citizen of the former State in the sense of the Constitution. There is no doubt that one may in this way change his citizenship from one State to another. This right is secured not only by the Fourteenth Amendment, but by the provision of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The *animus manendi* is the chief point in such a case, and distinguishes a legal residence, or one that involves citizenship, from a temporary and transient occupancy of a place which carries with it no change of citizenship. Courts of justice adopt reasonable rules as to the evidence of such a purpose. (*The Venus*, 8 Cranch, 253, 279; *Case* v. *Clarke*, 5 Mason, 70; and *Cooper* v. *Galbraith*, 3 Wash. 546.)

It is a general principle that one who is a citizen of a given State, retains that citizenship, with the rights involved therein, until his citizenship, being unforfeited by crime, shall be established elsewhere. He cannot at the same time be a citizen of different States. If removing from one State to another, being a citizen of the former, he remains such until he becomes a citizen of the latter; and this is an accomplished fact as soon as his legal domicile is established in the latter State.

3. The Matter in Dispute.—Congress, in vesting the jurisdiction conferred by this clause of the Constitution, has not only confined it to the Circuit Courts of the United States, but also limited it by a jurisdictional sum. The matter in dispute between the parties must exceed, exclusive of costs, the sum or value of five hundred dollars. By the matter in dispute is meant the subject-matter of the litigation, as set forth in the declaration or bill of complaint, or that for which the suit is brought and on which the issue is joined between the parties. (*Culver* v. *Crawford*, 4 Dill. 239; *Judson* v. *Macon County*, 2 Dill. 213; and *Sherman* v. *Clark*, 3 McLean, 91.)

This supposes that the subject of the controversy is of such a character that the value involved is capable of being expressed in the terms of money. If the "demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration," the plaintiff may introduce evidence to show the value of the property in litigation. (*Ex parte Bradstreet*, 7 Pet. 634.) The value in all cases, in order to support jurisdiction, must, exclusive of costs, exceed the sum specified in the statute.

4. The Requisite Citizenship.—The fundamental fact upon which jurisdiction in these controversies depends, is the requisite citizenship of the parties, considered relatively to each other. The controversies, as described in the Constitution and the law, are "between citizens of different States." The opposing parties to the suit must not only be citizens, but must have a different State citizenship. If one party be a citizen of a given State, then the other must be a citizen of some other State. This relation of the parties is a jurisdictional relation, since it is upon this ground,

and not the subject-matter of the controversy, that the jurisdiction is conferred.

The Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), required that one of the parties should be a citizen of the State in which the suit is brought. (*Goodyear* v. *Day*, 1 Blatch. 565; and *Kelly* v. *Harding*, 5 Blatch. 502.) In the latter of these cases it was said by the court: "This court has no jurisdiction whatever over controversies between parties, all of whom, plaintiffs as well as defendants, are citizens of States other than that in which the suit is brought." Such was the fact under the Judiciary Act of 1789.

The Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), has removed this condition as to jurisdiction, giving jurisdiction of controversies "between citizens of different States," without any reference to the question whether either party is a citizen of the State in which the suit is brought.

States of the Union are the political bodies referred to in the extension of the judicial power of the United States to controversies "between citizens of different States." The Territories of the United States are not such States, and the District of Columbia is not a State; and hence citizenship in neither will suffice to give jurisdiction. (*Hepburn* v. *Ellzey*, 2 Cranch, 445; and *The Corporation of New Orleans* v. *Winter*, 1 Wheat. 91.)

It being a fact that the jurisdiction depends upon the relative situation of the parties, considered as citizens of different States, it then necessarily results that this situation must be shown on the record. A failure to make the proper averment as to citizenship defeats the jurisdiction altogether. The court surely cannot take cognizance of a case that does not upon the face of the proceedings come within the terms of the Constitution and the law. The parties, as known to the court, are those and those only that appear on the record; and if these parties are not set forth, as being citizens of different States, then the case must be dismissed for the want of jurisdiction.

Chief Justice Marshall, in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 856, referring to controversies "between citizens of different States," said that the universally received construction is "that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record." The parties on

the record are the party suing and the party sued, as shown by the record; and these parties must be shown to be citizens of different States, or jurisdiction will not attach to the case.

The fact that there are other parties, not named in the record, who may have an interest in the suit, does not remove the necessity that the parties on the record should be presented as citizens of different States. "The jurisdiction of the court," as remarked by Chief Justice Marshall, "depends, not upon this interest, but upon the actual party on the record."

The citizenship of the parties, in *Jackson* v. *Ashton*, 8 Pet. 148, was stated in the title of the bill, but not in the bill itself; and in regard to the question of jurisdiction, Chief Justice Marshall said; "The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings. The bill and proceedings should state the citizenship of the parties to give jurisdiction of the case." The case was dismissed for the want of jurisdiction.

In *Godfrey* v. *Terry*, 7 Otto, 171, 175, the citizenship of the plaintiff was set forth on the record, but not that of any of the defendants, and this was held not sufficient to give jurisdiction. In regard to this case Mr. Justice Miller remarks; "This whole proceeding is a very extraordinary one. It is a case in which, if the Circuit Court of the United States had any jurisdiction at all, it must have been on the ground of the citizenship of the parties. But the only allegation or evidence in the whole record on that subject is, that plaintiff, Terry, is a citizen of the State of Virginia."

In *Robertson* v. *Cease*, 7 Otto, 646, it was held: 1, That "where the jurisdiction of a court of the United States depends upon the citizenship of the parties, such citizenship, not simply their residence, must be shown by the record." 2. That "the ruling in *Railway Company* v. *Ramsey* (22 Wall. 322), approved in *Briges* v. *Sperry* (95 U. S. 401), that such citizenship need not necessarily be averred in the pleadings, if it otherwise affirmatively appears by the record, does not apply to papers copied into the transcript which do not make a part of the record by bill of exceptions, or by an order of the court referring to them, or by some other mode recognized by law."

Mr. Justice Harlan remarks in regard to this case: "Looking, then, at the pleadings, and to such portions of the transcript as

properly constitute the record, we find nothing beyond the naked averment of Cease's residence in Illinois, which, according to the uniform course of decisions in this court, is insufficient to show his citizenship in that State. Citizenship and residence, as often declared by this court, are not synonymous terms." (*Parker* v. *Overman*, 18 How. 137, 141.)

These cases, without the addition of others, are sufficient to establish these two principles: 1. That the parties to a suit under this clause of the Constitution must be citizens of different States. 2. That the record must in each case clearly show this fact, and not leave it to be inferred from the fact of residence.

The averments of the record as to the citizenship of the parties to a suit, if upon their face sufficient to establish jurisdiction, can be impugned by the defendant only in a special plea, a plea of abatement, which denies the fact of the requisite citizenship, and, therefore, the jurisdiction of the court. This doctrine was laid down in *Wickliffe* v. *Owings*, 17 How. 47, 51. If the defendant pleads to the merits of the case, he virtually concedes the jurisdiction, and having done this, he is in no condition to deny it. (Jurisdiction of the U. S. Courts, by Curtis, p. 126.)

5. Co-plaintiffs and Co-defendants.—The rule adopted by the Supreme Court, in construing the Constitution and the law in respect to controversies between citizens of different States is, that if, as may be the fact, there are several co-plaintiffs or several co-defendants, or several plaintiffs and several defendants, as parties in the same suit, then all the plaintiffs or all the defendants, as the case may be, must have the requisite citizenship, considered relatively to the person or persons composing the opposite party. Each plaintiff must, in the matter of citizenship, be so related to each defendant, that the one is competent to sue, and the other is liable to be sued; and this fact must be shown on the record in respect to them all. The requisite citizenship, on the part of some of the plaintiffs or some of the defendants, will not be sufficient. It must be true of them all on both sides, in order to sustain the jurisdiction.

Chief Justice Marshall, in *Strawbridge* v. *Curtis*, 3 Cranch, 267, having referred to the words of the Judiciary Act of 1789, giving the jurisdiction, proceeded to say: "The court understands these expressions to mean that each distinct interest should be rep-

resented by persons, all of whom are entitled to sue, or may be sued, in the Federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue or liable to be sued in those courts." This rule of construction was referred to and affirmed in *The Commercial and Railroad Bank of Vicksburg* v. *Slocomb*, 14 Pet. 60.

In *The Coal Company* v. *Blatchford*, 11 Wall. 172, Mr. Justice Field said: "If there are several co-plaintiffs, the intention of the act is, that each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained." This is the settled doctrine of the Federal courts, in cases where there are several plaintiffs or several defendants. (*Lockhart* v. *Horn*, 1 Woods, 628; *Anderson* v. *Bell*, 2 Paine, 426; and *Bissell* v. *Horton*, 3 Day, 281.)

The obvious reason for this doctrine is founded on the fact that the jurisdiction, as conferred by the Constitution, depends entirely on the parties to a suit, who must be "citizens of different States." Hence, if one or more of the plaintiffs and one or more of the defendants be citizens of the same State, then, as between these plaintiffs and defendants, the court can determine nothing, since it has no jurisdiction over them. Their relative situation is not the one defined in the Constitution as the basis of jurisdiction.

Ex-Judge Dillon raises the question whether, under the Act of March 3d, 1875, "the Federal judicial power as conferred and limited by the Constitution can, by reason of citizenship, extend to a case in which some of the necessary defendants are citizens of the same State with the plaintiffs or some of the plaintiffs." He expresses the opinion that "the Supreme Court would be justified in holding that a case does not cease to be one between citizens of different States, because one or some of the defendants are citizens of the same State with the plaintiffs or some of the plaintiffs, provided the other defendants are citizens of another or other States." (Dillon's Removal of Causes, 3d ed. pp. 31, 32.)

This does not accord with the view taken by the Supreme Court. Chief Justice Waite, in *The Removal Cases*, 10 Otto, 457, 468, referring to the jurisdiction of Circuit Courts in cases removed to them from State courts, under one of the provisions of the Act of March 3d, 1875, said: "For the purposes of a re-

moval, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If, in such an arrangement, it appears that those on one side are *all* citizens of different States from those on the other, the suit may be removed." The distinct implication is, that if this fact does not appear, the suit cannot be removed. The controversy, in order that the Circuit Court may take jurisdiction as between the parties, must be "between citizens of one or more States on one side, and citizens of other States on the other side." This being the fact, then either party, under the Act of 1875, may remove it to the Circuit Court.

It appears, however, from the case of *Conolly* v. *Taylor*, 2 Pet. 556, 564, that "where, at the commencement of a suit, there are several parties on one side, one of whom has not the character requisite for jurisdiction, while the others have that character, and before the hearing or trial an amendment can properly be made by striking out such party, the impediment to the exercise of jurisdiction will be removed." Such was the ruling of the Supreme Court in this case. Chief Justice Marshall said: "We can perceive no objection, founded in convenience or in law, to this course."

Congress, by the Act of February 28th, 1839 (5 U. S. Stat. at Large, 321), the first section of which is reproduced as section 737 of the Revised Statutes of the United States, provided as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer; and the non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute a matter of abatement, or objection to the suit."

Mr. Justice Barbour, in *The Commercial and Railroad Bank of Vicksburg* v. *Slocomb*, 14 Pet. 60, 65, said that this legislation was intended to remove certain difficulties in respect to non-resident defendants, not served with process and not voluntarily appearing, and that "it did not contemplate a change in the jurisdiction of the courts, as regards the character of the parties, as

prescribed by the Judiciary Act, and as expounded by this court; that is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued." It simply permitted the trial to proceed as between the parties properly before the court, dispensing with the presence of other parties in the circumstances specified, without prejudice to their interests.

In *Jones* v. *Andrews*, 10 Wall. 327, the following doctrine was held by the court: "By the Judiciary Act of 1789, in a case where jurisdiction of the Circuit Court depended on citizenship, every defendant must have resided, or been served with process, in the district where the suit was brought. But by the Act of 1839 this is not necessary. A non-resident defendant may either voluntarily appear, or, if not a necessary party, his appearance may be dispensed with. Appearing by counsel and moving to dismiss the bill for want of jurisdiction, and also for want of equity, is a waiver of a non-resident's privilege, and amounts to a voluntary appearance."

6. Legal Representatives.—The question of citizenship, in cases in which suits are brought by or against the legal representatives of other parties, as administrators, executors, guardians, or trustees, relates to these representatives, and not to those whom they represent. This rule of construction was adopted in the cases of *Chappedelaine* v. *Dechenaux*, 4 Cranch, 306, and *Childress* v. *Emory*, 8 Wheat. 642.

Chief Justice Marshall in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 856, said that, in a suit "brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that if the executor be a resident of another State, the jurisdiction of the Federal courts could be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party." The jurisdiction depends not on "the relative situation of the parties concerned in interest," but on "the relative situation of the parties named in the record."

In *The Coal Company* v. *Blatchford*, 11 Wall. 172, it was held that if the legal representatives of others "are personally qualified by their citizenship to bring suit in the courts of the United States, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified; and if they are

not personally qualified by their citizenship, the courts of the United States will not entertain jurisdiction, although the parties they represent may be qualified."

Mr. Justice Davis, in *Houston* v. *Rice*, 13 Wall. 66, 67, stated the doctrine as follows: "Although in controversies between citizens of different States, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction, yet it has been repeatedly held by this court that suits can be maintained in the Circuit Court by executors and administrators if they are citizens of a different State from the party sued, on the ground that they are the real parties in interest, and succeed to all the rights of the testator or intestate by operation of law. And it makes no difference that the testator or intestate was a citizen of the same State with the defendants, and could not, if alive, have sued in the Federal courts; nor is the status of the parties affected by the fact that the creditors and legatees of the decedent are citizens of the same State with the defendants."

In *Bonnafee* v. *Williams*, 3 How. 574, 577, Mr. Justice McLean said: "Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. They are not necessary parties on the record. A person having the legal right may sue at law in the Federal courts, without reference to the citizenship of those who may have the equitable interest." (*Irvine* v. *Lowry*, 14 Pet. 293.)

In *Farlow* v. *Lea*, 2 C. L. B. 329, it was held, that "if a receiver of a corporation is a citizen of another State, he may sue in the Circuit Court, although the corporation and the defendant are citizens of the same State."

The settled rule is, that where jurisdiction depends on citizenship, the question of the requisite citizenship relates to the party who has the legal right to sue; and if this party, though an executor or trustee, has the necessary citizenship, considered relatively to that of the party sued, the Circuit Court has jurisdiction, without reference to those whom he represents, and who have an equitable interest in the suit.

7. Nominal Parties.—The case of *Browne et al.* v. *Strode*, 5 Cranch, 303, was that of a suit brought in the Circuit Court of the United States for Virginia, on a bond given by an executor for the faithful execution of the testator's will, in conformity with the statute of Virginia. The object of the suit was to recover a debt due from the testator in his lifetime, to a British subject. The bond being required to be given to the justices of the peace of the county in which the testator died, the suit was brought in their name as plaintiffs. They were all citizens of Virginia, and so was the defendant. The question whether the Circuit Court had jurisdiction of the case was certified to the Supreme Court, and answered in the affirmative.

The ground of this answer, as explained in *Irvine* v. *Lowry*, 14 Pet. 293, 300, is the following: "The jurisdiction of the Circuit Court was sustained on the ground that, though the plaintiffs and defendants were citizens of the same State, the former were mere *nominal* parties, without any interest or responsibility, and made by the law of Virginia the mere instruments or conduits through whom the legal right of the real plaintiff could be asserted. As such, their names must be used, for the bond must be given to them in their official capacity; but as the person to whom the debt was due was a British subject, he was properly considered as the only party plaintiff in the action." The justices of the peace were regarded as merely nominal and not real plaintiffs, and hence the fact that they were citizens of the same State with the defendant did not affect the jurisdiction of the Circuit Court to entertain the suit.

The case of *McNutt* v. *Bland*, 2 How. 9, was an action of debt upon a sheriff's bond, instituted by certain citizens of New York in the name of the Governor of Mississippi, as Governor of the State, to whom, in pursuance of a statute of the State, the bond was required to be given, for the protection of any party who might be aggrieved by the conduct of the sheriff. The Governor of Mississippi was, in this case, regarded as merely a nominal plaintiff. Mr. Justice Baldwin, in stating the opinion of the court, said: "In this case, there is a controversy and suit between citizens of New York and Mississippi; there is neither between the Governor and the defendants. As the instrument of the State law to afford a remedy against the sheriff and his sureties, his name is on the bond and to the suit upon it; but in no just view

of the Constitution or law can he be considered as a litigant party. Both look to things, not to names: to the actors in controversies and suits, not to the mere forms or inactive instruments in conducting them, in virtue of some positive law."

Mr. Justice Baldwin, referring to the case of *Browne* v. *Strode*, *supra*, as involving the same principle, added: "That where the real and only controversy is between citizens of different States, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, nor ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists."

Both of the above cases were referred to in *The Coal Company* v. *Blatchford*, 11 Wall. 172, with the remark by the court that "the justices of the peace in the one case, and the Governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved." The question of citizenship in respect to such merely nominal parties has nothing to do with that of jurisdiction.

The same principle was applied in *Huff* v. *Hutchinson*, 14 How. 586, in which case it was held that "a marshal, even after he has gone out of office, is competent to sue, in a court of the United States, on an attachment bond, citizens of the State of which he himself is a citizen, averring on the record that the suit is brought for the benefit of the plaintiffs in the original action, and that they are citizens of another State." The attachment bond was, by certain citizens of Wisconsin, executed to the United States marshal for that State and his successor in office, in pursuance of a statute of the State; and the suit on the bond was brought in his name, for the benefit of certain citizens of New York named in the declaration. The Supreme Court held that "the real plaintiffs were those named in the declaration, for whose use the suit was brought, and who are averred to be citizens of New York," and that the citizenship of the marshal, whose relation to the suit was merely formal, was immaterial, so far as the question of jurisdiction was concerned.

8. Assignees.—The first paragraph of section 629 of the Revised Statutes of the United States, reproducing a part of the

eleventh section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provides that "no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

The Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), provides that no Circuit or District Court shall "have cognizance of any suit, founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

The purpose of Congress in both of these acts was to impose a limitation upon the jurisdiction of the Federal courts in respect to suits coming within the description given, and sought to be brought by assignees. The general rule laid down is that, if these suits could not have been prosecuted in these courts, if no assignment had been made, they shall not be so prosecuted by assignees. It necessarily follows that, in a suit where the jurisdiction of the court depends upon the citizenship of the parties, an assignee, if the party bringing it, cannot prosecute it in a Federal court, unless he himself has the requisite citizenship, and unless the assignor, by virtue of the requisite citizenship, could have prosecuted the suit in the same court if no assignment had been made. Both conditions, in the class of suits referred to and brought by assignees, must be present in order to give the court jurisdiction.

The suits that come under the operation of this rule, as stated in the Judiciary Act of 1789 and in section 629 of the Revised Statutes, are those brought "to recover the contents of any promissory note or other *chose in action* in favor of an assignee." The cases excepted from the rule are "foreign bills of exchange." The suits embraced in the rule, as stated in the Act of March 3d, 1875, are suits "founded on contract in favor of an assignee." The exceptions to the rule are "promissory notes negotiable by the law merchant and bills of exchange."

Promissory notes, with other *choses in action*, came within the restriction in the earlier law; but such notes, if "negotiable by the law merchant," come within the exceptions in the later law.

So, also, "foreign bills of exchange" formed the only exception mentioned in the earlier law; but, in the later act, "bills of exchange" are embraced in the exception, without the qualification of the word "foreign" being annexed thereto.

The theory which originally led Congress to establish the restriction in respect to assignees, is thus stated by Chief Justice Chase in *Bushnell* v. *Kennedy*, 9 Wall. 387, 392: "Not a little apprehension was excited at the time of the adoption of the Constitution in respect to the extent of the jurisdiction vested in the national courts; and that apprehension was respected in the Judiciary Act, which soon after received the sanction of Congress. It was obvious that numerous suits by assignees, under assignments made for the express purpose of giving jurisdiction, would be brought in those courts if the right of assignees to sue was left unrestricted. It was to prevent that evil and to keep the jurisdiction of the national courts within just limits that the restriction was put into the act."

Referring to the same point in *The Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheat. 904, 909, Chief Justice Marshall said: "It was apprehended that bonds and notes given in the usual course of business, by citizens of the same State to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in the Federal courts. To remove this inconvenience, the act which gives jurisdiction to the courts of the Union over suits, brought by the citizen of one State against the citizen of another, restrains that jurisdiction where the suit is brought by an assignee to cases where the suit might have been sustained, had no assignment been made."

The great mass of the cases in which the courts have expounded the restriction with reference to the end, as thus explained, arose under the provision made in the Judiciary Act of 1789, which was the sole law on the subject until the Act of March 3d, 1875. The later act, though it does not change the general purpose of the earlier one, enlarges the list of cases that come within the exceptions to the restriction upon the jurisdiction of the Federal courts.

The doctrine is well settled that the restriction has no application to suits originally commenced in State courts, and transferred therefrom to the Circuit Courts of the United States. (*Green* v. *Custard*, 23 How. 484; *Bushnell* v. *Kennedy*, 9 Wall. 387; and

The City of Lexington v. *Butler*, 14 Wall. 282.) Nor does the restriction apply to suits brought by executors or administrators, who are not regarded as assignees claiming by the acts of assignors. (*Chappedelaine* v. *Dechenaux*, 4 Cranch, 306; *Childress* v. *Emory*, 8 Wheat. 642; and *Mayer* v. *Foulkrod*, 4 Wash. 349.)

In *Halsted* v. *Lyon*, 2 McLean, 226, and in *Sackett* v. *Davis*, 3 Id. 101, it was held that, under the restriction in the Judiciary Act of 1789, "the transfer of a promissory note by indorsement is not an assignment within the provision forbidding an assignee to sue in the courts of the United States, when his assignor could not have done so." And in *Dundas* v. *Bowler*, 3 McLean, 205, it was held that the assignment of a mortgage is not within this provision. The foreclosure suit acts upon the land.

There are four questions, any one or more of which may arise in determining whether a suit sought to be brought in a Federal court is excluded therefrom by the restriction contained in the Act of March 3d, 1875.

The *first* of these questions is whether the suit is "founded on contract." The statute, in express terms, describes it as such a suit; and if this be not its character, then the restriction has no application to it. The obvious meaning of the statute is that the suit must arise out of a "contract," and be originally brought in a Federal court, to enforce the performance of its stipulations. A contract is a *chose in action*, a covenant, a promise, giving to one party the right legally to claim of the other its fulfillment. (*Sheldon* v. *Sill*, 8 How. 441.) The "contents" of a contract are the things specified in it and stipulated to be done. (*Deshler* v. *Dodge*, 16 How. 622; and *Barney* v. *The Globe Bank*, 5 Blatch. 107.)

The *second* question is whether the suit, if "founded on contract," is "in favor of an assignee," or the party to whom the contract, with all its rights, has been assigned by a transfer in writing, as distinguished from a mere delivery, and who by the suit seeks to enforce the contract. If the party bringing the suit be not an assignee in the legal sense, then he does not come within the terms of the statute, and, of course, it does not apply to him.

Mr. Justice Story, in *Bullard* v. *Bell*, 1 Mason, 243, 251, took the ground that, in order to bring a case within the inhibition specified in the eleventh section of the Judiciary Act of 1789, "the action must not only be founded on a *chose in action*, but it must be assignable, and the plaintiff must sue in virtue of an assign-

ment." As to the assignableness of a note, he said: "A note payable to bearer is often said to be assignable by delivery; but, in correct language, there is no assignment in the case. It passes by mere delivery, and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become the bearer. It is, therefore, payable to any person who successively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer."

In *The Bank of Kentucky* v. *Wister*, 2 Pet. 318, it was held that "a note, payable to bearer, is payable to anybody, and is not affected by the disability of the nominal payee to sue."

Judge Wallace, in *Cooper* v. *The Town of Thompson*, 13 Blatch. 434, 437, said that, under the Judiciary Act of 1789, it was uniformly held "that the holder of a promissory note, payable to bearer, was not an assignee, within the meaning of the statute, for the reason that a note payable to bearer is payable to anybody who may become the holder, and the contract is with the holder, and the holder does not acquire title by assignment, but by delivery." (*Wood* v. *Dummer*, 3 Mason, 308; *Bradford* v. *Jenks*, 2 McLean, 130; *Bonnafee* v. *Williams*, 3 How. 574; and *Noel* v. *Mitchell*, 4 Biss. 346.)

In *The Town of Thompson* v. *Perrine*, 27 Albany Law Jour. 132, it was held by the Supreme Court of the United States that "overdue coupons of municipal bonds which have not matured are negotiable by the law merchant," and that "the right of the owner of coupons payable to bearer, or to the holder thereof, to sue in the Federal courts, does not depend upon the citizenship of any previous holder," and that such owner or holder "is not an assignee within the meaning of the Act of March 3d, 1875."

Mr. Justice Harlan, in stating the opinion of the court in this case, said: "Giving the words assignee and assignment their broadest signification, and conceding that in some cases the holder of a promissory note may become such in virtue alone of an assignment, yet, according to the established construction of the Judiciary Act of 1789, the right of the holder of a promissory note or bond payable to a particular person or bearer to sue in his own name, did not depend upon the citizenship of the named payee or of the first or any previous holder; this, because in all such cases

the title passed by delivery, and not in virtue of any assignment." (*Thompson* v. *Lee Co.* 3 Wall. 331; *Bushnell* v. *Kennedy*, 9 Id. 391; and *The City of Lexington* v. *Butler*; 14 Id. 293.)

The doctrine established by these cases is, that the *bona fide* holder by simple delivery, of a promissory note, payable to the person named therein, or to his order, or to bearer, is not an assignee within the meaning of the Act of March 3d, 1875. The note is negotiable and transferable by delivery, and the promise made therein is made to the *bona fide* holder, whoever he may be. If he brings a suit to recover on it, he does so in his own name, and by virtue of his rightful possession of the note, and not in virtue of any authority, power, or right, acquired by an assignment. The law, consequently has no application to such a case. It applies only when the party seeking to bring the suit is an assignee, and brings the suit in the exercise of the power thus acquired.

The *third* question is, whether the suit is brought on a promissory note negotiable by the law merchant, or on a bill of exchange, both of which are expressly excepted from the inhibition of the law. This being the fact, then the law, by its own terms, has no application to the case, and that, too, whether the holder acquired possession by assignment or by mere delivery.

The first form of the exception is that of "promissory notes negotiable by the law merchant." The notes here referred to are not only "promissory notes negotiable," but such notes "negotiable by the law merchant." This law is mentioned as the test and criterion of the negotiability; and by this law Congress undoubtedly referred to the general commercial usages which constitute "the law merchant." The phrase is a technical one, and has a well understood meaning as used in legal statutes. And, under the exception made by Congress, it is the business of courts to determine whether promissory notes, being the subjects of suits, are negotiable by the law merchant.

In *Gregg* v. *Weston*, 7 Biss. 360, "promissory notes negotiable by the law merchant," as intended by Congress, were held to be "notes which, in the hands of a *bona fide* purchaser for value before maturity, were subject to no equities in favor of the maker." It was further held in this case that, "if a note which is not payable to order or bearer at a particular bank in the State, does not, under the laws of the State, possess the qualities of a negotiable note, then the assignee cannot sue in the Circuit Court if the

maker and payee are both citizens of the same State." Such a note, on the supposition stated, lacks the element of negotiability, and hence does not, in the hands of an assignee, come within the exception of the statute, but does come within its prohibition, if the maker and payee are citizens of the same State.

In *Porter* v. *The City of Janesville*, 3 Fed. Rep. 617, it was held that "the Circuit Courts of the United States have jurisdiction, under section 1, c. 137, of the Act of March 3d, 1875, over a suit brought by the assignee of a municipal bond, where such bond is, in form, a simple acknowledgment of indebtedness, and an unconditional promise to pay a certain sum of money at a time certain." The municipal bond in this case bore the seal of the city issuing it, and was made payable to a specified railroad company, "or its assignees," and had been assigned to the plaintiff, who was a citizen of Massachusetts, and by whom the suit was brought against the city of Janesville, in Wisconsin, the State in which the railroad company was located.

As to the question whether this bond was a promissory note negotiable by the law merchant, Judge Bunn said: "Sealed instruments of this character, providing for the payment of money at a future time, certainly have, in this country, with very few exceptions, been held promissory notes rather than specialties. In fact, the instrument in suit answers every definition and requisite of a promissory note by the law merchant." He said that the intention of Congress, in using the words "promissory notes" and "bills of exchange," was "to include all negotiable paper, by whatever technical name it might be known," and that "municipal bonds of this character have always been held commercial paper by the United States courts." The fact that the bond was made payable to "said company or its assignees," and not to "bearer," or "order," did not in his view affect its commercial character as a promissory note negotiable by the law merchant.

In *Halsey* v. *The Town of New Providence*, 3 Fed. Rep., 364, it was held by Judge Nixon, that "municipal bonds do not come within the prohibition of the Act of March 3d, 1875." The judge in this case said: "Such municipal bonds are contracts, but they are not the contracts that are contemplated by the section of the statute under consideration. It is not a contract which the maker of the bonds enters into with the original holder, who transfers his right of action, by assignment, to a subsequent holder,

but one made with every holder of a bond who has the right of action by reason of his *bona fide* possession. Such bonds have all the qualities of negotiable paper, and pass from hand to hand without assignment, and hence come within the spirit, if not the letter, of the exception stated in the act."

The object of Congress in the inhibition of the act was, as the judge said, "to prevent persons assigning contracts to nominal parties, residing in other States, merely to clothe the court with jurisdiction from the residence of the litigants." This has no application to negotiable paper payable to bearer and transferable by delivery. The party holding such paper is the party to whom the promise is made, and he can sue in his own right and name. (*Smith* v. *Clapp*, 15 Pet. 125; *White* v. *The Railroad Co.* 21 How. 575; *Thompson* v. *Lee Co.* 3 Wall. 327; *The City of Lexington* v. *Butler*, 4 Wall. 282, 295; and *Bradford* v. *Jenks*, 12 McLean, 130.)

Coupons payable to bearer are "promissory notes negotiable by the law merchant," and the holders thereof are not assignees within the meaning of the Act of March 3d, 1875. (*Pettit* v. *The Town of Hope*, 2 Fed. Rep. 623; and *Cooper* v. *The Town of Thompson*, 13 Blatch. 434.)

Mortgages are not negotiable instruments, transferable by mere delivery; and hence a Circuit Court cannot take jurisdiction of a suit brought by the assignee of a mortgage alone, when the assignor and the mortgagor are citizens of the same State. (*Mersman* v. *Werges*, 3 Fed. Rep. 378; and *Sheldon* v. *Sill*, 8 How. 441.)

Mr. Justice Field, in *Wall* v. *The County of Monroe*, 13 Otto, 74, speaking of warrants issued by the treasurer of the county, and payable to "Frank Gallagher or bearer," said: "The warrants, being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them, and so maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a *bona fide* purchaser, evidence of their invalidity, or defenses against the original payee, would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee." Such warrants are, according to this language, negotiable by the law merchant for the purpose of enabling the holder to bring and

maintain, in his own name, an action upon them, though not for the purpose of excluding all legal and equitable defenses which existed to them when in the hands of the original payee.

In *Coe* v. *The Cayuga Lake R. Co.*, 19 Blatch. 522, it was held by Mr. Justice Blatchford, that "a promissory note made by a corporation and *sealed with its corporate seal*, payable to the order of a payee, and indorsed by him, is not a promissory note negotiable by the law merchant, within section 1 of the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), and, therefore, an assignee of it cannot sue the payee on it, in a Circuit Court of the United States, unless his assignor could have sued the payee on it in such court."

The ground on which this opinion rests is the fact that the notes in this case, being sealed with the corporate seal of the railroad company, though promissory notes payable to the order of the party named, were not, according to "the long-settled and well-settled principles of law," to be deemed "negotiable by the law merchant." They would have been such if they had not borne the seal of the company. This, however, made them "a specialty," and took them out of the category of notes excepted from the inhibition of the Act of March 3d, 1875. And, inasmuch as these notes had been transferred to the plaintiff by assignment, and bearing the corporate seal of the company, were not within the exception of the law, the assignee could not, in a Circuit Court of the United States, bring an action to recover thereon, unless the assignor could have done so if no assignment had been made.

In regard to these notes, Mr. Justice Blatchford said: "The instruments, aside from the seal of the company, have all the qualities of promissory notes, and of promissory notes made by the company as a corporation." Having remarked that the maker of a promissory note, whether an individual or a corporation, might make it either with or without a seal, he further said: "The instrument without the corporate seal will be a promissory note negotiable by the law merchant, and the instrument with the corporate seal will be a specialty and not a promissory note negotiable by the law merchant." He assumes that it was not the intention of Congress, under the phrase "promissory notes negotiable by the law merchant," to except sealed instruments from the inhibition of the Act of March 3d, 1875.

This construction of the law differs from that of Judge Bunn,

in *Porter* v. *The City of Janesville, supra.* The construction, however, accords with the general doctrine of the law merchant. Mr. Daniel, in his work on "Negotiable Instruments," 3d ed., vol. I, p. 37, says: "The first requisite of a bill is, that it shall be an open letter of direction, and of a note, that it shall be an open promise for the payment of money. By the term open is meant unsealed, and though the instrument possess all the other requisites of a bill or note, its character as a commercial instrument is destroyed, and it becomes a covenant, governed by the rules affecting common law securities, if it be sealed." (Edwards on Bills, 208, 210; Story on Bills, sec. 62; Story on Notes, sec. 55.)

The other exception made in the statute is that of "bills of exchange," without the word "foreign," which was in the earlier law on this subject. Bouvier defines such a bill to be "a written order from one person to another, directing the person to whom it is addressed to pay to a third person a certain sum of money therein named." (Law Dict.) If drawn in one country and payable in another, such an order is called a foreign bill; but if drawn and payable in the same State or country, it is an inland bill. It is essentially the same in either case.

The person who makes the order is known, in the language of commerce, as the drawer of the bill; the person upon whom it is drawn is the drawee; and the party to whom the drawee is directed to pay a certain sum of money is the payee.

Such bills, when drawn in one State of the Union and made payable in another State, are regarded as foreign bills, and if drawn and made payable in the same State, they are deemed inland bills. This is the doctrine stated in *Buckner* v. *Finley*, 2 Pet. 586.

The payee named in a bill of exchange has the power, by indorsement and delivery, to transfer it to another party, who may make a transfer in the same way to another party, and so on through successive indorsements and deliveries. This mercantile usage has given to bills of exchange the character of commercial paper, negotiable by indorsement and delivery; and it is a rule among courts to treat them as possessing this character.

Thus Mr. Justice Clifford, in stating the opinion of the court in *Goodman* v. *Simonds*, 20 How. 343, 364, remarked: "Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of

their negotiable quality, as their universal convenience in mercantile affairs. They may be transferred by indorsement, or when indorsed in blank, or made payable to bearer, they are transferable by mere delivery." They serve the purposes of money in the settlement of transactions between parties. The lawful holder of a bill of exchange is entitled to bring an action against the proper party to recover thereon.

The well-known commercial and negotiable character of such bills, like that of "promissory notes negotiable by the law merchant," undoubtedly furnished the reason why Congress excepted them from the inhibition of the Act of March 3d, 1875, and omitted to make any discrimination between foreign and inland bills. It was not necessary, for the purposes of the act, to include them in the inhibition. The lawful holder of such a bill, no matter whether he has acquired possession of it by assignment or otherwise, may bring a suit thereon in the proper Circuit Court, without regard to the question whether the assignor, if the possession is by assignment, could have brought a suit in the same court if no assignment had been made. He may maintain the action in his own name, and simply in virtue of his lawful possession of the bill, upon the proper conditions as to citizenship between him and the party sued.

The *fourth* and last question is, whether the suit might have been prosecuted in the Federal court by the assignor, to recover on the contract, if no assignment had been made. If the assignor, by reason of the requisite citizenship between himself and the other contracting party, could have brought the suit in the Federal court, then the assignee of the contract, having the proper citizenship considered relatively to the other party, may also bring the suit in the same court, but not otherwise, unless the contract be a promissory note negotiable by the law merchant, or a bill of exchange.

Here, then, is a question of fact relating to the power of the assignor to bring the suit, if no assignment had been made. He must have the proper citizenship, and in respect to the requisite citizenship of the assignor as the basis of supporting jurisdiction of a suit "in favor of an assignee," the rule of law is that the latter must affirmatively show that the former could, by reason of the proper citizenship, have brought the suit if no assignment had been made.

Mr. Justice Miller, in stating the opinion of the court, in *Bradley* v. *Rhines' Administrator*, 8 Wall. 393, said: "We take the doctrine to be settled, that when a party claims in the Federal courts, through an assignment of a *chose in action*, he must show affirmatively that the action might have been sustained by the assignor, if no assignment had been made." (*Turner* v. *The Bank of North America*, 4 Dall. 8; *Mollan* v. *Torrance*, 9 Wheat. 537; *The United States Bank* v. *Moss*, 6 How. 31; and *Sheldon* v. *Sill*, 8 How. 441.)

It is quite true that the doctrine established by these cases rests on the provision contained in the eleventh section of the Judiciary Act of 1789. The doctrine, however, is just as applicable under the similar provision contained in the Act of March 3d, 1875. The two acts in this respect are identical.

A suit, then, to which the inhibition in the Act of March 3d, 1875, applies, is one that is "founded on contract," and is brought by and in favor of the assignee of the contract, which contract is not a promissory note negotiable by the law merchant, or a bill of exchange, and in respect to which contract it is true that the assignor could not have prosecuted the suit in the Federal court, in which the assignee seeks to prosecute it, if no assignment had been made. The statute expressly excludes the cognizance of the court in all cases coming within this description.

Whether a particular case presented to the court is within the description or not must be determined by the application of the terms of the statute to the facts of that case. If it is, then that ends the question of jurisdiction; but if it is not within the description, then jurisdiction is not excluded by the inhibition, and whether it exists or not must be settled by other considerations. And since the Act of March 3d, 1875, is later than the Judiciary Act of 1789, the inhibition of the former, with its qualifications and exceptions, must be taken as the rule on this subject.

The reader will find in Bump's "Federal Procedure," pp. 139–143, 156, a reference to a series of cases in which the courts have passed upon the construction of the inhibition in both of these acts.

9. Change of Citizenship.—Every citizen of a State has the right to remove his residence from one State to another; and if the removal be *bona fide*, and with the *animo manendi*, he be-

comes *ipso facto* a citizen of the latter State, and ceases to be a citizen of the State from which he has removed. The fact that his motive, in making this change of citizenship, was to bring a suit in the Circuit Court of the United States, which he could not otherwise bring, will not invalidate the act or destroy the right of such suit, provided that the change is not simply colorable, but is real and in good faith, which is a question of fact to be determined by the court.

It was held in *Jones* v. *League*, 18 How. 76, 81, that "a change of residence, with a real intent to remain, makes a change of citizenship, and though made with intent to give jurisdiction, will be sufficient for that purpose." Mr. Justice McLean said in this case: "The change of citizenship, even for the purpose of bringing a suit in the Federal court, must be with *bona fide* intention of becoming a citizen of the State to which the party removes. Nothing short of this can give him a right to sue in the Federal courts, held in the State from whence he removed." Such a change, however, will give the right. (*Briggs* v. *French*, 2 Sum. 251; *Castor* v. *Mitchell*, 4 Wash. 19; *Catlett* v. *The Pacific Ins. Co.* 1 Paine, 594; *Cooper* v. *Galbraith*, 3 Wash. 546; *Case* v. *Clark*, 5 Mason, 70.)

This principle was, in *Rice* v. *Houston*, 13 Wall. 66, held to be applicable to an administrator who, after getting letters of administration in the State of which the decedent was a citizen, removes to another State and becomes a citizen thereof, in order that he may bring a suit in the Circuit Court of the United States for the State from which he removed, provided that there is nothing in the laws of the State forbidding administrators thus to remove from that State. An administrator has, in this respect, the same right of removal and of suit as any other citizen.

If, however, a suit has been commenced in a Circuit Court, and if, on the ground of the requisite citizenship, the court has acquired jurisdiction, then this jurisdiction cannot be ousted or divested by any subsequent change of residence of either party, *pendente lite*.

Chief Justice Marshall, in *Morgan's Heirs* v. *Morgan et al*, 2 Wheat. 290, 297, said: "We are all of opinion that the jurisdiction, having once vested, was not devested by the change of residence of either of the parties." In *Mollan* v. *Torrance*, 9 Wheat. 537, 539, Chief Justice Marshall said: "The jurisdiction

of the court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events." In *Dunn* v. *Clarke*, 8 Pet. 1, 3, Mr. Justice McLean said: "The Circuit Court had jurisdiction, and no change in the residence or condition of the parties can take away a jurisdiction which has once attached."

In *Conolly* v. *Taylor*, 2 Pet. 556, 565, Chief Justice Marshall said: "Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." He also affirmed as correct the following propositions of the counsel for the defendants in this case: "If an alien becomes a citizen pending the suit, the jurisdiction which was once vested is not devested by this circumstance. So if a citizen sue a citizen of the same State, he cannot give jurisdiction by removing himself and becoming a citizen of a different State."

These cases settle the law as to the continuance of jurisdiction, after it has been once acquired in virtue of the proper conditions as to citizenship. Neither party can either give or evade jurisdiction by a change of residence after the suit has been brought in the Circuit Court. The law never wittingly makes itself a party to tricks designed to evade its provisions.

10. The Citizenship of Corporations.—Civil corporations are not persons in the natural sense, and can claim no privileges or immunities under the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This doctrine was laid down in *The Bank of Augusta* v. *Earle*, 13 Pet. 519, and in *Paul* v. *Virginia*, 8 Wall. 168.

The Supreme Court has, however, regarded such corporations as legal persons, having a local residence and citizenship in the State in which they are organized under the authority of law, for the purpose of suits under the provision of the Constitution which extends the judicial power of the United States to controversies "between citizens of different States," and under the laws of Congress enacted in pursuance thereof.

The ground originally taken by the court was that citizenship depends upon and is determined by the citizenship of the individual corporators, and, hence, that it was necessary to aver this

citizenship in the record. The ground subsequently taken and now thoroughly established is that, for all the purposes of jurisdiction, a corporation is a citizen of the State creating it, within the meaning of the provision which extends the judicial power to controversies "between citizens of different States." (*The United States Bank* v. *Deveaux*, 5 Cranch, 61; *The Louisville, &c., Railroad Co.* v. *Letson*, 2 How. 497; *Marshall* v. *The Baltimore & Ohio Railroad Co.* 16 How. 314; *The Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227; *The Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286; *Cowles* v. *Mercer County*, 7 Wall. 118; and *The Railway Co.* v. *Whitton*, 13 Wall. 270.)

Ex-Judge Dillon, in his Removal of Causes, 3d ed. p. 69, says: "The settled rule now is that a corporation, for all purposes of Federal jurisdiction, is conclusively considered as if it were a citizen of the State which created it, and no averment or proof as to citizenship of its members elsewhere is competent or material." It can hence sue or be sued in the Federal courts as if it were a natural person, under the conditions as to citizenship applicable to such a person.

This rule applies to public municipal corporations, created and regulated by State authority, such as cities, towns, and counties, as fully as it does to private corporations. It was held, in *Cowles* v. *Mercer County*, 7 Wall. 118, that "a municipal corporation created by one State within its own limits may be sued in the courts of the United States by the citizens of another State," and that "the statutes of a State limiting the jurisdiction of suits against counties to Circuit Courts held within such counties have no application to courts of the National Government." Chief Justice Chase said in this case: "The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat the jurisdiction given by the Constitution."

In *McCoy* v. *Washington County*, 3 Wall. Jr. C. C. 381, it was claimed that the county of Washington, being simply a subordinate political division of the State of Pennsylvania, is not a citizen of the State within the meaning of the Constitution, or the acts of Congress, and therefore not suable in the Federal court. To this Mr. Justice Grier replied as follows: "Though the metaphysical entity called a corporation may not be physically a citizen, yet the law is well settled that it may sue and be sued

in the courts of the United States, because it is but the name under which a number of persons, corporators and citizens, may sue and be sued. In deciding the question of jurisdiction the court look behind the name, to find who are the parties really in interest. In this case the parties to be affected by the judgment are the people of Washington County. That the defendant is a municipal corporation, and not a private one, furnishes a stronger reason why a citizen of another State should have his remedy in this court, and not in a county where the parties, against whom the remedy is sought, would compose the court and jury to decide their own case. The point is therefore overruled."

In *The Railway Company* v. *Whitton*, 13 Wall. 270, it was held that no statute of a State can limit the liability of a corporation to suits, in the courts of the State, in any way that will affect the jurisdiction of the Federal courts as granted by the Constitution and by the laws of Congress. The proper conditions as to citizenship being present, the jurisdiction operates, no matter what may be the laws of the State.

Corporations, especially such as construct continuous lines of railway through different States, may act and exercise their corporate powers under charters granted to them by two or more States. How does such a fact operate in the event that suits, on the ground of citizenship, are brought by or against such corporations in the Federal courts? The Supreme Court of the United States has had several occasions for answering this question.

The case of *The Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286, came before the Supreme Court on the certificate of divided opinions in the Circuit Court. The company brought the suit in the Circuit Court, setting forth in its declaration that it is a corporation created by the laws of Indiana and Ohio, that it is a citizen of Ohio, having its principal place of business in that State, and that Wheeler, the defendant, is a citizen of Indiana. Wheeler denied the jurisdiction of the court on the ground that the company was a citizen of the same State with himself; and on this question the opinions of the judges of the court were divided, and, hence, they certified the case to the Supreme Court. Chief Justice Taney, in stating the opinion of the court, referred to the fact that the company, according to the averments of the declaration, appears "to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two

States, and to be one and the same legal being in both States," and then proceeded to say:

"It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects; and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereign which brings it into life and endues it with its faculties and powers. The President and Directors of the Ohio & Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States."

The court hence certified to the Circuit Court that, on the showing of the facts as presented in the record, it had no jurisdiction of the suit. Two distinct and separate corporate bodies, chartered by different States under the same name, one of which was a citizen of the same State with the defendant, were joined in the suit; and this was fatal to the jurisdiction of the Circuit Court. These bodies thus joined could not maintain a suit in that court against a citizen of either State.

The case of *The Railway Company* v. *Whitton*, 13 Wall. 270, originated in a suit brought by Whitton in a State court in Wisconsin against the Chicago and Northwestern Railway Company. Whitton, under the Act of March 2d, 1867, passed by Congress, petitioned to have the suit removed from the State court to the Circuit Court of the United States for that State, setting forth the fact that he was at the time and for three years had been a resident and citizen of the State of Illinois, and that the defendant is a corporation organized under the laws of Wisconsin. This petition was resisted by the company on the ground, among other reasons, that the defendant was a corporation organized under the laws of the States of Illinois, Wisconsin, and Michigan, of one of

which States the plaintiff was a citizen, and that, therefore, the Circuit Court could take no jurisdiction of the suit. The Circuit Court, however, held that, upon the showing of the record, it had jurisdiction, and proceeded with the case. The jury gave judgment against the company, and the company then carried the case by writ of error to the Supreme Court of the United States.

One of the points before the Supreme Court related to the question of jurisdiction, as derived from the character of the parties to the suit. In respect to this point, Mr. Justice Field, in delivering the opinion of the court, said:

"The plaintiff is a citizen of the State of Illinois, and the defendant is a corporation created under the laws of Wisconsin. * * * The defendant, therefore, must be regarded for the purposes of this action as a citizen of Wisconsin. But it is said, and here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and, therefore, is also a citizen of the same State with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not *there* a corporation or a citizen of any other State. Being there sued, it can only be brought into court as a citizen of that State, whatever its status or citizenship may be elsewhere."

The company was sued by Whitton simply as a citizen of Wisconsin; and since it was such a citizen, and since Whitton was a citizen of Illinois, the requisite citizenship existed between the parties, which was not in Wisconsin affected by the fact that the company was incorporated under the laws of other States. It was enough for the purposes of the suit that the company had a real citizenship in Wisconsin, and that it was there sued by a citizen of Illinois. This made the suit a controversy "between citizens of different States."

The same general doctrine was adopted by the Supreme Court in *Muller* v. *Dows*, 4 Otto, 444. It appeared in this case that two railway companies had been consolidated, and had become one company for business purposes, by the laws of Iowa and those of Missouri. It was, however, held in this case that this one corporation was in the State of Iowa "an Iowa corporation, existing under the laws of that State alone," and that "the laws of Missouri had no operation in Iowa." Reference was made to the

decision of the court in *The Railway Company* v. *Whitton*, *supra*, with the remark by Mr. Justice Strong that, "in view of this decision, it must be held that the objection to the jurisdiction of the Circuit Court of Iowa is unsustainable."

In *Vose* v. *Reed*, 1 Woods, 647, it was held that "if persons who are incorporated under the laws of one State are subsequently incorporated under the laws of another State, a citizen of the former State may sue the latter corporation in the Circuit Court" of the United States. There are in fact two incorporations of the same persons, one in each State; and in each State the corporate citizenship is, for the purposes of suit in that State, a distinct legal fact by itself. Consolidation of railway companies by charters granted by different States does not change or obliterate this fact.

So also, in *The Chicago & N. W. R. R. Co.* v. *The Chicago & P. R. R. Co.* 6 Biss. 219, it was held that "a corporation which is created under the laws of one State, may institute an action in a Circuit Court in another State, although it is associated with a corporation in the latter State."

The doctrine, established by these cases, is that a railway company extending its line of railroad through different States, and from these States receiving charters of incorporation, and consolidated in this sense, is, nevertheless, for the purposes of jurisdiction by the Circuit Courts of the United States, to be deemed a corporation and citizen in each State granting it a charter, and making it a body corporate in that State, and that if a corporation thus exists under the laws of two States, being a corporate body in each, then a citizen of one State may sue it in the Circuit Court of the United States held in another State, without reference to its status or citizenship elsewhere. It would seem to be equally true that the company may in like manner bring a suit in the Circuit Court against a citizen of another State, since it is legally a corporation in each State granting it a charter.

The difficulty in the case of *The Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286, as stated by Chief Justice Taney, was that two such corporations under one name were joined as plaintiffs in bringing a suit against a citizen of a State of which the defendant was also a citizen with one of the plaintiffs.

Such, then, are the general principles of law relating to controversies "between citizens of different States." These five

words, as found in the Constitution, have, in their use and application, proved to be pregnant with meaning. No inconsiderable portion of the business of the Circuit Courts of the United States has its origin in these words. Their jurisdiction in all controversies "between citizens of different States," when citizenship furnishes the basis of the jurisdiction, springs from this single source.

CHAPTER VIII.

CONTROVERSIES BETWEEN CITIZENS OF THE SAME STATE.

1. Constitutional Provision.—The judicial power of the United States is, by the Constitution, extended to controversies "between citizens of the same State claiming lands under grants of different States." The terms "citizens" and "States" are, in this clause, used in the same sense as in other clauses of the Constitution making grants of judicial power. The jurisdiction depends in part upon the fact that the parties to the controversy are citizens of the same State, and in part upon the fact that the matter in dispute between them relates to a claim of land under grants of different States.

2. Legislative Provisions.—The latter part of the twelfth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), as reproduced and continued in section 647 of the Revised Statutes of the United States, provides as follows:

"If, in any action commenced in a State court, where the title of land is concerned, and the parties are citizens of the same State, and the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, the sum or value being made to appear to the satisfaction of the court, either party before the trial states to the court, and makes affidavit if they require it, that he claims and shall rely upon a right or title to the land under a grant from a State other than that in which the suit is pending, and produces the original grant, or an exemplification of it, except where the loss of public records shall put it out of his power, and moves that the adverse party inform the court whether he claims a right or title to the land under a grant from the State in which the suit is pending, the said adverse party shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he gives information that he does claim under such grant, the party claiming under the grant first mentioned may, on motion, remove the cause for trial into the next Circuit Court to be holden in the district where such suit is pending. If the party so removing the cause is defendant, the removal shall be made under the regulations governing removals of a cause into

such court by an alien; and neither party removing the cause shall be allowed to plead or give evidence of any other title than that stated by him as aforesaid as the ground of his claim."

This legislation confers jurisdiction upon the Circuit Courts of the United States in these controversies only when the action was first commenced in a State court, and the cause has been removed therefrom to the proper Circuit Court, in the manner specified, and the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars. Neither the Judiciary Act of 1789 nor the Revised Statutes otherwise confer any jurisdiction upon the courts of the United States in these cases.

The Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), gives to the Circuit Courts of the United States original cognizance "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," and the suit is "between citizens of the same State claiming lands under grants of different States." The suit, under the provisions of this act, may be brought in the first instance in the Circuit Court of the United States. The same act also provides for the removal of such suits to the Circuit Courts, when first arising in State courts.

3. Legal Elements.—The legal elements involved in these cases are the following:

(1.) The controversy must be "between citizens of the same State." These are the parties specified by the Constitution, and, of course, these parties and these only must appear on the record of the suit.

(2.) The subject-matter of the controversy is an alleged right or title to given lands. Both parties claim the same lands, each by a different title from that of the other; and the question to be determined relates to the validity of these respective and conflicting titles.

(3.) These titles are based upon an alleged grant of the same lands to different persons by different States. Each of the parties sets up a claim to the lands under the grant of a State. This assumes that a State claimed to be the proprietor of the lands in question and to exercise jurisdiction over them. A land-grant gives a title that emanates from a government, and proceeds upon the supposition that the government claimed to be the owner of

the lands thus granted. If there be two such grants of the same lands to different parties, then the grants are conflicting, and the point to be judicially determined is which of these grants conveys a good title to the lands in dispute.

The framers of the Constitution anticipated the possibility that different States might claim proprietorship in and jurisdiction over the same lands, and might grant the same lands to different parties. They thought it expedient that controversies between citizens of the same State, growing out of and relating to such conflicting grants of land, should come within the judicial power of the United States, and not be left to be determined solely by State authority.

The Federal court vested with power to consider and determine such controversies, is, of necessity, vested with power to determine all the questions involved in them. One of these questions may be this: Which of the States making the grants was the proprietor of the land and had jurisdiction over it? Though the States themselves are not direct parties to the suit, the controversy between the parties may spring from their conflicting claims as to jurisdiction and boundary. The Federal court, authorized to take cognizance of the controversy, would undoubtedly have power to decide all the questions, including those of boundary and jurisdiction, whose determination might be necessary in settling the issue before it.

Mr. Justice Baldwin, in stating the opinion of the court in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 727, took the ground that, in controversies "between citizens of different States," the Circuit Courts, in the exercise of their original jurisdiction, and the Supreme Court, in the exercise of its appellate jurisdiction, have power to decide upon the boundary of States when this question is collaterally involved in suits between individuals pending before them, and must be determined in order to decide these suits. The jurisdiction of the Circuit Court in such a case was asserted by the Supreme Court in *Fowler* v. *Miller*, 3 Dall. 411.

In *Handly's Lessee* v. *Anthony et al.*, 5 Wheat. 374, Chief Justice Marshall said: "This was an ejectment, brought in the Circuit Court of the United States for the district of Kentucky, to recover land which the plaintiff claims under a grant from the State of Kentucky, and which the defendants hold under a grant from the United States as being part of Indiana. The title de-

pends upon the question whether the lands lie in the State of Kentucky, or in the State of Indiana." "The opinions given by the court," he added, "must be considered in reference to the case in which they were given. The sole question in the cause respected the boundary of Kentucky and Indiana, and the title depended entirely upon that question." The judgment of the Circuit Court, determining this question, was affirmed by the Supreme Court. (*Harcourt* v. *Gaillard*, 12 Wheat. 523.)

If, then, the Circuit Courts of the United States can pass upon the question of boundary between States, when deciding controversies "between citizens of different States," they surely can do so in determining controversies "between citizens of the same State claiming lands under grants of different States." The question of boundary, and with it the question of State proprietorship and jurisdiction, may arise in the latter class of controversies.

4. Cases Decided.—Suits under this particular clause of the Constitution have rarely come before the Federal Courts. Only two cases, so far as I am aware, have ever reached the Supreme Court of the United States.

The first was the case of *The Town of Pawlet* v. *Clark et al.*, 9 Cranch, 292, which was certified to the Supreme Court from the Circuit Court for the district of Vermont. The plaintiffs claimed certain lands under a grant from the State of Vermont, and the defendants claimed the same lands under a grant from the State of New Hampshire, which grant was made before Vermont became a State, and when the whole of its territory was comprehended in the State of New Hampshire. This raised the jurisdictional question whether the two grants were made by "different States," Vermont being included in the sovereignty of New Hampshire when the first grant was made. Mr. Justice Story, in stating the opinion of the Court as to the constitutional provision, said:

"It had no reference whatsoever to the antecedent situation of the territory, whether included in one sovereignty or another. It simply regarded the fact whether grants arose under the same or under different States. Now, it is very clear that, although the territory of Vermont was once a part of New Hampshire, yet the State of Vermont, in its sovereign capacity, is not and never was the same as the State of New Hampshire. The grant of the plaintiffs emanated purely and exclusively from the sovereignty of Vermont; that of the defendants purely and exclusively from the

sovereignty of New Hampshire. The sovereign power of New Hampshire remains the same, although it has lost a part of its territory; that of Vermont never existed until its territory was separated from the jurisdiction of New Hampshire. The circumstance, that a part of the territory or population was once under a common sovereign, no more makes the States the same than the circumstance that a part of the members of one corporation constitutes a component part of another corporation, makes the corporation the same."

On this ground it was held that the controversy comes within Federal jurisdiction, whatever may have been the situation of Vermont when the first grant was made by New Hampshire. No question of boundary between States was involved in this case. The dispute related to the validity of the respective titles claimed under grants of different States; and on this point the opinion of the court was "that, upon the special statement of facts by the parties, judgment ought to pass for the plaintiffs."

The other case was that of *Colson* v. *Lewis*, 2 Wheat. 377, which was removed from a State court into the Circuit Court for Kentucky, and from the latter court was certified to the Supreme Court of the United States. The specific question before the Supreme Court was "whether the Circuit Court for the district of Kentucky can take jurisdiction of the cause, because the grants for the land in controversy, lying in Kentucky, were issued, the one by the State of Virginia, and the other by the State of Kentucky, when both grants purport to be founded upon warrants and locations made under the authority of the laws of Virginia." Mr. Justice Washington, in stating the opinion of the court, referred to the case of *The Town of Pawlet* v. *Clark et al.*, *supra*, and then proceeded to say:

"The only difference between the two cases is that in the case referred to, both parties claimed immediately under grants, the one from the State of Vermont, and the other from the State of New Hampshire, before the separation, which grants were the inception of title; and that, in this case, both parties claim under grants, the one issued by the State of Kentucky, and the other by the State of Virginia, but upon warrants issued by Virginia, and locations founded thereon, prior to the separation of Kentucky from Virginia. But where the controversy arises upon claims founded upon grants from different States, as the present case is understood to be, the principle decided in the case which has been cited, precisely governs this. The decision in that case is founded on the words of the Constitution, which extends the judicial

power of the United States to controversies between citizens of the same State, claiming lands under grants of different States. It is the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different States, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant."

Controversies "between citizens of the same State claiming lands under grants of different States" have been so comparatively rare that the Federal courts have seldom had occasion to consider and apply this constitutional provision. The jurisdiction of the Circuit Courts of the United States in these controversies exists, ready to be exercised whenever the occasion calls for it. And it is only by this provision that Federal jurisdiction can reach a case arising from conflicting grants of land made by different States, when the parties to the suits are citizens of the same State. This, indeed, is the only case in which these courts have jurisdiction in controversies between such citizens, when citizenship is the basis of the jurisdiction.

CHAPTER IX.

CONTROVERSIES WITH FOREIGN STATES, CITIZENS, OR SUBJECTS.

1. Constitutional Provision.—The last of the enumerated classes of controversies to which the Constitution extends the judicial power of the United States, embraces controversies "between a State or the citizens thereof and foreign States, citizens, or subjects." In regard to this provision Alexander Hamilton said:

"The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts is with reason classed among the just causes of war, it will follow that the Federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity. * * * So great a proportion of the controversies in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." (The Federalist, No. 80.)

This is a lucid statement of the general reason why the framers of the Constitution judged it expedient to extend the judicial power of the United States to this class of controversies.

2. Legislative Provisions.—The eleventh section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), gave to the Circuit Courts of the United States original cognizance "of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," and where "an alien is a party," whether as plaintiff or defendant. The thirteenth section of this act gave to the Supreme Court original and exclusive cognizance "of all controversies of a civil nature where a State is a party," and a foreign State is the other party. These provisions of law are reproduced

and continued in sections 629 and 687 of the Revised Statutes of the United States.

Congress, by the Act of March 3d, 1875 (18 U. S. Stat. at Large, 460), gave to the Circuit Courts of the United States original cognizance "of all suits at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," and the controversy is "between citizens of a State and foreign States, citizens, or subjects." A controversy between a State of the Union and a foreign State is not embraced in this grant of jurisdiction. Such a controversy belongs to the original and exclusive jurisdiction of the Supreme Court.

Those who are simply citizens of the United States, domiciled in the District of Columbia, or who are merely citizens in a Territory of the United States, do not come within these provisions of the Constitution and the law. The provisions have no application to such persons. They are not included in their terms.

Nor do these provisions apply to the Indian tribes of this country. Though, for the purpose of making treaties with them, these tribes have been recognized as States, in the general political sense they are not foreign States, and not States of the Union, and, as tribes, not citizens or subjects of either class of States, and hence they do not come within the terms of these provisions. Their status is that of dependent nations within the general jurisdiction of the United States. This is the view which has been taken by the Supreme Court. (*The Cherokee Nation* v. *Georgia*, 5 Pet. 1, and *Worcester* v. *Georgia*, 6 Pet. 515.)

The possible controversies, either party being plaintiff or defendant, embraced within the terms of this clause of the Constitution, and those of the law in pursuance thereof, may be arranged into four classes, as follows:

(1.) *A State and a Foreign State*—The first class embraces those controversies which may arise between a State of the Union and a foreign State. Either may sue the other, and hence either may be plaintiff or defendant. In such suits the Supreme Court has original and exclusive jurisdiction.

It should be remembered, however, that a foreign State cannot be compelled to submit to the jurisdiction of this court; and hence, if it were sued therein by a State of the Union, the question whether it should plead as a defendant would be entirely a mat-

ter of its own choice. It could not be made a party, or be bound by the judgment or decree of the court, against its own pleasure. In regard to this point, Mr. Justice Story remarks: "In regard to controversies between an American and a foreign State, it is obvious that the suit must, on the one side at least, be wholly voluntary. No foreign State can be compelled to become a party, plaintiff or defendant, in any of our tribunals. If, therefore, it chooses to consent to the institution of any suit, it is its consent alone which can give effect to the jurisdiction of the court. (Story's Const. sec. 1699; 2 Elliott's Debates, 391, 407; and *Foster* v. *Neilson*, 2 Pet. 253, 307.)

The case would be different with a State of the Union, if sued in the Supreme Court by a foreign State, since, according to the Constitution, which is binding upon every State, it is suable in this court by a foreign State, just as it is suable in the same court by another State of the Union. The judicial power of the United States extends to controversies between a State of the Union and a foreign State; and in all cases in which a State is a party, the Supreme Court has original jurisdiction.

This jurisdiction clearly applies to a case in which a foreign State brings a suit in this court against a State of the Union, or in which the former should consent to be sued therein by the latter, provided the subject-matter of the suit admits of judicial determination. The Constitution operates as a "supreme law" upon every State in the Union; and, if such a State were sued in the Supreme Court by a foreign State, it would be bound to submit to the process, and abide by the judgment or decree of the court.

(2.) *A State and an Alien.*—The second class includes controversies between a State of the Union and a citizen or subject of a foreign State. As the Constitution originally stood, either party could bring a suit against the other in the Supreme Court of the United States. The Eleventh Amendment, however, provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State." Aliens cannot, since the adoption of this amendment, bring, in a Federal court, any suit in law or equity against a State of the Union. The right of such suit which previously existed is withdrawn.

The withdrawal is, in its terms, limited to suits "in law or equity." This does not include admiralty suits, and hence it would seem to follow that aliens may still bring, in the Supreme Court, this class of suits against States, just as they could have done if this amendment had never been adopted. There is nothing in the language of the amendment that affects this right. If the right ever existed, it still exists.

So, also, the right of States to sue aliens in the courts of the United States remains just as it was before the adoption of the amendment; and hence a suit by a State against an alien could be maintained in a Federal court, provided the alien could be reached by its process, or had property in this country upon which the jurisdiction of the court could act. If, however, the alien were a non-resident, and had no property within the jurisdiction of the court, it is difficult to see how such a suit could be made effective, unless the alien voluntarily chose to appear as a defendant. He would be beyond the reach of any coercive measures by the court.

(3.) *Citizens and Foreign States.*—The third class embraces controversies between a citizen of a State of the Union and a foreign State. Either, according to the terms of the Constitution, may sue the other in the Supreme Court, and either, according to the Act of March 3d, 1875, may sue the other in the Circuit Courts of the United States. This act expressly gives jurisdiction to these courts over "a controversy between citizens of a State and foreign States, citizens, or subjects."

A foreign State may, therefore, bring a suit in a Circuit Court of the United States against a citizen or citizens of any State of the Union. The latter may also, in the same court, bring suits against a foreign State. But whether the foreign State, if thus sued, shall submit to the jurisdiction of the court or not, must, in the nature of things, be dependent upon its own choice, just as would be the fact if it were sued in the Supreme Court by a State of the Union. There would be no power in the court to compel it to accept the position of a defendant, or to acquiesce in the judgment rendered. The court certainly could not carry its judgment into execution against the pleasure of a foreign State.

(4.) *Citizens and Aliens.*—The fourth class embraces controversies between citizens of a State of the Union and aliens, or

citizens or subjects of a foreign State. The Act of March 3d, 1875, gives jurisdiction to the Circuit Courts of the United States in such controversies, when the suit is one in law or equity, and the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. The Judiciary Act of 1789 gave the same jurisdiction in controversies in which "an alien is a party." These are the controversies which, under this constitutional provision and the legislation of Congress for its execution, the Federal courts have most frequently had occasion to consider and determine.

The general principles applicable to the question of State citizenship, in suits between citizens and aliens, are the same as those which apply in cases in which citizens are the parties, and in which jurisdiction depends on the fact of the requisite citizenship. A citizen of a State is here, as in other cases, a citizen of the United States domiciled in a particular State, and in virtue of this fact, a citizen of that State. Being a party to the suit, either plaintiff or defendant, and the jurisdiction of the court being dependent in part upon his citizenship, the record must contain the proper averment as to such citizenship.

So, also, the other party, the alien, must be a citizen or subject of some foreign State; and this fact must be shown by the record. The Indians of this country, not being citizens, and not being citizens or subjects of any foreign State, cannot be parties to suits under this clause of the Constitution. (*Karrahoo* v. *Adams*, 1 Dill. 344.)

The fact that an alien has filed a declaration of intention to become a citizen of the United States, and, consequently, of the State in which he resides, does not make him a citizen in either sense. His status of alienage remains a fact until the process of naturalization has been completed by a competent court; and until this period he may, as an alien, sue or be sued in the Circuit Courts of the United States. (*Baird* v. *Byrne*, 3 Wall. Jr. 1.)

The Circuit Courts, under this provision of the Constitution, and the law for carrying it into effect, have no jurisdiction of controversies simply between aliens; and hence, if an alien be a party, the other party must, in order to give jurisdiction, be a citizen of some one of the States of the Union, which fact must be set forth in the record. It is not enough that one of the parties is an alien, unless the other is a citizen. (*Montalet* v. *Murray*, 4 Cranch, 46; *Hodgson* v. *Bowerbank*, 5 Cranch, 303; *Mossman* v. *Higginson*, 4 Dall. 12; *Jackson* v. *Twentyman*, 2 Pet. 136;

Prentiss v. *Brennan*, 2 Blatch. 162; and *Rateau* v. *Bernard*, 3 Blatch. 244.)

If the party on the record be an alien suing in his own right, or as a trustee, having a substantial interest as a trustee, or if the nominal plaintiff, although a citizen of some State, sue for an alien who is the real party in interest, jurisdiction will attach to the case, provided the defendant party be a citizen of a State, and this fact appears on the record. (*Chappedelaine* v. *Dechenaux*, 4 Cranch, 306; *Browne* v. *Strode*, 5 *Cranch*, 303; and *Jackson* v. *Twentyman*, 2 Pet. 136.)

If the suit be between aliens and citizens, the latter being described simply as "citizens of the United States," the Circuit Court can exercise no jurisdiction in the case. (*Picquet* v. *Swan*, 6. Mass. 35.) If the alien be a foreign sovereign, he may institute a suit in the Circuit Court against a citizen of a State. (*King* v. *Oliver*, 2 Wash. 429.) The residence of the alien in the same State with the citizen whom he sues does not incapacitate him to bring a suit against him in the Circuit Court of the United States. (*Breedlove* v. *Nicolet*, 7 Pet. 413.)

If a citizen and an alien join in a suit against defendants whom the citizen plaintiff is not competent to sue in the Circuit Court, and thereupon the citizen plaintiff's name is stricken out, the court then has jurisdiction, and may proceed to determine the case as between the alien and the citizen defendants. (*Conolly* v. *Taylor*, 2 Pet. 556.)

The fact that an alien is a foreign consul does not exempt him from a suit in the Circuit Court against him as an alien, if the suit be brought by a citizen of the United States. (*St. Luke's Hospital* v. *Barclay*, 3 Blatch. 259; and *Graham* v. *Stucken*, 4 Blatch. 50.)

A foreign corporation is deemed to be an alien for the purposes of bringing suits in the Circuit Courts of the United States, against a citizen or citizens of a State, or of being sued by such citizen or citizens. This principle was recognized in *The Society, &c.* v. *New Haven*, 8 Wheat. 464. This case was an action of ejectment brought by the plaintiffs, who were a foreign corporation, against the town of New Haven, in Vermont, in the Circuit Court for the district of that State, and was certified to the Supreme Court upon a division of opinion between the judges of the

Circuit Court. The right of the plaintiffs, as a foreign corporation, to bring the suit, was fully recognized in both courts.

Mr. Justice Harlan, in *The National Steamship Company* v. *Tugman*, 15 Chicago Legal News, 105, referred to the doctrine established by the Supreme Court to the effect "that where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States." This is a well-settled doctrine. Applying the same principle to a foreign corporation, Mr. Justice Harlan proceeded to say:

"That if the individual members of a corporation, created by the laws of one of the United States, are, for the purposes of suit by or against it in the courts of the Union, conclusively presumed to be citizens of the State by whose laws that corporation is created and exists, it would seem to follow logically that the members of a corporation, created by the laws of a foreign State, should, for like purposes, be conclusively presumed to be citizens or subjects of such foreign State. Consequently, a corporation of a foreign State is, for the purposes of jurisdiction in the courts of the United States, to be deemed constructively a citizen or subject of such State."

Such a corporation may hence sue or be sued in the Circuit Courts of the United States, and if it brings a suit in a State court against a citizen of a State, or if a suit is brought against it in a State court by such a citizen, then, in either event, it may, by compliance with the provisions of the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), remove the suit for trial to the proper Circuit Court of the United States. It has in this respect the same rights as an individual alien.

In regard to the right of suit secured by the Constitution and the law to aliens, whether individual or corporate, Mr. Justice Story remarks: "In relation to aliens, however, it should be stated that they have a right to sue only while peace exists between their country and our own, for if a war breaks out, and they thereby become alien enemies, their right to sue is suspended until the return of peace." (Story's Const. sec. 1700.)

3. Application of State Laws.—The thirty-fourth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), which is continued as section 721 of the Revised Statutes of the United States, provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

The rule here stated is as applicable to suits between citizens and aliens, as it is to suits in which both parties are citizens. The Federal courts are in such suits to administer State laws where they are applicable, and have not been superseded by the Constitution, laws, or treaties of the United States. If the suits be suits in equity, then the general principles, rules and usages which belong to courts of equity, except as otherwise established by law or by courts in pursuance thereof, would be applicable to them. If the suits be suits at common law, then State laws, subject to the qualifications of the statute, are to be regarded as rules of decision. The fact that one of the parties is an alien would make no difference in the procedure or the rules of decision, whether the suit be one in equity or one in law. It is the jurisdiction that depends on this fact, and not the method of exercising it or the rules governing it, except as there may be special rules of law relating to controversies in which one of the parties is an alien.

PART III.

COURTS OF THE UNITED STATES.

CHAPTER I.

DISTRICT COURTS.

1. Judicial Agency.—The agency by which the judicial power of the United States, defined and in part vested in the third article of the Constitution, is administered, is that of courts. The Constitution provides that there shall be "one Supreme Court," and authorizes Congress, in its discretion, to establish "tribunals inferior to the Supreme Court." The organization of these "inferior" courts, their number, their relation to each other, and their jurisdiction, whether original or appellate, are left wholly to the legislative wisdom of Congress, limited in its exercise to the cases and controversies specified in the Constitution.

One of the courts which Congress has created, and in which lodged a portion of the judicial power granted in the Constitution, is the District Court of the United States. The Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), by which the Judicial Department of the General Government was organized, divided the United States into thirteen judicial districts, with two additional districts—one for Kentucky and the other for Maine, which were then parts of Virginia and Massachusetts respectively. This act provided for a District Court in each of these districts, and to this court gave original jurisdiction in certain specified cases.

Subsequent legislation, called for by the growth of the country, has, from time to time, added to the number of these districts, and, consequently, to the number of District Courts, and also greatly enlarged their jurisdiction beyond the limits originally fixed. The entire legislation of Congress with regard to these courts, in force on the 1st of December, 1873, is compiled, restated, and re-enacted in the Revised Statutes of the United States,

chiefly in the first four chapters of Title XIII. The purpose of this chapter is to present a summary of this legislation, together with such as has been since added, in respect to the District Courts of the United States.

2. Judicial Districts.—Chapter 1 of Title XIII divides the entire territory of the United States, embraced within the limits of the several States, into a series of judicial districts. (Sec. 530.)

The States constituting one district, each, are California, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, and West Virginia. (Sec. 531.) To this list must be added the State of Colorado, admitted into the Union under the enabling Act of March 3d, 1875 (18 U. S. Stat. at Large, 474), and by the Act of June 26th, 1876 (19 U. S. Stat. at Large, 61), constituted into a judicial district when admitted. This makes twenty-one States, each of which forms a judicial district.

The States of Arkansas, Florida, Georgia, Illinois, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and Wisconsin—thirteen States in all—are divided each into two judicial districts.

The States of Alabama, New York, Tennessee, and Texas are divided each into three judicial districts. Prior to the Act of February 24th, 1879, (20 U. S. Stat. at Large, 318), Texas was divided into two districts; but by this act these districts were changed, and a northern judicial district established in the State.

Each of these districts embraces either the whole or a part of a State, and in no instance does a district include either two States or parts of two or more States. It thus appears that Congress, in arranging these districts, has adopted the State as the unit of territorial division, sometimes dividing a State into two or more districts, but never uniting two or more States or parts of two or more States in the same district. This was the original plan as to judicial districts adopted in the Judiciary Act of 1789, and it has been adhered to ever since.

3. Organization of District Courts.—Chapter 2 of Title XIII, contains a series of provisions relating to the organization of these courts. It provides, as a general rule, that a district

judge shall be appointed for each judicial district, and declares that he shall reside in the district for which he is appointed, making it a high misdemeanor for him to offend against this provision. (Sec. 551.)

Only one district judge is authorized to be appointed in each of the States of Alabama, Georgia, Mississippi, South Carolina, and Tennessee, and he is required to act as judge of the District Court in each judicial district included in the State for which he is appointed, and must reside in one of these districts, with the provision that the district judge for the Southern district of Florida shall reside at Key West. (Secs. 552, 553.)

The Act of June 14th, 1878 (20 U. S. Stat. at Large, 132), provided that there should be two district judges for the State of Tennessee—one for the Western district, and the other for the other two districts into which the State is divided. This makes in all five judges, each of whom holds a District Court in more than one district.

The judge of each district is required to appoint a clerk of the court, except in cases otherwise provided for by law. One or more deputy clerks may be appointed, on the application of the clerk, and may be removed at the pleasure of the court making the appointment. In case of the death of the clerk, his deputy or deputies, unless removed, continue in office, and perform the duties of the clerk in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties in his official bond are held liable; and the executor or administrator has such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. The compensation of deputy clerks is to be paid by the clerks respectively, and allowed in the same manner as other expenses of the clerks' offices are paid and allowed. (Secs. 555, 558, 561.)

In the Eastern district of Arkansas two clerks of the District Court thereof are to be appointed, one to reside and keep his office at Little Rock, and the other to reside and keep his office at Helena. In the district of Kentucky a clerk is to be appointed at each place of holding the court, in the same manner and subject to the same duties and responsibilities as are or may be provided

concerning clerks in independent districts. In the district of Indiana the clerk of the District Court is required to appoint a deputy clerk for the court to be held at New Albany, and a deputy clerk for the court to be held at Evansville, who are to reside and keep their offices at these places respectively. Each of these deputies is required to keep in his office full records of all actions and proceedings in the District Court held in the same place, and has the same power to issue all process from the court that is or may be given to the clerks of other District Courts in like cases. In the district of Iowa a deputy clerk is required to be appointed at each place, in the four divisions of the district, where the District Court is held; and each of these deputies, in the absence of the clerk, is authorized to exercise all the official powers of the clerk, at the place and within the division for which he is appointed. (Secs. 556, 557, 559, 560.)

Congress, since the enactment of the Revised Statutes, has made additional provisions relating to clerks and deputy clerks for the district of Indiana, the district of Kansas, the Western district of Michigan, the Western district of Missouri, and the Western district of Tennessee. (20 U. S. Stat. at Large, 399; 20 Id. 355; 20 Id. 176; 20 Id. 263; and 20 Id. 236.)

The records of each District Court are required to be kept at the place where the court is held; and when it is held at more than one place in any district, and the place of keeping the records is not specially provided by law, they are to be kept at either of the places of holding the court which may be designated by the district judge. (Sec. 562.)

The annual compensation to the district judges is as follows: 1. To the judge of the district of California five thousand dollars. 2. To the judge of the district of Louisiana four thousand five hundred dollars. 3. To the judges of the districts of Massachusetts, of the Northern, Southern, and Eastern districts of New York, of the Eastern and Western districts of Pennsylvania, of the district of New Jersey, of the district of Maryland, of the Southern district of Ohio, and the Northern district of Illinois, four thousand dollars each. 4. To the judges of all the other districts three thousand five hundred dollars each. No other allowance is made for travel, expenses, or otherwise. (Sec. 554.)

It is hardly necessary to say that this is a niggardly rate of compensation, whether we consider the ample ability of the Gov-

ernment to pay better salaries, or the amount and character of the service to be performed and the grade of legal attainments requisite for the proper discharge of the duties of the office. It is quite true that the office is an honorable one, yet almost any lawyer who is fit for the position can earn more by the practice of his profession. The low rate of compensation is calculated to repel from the office the best legal talent of the country. The Government, aside from the honor of the office, furnishes no motive for such talent to seek or accept an appointment in this branch of the public service.

4. District Judges.—District judges, like all the other judges of the courts of the United States, are appointed by the President, with the advice and consent of the Senate, and hold office during good behavior, being removable therefrom only by the process of impeachment. Before entering upon the duties of the office, they are required to take the oath prescribed, in section 712 of the Revised Statutes, for justices of the Supreme Court, circuit judges, and district judges.

When any judge of any court of the United States resigns his office, after having held his commission as such for at least ten years, and having attained the age of seventy years, he is entitled, during the residue of his natural life, to receive the same salary which was by law payable to him at the time of his resignation. (Sec. 714.) This provision applies to district as well as to other Federal judges.

These judges, like all other Federal judges, are excluded from exercising the profession of counsel or attorney, or engaging in the practice of law, and any violation of this prohibition is declared to be a "high misdemeanor." (Sec. 713.)

5. Jurisdiction of District Courts.—Chapter 3 of Title XIII treats specially of the jurisdiction of the District Courts. Section 563 of this chapter enumerates the following subjects and matters to which this jurisdiction extends:

(1.) *Crimes and Offenses.*—All crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section 5412, Title "CRIMES."

(2.) *Piracy.*—All cases arising under any act for the punishment of piracy, when no Circuit Court is held in the district of such court.

(3.) *Penalties and Forfeitures.*—All suits for penalties and forfeitures incurred under any law of the United States.

The phrase "suits for penalties and forfeitures" applies only to such penalties and forfeitures as may be enforced in a civil action. (*The United States* v. *Mann*, 1 Gallis. 3.)

(4.) *Suits by the United States.*—All suits at common law brought by the United States, or by any officer thereof authorized by law to sue.

In *Cotton* v. *The United States*, 11 How. 229, it was said by the court that the United States, being a corporation or body politic, possess the general right of bringing "suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws. As an owner of property in almost every State in the Union, they have the same right to have it protected by local laws that other persons have." In *Dugan* v. *The United States*, 3 Wheat. 172, 181, it was said that "it would be strange to deny to them a right which is secured to every citizen of the United States." (*The United States* v. *The Bank of the Metropolis*, 15 Pet. 392; and *The United States* v. *Gear*, 3 How. 120.) This paragraph of the section gives jurisdiction to the District Courts in all common law suits brought by the United States, or by any officer authorized to sue in their name.

(5.) *Equity Suits to Enforce Taxes.*—All suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest. (See sec. 3207.)

(6.) *Suits for Frauds against the United States.*—All suits for the recovery of any forfeiture or damages under section 3490, Title "DEBTS DUE BY OR TO THE UNITED STATES," which suits may be tried and determined by any District Court within whose jurisdictional limits the defendant may be found.

The section here referred to provides that "any person, not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States,

who shall do or commit any of the acts prohibited by any of the provisions of section 5438, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit, and such forfeiture and damages which shall be sued for in the same suit." The District Courts have jurisdiction in such cases.

(7.) *Suits under Postal Laws.*—All causes of action arising under the postal laws of the United States. This jurisdiction is concurrent with that of Circuit Courts.

(8.) *Admiralty Causes and Seizures on Land.*—All civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, and all seizures on land and waters not within admiralty and maritime jurisdiction.

This jurisdiction is declared to be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the Circuit Courts. Congress, by the Act of February 18th, 1875 (18 U. S. Stat. at Large, 317), amended this paragraph of section 563, so as to give to the District Courts "original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section 629."

The paragraph here referred to gives to the Circuit Courts jurisdiction "of all proceedings for the condemnation of property taken as prize in pursuance of section 5308, Title 'INSURRECTION.'" This section provides as follows:

"Whenever, during any insurrection against the Government of the United States, after the President shall have declared by proclamation that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person, or his agent, attorney, or employe, purchases or acquires, sells or gives, any property of whatsoever kind or description, with intent to use or employ the same, or suffers the same to be used or employed, in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein, or, being the owner of any such property, knowingly uses or employs, or consents to such use or employment of the same, all such property shall be lawful subject of prize and capture wherever found; and it shall be the

duty of the President to cause the same to be seized, confiscated, and condemned."

The next section (5309) provides that such prizes and capture shall be condemned in the District or Circuit Court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted.

The jurisdiction conferred on the District Courts by the eighth paragraph of section 563, as amended by the Act of February 18th, 1875, extends, then, to three classes of cases. The first embraces "all civil causes of admiralty and maritime jurisdiction," whether founded on the locality of the occurrences which constitute the cause of action, or upon a contract, express or implied, which is essentially maritime in its nature. This jurisdiction is exclusive of State courts, and also of Circuit Courts except in the particular cases in which it is given to the latter courts. The second class embraces "all seizures on land and on waters not within admiralty and maritime jurisdiction." This also is exclusive of State courts, and of Circuit Courts, except in the cases in which the latter courts possess it. The third class embraces "all prizes brought into the United States," in which cases the jurisdiction is exclusive except as provided in paragraph six of section 629, giving to the Circuit Courts jurisdiction in a certain class of prize cases.

(9.) *Condemnation of Property as Prize.*—All proceedings for the condemnation of property taken as prize in pursuance of section 5308, Title "INSURRECTION." This paragraph is identical with paragraph six of section 629, which gives precisely the same jurisdiction to the Circuit Courts of the United States. Both paragraphs are founded on the Confiscation Act of August 6th, 1861. (12 U. S. Stat. at Large, 319.) This act confiscated property used in aid of insurrection, and authorized it to be seized as lawful prize, and gave the District and Circuit Courts jurisdiction of proceedings for its condemnation. (*The Union Insurance Co.* v. *The United States*, 6 Wall. 759; and *Osborn* v. *The United States*, 1 Otto, 474.)

(10.) *Suits on Debentures.*—All suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture

was originally granted, or against any indorser thereof, to recover the amount of such debenture. (Secs. 3038–3040.)

(11.) *Suits in Cases of Conspiracy.*—All suits authorized to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1980, Title "CIVIL RIGHTS." The section here referred to specifies a series of acts done by two or more persons against any person, and then provides that the latter, being thereby injured or deprived of any right or privilege of a citizen of the United States, may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. The District Courts, concurrently with the Circuit Courts, have jurisdiction of suits brought for such recovery.

(12.) *Suits for Deprivation of Rights.*—All suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States, to persons within the jurisdiction thereof.

Section 1979 provides that every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. In such cases jurisdiction is given alike to the District and Circuit Courts. (Sec. 629.)

(13.) *Suits to Recover Offices.*—All suits to recover possession of any office, except that of elector of President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the

rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by law to enforce the right of citizens of the United States to vote in all the States. Section 2010 gives to the person defeated or deprived of any office, as here referred to, a remedy by an appropriate suit in the Circuit or District Court of the United States for the circuit or district in which he resides.

(14.) *Suits for the Removal of Officers.*—All proceedings by writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States. Section 1786 makes it the duty of the district attorney for the district in which such person holds office to proceed against him by writ of *quo warranto*, returnable to the Circuit or District Court of the United States in such district, and prosecute the same to the removal of such person from office.

(15.) *Suits by or against National Banks.*—All suits by or against any association established under any law providing for national banking associations within the district for which the court is held. (*Kennedy* v. *Gibson*, 8 Wall. 498; and *Cadle* v. *Tracy*, 11 Blatch. 101.)

(16.) *Suits by Aliens for Torts.*—All suits brought by any alien for a tort only, in violation of the law of nations, or of a treaty of the United States. This is not a general jurisdiction of suits by aliens, but simply of such as come within the description.

(17.) *Suits against Consuls.*—All suits against consuls or vice-consuls, except for offenses above the description aforesaid. This includes civil suits against consuls or vice-consuls, and also criminal prosecutions, with the exception stated. International law does not exempt consuls from the jurisdiction of courts at the place of their residence. This jurisdiction, however, in the United States, belongs exclusively to the Federal courts. (*Laury* v. *Lousada*, 1 Am. L. Rev. 92; *Davis* v. *Packard*, 7 Pet. 276; and *St. Luke's Hospital* v. *Barclay*, 3 Blatch. 259.)

(18.) *Proceedings in Bankruptcy.*—All matters and proceedings in bankruptcy, in respect to which the District Courts are

constituted courts of bankruptcy, having original jurisdiction in their respective districts. The repeal of the National Bankrupt Law since the enactment of the Revised Statutes, renders this provision inoperative, except in application to cases pending in any court prior to the time when the act went into effect. (20 U. S. Stat. at Large, 99.)

Such are the classes of cases to which section 563 of the Revised Statutes extends the jurisdiction of the District Courts. This, however, does not exhaust their jurisdiction as specified in these Statutes, or in the chapter of which this section forms a part.

6. Additional Regulations in Regard to Jurisdiction.—Chapter 3 of Title XIII contains the following regulations and provisions in addition to those of section 563:

(1.) *Regulations in regard to Prize Causes and Certain Seizures.*—As to prize causes, it is provided that any District Court may, notwithstanding an appeal to the Supreme Court in any prize cause, make and execute all necessary orders for the custody and disposal of the prize property, and, in case of an appeal from a decree of condemnation, may proceed to make a decree of distribution, so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein. (Sec. 565.)

As to certain specified seizures, it is provided that proceedings on seizure for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection, into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any District Court into which the property so seized may be taken, and proceedings instituted, and the District Court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district. (Sec. 564.)

Sections 5301 and 5317 of the Revised Statutes provide for the forfeiture of property to the United States in the cases here specified. (*The Venice*, 2 Wall. 258; *The Reform*, 3 Wall. 617; *The Hampton*, 5 Wall. 372; *The United States* v. *Ward*, 5 Wall. 62; *The Ouachita Cotton*, 6 Wall. 521.)

(2.) *Trial of Issues of Fact.*—The trial of issues of fact in the District Courts, in all causes except those in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, is to be by jury; *Provided*, That in causes of admiralty and maritime jurisdiction, relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation, between places in different States and Territories, upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it. (Sec. 566.) This proviso is founded on the Act of February 26th, 1845. (5 U. S. Stat. at Large, 726.)

(3.) *Jurisdiction when a Territory becomes a State.*—When any Territory is admitted as a State into the Union, and a District Court is established therein, it is made the duty of such court to take cognizance of all cases which were pending and undetermined in the Superior Court of such Territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court, and the District Court is required to hear and determine the same. (Sec. 569.)

And, to this end, it is provided that all the records of the proceedings in the several cases pending in the Court of Appeals of the Territory at the time of its admission as a State, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in such court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the Supreme Court, shall be transferred to and deposited in the District Court for the said State. (Sec. 567.)

The judge of the District Court is authorized and required to demand of the clerk or other persou having possession or custody of these records the delivery of the same, to be deposited in the District Court, and, in case of the refusal of such clerk or person to comply with the demand, the judge is then required to compel the delivery of the records, by attachment or otherwise, according to law. (Sec. 568.)

(4.) *Commissioners to Administer Oaths to Appraisers.*—The judge of any District Court is authorized to appoint commissioners, before whom appraisers of vessels, or goods and merchandise, seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, are declared to be as effectual as if taken before the judge in open court. (Secs. 570, 938.)

(5.) *Circuit Court Jurisdiction.*—The District Courts for the Western district of Arkansas, the Eastern district of Arkansas at Helena, the Northern district of Mississippi, the Western district of South Carolina, and the district of West Virginia, in addition to the ordinary jurisdiction of District Courts, are invested with jurisdiction of all causes, except appeals and writs of error, which are cognizable in a Circuit Court, and are directed to proceed therein in the same manner as a Circuit Court. (Sec. 571.)

Congress by the seventh section of the Act of February 15th, 1879 (20 U. S. Stat. at Large, 292), provided that, in addition to the ordinary jurisdiction and powers of a District Court of the United States, with which the District Court of Colorado has been invested, it be and is hereby invested within the limits of said Southern and Western divisions of the same, with the exercise of concurrent jurisdiction and power, in all civil cases, now exercised by the Circuit Courts of the United States; and that in all cases where said court shall exercise such jurisdiction, writs of error and appeals shall be allowed and taken from the judgment, orders or decrees of said court to the Supreme Court of the United States, in the same manner and upon the same conditions as appeals may be taken from the Circuit Courts.

7. Jurisdiction under the Civil Rights Act.—Congress, by the Act of March 1st, 1875 (18 U. S. Stat. at Large, 335), entitled "An Act to protect all citizens in their civil and legal rights," and designed to secure to them "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theaters and other places of public amusement, subject only to the conditions and limitations established by law, and made applicable to citizens of every race and color, regardless of any previous condition of servitude," and also to secure to them the right to sit as jurors as against any disqualification "on account of race, color, or previous condition of servitude," provided that the District Courts of the United States,

concurrently with the Circuit Courts, but exclusively of the courts of the several States, shall have cognizance of all the crimes and offenses specified in the act, and of suits for the recovery of penalties in behalf of persons aggrieved by any violation of the provisions of the law.

The first part of this jurisdiction comes within the terms of the first paragraph of section 563 of the Revised Statutes; but the second part is dependent upon this enactment. So much of this act as relates to jurors was considered by the Supreme Court of the United States, in *Ex parte Virginia*, 10 Otto, 339, and its constitutionality was affirmed by the court.

8. Jurisdiction in Certain Summary Trials.—Chapter nine of Title XLVIII of the Revised Statutes provides "summary trials for certain offenses against navigation laws" in cases where the offense is "not capital or otherwise infamous." An indictment is not necessary in these cases. It is sufficient if the proper district attorney presents a case to the District Court by a statement in writing, verified by oath, and setting out the offense in such manner as clearly to apprise the accused of the character of the offense complained of, and to enable him to answer the complaint. The trial is to proceed in a summary manner, and the case is to be decided by the court simply, unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial is to be upon the complaint and plea of not guilty. If the trial be by jury, the United States and the accused are respectively entitled to three peremptory challenges; and all challenges for cause are to be tried by the court without the aid of triers. (Secs. 4300–4305.)

9. Naturalization of Aliens.—Title XXX of the Revised Statutes provides the method by which aliens may become citizens of the United States, and designates the classes of aliens to whom the provisions of this Title are applicable. The District Courts of the United States have jurisdiction to hear applications and make decrees of naturalization upon the conditions specified by law. (Sec. 2165–2174.)

10. Power to Issue Writs.—The District Courts have power to issue writs of *scire facias* and *habeas corpus*, and also all writs not specifically provided for by statute, which may be necessary

for the exercise of their jurisdiction, and agreeable to the usages and principles of law. (Secs. 716, 751.)

11. The Sessions of District Courts.—Chapter 4 of Title XIII of the Revised Statutes contains the regulations of law relating to the sessions of the District Courts, as follows:

(1.) *Regular Terms.*—The regular terms of the District Courts in the several districts are fixed at specific times and places designated by law; and when any of the dates happens to fall on Sunday, the term of the court commences on the following day. (Sec. 572.)

(2.) *Special Terms.*—A special term of any District Court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and place and upon such notice as may be ordered by the district judge; and any business may be transacted at such special term which might be transacted at a regular term. (Sec. 581.)

(3.) *Adjourned Terms.*—The District Courts are required to hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases. (Sec. 578.)

The judge of any District Court in Indiana, Kentucky, Louisiana, Michigan, Ohio, Pennsylvania, and Texas may adjourn the same from time to time, to meet the necessities or convenience of the business. (Sec. 579.)

In the district of Kentucky and Indiana the intervention of a term of the District Court at another place, or of a Circuit Court, does not preclude the power to adjourn over to a future day. (Sec. 580.)

If the judge of any District Court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to an earlier day, as the order may direct. (Sec. 583.)

If the judge of any District Court in Alabama, California, Georgia, Indiana, Iowa, Kentucky, North Carolina, Tennessee, or West Virginia is not present at the time of opening the Court, the

clerk may open and adjourn the court for four days; and if the judge does not appear by two o'clock after noon of the fourth day, the clerk is directed to adjourn the court to the next regular term. This section, however, is subject to the provisions of sections 583 and 585. (Sec. 584.)

In the districts of Indiana and Kentucky, the district judge, in the case provided in section 584, may, by a written order to the clerk within the first three days of his term, adjourn the District Court to a future day within thirty days of the first day. The court is directed to give notice of such adjournment by posting a copy of the order on the front door of the court house where the court is held. (Sec. 585.)

(4.) *Intermediate Terms.*—Whenever the judge of any District Court in the districts of California, Iowa, and Tennessee, fails to hold any regular term thereof, it is made his duty, if it appears that the business of the court requires it, to hold an intermediate term. Such term must be appointed by an order under his hand and seal, addressed to the clerk and marshal at least thirty days previous to the term fixed therein for holding it, and the order must be published the same length of time in the several newspapers published within such districts respectively; and at such term the business of the court is to have reference to and be proceeded with in the same manner as if it were a regular term. (Sec. 586.)

(5.) *Effect of Change of Terms.*—No action, suit, proceeding or process in any District Court abates or is rendered invalid by reason of any act changing the time of holding such court; but the same is to be deemed returnable to, pending, and triable in the terms established next after the return day thereof. (Sec. 573.)

(6.) *Continuance of Terms.*—In the districts of Kentucky and Indiana the terms of the District Courts are not limited to any particular number of days, nor is it necessary to adjourn by reason of the intervention of a term of the court elsewhere; but the court intervening may be adjourned over till the court in session is concluded. (Sec. 577.)

(7.) *The Courts always Open for Certain Purposes.*—The District courts, as courts of admiralty, and as courts of equity, so far

as equity jurisdiction has been conferred upon them, are to be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. (Sec. 574.)

The District Court for the Southern district of Florida is to be at all times open for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction. (Sec. 575).

The District Courts of the districts of Wisconsin are to be at all times open for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury. (Sec. 576.)

(8.) *Disability of the District Judge.*—When satisfactory evidence is shown to the circuit judge of any circuit, or, in his absence, to the circuit justice allotted to the circuit, that the judge of any district therein is disabled to hold a District Court, and to perform the duties of his office, and an application accordingly is made in writing to such circuit judge or justice by the district attorney or marshal of the district, the said judge or justice, as the case may be, may issue his order in the nature of a *certiorari*, directed to the clerk of such District Court, requiring him forthwith to certify into the next Circuit Court, to be held in said district, all suits and processes, civil and criminal, depending in said District Court, and undetermined, with all the proceedings thereon, and all files and papers relating thereto. The said order is to be immediately published in one or more newspapers printed in said district, at least thirty days before the session of such Circuit Court, which is to be deemed sufficient notification to all concerned; and thereupon the Circuit Court is directed to proceed to hear and determine the suits and processes so certified. And all bonds and recognizances taken for or returnable to such District Court, are to be deemed taken for and returnable to said Circuit Court, and to have the same effect therein as they could have had in the District Court to which they were taken. (Sec. 587.)

When an order has been made as provided in the preceding section, the clerk of the District Court is required to continue, during the disability of the district judge, to certify, as aforesaid, all suits, pleas, and processes, civil and criminal, thereafter begun in said court, and to transmit them to the Circuit Court next to be held in that district; and the said court is directed to proceed to hear and determine them as provided in said section: *Provided*, That when the disability of the district judge ceases or is removed, the Circuit Court shall order all such suits and proceedings then pending and undetermined therein, in which the District Courts have an exclusive original cognizance, to be remanded, and the clerk of such court shall transmit the same, with all matters relating thereto, to the District Court next to be held in that district; and the same proceedings are then to be had in the District Court as would have been had if such suits had originated or been continued therein. (Sec. 588.)

In the case provided in the two preceding sections the circuit judge, and, in his absence, the circuit justice, may exercise, during such disability, all the powers of every kind vested by law in such district judge. But this provision does not require them to hold any special court, or court of admiralty, at any other time than that fixed by law for holding the Circuit Court in said district. (Sec. 589.)

When the business of a District Court is certified into the Circuit Court on account of the disability of the district judge, the district clerk must be authorized, by order of the circuit judge, or, in his absence, of the circuit justice within whose circuit such district is included, to take, during such disability, all examinations and depositions of witnesses, and make all necessary rules and orders, preparatory to the final hearing of all causes of admiralty and maritime jurisdiction. (Sec. 590.)

When any district judge is prevented, by any disability, from holding any stated or appointed term of his District Court, or of the Circuit Court in his district in the absence of the other judges, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said courts, and to discharge all

the judicial duties of the judge so disabled, during such disability. Such appointment is required to be filed in the clerk's office and entered on the minutes of the said District Court, and a certified copy thereof, under the seal of the court, is to be transmitted by the district clerk to the judge so designated and appointed. (Sec. 591.)

When a certificate of the judge of either of the districts of Florida, stating that he is disabled to hold any regular, special, or adjourned term of the court of such district, and requesting the judge of the other district to hold the same, is filed in the clerk's office of the place where it is to be held, the judge of the other district is authorized to hold such courts, and to exercise all the powers of district judge in the district of the judge so certifying. (Sec. 598.)

Whenever the judge of the Northern district of New York is disabled to perform the duties of his office, it is made the duty of the judge of the Southern district, upon receiving from him notice thereof, to hold the District Court, and to perform all the duties of district judge for such district. And whenever the judge of the Southern district is so disabled, it is made the duty of the judge of the Eastern district, upon like notice, to hold the District Court, and to perform all the duties of district judge for the Southern district. In such cases the said judges, respectively, have the same powers as are vested in the judge so disabled. (Sec. 599.)

Whenever the judge of the Southern district of New York deems it desirable, on account of the pressure of public business or other cause, that the judge of the Eastern district shall perform the duties of a district judge in the Southern district, an order to that effect may be entered upon the records of the District Court thereof; and thereupon the judge of the Eastern district is authorized to hold the District Court, and to perform all the duties of district judge for the Southern district. (Sec. 600.)

(9.) *Circuit Judges acting as District Judges.*—In the case of the non-attendance of the district judge of Tennessee at any term of the District Court in either of the districts thereof, the circuit justice or circuit judge of the circuit to which the district belongs, may hold such terms, having and exercising the jurisdiction and powers given by law to a district judge. (Sec. 582.)

(10.) *When the District Judge is Interested in the Suit.*—Whenever it appears that the judge of any District Court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party, as to render it improper, in his opinion, for him to sit on the trial, it is made his duty, on application by either party, to cause the fact to be entered on the records of the court, and also an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next Circuit Court for the district, and if there be no Circuit Court therein, to the next Circuit Court in the State, and if there be no Circuit Court in the State, to the next convenient Circuit Court in an adjoining State; and the Circuit Court, upon the filing of such record with its clerk, is authorized and required to take cognizance of and proceed to hear the case, in like manner as if it had originally and rightfully been commenced therein. (Sec. 601.)

(11.) *Accumulation of Business.*—When, from the accumulation or urgency of business in any District Court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named, the same powers as are vested in the judge thereof; and each of the said district judges may, in case of such appointment, hold separately at the same time a District or Circuit Court in such district, and discharge all the judicial duties of a district judge therein; but no such judge shall hear appeals from the District Court. (Sec. 592.)

If the circuit judge and circuit justice are absent from the circuit, or unable to execute the provisions of either of the two preceding sections (591 and 592), or if the district judge so designated is disabled or neglects to hold the courts and transact the business for which he is designated, the district clerk is required to certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint, in the manner aforesaid, the judge of any district within such circuit, or within any circuit next contiguous; and said appointment shall be transmitted to the

district clerk, and be acted upon by him as directed in the preceding section. (Sec. 593.)

The circuit judge, or the circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge within the said circuits, for the duties, and with the powers mentioned in the three preceding sections (591, 592 and 593), and may revoke any previous designation and appointment. (Sec. 594.)

It is made the duty of the district judge who is designated and appointed under either of the four preceding sections (591, 592, 593, 594), to discharge all the judicial duties for which he is so appointed, during the continuance of such disability, or, in the case of an accumulation of business, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, have the same effect and validity as if done by or before the district judge of the said district. (Sec. 595.)

It is the duty of every circuit judge, wherever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section 591, the district judge of any judicial district within his circuit, to hold a District or Circuit Court in the place or in aid of any other district judge within the same circuit; and it is made the duty of the district judge so designated and appointed, to hold the District or Circuit Court as aforesaid, without any other compensation than his regular salary, as established by law, except in the case provided in the next section. (Sec. 596.)

Whenever a district judge from another district holds a District or Circuit Court in the Southern District of New York, in pursuance of the preceding section, his expenses, not exceeding ten dollars a day, certified by him, shall be paid by the marshal of said district, as a part of the expenses of the court, and shall be allowed in the marshal's account. (Sec. 597.)

(12.) *Vacancy in the Office.*—When the office of judge of any District Court is vacant, all process, pleadings, and proceedings pending before such court shall be continued of course until the next stated term after the appointment and qualification of his successor, except when such first mentioned term is held as provided in the next section. (Sec. 602.)

When the office of district judge is vacant in any district in a State containing two or more districts, the judge of the other or either of the other districts may hold the District Court, or the Circuit Court in case of the sickness or absence of the other judges thereof, in the district where the vacancy occurs, and discharge all the judicial duties of judge of such district, during such vacancy; and all the acts and proceedings in said court, by or before such judge of any adjoining district, shall have the same effect and validity as if done by or before a judge appointed for such district. (Sec. 603.)

The above exhibit presents the outlines of the existing provisions of law in relation to the organization, number, powers, jurisdiction and sessions of the District Courts of the United States. These courts have no appellate jurisdiction, yet, by reason of their number and the extent of their original jurisdiction, they hear and decide more cases than all the other courts of the United States put together. A comparison of the several dates at which Congress has conferred jurisdiction upon then, shows that their jurisdiction, especially within the last twenty years, has been greatly enlarged beyond the limits established by the Judiciary Act of 1789. Events in the history and progress of the country have made this enlargement necessary. The courts are the same in the theory of the judicial system of the United States, yet their number has been increased, and the cases to which their jurisdiction extends, cover a much wider field of subjects than at the outset.

It ought to be added that, since the enactment of the Revised Statutes, Congress has supplemented and somewhat modified the law, as therein contained, by special statutes relating to District Courts in particular States. These statutes, being local in their operation, do not apply to the District Courts generally, and hence do not change the general laws applicable to such courts, as set forth in this chapter.

CHAPTER II.

CIRCUIT COURTS.

Chapters five, six, seven, and eight of Title XIII of the Revised Statutes of the United States contain the chief parts of the law in force on the 1st of December, 1873, relating to the number, organization, jurisdiction, and powers of the Circuit Courts of the United States. Some additions and alterations have been made since the enactment of these statutes. The law, as it now is, will appear in the following Exhibit:

SECTION I.

JUDICIAL CIRCUITS.

The United States were, by the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), divided into three judicial circuits, and in each of these circuits a Circuit Court was established, consisting of two justices of the Supreme Court and a judge of a District Court. Now, however, the United States are divided into nine such circuits, in each of which a Circuit Court is established. (Sec. 604.) These circuits are as follows:

1. The first circuit includes the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.

2. The second circuit includes the districts of Vermont, Connecticut, and New York.

3. The third circuit includes the districts of Pennsylvania, New Jersey, and Delaware.

4. The fourth circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

5. The fifth circuit includes the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

6. The sixth circuit includes the districts of Ohio, Michigan, Kentucky, and Tennessee.

7. The seventh circuit includes the districts of Indiana, Illinois, and Wisconsin.

8. The eighth circuit includes the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, and Arkansas.

9. The ninth circuit includes the districts of California, Oregon, and Nevada.

Colorado has been admitted into the Union since the adoption of the Revised Statutes, and by the Act of June 26th, 1876 (19 U. S. Stat. at Large, 61), was constituted into a judicial district and attached to and made a part of the eighth judicial circuit.

SECTION II.

ORGANIZATION OF CIRCUIT COURTS.

1. Circuit Courts—Where Established and How Held.—Circuit Courts are established as follows: One for the three districts of Alabama, one for the Eastern district of Arkansas, one for the Southern district of Mississippi, and one for each district in the States not herein named. They are designated as the Circuit Courts for the districts for which they are established. (Sec. 608.)

These courts are held by the circuit justice, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of the judges sitting together. (Sec. 609.)

The district judge, when sitting alone and holding a Circuit Court, has the same powers as any other judge when holding the same court. (*Robinson* v. *Satterlee*, 3 Saw. 134; and *In re Circuit Court*, 1 Dill. 1.) This is true when a district judge of a given district is, under the authority of law, deputed to hold a District Court in another district. He, for the time being, possesses all the powers of the judge appointed for the latter district. (*In re Alexis Nicolas*, 8 Blatch. 102.)

2. Circuit Justices.—The words "circuit justice" and "justice of a circuit," when used in Title XIII of the Revised Statutes, are understood to designate the justice of the Supreme Court who is allotted to any circuit; and the word "judge," when applied generally to any circuit, is to be understood as including such justice. (Sec. 605.)

The Chief Justice and associate justices of the Supreme Court are required to be allotted among the circuits by an order of the court, and a new allotment to be made whenever it becomes neces-

sary or convenient by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it is to be made by the Chief Justice and to be binding until the next term and until a new allotment by the court. (Sec. 606.) In *Stuart* v. *Laird*, 1 Cranch, 299, it was held that a justice of the Supreme Court may hold a Circuit Court. Contemporaneous construction and practice had put the question at rest.

It is made the duty of the Chief Justice, and of each associate justice of the Supreme Court, to attend at least one term of the Circuit Court in each district of the circuit to which he is allotted during every period of two years. (Sec. 610.)

Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice of the Supreme Court may in writing request the justice of another circuit to hold the Circuit Court in that circuit, and thereupon it is lawful for him to do so until a justice is allotted to such circuit. (Sec. 618.)

Whenever a circuit justice deems it advisable, on account of his disability or absence, or of his having been of counsel, or being interested in any case pending in the Circuit Court for any district in his circuit, or of the accumulation of business therein, or for any other cause, that the said court shall be held by the justice of any other circuit, he may, in writing, request the justice of any other circuit to hold the same, during a time to be named in the request; and such request is to be entered upon the journal of the Circuit Court so to be holden. Thereupon it becomes lawful for the justice so requested to hold such court, and to exercise within and for said district, during the time named in said request, all the powers of the justice of such circuit. (Sec. 617.) It was held, in *The Supervisors* v. *Rogers*, 7 Wall. 175, that the power here conferred is simply "permissive and discretionary," and that its exercise is left to the wisdom of the respective justices.

Such are the provisions of the Revised Statutes relating specially to circuit justices, considered with reference to circuit courts. These provisions apply to them exclusively.

3. Circuit Judges.—The law provides that for each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court,

allotted to the circuit, and shall be entitled to receive a salary at the rate of six thousand dollars a year, payable quarterly on the first days of January, April, July, and October, and that every circuit judge shall reside in his circuit. (Sec. 607.)

This section of the Revised Statutes, with the exception of the clause relating to salaries, is founded on the second section of the Act of April 10th, 1869 (16 U. S. Stat. at Large, 44), which created the office of a circuit judge in distinction from that of a circuit justice, and provided for the appointment of such a judge in each judicial circuit. Previously to this act the Circuit Courts were held by the circuit justices and district judges, either sitting together or sitting alone. The act added a new judge, with the same powers as the circuit justice.

4. The Hearing of Cases.—Cases may be heard and tried by each of the judges holding a Circuit Court, sitting apart by direction of the presiding justice or judge, who then designates the business to be done by each; and Circuit Courts may be held at the same time in the different districts of the same circuit. (Secs. 611, 612.) Any one of the judges or any two of them sitting together may hold the court. (Sec. 609.) These provisions increase the power of the court to dispose of the cases that arise for adjudication.

5. Criminal Terms in the Southern District of New York.—The terms of the Circuit Court for the Southern district of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the circuit judge of the second judicial circuit and the district judges for the Southern and Eastern districts of New York, or by any one of these three judges; and provision is made that at every such term held by the judge of the Eastern district he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of another district judge while holding court in said district. (Sec. 613.)

6. District Judges in Cases of Appeal or Error.—The law declares that a district judge sitting in a Circuit Court shall not give a vote in any case of appeal or error from his own decision, but may assign the reasons for such decision: *Provided*, That such

a cause may, by consent of parties, be heard and disposed of by him when holding a Circuit Court sitting alone. When he holds a Circuit Court with either of the other judges, the judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge. (Sec. 614.)

7. The Transfer of Suits.—When it appears in any civil suit in any Circuit Court that all the judges thereof who are competent by law to try the case are in any way interested therein, or have been of counsel for either party, or are so related or connected with either party as to render it, in the opinion of the court, improper for them to sit in such trial, it is made the duty of the court, on the application of either party, to cause the fact to be entered on the records, and to make an order that an authenticated copy thereof, with all the proceedings in the case, shall be forthwith certified to the most convenient Circuit Court in the next adjoining State or in the next adjoining circuit; and the said court, upon the filing of such record and order with its clerk, is required to take cognizance of and proceed to hear and determine the case, in the same manner as if it had been rightfully and originally commenced therein; and the proper process for the due execution of the judgment or decree rendered in the cause runs into and may be executed in the district where such judgment or decree was rendered, and also into the district from which the cause was removed. (Sec. 615.)

The circuit justice or the circuit judge of any circuit may order any civil cause, which is certified into any court of the circuit under the provisions of the preceding section, to be certified back to the court whence it came; and then the latter court is required to proceed therein as if the cause had not been certified from it: *Provided*, That if, for any reason, it shall be improper for the judges of such court to try the cause so certified back, it shall be tried by some other judge holding such court, who, in pursuance of the provisions of section 617, is to be requested by the circuit justice to hold the court. (Sec. 616.)

The cases of *Richardson* v. *The City of Boston*, 1 Curt. 250, of *Sawyer* v. *Oakman*, 11 Blatch. 65, and of *The Supervisors* v. *Rogers*, 7 Wall. 175, explain these provisions in regard to the transfer of suits. The design of Congress was to provide for the trial of a civil suit by its removal, on the application of either

party, to the Circuit Court of another circuit, when for any of the reasons assigned the trial could not properly be had in the circuit where the case arose.

8. Clerks.—A clerk shall be appointed for each Circuit Court by the circuit judge of the circuit, except in cases otherwise provided for by law. (Sec. 619.) This section was, by the Act of June 19th, 1878 (20 U. S. Stat. at Large, 204), amended so as to read as follows: All the Circuit Courts of the United States shall have the appointment of their own clerks, the circuit and district judges concurring; and in case of a disagreement between the judges, the appointment shall be made by the associate justice of the Supreme Court allotted to such circuit, except in cases otherwise specially provided for by law.

In the district of Kentucky, a clerk of the Circuit Court is required to be appointed at each place of holding the court, in the same manner and subject to the same duties and responsibilities which are or may be provided for clerks in independent districts. (Sec. 620.)

In the Western district of North Carolina the circuit and district judges are required to appoint three clerks, each of whom shall be clerks both of the Circuit and District Courts for the district, one of them residing and keeping his office at Statesville, another residing and keeping his office at Asheville, and the third residing and keeping his office at Greensborough. (Sec. 621.)

In the Western district of Virginia the circuit and district judges are required to appoint four clerks, each of whom shall be clerks both of the Circuit and District Courts for the district, one of them residing and keeping his office at Lynchburg, another at Abingdon, another at Danville, and a fourth at Harrisonburgh. (Sec. 622.)

In the Western district of Wisconsin the circuit and district judges are required to appoint two clerks, each of whom shall be clerks both of the Circuit and District Courts for the district, one of them residing and keeping his office at Madison, and the other at La Crosse. (Sec. 623.)

Congress, by the Act of June 4th, 1880 (21 U. S. Stat. at Large, 155), provided that the clerk of the District Court for the district of Iowa shall be the clerk of the Circuit Court at all places where the same is held in said district, except at Des Moines. (Sec. 4.)

By the Act of June 22d, 1874 (18 U. S. Stat. at Large, 195), it was provided that there shall be appointed for each of the Circuit Courts for the Middle and Northern districts of Alabama, by the circuit judge of the circuit, a clerk who shall take the oath and give the bond required by law of clerks of Circuit Courts, and who shall discharge all the duties and be entitled to all the fees and emoluments prescribed by law for clerks of Circuit Courts. (Sec. 3.)

9. Deputy Clerks.—One or more deputies of any clerk of a Circuit Court may be appointed by such court, on the application of the clerk, and may be removed at the pleasure of judges authorized to make the appointment. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office, and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults and misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties in his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. (Sec. 624.)

In the district of Indiana a deputy clerk of the Circuit Court must be appointed for said court held at New Albany, and a deputy clerk for said court held at Evansville, who are required to reside and keep their offices at said places respectively. Each deputy must keep in his office full records of all actions and proceedings in the court held at the same place, and has the same power to issue all process from the said court that is or may be given to the clerks of other Circuit Courts in like cases. (Sec. 625.)

The compensations of deputies of clerks of the Circuit Courts are to be paid by the clerks, respectively, and allowed, in the same manner that other expenses of the clerks' offices are paid and allowed. (Sec. 626.)

10. Commissioners.—Each Circuit Court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who are to be called "Commissioners of the Circuit Courts," and to possess and exercise

the powers which are or may be expressly conferred by law upon Commissioners of Circuit Courts. (Sec. 627.) The law provides that no marshal or deputy marshal of any of the courts of the United States shall hold or exercise the duties of Commissioner of any of the said courts. (Sec. 628.)

These Commissioners, though appointed by the Circuit Courts, are not officers of these courts; and the courts do not, by the mere fact of having made the appointment, acquire any supervisory jurisdiction over them, or over their proceedings. (*Ex parte Van Orden*, 3 Blatch. 166.)

SECTION III.

THE JURISDICTION OF CIRCUIT COURTS.

1. Cases of Original Jurisdiction.—Section 629 of the Revised Statutes gives to the Circuit Courts original jurisdiction as follows:

(1.) *Aliens and Citizens of different States.*—Of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State: *Provided*, That no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

These provisions of law were considered and explained in chapters VII and IX of Part II, the former referring to controversies "between citizens of different States," and the latter to controversies "between a State or the citizens thereof and foreign States, citizens, or subjects." The jurisdiction here conferred enables the Circuit Court to take original cognizance of civil suits in law or equity between citizens of different States, provided that one of them is a citizen of the State in which the suit is brought, and also that the matter in dispute, exclusive of costs, exceeds the sum or value specified, and also of suits in which an alien is a party and the other party is not an alien, provided that the matter

in dispute is of the requisite amount. The general principles regulating this jurisdiction were set forth in the chapters referred to.

(2.) *Equity Suits by the United States.*—Of all suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners.

Judge Blatchford, in *The United States* v. *Stiner*, 8 Blatch. 544, held that this provision gives jurisdiction to a Circuit Court of a creditor's bill brought by the United States, if the amount involved, exclusive of costs, exceeds the sum specified.

(3.) *Common Law Suits by the United States.*—Of all suits at common law where the United States, or any officer thereof suing under the authority of any act of Congress, are the plaintiffs.

In *Dugan* v. *The United States*, 3 Wheat. 172, it was held that the United States may sue on a bill of exchange indorsed to the Treasurer of the United States, and that, in all cases of contract with the United States, they have a right to sue in their own name, unless a different mode of proceeding is required by law. In *The Postmaster-General* v. *Early*, 12 Wheat. 136, it was held that, under the Act of March 3d, 1815 (3 U. S. Stat. at Large, 245), the Circuit Courts of the United States have jurisdiction of suits by the Postmaster-General upon official bonds of postmasters.

In *Kohl* v. *The United States*, 1 Otto, 367, it was held that the proper Circuit Court of the United States has jurisdiction of proceedings brought by the United States for the condemnation of land for the use of the General Government.

The jurisdiction of the Circuit Courts given by this paragraph of the section covers all suits at common law brought by the United States, either in their own name, or by officers thereof authorized by law to bring the suit.

(4.) *Suits under Import, Internal Revenue, and Postal Laws.*—Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures, and of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws.

Chief Justice Waite, in *Ex parte Smith*, 4 Otto, 455, said: "The facts upon which the jurisdiction of the courts of the United

States rests, must, in some form, appear in the record of all suits prosecuted before them. * * * In this case * * * it was incumbent on the relators, therefore, to show, in their pleadings or otherwise, that this action arose under the revenue laws of the United States. This they failed to do. * * * There are no presumptions in favor of the jurisdiction of the courts of the United States."

The Circuit Court dismissed the suit, and the Supreme Court, for the reason stated, declined to issue a *mandamus* to compel it to take jurisdiction.

(5.) *Suits for Penalties in certain cases.*—Of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels.

Chapter six of Title XLVIII of the Revised Statutes of the United States contains a series of such regulations, enforced by penalties: and section 4270 of the chapter provides that the amount of the several penalties thus imposed shall be liens on the vessel violating the regulations specified, and that such vessel shall be libeled therefor in any Circuit or District Court of the United States where such vessel shall arrive.

(6.) *Proceedings for the condemnation of Property used for Insurrectionary Purposes.*—Of all proceedings for the condemnation of property taken as prize, in pursuance of section 5308, Title "INSURRECTION."

The section here referred to designates the circumstances under which it is made the duty of the President to cause the property to be seized, confiscated, and condemned; and the next section gives jurisdiction to the Circuit Courts of the United States in proceedings instituted for this purpose. It was held, in *The Union Insurance Company* v. *The United States*, 6 Wall. 759, that this law applies to all property, real or personal, on land or on water, if used in aid of insurrection, with the owner's knowledge and consent.

(7.) *Suits under Slave Trade Laws.*—Of all suits arising under any law relating to the slave trade. (*The United States* v. *La Vengeance*, 3 Dall. 297; *The United States* v. *The Schooner Sally*, 2 Cranch, 406; *The United States* v. *The Schooner Betsey and Charlotte*, 4 Cranch, 443; and *The Sarah*, 8 Wheat. 391.)

(8.) *Suits on Debentures.* Of all suits by the assignee of any

debenture for drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture. (Sec. 3039.)

(9.) *Patent and Copyright Suits.*—Of all suits at law or in equity arising under the patent or copyright laws of the United States.

Mr. Justice Nelson, in *Allen* v. *Blunt*, 1 Blatch. 480, held that, in suits arising under the patent laws, the jurisdiction of the Circuit Courts depends upon the subject-matter, and not upon the citizenship of the parties, and that, in such suits, it is not necessary that either the plaintiff or the defendant should be an inhabitant of the State where the suit is brought. If the suit be simply for a violation of contract in respect to a patent, then it does not arise under patent laws; and the requisite citizenship between the parties must be shown, in order to give the Circuit Court jurisdiction. (*Goodyear* v. *Day*, 1 Blatch. 565.) The suitor is at liberty to seek his remedy in a Circuit Court, either as a court of law or a court of equity. (*Perry* v. *Corning*, 7 Blatch. 195, 203.) The general principles that are applicable in patent-right suits are equally so in those founded on copyrights. The jurisdiction of the Circuit Courts in both is co-extensive.

(10.) *Suits by or against National Banks.*—Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

National banks, being organized under the laws of the United States, may sue or be sued in the proper Circuit Court, without reference to the parties or the amounts in dispute. (*Kennedy* v. *Gibson*, 8 Wall. 498; *The Union National Bank* v. *Chicago*, 3 Biss. 82; *The First National Bank* v. *Douglas*, 3 Dill. 298; *The County of Wilson* v. *The National Bank*, 13 Otto, 770.) The bank must be established in the district for which the court is held.

(11.) *Suits to Enjoin the Comptroller of the Currency.*—Of all suits brought by any banking association, established in the district for which the court is held, under the provisions of Title "NATIONAL BANKS," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title.

The jurisdiction here given is more fully stated in section 5237 of the Revised Statutes. In *Van Antwerp* v. *Hulburd*, 7 Blatch. 426, it was held by Judge Woodruff that the Circuit Court has no jurisdiction to entertain a suit in equity, brought by a private person, to interfere with or control the administration of the duties of the Comptroller of the Currency, and of the Treasurer of the United States, in respect to bonds deposited with the Treasurer, to secure the redemption of the circulating notes of a national bank. The jurisdiction to enjoin the Comptroller is given only when the suit is brought for this purpose by a national bank.

(12.) *Suits for Injuries Done under United States Laws.*—Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

(13.) *Suits to Recover Offices.*—Of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude; *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the States. (Sec. 2010.)

The twenty-third section of the Act of May 31st, 1870 (16 U. S. Stat. at Large, 140), authorized the bringing of such a suit or proceeding in the Circuit or District Court of the United States, of the circuit or district in which the suitor resides. This section is reproduced as section 2010 of the Revised Statutes. (*Ex parte Warmouth*, 17 Wall. 64, and *Johnson* v. *Jumel*, 3 Woods, 69.)

(14.) *Suits for the Removal of Officers.*—Of all proceedings by writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of State legislature, contrary to the pro-

vision of the third section of the fourteenth article of amendment to the Constitution of the United States.

Section 1786 of the Revised Statutes makes it the duty of the district attorney of the district in which such person holds the office, to institute the *quo warranto* proceeding for his removal therefrom, in either the Circuit or District Court of the United States for the district, and to prosecute the same to completion.

(15.) *Suits under Laws to Enforce the Elective Franchise.*—Of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several States.

The acts of Congress relating to the subject here referred to, are the Acts of May 31st, 1870, and of February 28th, 1871 (16 U. S. Stat. at Large, 140, 433), particularly the fifteenth section of the latter act. In *The United States* v. *Reese*, 2 Otto, 214, it was held that the Fifteenth Amendment to the Constitution, while not conferring the right of suffrage, invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude, and empowers Congress to enforce this right by "appropriate legislation." (*Minor* v. *Happersett*, 21 Wall. 162, and *The United States* v. *Cruikshank*, 2 Otto, 542.)

(16.) *Suits for the Deprivation of Rights.*—Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege or immunity secured by the Constitution of the United States, or of any rights secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Section 1979 of the Revised Statutes provides that any person who shall deprive another of any of the rights above set forth, "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Sections 1977 and 1978 secure to citizens of the United States equal rights under the law, and also such rights in respect to real and personal property.

(17.) *Suits for Injuries by Conspirators.*—Of all suits authorized by law to be brought by any person on account of any injury

to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1980, Title "CIVIL RIGHTS."

The section referred to provides that "the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

(18.) *Suits against Persons having knowledge of Conspiracy, &c.*—Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section 1980 are about to be done, and having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Section 1981 of the Revised Statutes specifies in detail the "wrongful act" here referred to, and gives the right to recover damages in an action on the case, provided that the suit is commenced within one year after the cause of action has accrued.

(19.) *Suits against Officers and Owners of Vessels.*—Of all suits and proceedings arising under section 5344, Title "CRIMES," for the punishment of officers and owners of vessels, through whose negligence or misconduct the life of any person is destroyed.

The section here mentioned provides that the person chargeable with the offense specified, "shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years." (*The United States* v. *Farnham*, 2 Blatch. 528; *The United States* v. *Warren*, 4 McLean, 463, and *The United States* v. *Taylor*, 5 McLean, 42.)

(20.) *Crimes and Offenses.*—Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts, of crimes and offenses cognizable therein.

This provision is founded on the eleventh section of the Judiciary Act of 1789. (1 U. S. Stat. at Large, 73.) Mr. Justice Miller, in *The United States* v. *Holliday*, 3 Wall. 407, said: "This provision has distinct reference, in its first clause, to cases of which

the Circuit Court shall have exclusive jurisdiction, and, in its latter clause, to cases in which they shall have concurrent jurisdiction with the District Courts. The former include all crimes and offenses where some statute does not provide the contrary. The latter include all crimes and offenses cognizable in the District Courts."

The Federal courts have no common law jurisdiction in criminal cases. Crimes and offenses, cognizable under the authority of the United States, are such, and such only, as are expressly designated by law. Congress must define these crimes, fix their punishment, and confer the jurisdiction to try them. (*The United States* v. *Hudson*, 7 Cranch, 32; *The United States* v. *Coolidge*, 1 Wheat. 415; *The United States* v. *Hall*, 8 Otto, 343, 345; and *The United States* v. *Barney*, 5 Blatch. 294.)

(21.) *Bankruptcy Cases.*—Section 630 provides that the Circuit Courts shall have jurisdiction in matters of bankruptcy, to be exercised within the limits and in the manner provided by law.

Congress, by the Act of June 7th, 1878 (20 U. S. Stat. at Large, 99), which took effect on the first of the following September, repealed the National Bankrupt Law, with the provision that cases pending before the act went into effect, should be completed under the law, as if the repealing act had not been passed. Except as to these cases there is now no bankrupt law for the Federal courts to administer.

2. Cases Transferred from District Courts. — When any cause, civil or criminal, of whatever nature, is removed into a Circuit Court, as provided by law, from a District Court, wherein the same is cognizable, on account of the disability of the judge of such District Court, or by reason of his being concerned in interest therein, or having been of counsel for either party, or being so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial thereof, such Circuit Court shall have the same cognizance of such cause, and in like manner, as the said District Court might have, or as said Circuit Court might have, if the same had been originally and lawfully commenced therein, and shall proceed to hear and determine the same accordingly. (Sec. 637.)

The provision of law for such transfers is found in sections 587 and 601 of the Revised Statutes.

3. Circuit Courts always Open for Certain Purposes.—The Circuits, as Courts of Equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any judge of a Circuit Court may, upon reasonable notice to the parties, make, and direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. (Sec. 638.)

4. Removal of Causes from State Courts.—Sections 639–647 of the Revised Statutes contain a series of provisions relating to the removal of causes from State courts to the Circuit Courts of the United States, which will be considered in the second chapter of Part IV.

5. Trial of Issues of Fact.—The trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section. (Sec. 648.)

The next section provides as follows: Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. (Sec. 649.)

In *Phillips* v. *Moore*, 10 Otto, 208, it was held that the concluding clause of section third of the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), does not repeal this provision in respect to trials without the intervention of a jury.

It was held in *Morgan's Executors* v. *Gay*, 19 Wall. 81, that it is not competent for a Circuit Court to determine, without the intervention of a jury, an issue of fact in the absence of the counsel of the party and without a written agreement to waive a jury trial.

In *Kearney* v. *Case*, 12 Wall. 275, it was held that, prior to the Act of March 3d, 1865, parties to an action at law could submit the issues of facts to be tried by the court without a jury; that, if they did so, they were bound by the judgment of the court, and could not have a review of that judgment on a writ of error in the Supreme Court; that, to enable parties to have such a review and make a valid agreement to waive a jury trial, the Act of 1865 was passed; and that, under this act, there can be no review of the ruling of the Circuit Court in such cases, unless the record shows that such an agreement was signed by the parties and filed with the clerk of the court. The fourth section of the act referred to is the basis of section 649 of the Revised Statutes. (13 U. S. Stat. at Large, 500.)

If the finding of facts by the court be general, then only such rulings of the court, in the progress of the trial, as are presented by a bill of exceptions, can be reversed by the Supreme Court. Such a bill, however, cannot be used to bring up the whole testimony for review, any more than in a trial by jury. If the finding be special, then it must be a finding of those ultimate facts on which the law determines the rights of the parties, and not a mere report of the evidence. In either case the finding is conclusive as to the facts found. (*Norris* v. *Jackson*, 9 Wall. 125; *The Mining Company* v. *Taylor*, 10 Otto, 37; *The United States* v. *Dawson*, 11 Otto, 569.)

It was held, in *The Insurance Company* v. *Boon*, 5 Otto, 117, that, where issues of fact are tried by the court, the finding belongs to the record as fully as does the verdict of a jury, and that where the court omits to file such a finding at the time of entering its judgment, it may do so *nunc pro tunc* at a subsequent term.

6. Division of Opinion.—The Revised Statutes contain the following provisions in reference to cases in which the judges holding a Circuit Court are divided in opinion:

(1.) *Division in Civil Suits.*—When a final judgment or decree is entered in any civil suit or proceeding before any Circuit Court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they

so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record. (Sec. 652.)

Whenever, in any civil suit or proceeding in a Circuit Court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being. (Sec. 650.)

(2.) *Division in Criminal Cases.*—Whenever any question occurs on the trial or hearing of any criminal proceeding before a Circuit Court upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment. (Sec. 651.)

The design of these provisions is to give the opportunity for a review and determination, by the Supreme Court, in respect to any points concerning which there was a division of opinion between the judges holding a Circuit Court. The rule of law is that such points of disagreement must be distinctly stated and made a part of the record, and that it is not necessary or proper to embody in the statement the whole record of the case. (*The United States* v. *Bailey*, 9 Pet. 267; *Adams* v. *Jones*, 12 Pet. 207; *White* v. *Turk*, 12 Pet. 238; *The United States* v. *Briggs*, 5 How. 208; *Havemeyer* v. *Iowa City*, 3 Wall. 294; and *Nesmith* v. *Sheldon*, 6 How. 41.)

7. The Circuit Court in Missouri.—The following provisions relate specially to the Circuit Court in Missouri:

(1.) *Business transferred, how.*—The Circuit Court for the Eastern district of Missouri is vested with full and complete juris-

diction to hear, determine, and dispose of, according to the usual course of judicial proceedings, all suits, causes, and other matters which were pending in the Circuit Court of the United States in and for the districts of Missouri at the time the said Circuit Court for the Eastern district was created, on the 8th of June, 1872, and also all other matters which have since arisen that pertain to said suits or causes, and also to make all orders and issue all processes which said Circuit Court of the United States in and for the districts of Missouri might have done if it had not ceased to exist; and said Circuit Court for said Eastern district of Missouri is vested with jurisdiction and authority to do all and singular that may, in the due course of judicial proceedings, pertain to any of said suits, causes, or unfinished business as fully as the said Circuit Court in and for the districts of Missouri might have done if said Circuit Court had not ceased to exist. (Sec. 653.)

(2.) *The Service of Process.*—The service of process, mesne or final, issued out of said Circuit Court of the United States in and for the districts of Missouri, which service was had after the 8th of June, 1872, and all levies, seizures, and sales made thereunder, also all service, seizures, levies, and sales made under any process which issued as out of said court after the said 8th of June, 1872, are made valid, and all said processes are to be deemed returnable to said Circuit Court of the United States in and for the Eastern district of Missouri as of the return day thereof. (Sec. 654.)

(3.) *Transfer of Cases.*—Either of the Circuit Courts for the Eastern or for the Western district of Missouri may order any suit, cause, or other matter pending therein, and commenced prior to the creation of said new court, to be transferred for trial or determination to the other of said Circuit Courts when, in the opinion of the court, said transfer ought to be made; and the court to which said transfer is made shall have as full authority and jurisdiction over the same, from the date of the certified transcript of the record is filed, as if the same had been originally pending therein. (Sec. 655.)

(4.) *Custody of Books, Papers, &c.*—The clerk of the Circuit Court for the Eastern district of Missouri, and his successors in office, shall have the custody of all records, books, papers, and property belonging or in any wise appertaining to said Circuit

Court of the United States in and for the districts of Missouri, and, as such custodians and the successors of the clerk of said last-named court, they are hereby invested with the same powers and authority with respect thereto as the clerk thereof had during the existence of said last-named Circuit Court. Said Circuit Court for the Eastern district of Missouri is hereby made the successor of said Circuit Court of the United States in and for the districts of Missouri as to all suits, causes, and unfinished business therein or in anywise pertaining thereto, except as hereinbefore provided. (Sec. 656.)

These provisions are founded on the Act of February 25th, 1873 (17 U. S. Stat. at Large, 476), amendatory of the Act of June 8th, 1872. (17 U. S. Stat. at Large, 282.)

8. The Circuit Court for the Southern District of New York.—The original jurisdiction of the Circuit Court for the Southern district of New York shall not be construed to extend to causes of action arising within the Northern district of said State. (Sec. 657.)

In *Black* v. *Thorne*, 10 Blatch. 66, it was held that the point that a cause of action arose in the Northern district of New York, so as not to be cognizable by the Circuit Court for the Southern district, may be voluntarily waived by a defendant, and is waived where, in a suit in equity, it is not raised in the answer.

9. Writ Powers.—The Revised Statutes provide that the Circuit Courts shall have power to issue writs of *scire facias;* that they shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their jurisdiction, and agreeable to the usages and principles of law; that they shall have power to issue writs of *habeas corpus;* and that the several judges of these courts shall have power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of restraint of liberty. (Secs. 716, 751, and 752.)

The same powers, and in the same terms, are given to the District Courts and to the Supreme Court. Two of these writs are expressly designated; and power is given to issue all other writs which may be necessary for the exercise of their jurisdiction, and are agreeable to the usages and principles of law.

10. Naturalization of Aliens.—Title XXX of the Revised Statutes gives to the Circuit Courts, in common with the other courts mentioned, the power to naturalize aliens, and prescribes rules for the exercise of this power.

11. Appellate Jurisdiction.—The Circuit Courts are appellate courts, as well as courts of original jurisdiction; and, in respect to their appellate powers, the Revised Statutes provide as follows:

(1.) *Cases of Appeal.*—From all final decrees of a District Court in causes of equity and of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the Circuit Court next to be held in such district, and such Circuit Court is required to receive, hear, and determine such appeal. (Sec. 631.)

The following cases are referred to as illustrating the judicial construction and application of this statute: *The United States* v. *Nourse*, 6 Pet. 470; *Mordecai* v. *Lindsay*, 19 How. 199; *Montgomery* v. *Anderson*, 21 How. 386; *The United States* v. *Woonson*, 1 Gallis. 4; *McLellan* v. *The United States*, 1 Gallis. 226; *The United States* v. *Thirty-seven Barrels*, 1 Woods, 19; *Davis* v. *The Seneca*, Gilp. 34; *The Lucille*, 19 Wall. 73; *Yeaton* v. *The United States*, 5 Cranch, 281; *The Rourer*, 1 Blatch. 1; *Harris* v. *Wheeler*, 8 Blatch. 81; and *The Lottawanna*, 20 Wall. 201.

(2.) *Copies of Proofs and Entries.*—In case of an appeal, as provided by the preceding section, copies of the proofs, and of such entries and papers on file as may be necessary on hearing of the appeal, may be certified up to the appellate court. (Sec. 632.)

(3.) *Writs of Error.*—Final judgments of a District Court in civil actions, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed or affirmed in a Circuit Court holden in the same district, upon a writ of error. (Sec. 633.)

The cases here provided for are civil actions at common law; and the judgments rendered therein, if final and if the matter in dispute exceeds the sum specified, are reviewable by the proper Circuit Court upon a writ of error. (*Patterson* v. *The United*

States, 2 Wheat. 221; *The Postmaster-General* v. *Cross*, 4 Wash. 326; *The United States* v. *Fifteen Hogsheads of Brandy*, 5 Blatch. 106; *Wheaton* v. *The United States*, 8 Blatch. 474; *The United States* v. *The Brilliants*, 10 Blatch. 221; and *Locke* v. *The United States*, 2 Cliff. 574.)

(4.) *The Circuit Court in Alabama.*—The Circuit Court in and for the three districts of Alabama shall exercise appellate and revisory jurisdiction of the decrees and judgments of the District Courts for the said districts under the laws conferring and regulating the jurisdiction, powers, and practice of Circuit Courts in cases removed into such courts by appeal or writ of error. (Sec. 634.)

This section has been superseded and repealed by the Act of June 22d, 1874 (18 U. S. Stat. at Large, 195), entitled, "An Act relating to Circuit Courts of the United States for the districts of Alabama."

(5.) *Limitation of Time.*—No judgment, decree, or order of a District Court shall be reviewed by a Circuit Court, on writ of error or appeal, unless the writ of error is sued out, or the appeal is taken, within one year after the entry of such judgment, decree, or order: *Provided*, That where the party entitled to prosecute a writ of error, or to take an appeal, is an infant, or *non compos mentis*, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within one year after the entry of the judgment, decree, or order, exclusive of the term of such disability. (Sec. 635.)

(6.) *The Revisory Judgment or Decree.*—A Circuit Court may affirm, modify, or reverse any judgment, decree, or order of a District Court brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the District Court, as the justice of the case may require. (Sec. 636. *Semmes* v. *The United States*, 1 Otto, 21, and *The United States* v. *Sawyer*, 1 Gallis. 86.)

SECTION IV.

SESSIONS OF CIRCUIT COURTS.

1. Regular Terms.—The regular terms of the Circuit Courts are directed to be held each year, at specified times and places, with the provision that when any of the dates fixed happens to fall on Sunday, the term shall commence on the following day. The regulations of law on this subject are contained in section 658 of the Revised Statutes, which, in respect to some of these courts, has been amended by subsequent legislation.

2. Recognizances to a Certain Term in the Southern District of New York.—All recognizances and bail-bonds taken in criminal cases for an appearance at a Circuit Court in the Southern district of New York, conditioned upon an appearance at the next one of the terms appointed by the Act of February 7th, 1873, shall be valid. (Sec. 659, and sec. 2 of the act here referred to; 17 U. S. Stat. at Large, 423.)

3. Change of Terms.—No action, suit, proceeding, or process in any Circuit Court shall abate or be rendered invalid, by reason of any act changing the time of holding such court; but the same shall be deemed returnable to, pending, and triable in the terms established next after the return day thereof. (Sec. 660.)

4. Special Sessions.—Any Circuit Court may, at its own discretion, or at the discretion of the Supreme Court, hold special sessions for the trial of criminal causes. (Sec. 661.)

The Supreme Court, or, when that court is not sitting, a circuit justice or circuit judge, together with the judge of the proper district, may direct special sessions of a Circuit Court to be held, for the trial of criminal causes, at any convenient place within the district nearer to the place where the offenses are said to be committed than the place appointed by law for the stated sessions. The clerk of such court shall, at least thirty days before the commencement of such special session, cause the time and place for holding it to be notified, for at least three weeks consecutively, in one or more of the newspapers published nearest to the place

where it is to be held. All process, writs, and recognizances respecting juries, witnesses, bail, or otherwise, which relate to the cases to be tried at such special sessions, shall be considered as belonging to such sessions, in the same manner as if they had been issued or taken in reference thereto. Any such session may be adjourned from time to time to any time previous to the next stated term of the court; and all business depending for trial at any special session shall, at the close thereof, be considered as removed to the next stated term. (Sec. 662.)

In the districts of California, Oregon, and Nevada, the circuit justice or circuit judge may appoint special sessions of the Circuit Courts, to be held at the places where the regular sessions are held, by an order under his hand and seal, directed to the marshal and clerk of such court, at least fifteen days before the time fixed for the commencement of such special sessions. Said order shall be published by the marshal in one or more of the newspapers within the district where such sessions are to be held. (Sec. 664.)

5. Adjourned Terms.—The Circuit Courts for the several districts of Missouri may, at any time, order adjourned terms thereof. In the Eastern district a copy of the order shall be posted on the door of the court room, and shall be advertised in some newspaper printed in Saint Louis, and in the Western district a copy of the order shall be posted on the door of the court room, and shall be advertised in some newspaper printed in the city of Jefferson, at least twenty days before the adjourned term is held. At such adjourned term any business may be transacted which might be transacted at a regular term. (Sec. 663.)

6. Special Terms.—In the districts of Kentucky and Indiana, the district judge, and, in his absence, the circuit justice or circuit judge, may, by a written order to the clerk of the Circuit Court, appoint a special term of such court; and by said order the judge may prescribe the duties of the officers of the court in summoning juries and in the performance of other acts necessary for the holding of such special term; or the court may, by its order, after it is opened, prescribe the duties of its officers, and the mode of proceeding, and any of the details thereof. Notice of such special term shall be given by the clerk by posting a copy of said order on the front door of the court house where the court is to be held,

and by publishing the same in one or more newspapers in the same place. (Sec. 665.)

In each of the districts of Tennessee, the judges of the Circuit Court may appoint special terms thereof, to be held at the place where the regular terms are held; and notice of such special term shall be published, for four consecutive weeks, in at least one newspaper printed at the place where the court is to be held. (Sec. 666.)

In each of the districts of North Carolina the Circuit Court may order special terms thereof to be held at such times and places in said district as the court may designate; *Provided*, That no special term of the Circuit Court for either district shall be appointed, except by and with the concurrence and consent of the circuit judge. (Sec. 667.)

In each of the districts of Virginia and Wisconsin, the Circuit Court may order special terms, and direct a grand or petit jury, or both, to attend the same, by an order, to be entered of record twenty days before the day on which such special term is to convene; *Provided*, That no special term of such Circuit Courts shall be appointed in any of the said districts, except by and with the concurrence and consent of the circuit judge. (Sec. 668.)

In the districts not mentioned in the five preceding sections (secs. 664, 665, 666, 667, and 668), the presiding judge of any Circuit Court may appoint special sessions thereof, to be held at the places where the regular sessions are held. (Sec. 669.)

7. Business at Special Terms.—At any special term of a Circuit Court in any district in Indiana, Kentucky, Missouri, North Carolina, Virginia and Wisconsin, any business may be transacted which might be transacted at any regular term of such court. At any special term of a Circuit Court in any other district, it shall be competent for the court to entertain jurisdiction of, and to hear and decide all cases in equity, cases in error or on appeal, issues of law, motions in arrest of judgment, motion for a new trial, and all other motions, and to award executions and other final process, and to do and transact all other business, and direct all other proceedings in all causes pending in the Circuit Court, except trying any cause by a jury, in the same way and with the same effect as the same might be done at any regular session of said court. (Sec. 670.)

8. Adjournment in the Absence of the Judges.—If neither of the judges of a Circuit Court is present to open any session, the marshal may adjourn the court from day to day, until a judge is present; *Provided*, That if neither of them attends before the close of the fourth day after the time appointed for the commencement of the session, the marshal may adjourn the court to the next regular term. (Sec. 671.)

If neither of the judges of a Circuit Court be present to open and adjourn any regular, or adjourned, or special session, either of them may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term. (Sec. 672.)

SECTION V.

SUPPLEMENTARY LEGISLATION.

Congress, since the enactment of the Revised Statutes, has passed several acts relating to the Circuit Courts of the United States. Some of these acts are general and apply to all the courts. Others are applicable only to Circuit Courts in particular States. Tho former class embraces the following acts:

1. The Act of March 3d, 1875 (18 U. S. Stat. at Large, 470).—This act, the most important of the whole series, relates to the jurisdiction of Circuit Courts, to the removal of causes from State courts, and to other purposes. That part of the act which relates to the removal of causes from State courts, will be considered in the second chapter of Part IV. The other provisions of the act are as follows:

(1.) *Original Jurisdiction.*—Section one of the act provides as follows:

(*a.*) *Civil Jurisdiction.*—The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made or

which shall be made under their authority, or in which the United States shall be plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State, claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects.

These recitals, as to the jurisdiction here conferred upon the Circuit Courts, follow, so far as they go, the language of the Constitution itself. They were considered in Part II, relating to the extent of the judicial power of the United States. They give no jurisdiction to Circuit Courts in controversies between two or more States, or between a State and citizens of another State, or between a State of the Union and a foreign State. But they do extend the jurisdiction of these courts, subject to the jurisdictional sum named, to all suits arising under the Constitution, laws, or treaties of the United States, and in this respect greatly enlarge that jurisdiction, while embracing a portion of the jurisdiction that had been previously granted. The jurisdiction is declared to be "concurrent with the courts of the several States;" that is to say, Congress does not exclude the concurrent jurisdiction of State courts, but leaves the question to be determined by State laws.

This section of the act appends to the jurisdiction two qualifications: 1. That no person shall be arrested in one district for trial in another, in any civil action before a Circuit or District Court, and that no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided. 2. That no Circuit or District Court shall have cognizance of any suit, founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange. The reader is referred to Part II, chapter 7, for an explanation of this qualification in respect to assignees.

The eighth section of the act relates to absent defendants in certain specified suits, and provides as follows:

"That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim

to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be;

"Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks;

"And in case such absent defendants shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district;

"But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court, within such district;

"And when a part of said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State;

"*Provided, however*, That any defendant or defendants, not actually personally notified as above provided, may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said Circuit Court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

The ninth section of the same act relates to the death of a party to a final judgment, and provides as follows:

"That whenever either party to a final judgment or decree which has been or shall be rendered in any Circuit Court, has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative

of such deceased party may file in the office of the clerk of such Circuit Court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought."

(*b.*) *Criminal Jurisdiction.*—The Circuit Courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of all crimes and offenses cognizable therein.

This is simply a re-enactment of the twentieth paragraph of section 629 of the Revised Statutes. The Constitution, in article 3, section 2, provides that the trial of crimes shall be in the State where the crimes were committed, and that if the crimes were not committed within any State, the trial shall then be in such place or places as Congress may by law have directed.

The Revised Statutes contain the following provisions in respect to the trial of crimes: 1. That the trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience. 2. That the trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought. 3. That when any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein. (Secs. 729–731.)

(2.) *Appellate Jurisdiction.*—The first section of the act declares that the Circuit Courts shall have appellate jurisdiction from the District Courts under the regulations and restrictions prescribed by law. This makes no change in the state of the law as to the appellate jurisdiction of these courts.

2. The Act of March 1st, 1875 (18 U. S. Stat. at Large, 335).—The first section of this act provides that all persons within the juris-

diction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

The second section declares that any person who violates any of the provisions of the first section shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs, and also be deemed guilty of a misdemeanor, and, upon conviction, be fined not less than five hundred nor more than one thousand dollars, or be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes, and that, having so elected to proceed in one mode or the other, their right to proceed in the other jurisdiction shall be barred, which proviso shall not apply to criminal proceedings, either under the act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon indictment, shall be a bar to either prosecution respectively.

The third section gives to the District and Circuit Courts of the United States, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of the act, and declares that actions for the penalty given by the second section may be prosecuted in the Territorial, District, and Circuit Courts of the United States, wherever the defendant may be found, without regard to the other party.

The fourth section provides that no citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude, and that any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

Such are the provisions of this act, and by its express terms,

the Circuit Courts of the United States have jurisdiction of all cases arising under it.

3. The Act of February 22d, 1875 (18 U. S. Stat. at Large, 333).—This act contains a series of provisions relating to clerks of courts, marshals, district attorneys, &c., and, in the fourth section, declares that the Circuit Courts of the United States, for the purposes of this act, shall have power to award the writ of *mandamus*, upon motion of the Attorney General or the District Attorney of the United States, to any officer thereof, to compel him to make the returns and perform the duties in this act required.

4. The Act of February 16th, 1875 (18 U. S. Stat. at Large, 315).—This act provides as follows:

"Sec. 1. That the Circuit Courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. And, in finding the facts as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law."

"Sec. 2. That said courts, when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may, from time to time, be made by the Supreme Court, and submit to them such questions of fact arising in such cause, as such Circuit Court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings."

These two sections, in the cases specified, and subject to the conditions named, authorize the submission of issues of fact to a

jury. The third section increases the jurisdictional sum from two thousand to five thousand dollars, exclusive of costs, as the condition of a review of the judgments and decrees of Circuit Courts by the Supreme Court, in all cases in which the former was the sum previously established by law.

5. The Act of March 3d, 1879 (20 U. S. Stat. at Large, 354).—This act contains a series of provisions, conferring appellate jurisdiction upon the Circuit Courts in certain criminal cases, as follows:

"Sec. 1. The Circuit Court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the District Court, where the sentence is imprisonment, or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars; and in such case a respondent, feeling himself aggrieved by a decision of a District Court, may except to the opinion of the court, and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge, and it shall be a part of the record of the case."

"Sec. 2. Within one year next after the end of the term at which such sentence shall be pronounced, and not after, the respondent may petition for a writ of error from the judgment of the District Court in the cases named in the preceding section, which petition shall be presented to the circuit judge or circuit justice in term or vacation, who, on consideration of the importance and difficulty of the questions presented in the record, may allow such writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence; but the allowance of such writ shall not so operate without such order. The judge or justice allowing such writ of error shall take a bond with sufficient sureties that the same shall be prosecuted to effect, and that the respondent shall abide the judgment of the Circuit Court thereon. And if the writ shall be allowed to operate as a stay of proceedings under the sentence, bail may in like manner be taken for the appearance of the respondent, at the term of the Circuit Court to which such writ of error shall be returnable, and that he will not depart without leave of court."

"Sec. 3. Such writ of error so allowed shall be returnable to the next regular term of the Circuit Court for the district, and shall be served on the district attorney of the United States for such district. The Circuit Court may advance all such writs of error on its docket in order that speedy justice may be done. And in case of an affirmance of the judgment of the District Court, the Circuit Court shall proceed to pronounce final sentence, and

to award execution thereon; but if such judgment shall be reversed, the Circuit Court may proceed with the trial of said cause *de novo*, or remand the same to the District Court for further proceedings."

This act modified the previous policy of Congress in respect to the judgments of District Courts in criminal cases. Such judgments, until after the passage of the act, were not reviewable in any case by Circuit Courts. The act gives to the latter courts the power of appellate review by writ of error, in the cases and in the manner specified.

The five acts above stated constitute a body of legislation in respect to the powers and jurisdiction of Circuit Courts, general in its application, which Congress has added since the enactment of the Revised Statutes. There are many other acts passed by Congress since the adoption of these Statutes, relating to the organization, or powers, or both, of Circuit Courts in particular States, and hence not general in their application. The author has not thought it necessary or expedient to incorporate these acts into this volume. The reader will find them in the United States Statutes at Large, vols. 18, 19, 20, and 21, or more conveniently in The Supplement to the Revised Statutes, vol. 1, by Judge Richardson, of the Court of Claims, giving the legislation of 1874–1881, by the 43d, 44th, 45th, and 46th Congresses.

CHAPTER III.

THE SUPREME COURT.

1. Constitutional Provision.—The Supreme Court of the United States is the only Federal court that is expressly designated and established by the Constitution. This instrument having provided that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," and having also specified the cases and controversies, to which this power shall extend, proceeds to declare that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction," and that "in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

2. Meaning of Jurisdiction.—The word "jurisdiction," as here used, was, in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718, construed to mean "the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them." This jurisdiction is the authority of the Supreme Court to take cognizance of and decide any of the cases or controversies enumerated in the Constitution, when presented to the court as subjects of litigation between parties. The authority is limited to the cases and controversies specified.

3. Forms of Jurisdiction.—The jurisdiction is to be exercised, either in the form of original jurisdiction, which takes cognizance of and determines the case or controversy in the first instance, or in that of appellate jurisdiction, which reviews, and corrects, or affirms the decisions rendered by inferior courts. Both forms—the original in the cases specified, and the appellate in all

the other cases mentioned—are by the Constitution assigned to the Supreme Court.

The result is that the jurisdiction of this court extends, in one or the other form, to all the cases and controversies enumerated in the third article of the Constitution, subject, in the appellate form, to such exceptions and regulations as Congress may see fit to establish. The Supreme Court is hence the final authority in all the cases that come within the judicial cognizance of the United States. The decision of this court in a particular case is the end of litigation in respect to that case.

4. Laws of Congress.—Congress, beginning with the Judiciary Act of 1789, has, from time to time, passed laws for the purpose of carrying into effect the provisions of the Constitution in respect to the Supreme Court. These laws are mainly found in chapters nine, ten, and eleven, of Title XIII of the Revised Statutes of the United States, except as they have been supplemented and amended by other laws passed since the enactment of these Statutes. The design of this chapter is to set before the reader the Supreme Court as existing and acting under the Constitution and laws of the United States.

SECTION I.

THE ORGANIZATION OF THE COURT.

The organization of the Supreme Court is the special subject of chapter nine of Title XIII of the Revised Statutes of the United States. The following are the laws therein contained:

1. Number of Justices.—The Supreme Court of the United States shall consist of a Chief Justice of the United States, and eight associate justices, any six of whom shall constitute a quorum. (Sec. 673.)

2. Precedence of the Associate Justices.— The associate justices shall have precedence according to the dates of their commissions, or, when the commissions of two or more of them bear the same date, according to their ages. (Sec. 674.)

3. Vacancy in the Office of Chief Justice.—In case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another Chief Justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of Chief Justice. (Sec. 675.)

4. Salaries of Judges.—The Chief Justice of the Supreme Court of the United States shall receive the sum of ten thousand five hundred dollars a year, and the justices thereof shall receive the sum of ten thousand dollars a year each, to be paid monthly. (Sec. 676.)

The judges of the Supreme Court, like the judges of all the other courts of the United States, are forbidden to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of law, while holding their offices; and if any of them resigns his office, after having held his commission as such for at least ten years, and having attained the age of seventy years, he is entitled, during the residue of his natural life, to receive the same salary which was by law payable to him at the time of his resignation. (Secs. 713, 714.)

5. Officers of the Court.—The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions. (Sec. 677.)

One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name, until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the life-time of the clerk or after his death, the clerk, and his estate, and the sureties in his official bond, shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his life-time. (Sec. 678.)

The records and proceedings of the Court of Appeals, appointed previous to the adoption of the present Constitution, shall be kept

in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them in the manner provided by law for giving copies of the records and proceedings of the Supreme Court; and such copies shall have like faith and credit with all other proceedings of said court. (Sec. 679.)

The marshal is entitled to receive a salary at the rate of three thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the Chief Justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the Chief Justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade. (Sec. 680.)

The reporter shall cause the decisions of the Supreme Court, made during his office, to be printed and published within eight months after they are made; and, within the same time, shall deliver three hundred copies of the volumes of said reports to the Secretary of the Interior. And he shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver, in like manner and time, three hundred copies. (Sec. 681.)

The reporter shall be entitled to receive from the Treasury an annual salary of twenty-five hundred dollars, when his report of said decisions constitutes one volume, and an additional sum of fifteen hundred dollars when, by direction of the court, he causes to be printed and published, in any year, a second volume. But said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published, and delivered within the time and in the manner prescribed by law, and upon the condition that the volumes of said reports shall be sold by him to the public for a price not exceeding five dollars a volume. (Sec. 682.)

Congress, by the Act of August 5th, 1882, changed this law, making the salary of the reporter four thousand five hundred dollars when he publishes a single volume in any year, adding to it twelve hundred dollars when a second volume is published in any year, and providing that the volumes of reports shall be fur-

nished to the public by the reporter at a sum not exceeding two dollars per volume.

Provision is made for the distribution of the three hundred copies of the reports of the decisions of the Supreme Court which the reporter is required to deliver to the Secretary of the Interior. (Sec. 683.)

SECTION II.

SESSIONS OF THE COURT.

Chapter ten of Title XIII of the Revised Statutes contains the following provisions relating to the sessions of the Supreme Court:

1. Terms of the Court.—The Supreme Court shall hold, at the seat of Government, one term annually, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business; and suits, proceedings, recognizances, and processes pending in or returnable to said court shall be tried, heard, and proceeded with as if the time of holding said sessions had not been hereby altered. (Sec. 684.)

2. Adjournments for Want of a Quorum.—If, at any session of the Supreme Court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day. (Sec. 685.)

3. Preparatory Orders made by Less than a Quorum.—The justices attending at any term when less than a quorum is present, may, within the twenty days mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to the hearing, trial, or decision thereof. (Sec. 686.)

SECTION III.

ORIGINAL JURISDICTION OF THE COURT.

1. The Constitutional Provision.—As already stated, the Constitution declares that, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction." The main function of this court consists in its appellate jurisdiction; yet these cases were by the framers of the Constitution deemed of sufficient importance to be considered by the Supreme Court in the first instance. Congress has no power to abridge or exclude the original jurisdiction of the court in these cases, since it is a direct and express grant of the Constitution itself. The Constitution says that "the Supreme Court *shall* have" this jurisdiction.

The court cannot, of course, create itself, or provide for its own organization, without the legislation of Congress and the action of the President and Senate in the appointment of judges; but, being created and organized under the authority of law, then it is *ipso facto*, independently of the will of Congress, and even against its will, invested with the original jurisdiction granted to it in the Constitution.

Chief Justice Taney, having referred, in *Kentucky* v. *Dennison*, 24 How. 66, 98, to the Judiciary Act of 1789, and to the precedents established by the Supreme Court under this act, proceeded to say:

"The cases referred to leave no question open to controversy, as to the jurisdiction of the court. They show that it has been the established doctrine ever since the Act of 1789, that, in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."

The Judiciary Act of 1789 did not prescribe any particular process or mode of proceeding for the exercise of original jurisdiction by the Supreme Court in the cases assigned to it by the Constitution; and the court hence established its own process and

mode, assuming that it had the right to do so, as the means of securing the ends for which the jurisdiction was conferred. It did not deny the authority of Congress to prescribe a process and mode; but, in the omission of such legislation by Congress, it claimed the right to exercise the jurisdiction in such manner as in its judgment would "best promote the purposes of justice." The jurisdiction was not defeated by the failure of Congress to legislate on the subject. (*Georgia* v. *Brailsford*, 2 Dall. 402; *Chisholm* v. *Georgia*, 2 Dall. 419; *Grayson* v. *Virginia*, 3 Dall. 320; *Madrazo* v. *The Governor of Georgia*, 1 Pet. 110; and *New Jersey* v. *New York*, 5 Pet. 284.)

2. Limitation of the Jurisdiction.—The question whether Congress can extend the original jurisdiction of the Supreme Court to other cases than those expressly specified in the Constitution, was, in *Marbury* v. *Madison*, 1 Cranch, 137, thoroughly considered by the Supreme Court, and answered in the negative. The application in that case was for a writ of *mandamus*, commanding the Secretary of State to make delivery of a certain paper to the party claiming it. The court, regarding the writ asked for in this case as an exercise of original jurisdiction, not within the limits of such jurisdiction prescribed by the Constitution, held that it had no authority to comply with the application, and also that the thirteenth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73) "is inoperative, so far as it attempts to grant to this court power to issue writs of *mandamus* in classes of cases of original jurisdiction not conferred by the Constitution on this court."

The case was admitted to be in itself a proper one for a *mandamus*, and this remedy was authorized by law; but the law itself was not warranted by the Constitution, and in such a case it was held to be the duty of the court to follow the latter rather than the former. The decision in this case settled the general principle, which has ever since been accepted, that Congress cannot confer upon the Supreme Court any original jurisdiction beyond that expressly designated and conferred in the Constitution itself.

Chief Justice Chase, referring, in *Ex parte Yerger*, 8 Wall. 85, 98, to this case, and also to the case of *Bollman & Swartwout*, 4 Cranch, 75, said that "the doctrine of the Constitution and the cases thus far" is that "the original jurisdiction of this court can-

not be extended by Congress to any other cases than those expressly defined by the Constitution." (*Cohens* v. *Virginia*, 6 Wheat. 264; and *Osborn* v. *The United States Bank*, 9 Wheat. 738.)

3. Exclusiveness of the Jurisdiction.—The Constitution does not in express words make the original jurisdiction of the Supreme Court exclusive. It simply says that, in the cases mentioned, the Supreme Court "shall have original jurisdiction." Congress, in the Judiciary Act of 1789, assumed that this jurisdiction, as conferred by the Constitution, does not exclude its power to bestow the jurisdiction upon other courts of the United States created by its authority. This act made the jurisdiction of the Supreme Court original and exclusive in some cases, and original but not exclusive in others.

The question whether this is a correct construction of the Constitution arose in *The United States* v. *Ravara*, 2 Dall. 297, before the Circuit Court of the United States for the district of Pennsylvania. The court was divided in opinion on this question; yet the majority of the judges held that the word "original," as used in the Constitution, does not necessarily imply exclusive cognizance in the cases specified, and, hence, that Congress has power in these cases to vest a concurrent jurisdiction in other courts of the United States.

This view was sustained by Judge Betts in *St. Luke's Hospital* v. *Barclay*, 3 Blatch. 259. Mr. Justice Nelson considered the same question in *Graham* v. *Stucken*, 4 Blatch. 50, and came to the same conclusion.

The question came before the Supreme Court in *The United States* v. *Ortega*, 11 Wheat. 467, on a certificate of divided opinion of the judges of the Circuit Court for the Eastern district of Pennsylvania. The court, however, disposed of the case without passing upon this specific point, on the ground that the case presented was not one "affecting a public minister within the plain meaning of the Constitution."

A portion of the reasoning in *Marbury* v. *Madison*, 1 Cranch, 137, implies that the original jurisdiction of the Supreme Court, in the cases enumerated in the Constitution, is exclusive; and the same is true of the reasoning in *Osborn* v. *The United States Bank*, 9 Wheat. 738, 820, 821. In the latter of these cases Chief

Justice Marshall said: "The Constitution establishes the Supreme Court and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and *exclusive*, and then defines that which is appellate." He also said: "With the exception of these cases in which original jurisdiction is given to this court, there is none to which the judicial power extends from which the original jurisdiction of the inferior courts is excluded by the Constitution." This is equivalent to saying that the original jurisdiction of the inferior courts is excluded by the Constitution in the cases in which such jurisdiction is granted to the Supreme Court, but not excluded in any of the other cases enumerated in the Constitution.

Intimations to the same effect were given by the court in *Rhode Island* v. *Massachusetts*, 12 Pet. 657. Mr. Justice Story says: "It has been strongly intimated, indeed, by the highest tribunal, on more than one occasion, that the original jurisdiction of the Supreme Court in those cases is exclusive." (Story's Const. sec. 1705.) The Supreme Court, however, has never rendered a positive decision on this point, and, hence, the law as enacted by Congress, in 1789, was reproduced in the Revised Statutes of the United States as the statutory rule on this subject.

4. Relation to Appellate Jurisdiction.—It is plain that the Supreme Court cannot, in the exercise of its appellate jurisdiction, review a judgment or decree which it has rendered in the exercise of its original jurisdiction. It might grant a re-hearing of the case, but this re-hearing would not be an exercise of appellate jurisdiction. There is no provision in the Constitution for any appellate jurisdiction in cases decided by the Supreme Court; and, in the nature of things, there can be none, without changing the character of the court.

The question, however, arose, in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, whether the Supreme Court could exercise appellate jurisdiction in a case originally brought in a State court to which a State was a party, and in which a right was claimed by the defendant under a law of the United States. The counsel, on one side, claimed that, a State being a party to the suit in the court below, and the Supreme Court having original jurisdiction in all cases to which a State is a party, the appellate jurisdiction of the Supreme Court in such a case is necessarily excluded.

The principle assumed in this reasoning is that the Supreme

Court can exercise no appellate jurisdiction in any case, no matter where it arises, or what it involves, in which the Constitution clothes it with original jurisdiction. Chief Justice Marshall, in stating the opinion of court, presented an extended argument upon the point. His conclusion is in these words:—

"When, then, the Constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and, in all cases arising under the Constitution or a law, to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given *because* a State is a party, and to include in the second those in which jurisdiction is given *because* the case arises under the Constitution or a law."

The original jurisdiction of the court, founded entirely upon the party to a suit, without reference to the subject-matter, does not, according to the decision in this case, exclude its appellate jurisdiction in a case arising in another court, where the latter jurisdiction is founded upon the nature and character of the controversy, without regard to the party. The one being given solely with reference to the character of the *party*, and the other being given solely with reference to the character of the *cause*, the latter holds good in all cases assigned to it by the Constitution, no matter who may have been the parties in the court where the suit originated and was first determined. Such is the doctrine stated by Chief Justice Marshall in this memorable case.

5. Statutory Regulation. — Section 687 of the Revised Statutes provides as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations, and original but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party."

This section, being a reproduction of a part of the thirteenth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73),

is a legislative construction of the Constitution in respect to the original jurisdiction of the Supreme Court. It presents two general classes of cases to which this jurisdiction is applicable.

(1.) *Cases where a State is a Party.*—The controversies in all these cases must be "of a civil nature," which embraces such suits in law or equity. They must also be such controversies as are judicial in their character, and hence admit of determination by a court of justice. (*Mississippi* v. *Johnson*, 4 Wall. 475; and *Georgia* v. *Stanton*, 6 Wall. 50.)

These controversies are divided into two subordinate classes; the first embracing those in which the jurisdiction of the Supreme Court is both original and exclusive; the second embracing those in which the jurisdiction is original, but not exclusive.

And, in order to give the jurisdiction in respect to either of these classes, the State must be a party on the record, and not merely consequentially interested in or affected by the suit. It must appear on the record that the State, as such, in its political character, is either suing or sued; and one of the parties at least must be a State of the Union. (*Fowler* v. *Lindsey*, 3 Dall. 411; *New York* v. *Connecticut*, 4 Dall. 1; *The United States* v. *Peters*, 5 Cranch, 115, 139; *The United States Bank* v. *The Planters' Bank of Georgia*, 9 Wheat. 904; *The Bank of Kentucky* v. *Wister*, 2 Pet. 318; *Osborn* v. *The United States Bank*, 9 Wheat. 738, 857; *The Cherokee Nation* v. *Georgia*, 5 Pet. 1; *The Governor of Georgia* v. *Madrazo*, 1 Pet. 110; and *Kentucky* v. *Dennison*, 24 How. 66, 98.)

The reader is referred to chapters five and six of Part II, for a statement of what must appear in the record where a State is a party to a suit.

The controversies in which a State is a party, and in which the jurisdiction of the Supreme Court is both original and exclusive, are such as exist between two or more States of the Union, or between a State of the Union and a foreign State. These controversies are included in the judicial power of the United States as granted by the Constitution, and are not included in the exceptions to the original and exclusive jurisdiction of the Supreme Court made by the statute. Hence, in these cases, the jurisdiction is both original and exclusive. No concurrent jurisdiction is given to any other court of the United States.

The controversies included in the exceptions of the statute, where a State is a party, in the latter two of which the jurisdiction of the Supreme Court is original but not exclusive, are the following: 1. Controversies between a State and its own citizens. 2. Controversies between a State and citizens of other States. 3. Controversies between a State and aliens, or citizens or subjects of a foreign State.

Controversies between a State and its own citizens, which form the first exception made in the statute, are not among the enumerated cases and controversies to which the Constitution extends the judicial power of the United States; and hence, when the Constitution, having enumerated these cases and controversies, proceeds to declare that the Supreme Court shall have original jurisdiction in those cases "in which a State shall be party," the reference is evidently to those cases within the enumeration "in which a State shall be party," and not to cases beyond this enumeration. It is true that, if a State were to sue one of its own citizens, it would be a party to the suit, as it would be if sued by such a citizen; yet, in neither case, would the controversy come within the cases mentioned in the Constitution as those to which the judicial power of the United States is extended. The intention of the statute, by the first exception, is to exclude altogether, from the original jurisdiction of the Supreme Court, all controversies between a State and its own citizens.

The Supreme Court, in *Pennsylvania* v. *The Quicksilver Company*, 10 Wall. 553, held that, while a State might bring an original suit in that court against a citizen of another State, it could not bring such a suit against its own citizens. The case was dismissed on the ground that the defendant company, being incorporated by Pennsylvania, was a citizen of that State, and not of another State. The jurisdiction of the court did not, therefore, attach to the case.

As to the other two classes of controversies—those between a State and citizens of another State, and those between a State and aliens, or citizens or subjects of foreign States—the statute declares that the Supreme Court shall have original but not exclusive jurisdiction. This jurisdiction, however, is qualified by the Eleventh Amendment to the Constitution, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." A State of the Union may sue such citizens or subjects in the Supreme Court, but they cannot bring any suit in law or equity against a State in this court.

The qualification of the amendment, in its express terms, relates to suits "in law or equity." This leaves the question open whether the Supreme Court might not entertain a suit in admiralty against a State, if brought by a citizen of another State, or by a citizen or subject of a foreign State. The amendment certainly does not, in express words, exclude such a suit.

(2.) *Ambassadorial and Consular Cases.*—The second part of the statute extends the original jurisdiction of the Supreme Court to three classes of cases: 1. Suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, in which cases the jurisdiction is declared to be such only as "a court of law can have consistently with the law of nations." 2. All suits brought by ambassadors or other public ministers. 3. All suits in which a consul or a vice-consul is a party, whether as plaintiff or defendant.

In the first of these classes, the jurisdiction is original and exclusive, and also limited by the law of nations in respect to the rights and immunities of public ministers and their servants. The limitation virtually excludes the jurisdiction altogether, since the law of nations exempts public ministers from liability to suits or prosecutions, and extends the exemption to their families and servants.

In the other two classes the jurisdiction is original but not exclusive, and hence if Congress so provides, it may be concurrently exercised by other courts of the United States. There is no reason why, in the absence of any law of Congress forbidding it, public ministers and consuls resident in this country may not bring suits in State courts where it is allowable by State laws, though such courts have no jurisdiction of suits sought to be brought against these parties.

Cases affecting public ministers and consuls were considered in chapter second of Part II; and to this chapter the reader is referred.

6. Issues of Fact.—Section 689 of the Revised Statutes

provides that "the trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury." This provision applies to the original jurisdiction of the court, and relates to suits at law brought in that court against the parties named, in distinction from suits in equity or suits in admiralty.

The Supreme Court has original jurisdiction of suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party. If a public minister or a consul should, in that court, bring an action at law against a citizen of the United States, then the trial, as to the issues of fact involved therein, must be by jury. This provision was made in the thirteenth section of the Judiciary Act of 1789, and is continued in the Revised Statutes.

It is worthy of notice that the original jurisdiction of the Supreme Court, when compared with its appellate jurisdiction, is very limited. It applies to cases that seldom arise, and hence it has been exercised but occasionally during the entire history of the Government. The cases affecting public ministers and consuls, and those in which a State is a party, were for special reasons applicable to such cases, made cognizable by the Supreme Court in the first instance. The great mass of the business of this court was, however, intended to be revisory in respect to the judgments and decrees of other courts, and such has been the fact.

SECTION IV.

CASES OF APPELLATE JURISDICTION.

1. Constitutional Provision. — The Constitution, having granted and defined the original jurisdiction of the Supreme Court, proceeds to declare that, "in all the other cases before mentioned,"—namely, all the cases and controversies specified in the immediately preceding paragraph, with the exception of those in which original jurisdiction is conferred upon the court,—"the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

This fixes the limits within which the appellate jurisdiction of

the Supreme Court is to be exercised, and beyond which it cannot pass, and at the same time leaves a broad margin for the interposition and regulation of law.

2. Inferior Courts. — The Constitution gives to Congress power "to constitute tribunals inferior to the Supreme Court," and to pass all laws which may be necessary and proper to carry into effect the judicial power of the United States. The framers of this instrument assumed that Congress would exercise this power, and thereby ordain and establish "inferior" Federal courts, and vest in them a portion, or the whole, of the judicial power of the United States, with the exception of that which belongs exclusively to the Supreme Court.

The existence of such courts, rendering judgments and decrees in the first instance, is necessary to the revisory power of the Supreme Court. The Constitution leaves their establishment to Congress; yet the plain intention was that they should exist under this authority, and that the Supreme Court should possess a revisory power over their judgments and decrees, with such exceptions and under such regulations as Congress should see fit to make. The purposes of the Constitution demand inferior Federal courts, as well as the Supreme Court; and these courts, it is the province of Congress, in its discretion, to create and endow.

Moreover, the revisory power of the Supreme Court, as granted in the Constitution, is not confined exclusively to subordinate Federal tribunals. This power, as interpreted by law, and also by the Supreme Court, extends, at the pleasure of Congress, to such judgments and decrees of State courts as, by reason of the subject-matter or the parties, come within the scope of the judicial power of the United States. The appellate jurisdiction of the court in such cases will be considered in the third chapter of Part IV.

3. Legislative Regulation.—The general doctrine which has been adopted and applied by the Supreme Court, in respect to the relation of Congress to its appellate jurisdiction, may be thus stated: That, although the Constitution confers and defines this jurisdiction in general terms, it nevertheless declares that the court "shall have appellate jurisdiction" in the cases specified, "with such exceptions and under such regulations as the Congress

shall make," and hence that Congress must legislate in order to enable the court to exercise the power conferred, and that when it has legislated upon the subject, either by making exceptions, or by furnishing regulations to guide the exercise of the jurisdiction, the court must follow the rule thus supplied. Congress, of course, cannot exceed the limits fixed in the Constitution; but, within these limits, the will of Congress is the law for the court.

Chief Justice Taney, in *Barry* v. *Mercein*, 5 How. 103, 119, said: "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by an act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding than that which the law prescribes." This is the settled doctrine of the court. (*The United States* v. *More*, 3 Cranch, 159, 173; *Wiscart* v. *Dauchy*, 3 Dall. 321; *Durousseau* v. *The United States*, 6 Cranch, 307, 314; and *Ex parte McCardle*, 7 Wall. 506.)

4. The Jurisdictional Sum. — The jurisdictional sum, as originally established in the twenty-second section of the Judiciary Act of 1789, as a necessary condition of the power of the Supreme Court to review the final judgment or decree of a Circuit Court of the United States, and as re-stated in the Revised Statutes, was two thousand dollars, exclusive of costs, or rather an amount in excess of this sum. The matter in dispute was required to exceed this amount, exclusive of costs, in order to give jurisdiction.

Congress, by the Act of February 16th, 1875 (18 U. S. Stat. at Large, 315), passed since the enactment of the Revised Statutes, changed this rule, and provided "that whenever, by the laws now in force, it is required that the matter in dispute shall exceed the sum or value of two thousand dollars, exclusive of costs, in order that the judgments and decrees of the Circuit Courts of the United States may be re-examined in the Supreme Court, such judgments and decrees hereafter rendered shall not be re-examined in the Supreme Court, unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs."

This is equivalent to an amendment of the Revised Statutes, by substituting five thousand for two thousand dollars in the cases referred to, and will be so treated in the sequel.

5. The Courts subject to the Appellate Jurisdiction of the Supreme Court.—The Revised Statutes, in chapter eleven

of Title XIII, designate the various courts over whose judgments and decrees the Supreme Court may exercise appellate jurisdiction, together with the character of the cases involved in these judgments and decrees. It is convenient to examine this jurisdiction as it applies to the several courts thus designated. The provisions of law on this subject are as follows:

(I.) Circuit Courts.

1. Final Judgments and Decrees, with a Jurisdictional Sum.—All final judgments of any Circuit Court, or of any District Court acting as a Circuit Court, in civil actions brought there by original process, or removed there from courts of the several States, and all final judgments of any Circuit Court in civil actions removed there from any District Court by appeal or writ of error, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court, upon a writ of error; and an appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court, or of any District Court acting as a Circuit Court, in cases of equity and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and the Supreme Court is required to receive, hear, and determine such appeals. (Secs. 691, 692.)

These two sections are placed together for the purpose of the following comment as to what is peculiar to each, and what is common to both:

(1.) *Final Judgments.*—The term "judgments," as here used, evidently means the decisions of Circuit Courts in suits at law, as distinguished from criminal prosecutions, and also from equity and admiralty suits. These suits or "civil actions" are described as coming before the Circuit Courts by original process, or by removal from State courts, or by removal from District Courts on appeal or writ of error. In the first two cases the jurisdiction possessed by the Circuit Courts is original, in the mode of exercise; and in the third the jurisdiction is appellate, and the function is that of review.

(2.) *Final Decrees.*—The term "decrees," as used in the other section, applies to the decisions of Circuit Courts, rendered in

cases of equity, and of admiralty and maritime jurisdiction, as distinguished from cases at law. These decrees are usually rendered without the intervention of a jury. The court itself decides all the questions of both law and fact involved in the cases before it.

(3.) *Mode of Review.*—The two sections, when compared together, show very clearly that, in the intention of the law, there is a distinction between a writ of error and an appeal, as methods of review by the Supreme Court. Final judgments in civil actions at law are to be reviewed upon a writ of error; but final decrees in cases of equity, and of admiralty and maritime jurisdiction, are to be reviewed by an appeal.

Chief Justice Ellsworth, in stating the opinion of the court, in *Wiscart* v. *Dauchy*, 3 Dall. 321, 327, said: "An appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact as well as the law to a review and re-trial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law. Does the statute observe this obvious distinction? I think it does." This view is approvingly referred to and adopted in *The United States* v. *Goodwin*, 7 Cranch, 108, 110.

The settled rule of law is that civil actions at law in the Circuit Courts, resulting in final judgments by these courts, are removable to the Supreme Court only by writ of error, and that when thus removed, the review of the latter court is confined to a re-examination of questions of law as presented by the record. (*Sarchet* v. *The United States*, 12 Pet. 143; *Bayard* v. *Lombard*, 9 How. 530; and *Saltmarsh* v. *Tuthill*, 12 How. 387.)

The twenty-second section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), made no provision for the removal of a suit in any case from a Circuit Court to the Supreme Court, except by writ of error. (*Blaine* v. *The Charles Carter*, 4 Dall. 22.) The Act of March 3d, 1803 (2 U. S. Stat. at Large, 244), substituted appeals for writs of error in equity and admiralty cases.

A writ of error in this case is simply an order issued under the authority of the Supreme Court, and addressed to the Circuit Court, commanding the latter to send, under its seal, to the former, the record of the suit specified in the writ, that the court, in the light of the record, may examine the case with reference to

the errors of law alleged by the plaintiff in error. The effect of the writ is to remove the record for this purpose into the supervising tribunal. It does not act directly upon the parties to the suit in the court below. It acts only on the record, or rather the court having the record in custody. (*Cohens* v. *Virginia*, 6 Wheat. 264, 410, and *Suydam* v. *Williamson*, 20 How. 427.)

Final decrees rendered by Circuit Courts, in cases of equity or of admiralty and maritime jurisdiction, are removable to the Supreme Court only by appeal, and, when there, are reviewable both as to law and fact. A writ of error is hence not the proper process in such cases. (*The Baltimore*, 8 Wall. 377, 381; *Gruner* v. *The United States*, 11 How. 163; *Merrill* v. *Petty*, 16 Wall. 338; *The Alicia*, 7 Wall. 571; *Walker* v. *Dreville*, 12 Wall. 440; *McCollum* v. *Eager*, 2 How. 61; and *Sampson* v. *Welsh*, 24 How. 207.) The intention of Congress is that the whole merits of the controversy, including the facts as well as the law, should in these cases be heard and determined by the Supreme Court on appeal. (*The Baltimore*, 8 Wall. 377.)

Congress, by the first section of the Act of February 16th, 1875 (18 U. S. Stat. at Large, 315), provided that the Circuit Courts, in the trial of admiralty causes on the instance-side of the court, might, with the consent of the parties, submit issues of fact to a jury, and that the finding of the jury should stand as the finding of the Court, and that "the review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law." In *The Abbotsford*, 8 Otto, 440, it was held that the finding of the facts in the Circuit Court under this statute is conclusive, and that the only questions that can be determined by the Supreme Court in review are those of law.

Matters which belong to the sound discretion of the Circuit Courts, and generally matters of mere practice in these courts, whether in actions at law, or in equity or admiralty suits, are not subject to review by the Supreme Court, either by writ of error or on appeal. Such matters are not deemed as coming within its revisory jurisdiction. (*Connor* v. *Peugh*, 18 How. 394; *Early* v. *Rogers*, 16 How. 599; *Pomeroy* v. *The State Bank*, 1 Wall. 592;

Parsons v. *Bedford*, 3 Pet. 433; *Cook* v. *Burnley*, 11 Wall. 659; and *Hall* v. *Weare*, 2 Otto, 728.)

(4.) *Finality of the Judgment or Decree.*—It is only a final judgment or decree of a Circuit Court for whose review by the Supreme Court provision is made in these sections. What then is a final judgment or decree? Chief Justice Marshall, in *Weston* v. *The City Council of Charleston*, 2 Pet. 449, said that the word "final" must be understood "as applying to all judgments and decrees which determine the particular cause." If this be the effect, then the judgment or decree is final; but if not, then it is not final in the sense of the statute.

Mr. Justice Wayne, in *Bebee* v. *Russell*, 19 How. 283, 285, said: "When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."

Chief Justice Waite, in *Bostwick* v. *Brinkerhoof*, 16 Otto, 3, said: "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." If the judgment or decree leaves open any questions yet to be determined, then, according to this rule, it is not final, and is hence not reviewable by the Supreme Court.

The reports of the Supreme Court show that the court has, during its whole history, as the occasion called for it, drawn the line of distinction between judgments and decrees that were final and such as were not so, adhering to the principle that final judgments or decrees, whether in cases of common law, or of equity, or of admiralty and maritime jurisdiction, are those, and those only, in which the rights of the parties in the pending suits were fully determined by the courts below, so as to leave nothing further for these courts to do in ending the litigation, and refusing to take cognizance of a case, either on appeal or writ of error, when the record did not show this state of facts.

The cases which set forth and illustrate this principle are ex-

ceedingly numerous as well as various. *Holcombe* v. *McKusick*, 20 How. 552; *Forgay* v. *Conrad*, 6 How. 201; *Thomson* v. *Dean*, 7 Wall. 342; *St. Clair County* v. *Livingston*, 18 Wall. 628; *Baker* v. *White*, 2 Otto, 176; *Sage* v. *The Railroad Company*, 6 Otto, 712; *Montgomery* v. *Anderson*, 21 How. 386; *Boyle* v. *Zacharie*, 6 Pet. 648; *Smith* v. *Trabue*, 9 Pet. 4; *Evans* v. *Gee*, 14 Pet. 1; *Tracy* v. *Holcombe*, 24 How. 426; *Lea* v. *Kelly*, 15 Pet. 213; *Perkins* v. *Fourniquet*, 6 How. 206; *Bronson* v. *The Railroad Company*, 2 Black, 524; *The Railroad Company* v. *Bradleys*, 7 Wall. 575; *French* v. *Shoemaker*, 12 Wall. 86; and *The Railroad Company* v. *Swasey*, 23 Wall. 405. These are a few of the cases that present the rulings of the Supreme Court as to final judgments and decrees.

(5.) *The Matter in Dispute.*—The rule laid down in these sections, as amended by the Act of February 16th, 1875 (18 U. S. Stat. at Large, 315), is that, in order to give appellate jurisdiction to the Supreme Court, the matter in dispute must exceed, exclusive of costs, the sum or value of five thousand dollars. This is a condition of jurisdiction, and if not shown to be present, the court cannot review the case. (*Winston* v. *The United States*, 3 How. 771; *Lee* v. *Watson*, 1 Wall. 337: *Walker* v. *The United States*, 4 Wall. 163; *The Western Union Tel. Co.* v. *Rogers*, 3 Otto, 565; and *Gray* v. *Blanchard*, 7 Otto, 564.)

As to what is meant by the matter in dispute, Mr. Justice Field, in *Lee* v. *Watson*, 1 Wall. 337, said: "By the matter in dispute is meant the subject of litigation—the matter for which the suit is brought, and upon which the issue is joined, and in relation to which jurors are called and witnesses are examined."

Chief Justice Taney, referring, in *Barry* v. *Mercein*, 5 How. 103, 120, to the words of the law, said: "They give the right of revision only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law which, by any just interpretation, can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied." To the same effect is the case of *Pratt* v. *Fitzhugh*, 1 Black, 271.

If the matter in dispute is not shown by the record, and is itself a subject of dispute between the parties, then, on the question of jurisdiction, the court will allow this point to be settled by

affidavits, and give time for this purpose. (*Williamson* v. *Kincaid*, 4 Dall. 20; *Course* v. *Stead*, 4 Dall. 22; and *Rush* v. *Parker*, 5 Cranch, 287.)

The *onus probandi* as to the amount in controversy is upon the party seeking to obtain a revision of the case. He must show the amount necessary to sustain the jurisdiction, either by the record or by affidavits. (*Hagan* v. *Foison*, 10 Pet. 160.)

After a case has been heard and dismissed for the want of jurisdiction, because it did not appear that the value in controversy was sufficient, it is then too late to show this value by affidavits. (*Richmond* v. *Milwaukie*, 21 How. 391.)

If jurisdiction has attached to the case in virtue of the requisite amount, it will not be ousted by a subsequent reduction below this amount. (*Cooke* v. *The United States*, 2 Wall. 218.)

If the plaintiff in the court below claimed an amount sufficient to sustain the appellate jurisdiction of the Supreme Court, and obtained a judgment for a less sum than this amount, then, although the plaintiff may sue out a writ of error to have the case reviewed in the Supreme Court, the defendant cannot by such a writ give the court jurisdiction of the case, since the amount in controversy, as to him, is the judgment rendered in the court below, and this is not sufficient to give the right of appellate review. (*Gordon* v. *Ogden*, 3 Pet. 33; *Clifton* v. *Sheldon*, 23 How. 481; and *Smith* v. *Honey*, 3 Pet. 469.)

In *Troy* v. *Evans*, 7 Otto, 1, it was held that the amount of a judgment below against a defendant in an action for money is *prima facie* the measure of the jurisdiction of the Supreme Court in his behalf, and that this *prima facie* case continues until the contrary is shown; and, if jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds five thousand dollars, exclusive of interest and costs.

2. Judgments and Decrees without Regard to the Sum or Value in Dispute.—A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute: (Sec. 699.)

(1.) *Patent and Copyright Cases.*—Any final judgment at law or any final decree in equity of any Circuit Court, or of any Dis-

trict Court acting as a Circuit Court, or of the Supreme Court of the District of Columbia, or of any Territory, in any case touching patent rights or copyrights.

This clause of the section is founded on sections 56 and 107 of the Act of July 8th, 1870. (16 U. S. Stat. at Large, 198.) The provision applies only to controversies in law or equity that directly relate to patent rights or copyrights granted under the laws of the United States, and which may arise between a patentee or author and an alleged infringer, or between rival patentees. The subject-matter of such a controversy is the right thus secured. (*Wilson* v. *Sandford*, 10 How. 99; *Brown* v. *Shannon*, 20 How. 55; and *Philip* v. *Nock*, 13 Wall. 185.)

(2.) *Actions to enforce Revenue Laws.*—Any final judgment of a Circuit Court, or of any District Court acting as a Circuit Court, in any civil action brought by the United States for the enforcement of any revenue law thereof. (*The United States* v. *Carr*, 8 How. 1; *The United States* v. *Bromley*, 12 How. 88; and *Pettigrew* v. *The United States*, 7 Otto, 385.)

(3.) *Actions against Revenue Officers.*—Any final judgment of a Circuit Court, or of any District Court acting as a Circuit Court, in any civil action against any officer of the revenue for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the Treasury. (*Cary* v. *Curtis*, 3 How. 236; and *Mason* v. *Gamble*, 21 How. 390.)

(4.) *Cases for Deprivation of Citizen Rights.*—Any final judgment at law or final decree in equity of any Circuit Court, or of any District Court acting as a Circuit Court, in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States. (*Ex parte* Warmouth, 17 Wall. 64.)

(5.) *Suits for Injuries by Conspirators against Civil Rights.*—Any final judgment of a Circuit Court, or of any District Court acting as a Circuit Court, in any civil action brought by any person on account of injury to his person or property by any act done in furtherance of any conspiracy mentioned in section 1980, Title "CIVIL RIGHTS."

The final judgments or decrees of the courts below in all these cases may be reviewed by the Supreme Court, without regard to the sum or value in dispute. Congress, in the fifth section of the Act of March 1st, 1875 (18 U. S. Stat. at Large, 335), entitled "An Act to protect all citizens in their civil and legal rights," provided "that all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court." This applies only to civil suits brought under the provisions of the act.

3. Cases tried by a Circuit Court without a Jury.—When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. (Sec. 700.)

This section is founded on section four of the Act of March 3d, 1865. (13 U. S. Stat. at Large, 500.) Section 649, to which reference is made and which is founded on the same act, provides that issues of fact in civil cases in any Circuit Court may be tried and determined by the court without a jury, when the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury, and that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

Put these two sections together, and we have the following propositions of law: 1. That in civil cases, and upon the condition specified, Circuit Courts may try and determine issues of fact, without the intervention of a jury, finding either a general or a special verdict as to the facts. 2. That in these cases the Supreme Court may review the rulings of the Circuit Court in the progress of the trial of a cause, if excepted to at the time and duly presented by a bill of exceptions. 3. That if the finding of facts by the Circuit Court is special, the review may extend to the deter-

mination of the sufficiency of the facts found to support the judgment. 4. That the review may be upon a writ of error, or upon appeal.

The following cases afford a general illustration of the construction and application of these legal propositions:

In *Flanders* v. *Tweed*, 9 Wall. 425, the court expresses itself as disposed to hold parties who, under the Act of March 3d, 1865, waive a trial by jury, and substitute the court for the jury, to a reasonably strict conformity to the regulations of the act, if they desire to save to themselves all the rights and privileges which belong to them in trials by jury at common law. In this case the only evidence of filing an agreement to waive a jury trial was in the statement of facts made by the judge three months after the date of the judgment, which statement was regarded as a nullity. The judgment was reversed for mis-trial, and the case remanded for a new trial.

In *Norris* v. *Jackson*, 9 Wall. 125, it was held: 1. That the Act of March 3d, 1865, establishes the mode in which parties may submit cases to the court without a jury, and the manner in which a review of the law of such cases may be had in the Supreme Court. 2. That the special finding of the facts mentioned in the act is not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties. 3. That if the finding of the facts be general, only such rulings of the court, *in the progress of the trial*, can be reversed as are presented by a bill of exceptions. 4. That in such cases a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury. 5. That objections to the admission or rejection of evidence, or to such rulings or propositions of law as may be submitted to the court, must be shown by a bill of exceptions. 6. That if the parties desire a review of the law of the case, they must ask the court to make a special finding which raises the question, or get the court to rule on the legal propositions which they present.

In *Coddington* v. *Richardson*, 10 Wall. 516, it was held that the Supreme Court will not review a general finding upon a mass of evidence brought up, and that if the party desires to have the finding reviewed, he must have the court find the facts specially, so that the case may come here as on a special verdict or case stated.

In *Kearney* v. *Case*, 12 Wall. 275, it was held: 1. That, prior to the Act of March 3d, 1865, parties to an action at law could submit the issues of fact to be tried by the court without a jury, but they were bound by the judgment of the court, and could not have a review on error of any ruling of the court on such trial. 2. That to enable the parties to have such a review, and to enable them to make a valid agreement to waive a jury, the above mentioned act was passed, which, for that purpose, required the waiver to be in writing and filed with the clerk. 3. That there can, under this act, be no review of the ruling of the court in such cases, unless the record shows that such an agreement was signed and filed with the clerk. 4. That the existence of such a writing may be shown in the Supreme Court by a copy of the agreement, or by a statement in the finding of facts by the court that it was executed, or by such a statement in the record entry of the judgment, or by such a statement in the bill of exceptions.

In *Miller* v. *The Insurance Company*, 12 Wall. 285, the general principles laid down in the above cases were re-affirmed.

In *Dirst* v. *Morris*, 14 Wall. 484, it was held that the Supreme Court, under the Act of March 3d, 1865, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of evidence. If the court chooses to find generally for one side or the other, instead of making a special finding of facts, the losing party has no redress on error except for the wrongful admission or rejection of evidence. In *The Insurance Company* v. *Folsom*, 18 Wall. 237, it was held that if the finding of facts be a general one, the Supreme Court will only review questions of law arising in the progress of the trial and duly presented by a bill of exceptions, or errors of law apparent on the face of the pleadings.

In *The Insurance Company* v. *Sea*, 21 Wall. 158, the court re-stated the general rules which had been adopted in executing the provisions of the Act of March 3d, 1865, the fourth section of which forms the basis of sections 649 and 700 of the Revised Statutes.

Where a case is tried by the Circuit Court without a jury, the decision of the court upon the weight of evidence is conclusive; and where there is a special finding of facts by the court, the Supreme Court will not examine the evidence to see whether the finding is correct or not, since its judgment is to be founded ex-

clusively upon the finding of facts. (*Bond* v. *Brown*, 12 How. 254; *Copelin* v. *The Insurance Company*, 9 Wall. 461; and *The United States* v. *Dawson*, 11 Otto, 569.)

In *Tyng* v. *Grinnell*, 2 Otto, 467, Mr. Justice Clifford, in stating the opinion of the court, said: "Whether the finding is general or special, the rulings of the court during the progress of the trial, if duly excepted to at the time and presented by a bill of exceptions, may be reviewed in this court; and in a case where the finding is special, the review, even without a bill of exceptions, may extend to the question whether the facts found are sufficient to support the judgment." (*Miller* v. *The Insurance Company*, 12 Wall. 285.)

These cases embody and illustrate the general principles adopted by the Supreme Court in construing and applying the law which provides for the trial of civil suits in Circuit Courts without the intervention of a jury. The suits are such as would require a jury trial, but for the waiver of the right to such trial by the parties themselves.

4. Certified Divisions of Opinion.—Any final judgment or decree, in any civil suit or proceeding before a Circuit Court which was held at the time by a circuit justice and a circuit judge or a district judge, or by the circuit judge and a district judge, wherein the said judges certify, as provided by law, that their opinions were opposed upon any question which occurred on the trial or hearing of the said suit or proceeding, may be reviewed, and affirmed, or reversed, or modified by the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error, or appeals in regard to bail, and *supersedeas;* and when any question occurs in the hearing or trial of any criminal proceeding before a Circuit Court, upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court, and its decision and order in the premises shall be remitted to such Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order. (Secs. 693 and 697.)

The feature which is common to both of these sections is the fact that the cases for which they provide come before the Su-

preme Court on a certified division of opinion between the judges who held the Circuit Court. These cases are either civil or criminal, and exist only when the Circuit Court is held by two judges.

(1.) *Civil Cases.*—Sections 650 and 652 of the Revised Statutes provide that when in civil cases such a division of opinion occurs, the opinion of the presiding justice or judge shall be considered the opinion of the court for the time being, and that the point upon which the judges disagreed shall, during the same term, be stated under the direction of the judges, and certified, and that such certificate shall be entered of record. This certified statement is intended to be the legal evidence of such disagreement, and of the particular point or points to which it referred.

The provision in section 693 is that the final judgment or decree which was rendered on the basis of the opinion of the presiding justice or judge of the Circuit Court, may be reviewed by the Supreme Court on writ of error or appeal, according to the nature of the case, if the judges, having been opposed in opinion upon any question which occurred on the trial or hearing of the suit or proceeding, have certified to this effect as required by law. Their certified statement in the record is the basis of the jurisdiction of the Supreme Court, and presents the point or points to be considered and determined by the court. The amount in controversy has nothing to do with the power of the Supreme Court to take jurisdiction in these cases. (*Dow* v. *Johnson*, 10 Otto, 158.)

The questions proper to be certified are questions of law, and not questions of fact or questions that belong to the discretion of the court. (*Wilson* v. *Barnum*, 8 How. 258; *Silliman* v. *The Hudson River Bridge Co.*, 1 Black, 582; *Daniels* v. *The Railroad Company*, 3 Wall. 250; *Wiggins* v. *Gray*, 24 How. 303; and *Davis* v. *Braden*, 10 Pet. 286.)

If the question about which the division of opinion occurred relates to some proceeding subsequent to the decision of the cause in the Circuit Court, the Supreme Court cannot take jurisdiction of the case. (*Devereaux* v. *Marr*, 12 Wheat. 212.) If the questions are simply questions of practice of the Circuit Court, in equity causes, then they are not proper to be certified, since they rest in the sound discretion of the court. (*Packer* v. *Nixon*, 10 Pet. 408.)

The intention of the law is not that the whole cause should be certified, but only the particular question or questions in regard to which the judges were opposed in opinion; and this question or these questions should be distinctly stated. (*White* v. *Turk*, 12 Pet. 238; *Nesmith* v. *Sheldon*, 6 How. 41; *Sadler* v. *Hoover*, 7 How. 646; *Webster* v. *Cooper*, 10 How. 54; *Dennistoun* v. *Stewart*, 18 How. 565; and *Weeth* v. *New England Mortgage Co.*, 16 Otto, 605.)

If the question certified rests upon a mere hypothesis, the Supreme Court will decline to answer it. (*Pelham* v. *Ross*, 9 Wall. 103.)

The power of the Supreme Court to revise the proceedings of a Circuit Court, in a case brought before it on a certificate of division, is confined strictly to the questions set forth in the certificate. (*Ward* v. *Chamberlain*, 2 Black, 430.)

(2.) *Criminal Cases.*—Section 651 of the Revised Statutes provides that if, on the trial or hearing of any criminal proceeding in a Circuit Court, the judges are divided in opinion, the question upon which they disagree shall, during the same term, upon the request of either party or of their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court at their next session; that the cause may, nevertheless proceed, if in the opinion of the judges this can be done without prejudice to the merits; and that no imprisonment shall be allowed or punishment inflicted where the division of opinion relates to such imprisonment or punishment.

Section 697 of the same statutes provides that the question, being thus certified, shall be finally decided by the Supreme Court, and that its decision shall be remitted to the Circuit Court as the rule for its action in regard to the same.

In *The United States* v. *Daniel*, 6 Wheat. 542, it was held that a division of the judges of the Circuit Court, on a motion for a new trial, is not one of those divisions of opinion which is to be certified to the Supreme Court for its decision. In *The United States* v. *Rosenburgh*, 7 Wall. 580, it was held that the Supreme Court can take no cognizance of a division of opinion between the judges of a Circuit Court upon a motion to quash an indictment. This view was affirmed in *The United States* v. *Avery*, 13 Wall. 251, even when the motion presents the question of the jurisdic-

tion of the Circuit Court to try the offense charged. In *The United States* v. *Tyler*, 7 Cranch, 285, a certified division of opinion, on a motion in arrest of judgment, was entertained by the Supreme Court, and the point involved was decided.

Chief Justice Marshall, in *The United States* v. *Bailey*, 9 Pet. 367, said: "A division on a point, in the progress of a cause on which the judges may be divided in opinion, not the whole cause, is to be certified to this court."

It was held, in *The United States* v. *Briggs*, 5 How. 208, that the Supreme Court is not authorized to take jurisdiction upon a certificate that the judges of a Circuit Court were divided in opinion upon the question whether a demurrer was well taken, since this presented the whole case. The particular point on which the division occurred must be certified. Chief Justice Taney remarked in this case: "We are bound to look to the certificate of the court alone for the questions which occurred, and for the point on which they differed, and as this does not appear, we have no jurisdiction in the case, and it must be remanded to the Circuit Court."

Chief Justice Taney, in stating the opinion of the court, in *Ex parte Gordon*, 1 Black, 503, said: "The only case in which this court is authorized to express an opinion on the proceedings in a Circuit Court in a criminal case, is where the judges of the Circuit Court are opposed in opinion upon a question arising at the trial, and certify it to this court for its decision. But certainly the party had no right to ask for such a certificate, nor could it have been granted consistently with the duty of the court, if the judges agreed in opinion, and did not think there was doubt enough to justify them in submitting the question to the judgment of this court."

In *Luther* v. *Borden*, 7 How. 1, 47, it was held that the whole of a case cannot be broken up into points and sent to the Supreme Court on a certificate of division of opinion.

5. Removal Cases.—The fifth section of the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), provides that the order of a Circuit Court dismissing or remanding a cause to the State court, from which it was sought to be removed, shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

In *The Insurance Company* v. *Comstock*, 16 Wall. 258, and *The Railroad Company* v. *Wiswall*, 23 Wall. 507,—cases which occurred before the Act of March 3d, 1875,—it was held that the order of the Circuit Court remanding a cause to a State court is not a final judgment in the case, but a refusal to hear and decide, and that the remedy in such a case is by *mandamus* to compel action, and not by a writ of error to review what was done.

Congress subsequently passed the Act of March 3d, 1875, and the Supreme Court held that this modified the previous legislation on the subject, and that, under the fifth section of the act, it has power to review such orders of Circuit Courts. (*Hoadley* v. *San Francisco*, 4 Otto, 4, and *Ayers* v. *Chicago*, 11 Otto, 184.)

6. Appeals in Prize Causes.—An appeal shall be allowed to the Supreme Court, from all final decrees of any Circuit Court, in prize causes depending therein, on the 30th of June, 1864, in the same manner and subject to the same conditions as appeals in prize causes from the District Courts. (Sec. 696.) Congress, by the seventh section of the Act of March 3d, 1863 (12 U. S. Stat. at Large, 760), provided that appeals in prize causes from the District Courts shall be made directly to the Supreme Court. Prior to this act the Supreme Court had no appellate jurisdiction in prize causes, except where the same were removed thereto by appeal from the Circuit Courts. (*The Admiral*, 3 Wall. 603.)

The thirteenth section of the Act of June 30th, 1864 (13 U. S. Stat. at Large, 310), reproduces, in exact words, section seven of the Act of March 3d, 1863. Section 696 of the Revised Statutes refers to this section, and provides that appeals shall be allowed to the Supreme Court from the final decrees of Circuit Courts in prize causes depending therein on the 30th of June, 1864. This makes an exception to the general rule that all prize causes shall be carried to the Supreme Court from the District Courts, and permits the cases specified to be carried to the Supreme Court from Circuit Courts.

(II.) District Courts.

1. Appeals in Prize Causes.—An appeal shall be allowed to the Supreme Court from all final decrees of any District Court in prize causes, where the matter in dispute, exclusive of costs, ex-

ceeds the sum or value of two thousand dollars, and shall be allowed, without reference to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance. And the Supreme Court shall receive, hear, and determine such appeals, and shall be open for the entry thereof. (Sec. 695.)

Section 1009 provides that appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time for cause shown in the particular case, and that the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal or of intention to appeal was filed with the clerk of the District Court within thirty days after the rendition of the final decree therein. The Supreme Court may, if in its judgment the purposes of justice require it, allow any amendments, either in form or substance, of any appeal in prize causes. (Secs. 1006, 4636).

The jurisdiction in prize causes, whether exercised by the District Courts, or by the Supreme Court in the appellate form, is regarded as coming under the general head of admiralty and maritime powers as granted in the Constitution, and in the ninth section of the Judiciary Act of 1789 given to the District Courts. (*The Admiral*, 3 Wall. 603, 612.)

In *The Alicia*, 7 Wall. 571, it was held that, a prize cause having been removed from a District to a Circuit Court by appeal, which latter court made an order transferring the cause to the Supreme Court, no jurisdiction in the case could be exercised by the Supreme Court, since there was no judgment or decree in the Circuit Court from which an appeal could be taken.

In *Withenbury* v. *The United States*, 5 Wall. 819, it was held that a decree in a prize cause which, upon a claim filed by particular parties, disposes of the whole matter in controversy, and is final as to these parties and their rights, and also final, so far as the claimants and their rights are concerned, as to the United States, and hence leaves nothing to be litigated between the parties, and awards execution in favor of the libellants against the claimants, is a final decree, and that an appeal may be taken therefrom to the Supreme Court. (*The Palmyra*, 10 Wheat. 502; *Montgomery* v. *Anderson*, 21 How. 386; and *The United States* v. *Ames*, 9 Otto, 35.)

In *The Nuestra Senora de Regla*, 17 Wall. 29, it was held that, in prize cases, wherever it appears that notice of appeal or of intention to appeal to the Supreme Court was filed with the clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed to the Supreme Court whenever the purposes of justice require it.

If the facts show that a case which has been prosecuted as prize is not of this character, but simply a forfeiture under a statute of Congress, the Supreme Court will remand it for the proper proceedings in the District Court. (*The United States* v. *Weed*, 5 Wall. 62; and *The Watchful*, 6 Wall. 91.)

In *Jecker* v. *Montgomery*, 18 How. 110, it was held that, while it is the rule in prize cases that proceedings should be conducted in the name of the United States, the decree will not be reversed when they have been conducted in the name of the captors, through a course of long litigation, without objection on that score until the case is argued in the Supreme Court.

If the District Court in a prize case denies an order for further proof when it ought to be granted, or allows it when it ought to be denied, and the objection is taken by the party, and appears on the record, the Supreme Court can administer the proper relief. But, if evidence in the nature of further proof be introduced, and no formal order or objection appears on the record, it must be presumed to have been done by consent, and the irregularity is waived. (*The Pizarro*, 2 Wheat. 227.)

2. Transcripts on Appeals in Prize and other Cases.— Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court: *Provided*, That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeals no new evidence shall be received in the Supreme Court, except in admiralty and prize causes. (Sec. 698.) Section 750 provides that, in equity and admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction

of the court and the regularity of the proceedings, shall be entered upon the final record.

The design of this legislation is to designate the documentary basis upon which the Supreme Court proceeds in the exercise of its appellate power in equity cases and in those of admiralty and maritime jurisdiction, including therein prize causes. For this purpose transcripts of the record and copies of other necessary papers on file in the court below must be sent to the Supreme Court; and the Supreme Court or the court below may, in its discretion, order the transmission of any original document or other evidence, in addition to a copy of the record, or in lieu of a copy of a part thereof.

The rule of law in equity cases is that such cases come before the Supreme Court from the Circuit Courts, or from District Courts acting as Circuit Courts, by appeal, and not by writ of error, and that they are to be heard and determined upon proofs sent up with the record from the court below, and that no new evidence can be received in the Supreme Court. (*Roemer* v. *Simon*, 1 Otto, 149; and *Blease* v. *Garlington*, 2 Otto, 1, 4.)

In admiralty and prize causes the introduction of new evidence is admissible: but the Supreme Court hears the case, in the first instance, upon the evidence transmitted from the court below, and then decides upon that evidence whether it is proper to allow further proof. If further proof be allowed, the case may be continued to the next term of the court for this purpose. This proof will not be taken *viva voce* in the Supreme Court, but must be taken by a commission appointed by the court below and authorized to take the testimony of witnesses. The order to take such testimony must come from the Supreme Court. (*The London Packet*, 2 Wheat. 371; *The Samuel*, 1 Wheat. 9; *Hawthorne* v. *The United States*, 7 Cranch, 107; *The Western Metropolis*, 12 Wall. 389; *The Juniata*, 1 Otto, 366; and *The Ocean Queen*, 6 Blatch. 24.)

A transcript of the record and proceedings in the court below is sufficiently authenticated if it bears the seal of the court, and is signed by the clerk or his deputy in the name of and for the clerk. (*The Rio Grande*, 19 Wall. 178; and *Garneau* v. *Dozier*, 10 Otto, 7.)

Where the examination of original documents is material to the decision of a prize case, the Supreme Court will order these papers to be sent up from the court below; yet papers properly

belonging to the files of a court should not be removed therefrom, except in cases of positive necessity. (*The Elsineur*, 1 Wheat. 439; and *Craig* v. *Smith*, 10 Otto, 226.)

The general rule in cases of appeal is, that the transcript of the record must be filed and the case docketed at the term next succeeding the appeal; and yet, where the appellant, without fault on his part, is prevented from seasonably obtaining the transcript by the fraud of the other party, or by the ill-founded order of the court below, or by the contumacy of its clerk, this rule will not apply. (*The United States* v. *Gomez*, 3 Wall. 752, and *The United States* v. *Booth*, 21 How. 506.)

3. Judgments and Decrees in Transferred Cases. — The judgments or decrees of any District Court, in cases transferred to it from the Superior Court of any Territory, upon the admission of such Territory as a State, under sections 567 and 568, may be reviewed, and reversed or affirmed, upon writs of error sued out of, or an appeal taken to, the Supreme Court, in the same manner as if such judgments or decrees had been rendered in said Superior Court of such Territory. And the mandates and all writs necessary to the exercise of the appellate jurisdiction of the Supreme Court in such cases shall be directed to such District Court, which shall cause the same to be duly executed and obeyed. (Sec. 704.)

The sections here referred to provide that, when any Territory is admitted as a State, and a District Court is established therein, all the records of the proceedings in the several cases pending in the Court of Appeals of said Territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out, or appeals could have been taken, or from which writs of error had been sued out, or appeals had been taken and prosecuted to the Supreme Court, shall be transferred to and deposited in the District Court for the said State, and that it shall be the duty of the district judge to demand these records, and, if necessary, to compel their delivery by attachment or otherwise, according to law. Section 569 makes it the duty of the District judge to take cognizance of all cases which were depending and undetermined in the Superior Court of such Territory, from the

judgments or decrees to be rendered, in which writs of error could have been sued out, or appeals taken to the Supreme Court, and to hear and determine the same.

These sections explain the appellate jurisdiction assigned to the Supreme Court in section 704. The latter section is founded on the Acts of February 22d, 1847, and February 22d, 1848. (9 U. S. Stat. at Large, 128, 211.) The object of the law is, in the cases specified, to substitute the District Court for the Superior Court of a Territory that has become a State, and provide that the judgments or decrees of the District Court in these cases may be reviewed by the Supreme Court, just as they would have been thus reviewable if rendered by the Superior Territorial Court.

The construction of the Acts of 1847 and 1848, for which these sections of the Revised Statutes seem to be the substitute, as given in *The Express Company* v. *Kountze Brothers*, 8 Wall. 342, is that cases of a Federal character pending in the Superior Court of any Territory, at the time of its admission into the Union as a State, are to be transferred to the District Court in such State if one was established therein, and if, at the time of admission, the State was not made part of a judicial circuit; but that, if the State was at the time made part of such a circuit, then the cases are to be transferred to the Circuit Court, and that, upon such a transfer, the Circuit Court would have jurisdiction of the cases, and that the Supreme Court could review its judgments or decrees in the premises. This construction was held to be necessary to give effect to the intention of Congress.

(III.) Territorial Courts.

1. Final Judgments and Decrees.—The final judgments and decrees of the Supreme Court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed, and reversed or affirmed, in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court. In the Territory of Washington, the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the Supreme Court

of said Territory in any cause [when] the Constitution, or a statute, or treaty of the United States is brought in question, may be reviewed in like manner. (Sec. 702.)

A jurisdictional sum is specified in this section, which in all cases must exceed one thousand dollars, exclusive of costs, and, in the Territory of Washington, must exceed two thousand dollars, exclusive of costs. The same general rules of construction as to writs of error and appeals, and as to what are final judgments and decrees, which apply to Circuit Courts of the United States, are equally applicable to the Supreme Courts of Territories.

If the laws of a Territory abolish the distinction between cases at law and cases in equity, and require all cases to be removed from an inferior to a higher court by writ of error, and not by appeal, such legislation has no effect in respect to the removal of cases to the Supreme Court of the United States. If the case be essentially one in equity, it can be removed to the Supreme Court only by appeal. (*Brewster* v. *Wakefield*, 22 How. 118.)

The provision which authorizes the Supreme Court to review any final judgment or decree of the Supreme Court of the Territory of Washington, has no application to a criminal case, unless it be true that the Constitution, or a statute or treaty of the United States, was brought in question. (*Watts* v. *The Territory of Washington*, 1 Otto, 580.) It was on this ground that the writ of error was dismissed for the want of jurisdiction.

2. Cases where a Territory becomes a State after Judgment or Decree in the Territorial Court.—In all cases where the judgment or decree of any court of a Territory might be reviewed by the Supreme Court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner prescribed by law, notwithstanding such Territory has, after such judgment or decree, been admitted as a State; and the Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires. (Sec. 703.)

This section, founded on the eighteenth section of the Act of June 12th, 1858 (11 U. S. Stat. at Large, 328), is designed to supply a rule for the guidance of the Supreme Court in the cases which it specifies.

When Florida was admitted as a State, the records of the former Territorial Court of Appeals were, by a law of the State, di-

rected to be deposited for safe keeping with the clerk of the Supreme Court of the State. In *Hunt* v. *Palao*, 4 How. 589, it was held that no writ of error could be issued by the Supreme Court to bring up a record thus situated, since Congress had made no provision for a case of this kind. The territorial court had ceased to exist; and the Supreme Court of the State did not hold the records as a part of its own records, and had no judicial control over them. There was no court to which the Supreme Court of the United States could address its mandate. Chief Justice Taney, in stating the opinion of the court, said: "We think, therefore, that no judgment or decree rendered by the late territorial court can be reviewed here by writ of error or appeal, unless some further provision on that subject shall be made by Congress. (*Benner* v. *Porter*, 9 How. 235.)

In *McNulty* v. *Batty*, 10 How. 72, it was held that a writ of error to the Territorial Court of Wisconsin, pending in the Supreme Court when the Territory was admitted into the Union as a State, must be dismissed because the court had ceased to exist, and no court had been empowered by Congress to execute the mandate of the Supreme Court in such a case. In *Freeborn* v. *Smith*, 2 Wall. 160, it was held that when Congress has passed an act admitting a Territory into the Union, as a State, but omitting to provide, by such act, for the disposal of cases pending in the Supreme Court on appeal or writ of error, it may constitutionally and properly pass a subsequent act, making such provision for them.

It was to meet the difficulty disclosed and considered in these cases that Congress passed the eighteenth section of the Act of June 12th, 1858, which forms the basis of section 703 of the Revised Statutes. This authorizes the Supreme Court to take jurisdiction in the cases described, and to direct its mandate to such court as the nature of the writ of error or appeal requires.

3. Writs of Habeas Corpus.—Section 1909 of the Revised Statutes provides that a writ of error or appeal shall be allowed to the Supreme Court of the United States from any decision of the Supreme Courts created by this Title "THE TERRITORIES," or of any judge thereof, or of the District Courts created by this Title, or of any judge thereof, upon writs of *habeas corpus* involving the question of personal freedom.

4. Criminal Cases.—Section 3 of the Act of June 23d, 1874 (18 U. S. Stat. at Large, 254), provides that a writ or error from the Supreme Court of the United States to the Supreme Court of the Territory of Utah, shall lie in criminal cases, where the accused shall have been sentenced to capital punishment, or convicted of bigamy or polygamy. (*Wiggins* v. *The People*, 3 Otto, 465; *Smith* v. *The United States*, 4 Otto, 97; *Reynolds* v. *The United States*, 8 Otto, 145; and *Wilkerson* v. *Utah*, 9 Otto, 130.)

5. Regulation of Appellate Jurisdiction.—The Act of April 7th, 1874 (18 U. S. Stat. at Large, 27), provides, in its second section, that the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of territorial courts in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court has prescribed or may hereafter prescribe: *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal: *And provided further*, That the appellate court may make any order in any case heretofore appealed, which may be necessary to save the rights of the parties; and that this act shall not apply to cases now pending in the Supreme Court of the United States, where the record has already been filed.

It was held in *Stringfellow* v. *Cain*, 9 Otto, 610, that the appellate jurisdiction of the Supreme Court over the judgment or decree rendered in a territorial court, in a case not tried by a jury, can, under the provisions of this act, be exercised only by appeal. (*Cannon* v. *Pratt*, 9 Otto, 619.)

(IV.) Supreme Court of the District of Columbia.

The final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute,

exclusive of costs, exceeds the value of one thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a Circuit Court. (Sec. 705.) This section was, by the Act of February 25th, 1879 (20 U. S. Stat. at Large, 320), so amended as to make the jurisdictional sum twenty-five hundred dollars.

The writ of error or appeal provided by the preceding section may be allowed in any case where the value of the matter in dispute, exclusive of costs, is less than one thousand dollars, but more than one hundred dollars, upon the petition in writing of either party, accompanied by a copy of the proceedings complained of, and an assignment of errors, exhibited to any justice of the Supreme Court, if said justice is of opinion that such errors involve questions of law of such extensive operation as to render a decision of them by the Supreme Court desirable. The allowance in such case shall be, by the written order of said justice, directed to the clerk of the Supreme Court of said District, to allow the appeal or issue the writ of error. (Sec. 706.)

The general rule here established is that the appellate jurisdiction of the Supreme Court, whether by writ of error or on appeal, is to be exercised over the judgments and decrees of the Supreme Court of the District of Columbia, in the same manner and under the same regulations as are provided by law with reference to the judgments and decrees of Circuit Courts. (*Brown* v. *Wiley*, 4 Wall. 165; and *Stanton* v. *Embrey*, 3 Otto, 548.)

Where a case has been tried in the District Court of the District of Columbia, the judgment or decree must be reviewed by the Supreme Court of the District, before it can be carried to the Supreme Court of the United States for examination. (*Garnett* v. *The United States*, 11 Wall. 256.)

In order to give the Supreme Court jurisdiction, the matter in dispute must be money, or some right the value of which can be calculated in money; and this must exceed twenty-five hundred dollars, without adding interest or costs, or the case will be dismissed for the want of jurisdiction. (*De Krafft* v. *Barney*, 2 Black, 704; *The Railroad Company* v. *Grant*, 8 Otto, 398; and *The Market Company* v. *Hoffman*, 11 Otto, 112.)

The Supreme Court has no jurisdiction, by appeal or writ of

error, over the judgment of the Supreme Court of the District of Columbia in a criminal case. (*The United States* v. *More*, 3 Cranch, 159.)

If no principle of law of "extensive operation" is involved in the case, the writ of error or appeal allowed by a justice of the Supreme Court under section 706 of the Revised Statutes, will be dismissed. (*Campbell* v. *Read*, 2 Wall. 198.)

(V.) The Court of Claims.

An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where the claim is forfeited to the United States by the judgment of said Court, as provided in section 1086. All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct. (Secs. 707, 708.)

The Supreme Court, in the exercise of the power to prescribe regulations for appeals from the judgments of the Court of Claims, has adopted the following rules:

Rule No. 1.—In all cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other: 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case. 2. A finding of the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.

Rule No. 2.—In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such

alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.

Rule No. 3.—In all cases an order of allowance of appeal by the Court of Claims or the chief justice thereof in vacation, is essential, and the limitation of time for *granting* such appeal shall cease to run from the time an application is made for the allowance of appeal.

Rule No. 4.—In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

Rule No. 5.—In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

The right of appeal, in the cases specified, and in conformity with the rules prescribed by the Supreme Court, is secured by law, and hence does not depend on the discretion of the Court of Claims. Either party may exercise the right within the limits thus defined. (*The United States* v. *Adams*, 6 Wall. 101.) If the Court of Claims refuses to allow an appeal, it is competent for the petitioner to apply to the Supreme Court for a *mandamus* to compel the allowance, and upon a proper showing of facts a writ to this effect will be issued. (*Ex parte Zellner*, 9 Wall. 244.)

The allowance of an appeal by the Court of Claims does not absolutely and of itself remove the case from its jurisdiction, so that it can make no order revoking such allowance for adequate reason. (*Ex parte Roberts*, 15 Wall. 384.)

If the Court of Claims, after rendering judgment, and while an appeal is pending, grants a new trial, this vacates the judgment, and the court thereby resumes control of the case and of the parties. In such a case a writ of *certiorari* will not be granted to compel the court to send to the Supreme Court the proceedings subsequent to the appeal; but the appeal will be dismissed. After judgment shall have been finally rendered by the Court of Claims, the proceedings in which the new trial was obtained may

be brought to the Supreme Court for review. (*The United States* v. *Young*, 4 Otto, 258.)

The decision of the Court of Claims awarding, on motion of the United States, a new trial, while a claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, cannot be reviewed by the Supreme Court. (*Young* v. *The United States*, 5 Otto, 641.) The appellant has a right to have his appeal dismissed notwithstanding the opposition of the other side. (*Latham's & Deming's Appeals*, 9 Wall. 145.)

In *Ex parte Atocha*, 17 Wall. 439, it was held that where a special act of Congress referred a claim to the Court of Claims to ascertain a particular fact for the guidance of the Government in the execution of a treaty, no appeal would lie from its decision to the Supreme Court.

The finding of facts by the Court of Claims, which, according to the rules prescribed by the Supreme Court, must be "in the nature of a special verdict," is conclusive in the Supreme Court, unless impeached for some error of law appearing in the record. Such finding is like the verdict of a jury under similar circumstances. (*The United States* v. *Smith*, 4 Otto, 214.) If, however, the finding is a conclusion of law, rather than of fact, it may be reviewed by the Supreme Court on appeal. (*Meade* v. *The United States*, 9 Wall. 691.)

The statement of facts sent up to the Supreme Court should be such as will enable the court to decide upon the propositions of law ruled by the court below; and this statement is to be presented in the shape of the facts found to be established by the evidence in such form as to raise the question of law decided by the court. It should not include the evidence in detail. (*De Groot* v. *The United States*, 5 Wall. 419.)

If the statement of facts found by the Court of Claims is not a sufficient compliance with the rules prescribed by the Supreme Court on that subject, the court will, of its own motion, while retaining jurisdiction in such cases, remand the records to the Court of Claims for a proper finding. (*The United States* v. *Adams*, 6 Wall. 101.) It is the province of the Supreme Court to apply the law to the facts as found, and not to decide upon the weight of the evidence, or look beyond the finding; and, hence, if the finding fails to set forth the amount the party is entitled to

recover, the judgment of the Court of Claims will be reversed, and the cause remanded for such further proceedings as law and justice require. (*The United States* v. *Clark*, 4 Otto, 73.)

When the Court of Claims, on a claim embracing several items, reject some but allow others, against which allowance the United States *alone* appeals, the Supreme Court will not give consideration to the items rejected, and against whose rejection the claimant has not appealed, except so far as may be necessary for a proper understanding of the item or items allowed. (*The United States* v. *Hickey*, 17 Wall. 9.)

(VI.) State Courts.

Section 709 of the Revised Statutes provides for a review, by the Supreme Court, of the judgments and decrees of State courts, in the cases and manner specified in the section. The consideration of this jurisdiction will be found in chapter 3 of Part IV.

This completes the entire series of courts over whose judgments and decrees the Supreme Court is authorized to exercise appellate jurisdiction. And considering the number of these courts and the number and variety of cases which, originating therein, may, by writ of error or appeal, be carried to the Supreme Court, it is not at all surprising that the latter court should be overburdened with the amount of its judicial business, or that this fact should have led to grave inquiry as to the best method of relief.

SECTION V.

REVISORY POWER OF THE COURT.

The previous section contains a synopsis of the law as to the courts and the judgments and decrees thereof which come within the scope of the appellate jurisdiction of the Supreme Court. What then are the revisory powers of this court in disposing of cases within its jurisdiction and properly before it? This is the next question to be considered.

1. Statutory Regulation.—The twenty-second section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), authorized the

Supreme Court, in the cases specified, to re-examine and reverse or affirm the judgments and decrees of the Circuit Courts of the United States, in civil actions and suits in equity. The twenty-fourth section of the same act provided as follows:

"That when a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment or pass such decree as should have been rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or the matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writ of error, but shall send a special mandate to the Circuit Court to award execution thereupon."

These provisions defined the revisory power to be exercised by the Supreme Court over the judgments and decrees of Circuit Courts.

The second section of the Act of June 1st, 1872 (17 U. S. Stat. at Large, 196), relating to the revisory power of the Supreme Court and also the Circuit Courts, provided that "the appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require."

This provision, alike applicable to the Circuit Courts and the Supreme Court, did not, as was done in the twenty-fourth section of the Judiciary Act of 1789, require the Supreme Court, on reversals, to render such judgment or pass such decree as the Circuit Court should have rendered or passed, with the exception stated. While authorizing it to affirm, modify, or reverse the judgment, decree, or order of the lower court, it also authorized the court to *direct* what judgment, decree, or order should be rendered, or what further proceedings should be had, in the court below, and so far repealed the provision made in the Judiciary Act.

The thirteenth section of the Act of June 30th, 1864 (13 U. S. Stat. at Large, 306), provided that "appeals from the District Courts of the United States in prize causes shall be directly to the Supreme Court," and not, as previously, to the Circuit Courts.

The legislation contained in the acts, as above quoted, fur-

nished the materials out of which the revisers prepared section 701 of the Revised Statutes of the United States, which, being adopted by Congress, became the law on the subject. This section reads as follows:

"The Supreme Court may affirm, modify, or reverse any judgment or decree, or order of a Circuit Court, or a District Court acting as a Circuit Court, or of a District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had, by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

The last sentence of this section was taken from the Judiciary Act of 1789. The first sentence was taken from the Acts of 1872 and 1864. The whole section is to be regarded as a substitute for the prior provisions of law relating to the revisory power of the Supreme Court over the judgments and decrees of Circuit Courts, or District Courts acting as Circuit Courts, and of District Courts in prize causes. It refers, in express terms, only to such courts.

It is, however, provided in section 702 of the Revised Statutes that the final judgments and decrees of the Supreme Courts of the Territories of the United States may, in the cases specified, "be reviewed, and reversed or affirmed in the Supreme Court upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of Circuit Courts." Section 705 of these Statutes contains a similar provision in regard to the final judgments and decrees of the Supreme Court of the District of Columbia, in civil cases. The revisory power of the Supreme Court over the judgments and decrees of these courts is consequently the same as that over the judgments and decrees of Circuit Courts.

The Revised Statutes do not, in express terms, state what shall be the revisory power of the Supreme Court over the judgments of the Court of Claims in the cases specified, yet they clearly imply the authority of the court to exercise such power as may be necessary to give effect to its own judgment in the premises. (Secs. 707, 708.)

This power, in application to the judgments and decrees of State courts, as provided for in section 709 of the Revised Statutes, will be considered in the third chapter of Part IV.

No express provision is made by statute for the dismissal of a case not lawfully brought before the court for review, or not within its appellate jurisdiction, and none need be made. It is the inherent power of every court, as well as its duty, not to take cognizance of and determine such a case. Revisory power supposes jurisdiction according to law; and if this fact does not exist, then a judgment of dismissal follows as a matter of course, without any determination of the controversy between the parties, or any judgment or decree affecting that controversy. The court, in dismissing a case for the want of jurisdiction, may make an order in respect to costs incurred, but not in respect to the merits of the controversy.

2. Exercise of Revisory Power.—The provisions of law relating to the exercise of the revisory power of the Supreme Court are the following:

(1.) *Affirmance.*—The court may, in the case specified, "affirm" the judgment, decree, or order. Affirmance, if it be without qualification, ends the case, and leaves nothing to be done by the lower court but to carry the affirmed judgment or decree into effect, just as it would have done if there had been no review thereof by the Supreme Court.

The judgment of affirmance follows, as a matter of course, in every case that is regularly brought before the court, when the record of the case shows jurisdiction, and shows no error committed by the lower court. (*Stockton* v. *Bishop*, 4 How. 155; *Taylor* v. *Morton*, 2 Black. 481; *Stevens* v. *Gladding & Pound*, 19 How. 64; *Suydam* v. *Williamson*, 20 How. 427; and *Pomeroy* v. *The Bank of Indiana*, 1 Wall. 592.)

If the judges of the Supreme Court are equally divided upon a writ of error or appeal, and hence not able to determine the questions of law or fact involved in the case, the rule of the court is to enter a judgment of affirmance, which is as conclusive and binding upon the rights of the parties as if it had been rendered by the concurrence of all the judges. (*Etting* v. *The Bank of the United States*, 11 Wheat. 59; *The Washington Bridge Co.* v. *Stewart*, 3 How. 413; *Durant* v. *The Essex Company*, 7 Wall. 107; and *Durant* v. *The Essex Company*, 11 Otto, 555.)

(2.) *Modification.*—The Supreme Court may "modify" the judgment or decree of the lower court. Modification neither af-

firms nor reverses the entire judgment or decree, but simply changes it in some respects, so as to secure the ends of justice.

In *Penhallow* v. *Doane*, 3 Dall. 88, 107, 120, it was held that the damages awarded by the lower court were joint, whereas they ought to have been several, and that as the facts were spread on the record, and the case itself was one of equity rather than one of common law, it was in the power of the court so to modify the decree as to sever the damages, and so to apportion them as to effectuate substantial justice.

In *Hills* v. *Ross*, 3 Dall. 331, the court modified the decree of the lower court, in respect to a libel to recover the proceeds of certain prize cargoes, so as to reduce the amount, the record showing the necessary facts calling for such a change in the decree.

In *The Insurance Company* v. *Piaggio*, 16 Wall. 378, the court held that the error which appears on the face of the record did not require a *venire de novo*, but was such that the court, under the Act of June 1st, 1872 (17 U. S. Stat. at Large, 197), could reverse the judgment and modify it by disallowing the $5,000, and remanding the case with directions to enter judgment for the residue found by the jury, with interest; the case being one where all the facts were apparent in the record, though not by a special verdict in form.

In *The Insurance Companies* v. *Boykin*, 12 Wall. 433, the court reversed the judgment and modified it by certifying a judgment to the Circuit Court for plaintiff against each of the defendants for the one-fourth of the amount of the plaintiff's damages, including interest, as ascertained by the verdict, and for a joint judgment against them for all the costs in that court. The error of the judgment in this case, which did not extend to the verdict, consisted in the fact that it was against the defendants jointly and not severally for the full amount of the policy, with interest. This error the court corrected by certifying to the Circuit Court such a judgment as it should have rendered, without disturbing the verdict of the jury as to the amount of the damages to which the plaintiff in the court below was entitled.

Mr. Justice Clifford, in *The Camanche*, 8 Wall. 448, 479, said: "Appellate courts are reluctant to disturb an award for salvage, on the ground that the subordinate court gave too large a sum to the salvors, unless they are clearly satisfied that the court below made an exorbitant estimate of their services." This implies that

if the estimate appeared to be exorbitant, the court would modify the decree.

(3.) *Reversal.*—The Supreme Court may "reverse" the judgment, decree, or order of the court below. The effect of simple reversal is to set aside or annul the judgment or decree, and make it inoperative, which is just the opposite of that of affirmance. The reversal is based on some error of the lower court, shown by the record; and inasmuch as the object of the Supreme Court is to correct that error, the usual course of the court is to remand the case to the inferior court, with instructions.

Mr. Justice Grier, in *Simpson* v. *Baker*, 2 Black, 581, said: "The judgment of the court below is assumed to be correct till the contrary is made to appear. It is not sufficient to produce a record from which it does not appear whether it is right or wrong." Inasmuch as the Supreme Court bases its judgment upon the record, that record must show error which calls for correction, or there will be no judgment of reversal.

Mr. Phillips, in his Practice (revised edition, 1878), pp. 305, 306, states as follows the character of the cases in which there will be a judgment of reversal:

"Where the record shows a special verdict imperfect or ambiguous; or where the evidence of facts, and not the facts, are presented; or where but part of the facts put in issue are found; or where a demurrer to evidence states the evidence, and not the facts established, and there is no joinder in demurrer, but judgment notwithstanding is rendered in favor of the demurrer; or where it sufficiently appears that improper instructions have been given, or proper instructions have been refused; or where, in a case tried by a judge, without a jury, all the evidence is brought up by bill of exceptions; in these and the like cases there is a mistrial, and there is a judgment of reversal, with an award of a *venire de novo*. (*Livingston et al.* v. *Insurance Company*, 6 Cr. 274; *Fowle* v. *Alexandria*, 11 Wheat. 320; *Barnes* v. *Williams*, Id. 415; *McArthur* v. *Porter*, 1 Pet. 626; *Farrar* v. *United States*, 5 Id. 373; *United States* v. *Hawkins*, 10 Id. 125: *Prentice* v. *Zane*, 8 How. 484; *Graham* v. *Bayne*, 18 Id. 60; *Suydam* v. *Williamson*, 20 Id. 427.)"

In *Garland* v. *Davis*, 4 How. 131, the record showed a fatal defect in the pleadings, and the judgment was reversed, and the case remanded to the court below for further proceedings.

In *Barney* v. *The City of Baltimore*, 6 Wall. 230, it was held

that "a decree in the Circuit Court dismissing a bill on the merits, will be reversed here if the Circuit Court had not jurisdiction, and a decree of dismissal without prejudice directed."

In *Mandelbaum* v. *The People*, 8 Wall. 310, it was held to be "error, entitling the aggrieved party to a reversal, for a court, on motion of a plaintiff, to strike out of an answer that which constitutes a good defense, and on which the defendant may chiefly rely."

In *The United States et al.* v. *Huckabee*, 16 Wall. 414, it was held that "where a subordinate court, which had no jurisdiction in the case, has given judgment for the plaintiff or defendant, or improperly decreed affirmative relief to a claimant, an appellate court must reverse," and that "it is not enough to dismiss the suit."

(4.) *Direction.*—The statute provides that, in addition to the power of affirmance, modification, or reversal, the Supreme Court "may direct such judgment, decree, or order to be rendered, or such further proceedings to be had, by the inferior court, as the justice of the case may require."

This broad and comprehensive power enables the Supreme Court to give instructions to the lower court upon a reversal of the judgment or decree. These instructions may direct the court to render a particular judgment or decree, or specify some further proceeding to be had in the case. The further proceeding to be had, if ordered, may be a new trial of the whole case, or an amendment of the decree in some respect, or a new accounting, or any other proceeding known to law and deemed necessary to correct the error of the inferior court. Any one who will examine the reports of the Supreme Court will, at a glance, see the various ways in which that court has exercised the power of giving instructions to the lower courts, according to the facts in each particular case, and the character of the error to be corrected.

These instructions are authoritative and binding, and if not obeyed, may, if necessary, be enforced by a writ of *mandamus.*

(5.) *Execution and Special Mandate.*—The statute further provides that "the Supreme Court shall not issue execution in a cause removed to it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

This supposes that the Supreme Court has determined the case

before it, and also determined that its judgment and decree should be carried into effect by the issue of execution. While the court has no power to issue the final process of execution in the cases contemplated, it is authorized and directed, by a special mandate, to require such issue to be made by the lower court. On this point Mr. Justice Baldwin, in *Ex parte Sibbald* v. *The United States*, 12 Pet. 488, 492, remarked: "When the Supreme Court have executed their power in a cause before them, and their judgment or decree requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below, to award it. * * * The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate." A declinature to obey the mandate would, as he said, furnish an occasion for "a *mandamus* or other appropriate writ."

In *West* v. *Brashear*, 14 Pet. 51, it was held that the "mandate of the Supreme Court to the Circuit Court must be its guide in executing the judgment or decree on which it is based." Chief Justice Taney said in this case that "it is the duty of the Circuit Court to carry it into execution, and not to look elsewhere for authority to change its meaning."

It is proper, in order to understand the meaning of the decree and the mandate of the Supreme Court, that the decree of the court below and that of the Supreme Court should be compared, and for this purpose the evidence contained in the original record may be referred to. (*Mitchel* v. *The United States*, 15 Pet. 52.)

A plea to the jurisdiction of the court below in the original suit is too late when the mandate has gone down to that court. (*Whyte* v. *Gibbes*, 20 How. 541, and *The Washington Bridge Co.* v. *Stewart*, 3 How. 413.) This general rule is, however, modified by some exceptions, as when the court by mistake or fraud was led to take jurisdiction when in fact it was without jurisdiction. (*Cochrane* v. *Deener*, 5 Otto, 355.)

Such, then, are the statutory powers of the Supreme Court in disposing of a case lawfully before it, as provided for in section 701 of the Revised Statutes. The court may affirm, modify, or reverse the judgment, decree, or order of the court below. It may direct what judgment, decree, or order shall be rendered by the inferior court, or it may direct such further proceedings to be had in that court as the justice of the case shall require. It can-

not issue execution, but can send a special mandate to the inferior court, commanding it to award execution, and can enforce obedience thereto. How these powers shall be exercised in each particular case is a question for the court to determine in the light of the facts as presented by the record.

SECTION VI.

LAW AND FACT.

1. The Constitutional Provision.—The Constitution, in its third article, provides that the appellate jurisdiction of the Supreme Court shall, in the cases specified, which include all the cases and controversies enumerated, except those in which the jurisdiction of the court is declared to be original, be exercised, "*both as to law and fact*, with such exceptions and under such regulations as the Congress shall make."

The phrase "law and fact," as here occurring in the Constitution, extended the appellate jurisdiction of the Supreme Court, not only to questions of "law" involved in the review of a case, but also to questions of "fact" that might be involved in the same case, and thus enabled the court to review and decide both classes of questions, "with such exceptions and under such regulations as the Congress shall make." The framers of the Constitution were not ignorant of the well-known distinction between "law and fact," and, in drafting the instrument, they left it to the pleasure of Congress to determine to what extent the appellate jurisdiction of the Supreme Court should apply to both law and fact, without imposing any restraint upon that pleasure.

2. The Seventh Amendment.—The Seventh Amendment, however, after providing that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," further provides, in a distinct and independent clause, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This, upon its face, relates only to those cases in which a fact has been tried and determined by a jury, and consequently was

not intended to apply to cases of equity, and of admiralty and maritime jurisdiction, tried and determined by the court without a jury. The rule laid down is that no fact tried by a jury shall, in any court of the United States, including the Supreme Court, be re-tried and determined, except "according to the rules of the common law."

This is a qualification of judicial power that did not appear in the Constitution as originally adopted. It qualifies the words "both as to law and fact," with the proviso that a fact tried by a jury shall not "be otherwise re-examined in any court of the United States, than according to the rules" referred to, and, at the same time, as distinctly implies that such a fact may be thus re-examined.

3. Rule of the Common Law.—What then is the rule of the common law in respect to the re-examination of a fact that has been tried by a jury? Mr. Justice Story, in *Parsons* v. *Bedford*, 3 Pet. 433, 448, referred to the prohibition contained in the Seventh Amendment, and then proceeded to say: "The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings." Referring to the Judiciary Act of 1789, he further said: "The appellate jurisdiction has also been amply given by the same act to this court, to redress errors of law, and, for such errors, to award a new trial in suits at law which have been tried by a jury."

Such a re-examination of facts tried by a jury is according to the rules of the common law, and, therefore, not in conflict with the prohibition of the Seventh Amendment. The judge before whom the case was tried may set aside the verdict of the jury and grant a new trial, for reasons recognized by the common law, if the verdict was not one of acquittal in a criminal case. And so an appellate court, with the case properly before it, may, for the same reasons, with a view to correct errors of law that appear in the proceedings of the court below, order a new trial, subject to the same restriction as to acquittals in criminal cases. The Seventh Amendment, while forbidding the direct re-examination of any facts, by a Federal court, which have been tried by a jury, recog-

nizes and sanctions that method of re-examining such facts which is "according to the rules of the common law." This simply submits the same issues of fact, in a case at common law, to another jury, and in so doing cancels the verdict already rendered.

4. Power to Grant New Trials.—Section 726 of the Revised Statutes of the United States, reproducing a part of the seventeenth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provides as follows: "All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law." The Supreme Court, in the exercise of its appellate jurisdiction, and for the purpose of redressing errors of law in cases which have been tried by a jury, possesses the power of granting or ordering new trials, in common with the other courts of the United States.

The statutory qualification annexed to the exercise of the power is, that such trials are to be granted "for reasons for which new trials have usually been granted in courts of law." The general rule adopted by the Supreme Court, in the exercise of its appellate jurisdiction, is that to grant or refuse a new trial rests in the sound discretion of the court below to which the motion for such trial was addressed, and that the decision of that court upon such a motion cannot be made the subject of review by the Supreme Court upon a writ of error. (*Warner* v. *Norton*, 20 How. 448, 461; and *Newcomb* v. *Wood*, 7 Otto, 581.)

There is no doubt, however, that the Supreme Court, in disposing of a case which is properly before it, and has been tried by a jury, may, in the exercise of its appellate jurisdiction, redress errors of law which intervened in the progress of the trial, and may, if necessary to this end, order a new trial. This is the doctrine stated in *Parsons* v. *Bedford*, 3 Pet. 443, and frequently applied by the court.

SECTION VII.

PROCEDURE IN WRITS OF ERROR AND APPEALS.

1. Removal of Causes by Writ of Error.—There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. (Sec. 997.) The rule here prescribed does not apply exclusively to writs of error issued from the Supreme Court, but extends also to such writs when issued from the Circuit Courts of the United States.

As to the construction of this statute the following doctrine was laid down in *Mussina* v. *Cavazos*, 6 Wall. 355: 1. That the writ of error by which a case is transferred from a Circuit Court to the Supreme Court, is the writ of the Supreme Court, although it may be issued by the clerk of the Circuit Court, and that the original writ should always be sent to the Supreme Court with the transcript of the record. 2. That the writ is served by depositing it with the clerk of the Circuit Court, and that if he makes return by sending to the Supreme Court a transcript of the record in due time, the court has jurisdiction to decide the case, although the original writ may be lost or destroyed before it reaches the Supreme Court. 3. That it is not a fatal defect in a writ of error that it describes the parties as plaintiffs and defendants in error, as they appear in the Supreme Court, instead of describing them as plaintiffs and defendants, as they stood in the court below, if the names of all the parties are given correctly. 4. That where the bill of exceptions is neither signed nor sealed by the judge, so that there is nothing to show that it was submitted to him, or in any way received his sanction, the judgment below will be affirmed.

No one can sue out a writ of error unless he is a party to the judgment in the court below; and if the judgment be joint and several, then any one of the defendants may sue out the writ without joining the other defendants. But if the judgment be joint, then no one of the defendants can sue out the writ without joining all the other defendants. (*Payne* v. *Niles*, 20 How. 219;

Cox v. *The United States*, 6 Pet. 172; *Hampton* v. *Rouse*, 13 Wall. 187; and *Simpson* v. *Greeley*, 20 Wall. 152.)

It was, however, held in *O'Dowd* v. *Russell*, 14 Wall. 402, that a notice of one of three defendants to his co-defendants of his intention to prosecute a writ of error, and refusal by them to co-operate, is equivalent to the old proceeding of summons and severance, and that where the record shows this fact, the one defendant may take his writ accordingly. The same doctrine had been previously adopted in *Masterson* v. *Herndon*, 10 Wall. 416.

The allowance of a writ of error or appeal, together with an authenticated copy of the record and the citation, when a citation is required, must be returned to the next term of the Supreme Court after the allowance. (*Castro* v. *The United States*, 3 Wall. 46; and *Blair* v. *Miller*, 4 Dall. 21.)

For the purpose of an appeal to, or a writ of error from, the Supreme Court, the transcript of the record is sufficiently authenticated, if it be sealed with the seal of the court below, and signed by the deputy clerk thereof in the name of and for his principal. (*Garneau* v. *Dozier*, 10 Otto, 7.) Usually the clerk authenticates the record, yet in this case it was held that this might be done by his deputy.

The citation to the adverse party, with due return thereof, or a waiver by general appearance or otherwise, is indispensable to the jurisdiction of the Supreme Court; and if this condition be not supplied, the case will be dismissed. (*Wilson* v. *Daniel*, 3 Dall. 401; and *Alviso* v. *The United States*, 5 Wall. 824.) This citation is not the institution of a new suit, but simply a legal notice to the adverse party that the record has been transferred to the Supreme Court for review. (*Cohens* v. *Virginia*, 6 Wheat. 264.) The citation must correspond with the writ of error in the description of the persons who are the plaintiffs in error. (*Kail* v. *Wetmore*, 6 Wall. 451.)

If there be no assignment of errors by a bill of exceptions, and nothing on which error can be assigned, the practice of the Supreme Court is not to dismiss the writ if regularly brought, but to affirm the judgment of the court below. (*James* v. *The Bank*, 7 Wall. 692.)

2. Signing the Citation.—When the writ is issued by the Supreme Court to a Circuit Court, the citation shall be signed by a

judge of such Circuit Court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days notice. (Sec. 999.)

The rule here laid down as to the signing of the citation is imperative. The signature of the clerk of the Circuit Court will not be sufficient. (*The United States* v. *Hodge*, 3 How. 534; *Chaffee* v. *Hayward*, 20 How. 208; *Villabolos* v. *The United States*, 6 How. 81.) The citation may be signed by the district judge when sitting and acting as a member of the Circuit Court. (*Sheppard* v. *Wilson*, 5 How. 210, 212.) Chief Justice Waite, in *Sage* v. *The Railroad Company*, 6 Otto, 712, 715, said that power to sign the citation "is not confined to the justice assigned to the particular circuit in which the court that rendered the decree is held." Chief Justice Taney, in *The Insurance Company* v. *Mordecai*, 21 How. 195, 202, said that the act of Congress requires the citation "to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court."

The actual service of the citation upon the adverse party, or upon his attorney or counsel, is necessary to give the Supreme Court jurisdiction over the parties. (*The United States* v. *Curry*, 6 How. 106; *Bacon* v. *Hart*, 1 Black, 38; *Bigler* v. *Waller*, 12 Wall. 142; and *Dayton* v. *Lash*, 4 Otto, 112.)

The defendant in error is entitled to have at least thirty days notice before he can be compelled to go to a hearing before the Supreme Court. (*The National Bank* v. *The Bank of Commerce*, 9 Otto, 608.) The Supreme Court may remedy a defect as to the time of serving the citation by fixing a new return day, and ordering a new citation to be issued and served. (*The Railroad Company* v. *Blair*, 10 Otto, 661.)

If an appeal be taken in open court during the term at which the decree complained of is actually entered, and the fact appears in some form on the record of the court, this renders the formal service of a citation unnecessary, since the adverse party is constructively assumed to be present, and cognizant of the proceedings in the suit to which he is a party. It is his own fault if he does not take due notice of the appeal. (*The Railroad Company* v. *Blair*, 10 Otto, 661.)

The appearance of the defendant in error in the Supreme Court cures any defect that may have existed in the citation or its service, if such appearance be without a motion at the first

term, to dismiss the writ of error or appeal on the ground of such defect. He will be considered as having waived his right in this respect. (*Buckingham* v. *McLean*, 13 How. 150; *Chaffee* v. *Hayward*, 20 How. 208; *The United States* v. *Yates*, 6 How. 605; and *Pierce* v. *Cox*, 9 Wall. 786.)

3. The Bond in Error and on Appeal.—Every justice or judge, signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid. (Sec. 1000.) This provision applies alike to writs of error from the Supreme Court to Circuit Courts, and from Circuit Courts to District Courts.

The security prescribed must be taken and approved by the judge or justice who signs the citation; and this duty cannot be delegated to the clerk of the court. (*O'Reilly* v. *Edrington*, 6 Otto, 724; and *The National Bank* v. *Omaha*, 6 Otto, 737.)

The legal presumption, until the contrary is shown, is that every justice or judge who signs a citation has complied with the requirement of the law in respect to taking the requisite security. (*Martin* v. *Hunter*, 1 Wheat. 304.)

As to what is good and sufficient security, the justice or judge who signs the citation is the judge in the first instance. (*Black* v. *Zacharie*, 3 How. 483.) If, however, after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond have so changed that the security which at the time of taking it was good and sufficient, does not continue to be so, the Supreme Court, on proper application, may so adjudge, and order as justice may require. But upon the facts as existing when the security was accepted, the action of the justice or judge, within the statute and the rules adopted for his guidance, is final. (*The Rubber Company* v. *Goodyear*, 6 Wall. 153; *Jerome* v. *McCarter*, 21 Wall. 17; and *Martin* v. *The Hazard Powder Company*, 3 Otto, 302.)

No particular form of taking the security is prescribed by the statute. The usual form is that of a bond with proper sureties,

in favor of the adverse party; and if the condition of the bond be that the plaintiff in error or the appellant will prosecute the writ of error or the appeal to effect, and pay the amount of costs and damages rendered or to be rendered by the judgment or decree of the Supreme Court, this will meet all the requirements of the statute. (*Gay* v. *Parpart*, 11 Otto, 391.)

Where the writ of error operates as a *supersedeas*, and the judgment or decree is for the recovery of money, not otherwise secured, the bond must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on appeal. But in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, the indemnity is only required in an amount sufficient to secure the sum recovered for the use or detention of the property. What is necessary is that the bond should be sufficient to cover the whole case when the writ of error or appeal operates as a *supersedeas*. (*Catlett* v. *Brodie*, 9 Wheat. 553; and *French* v. *Shoemaker*, 12 Wall. 86, 99.)

An omission by the justice or judge signing the citation to take the proper bond does not necessarily invalidate the writ of error or appeal. The Supreme Court may grant summary relief in such a case by imposing such terms as under the circumstances justice requires. (*Martin* v. *Hunter*, 1 Wheat. 304; *Seymour* v. *Freer*, 5 Wall. 822; *Ex parte Milwaukee Railroad Co.* 5 Wall. 188; and *Edmonson* v. *Bloomshire*, 7 Wall. 306.)

Neither writs of error nor appeals become a *supersedeas* and stay execution by virtue merely of the process issued by the Supreme Court; but when they become such by compliance with the conditions prescribed by law, if the subordinate court proceeds thereafter to issue final process, it is competent for the Supreme Court, in the exercise of its appellate jurisdiction, to correct the error by a *supersedeas*, and this may be done though the application for the *supersedeas* is made before the return day of the writ. (*The Slaughter House Cases*, 10 Wall. 273.)

Everything being done which the law prescribes, a writ of error is a *supersedeas*, *per se*, without any special order of the court making it such. (*Tiernan* v. *Booth*, 4 Fed. Rep. 620; and *Arnold* v. *Frost*, 9 Ben. 367.)

If the approval of the *supersedeas* bond has been obtained by fraud, and this fact is shown, the Supreme Court will vacate the

bond and order as justice may require. (*The Railroad Company* v. *Schutte*, 10 Otto, 644.)

Rule No. 29 of the Supreme Court defines the character and requirements of the *supersedeas* bond when the writ of error is issued from that court.

4. No Bond required of the United States.— Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a Circuit Court, either by the United States or by direction of any Department of the Government, no bond, obligation, or security shall be required from the United States or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted. (Sec. 1001.)

5. Writs of Error from District Courts acting as Circuit Courts.—Writs of error shall be prosecuted from the final judgments of District Courts acting as Circuit Courts to the Supreme Court in the same manner as from the final judgments of Circuit Courts. (Sec. 1002.)

6. Manner of issuing Writs of Error.—Writs of error returnable to the Supreme Court may be issued as well by the clerks of the Circuit Courts, under the seals thereof, as by the clerk of the Supreme Court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several Circuit Courts by the clerk of the Supreme Court, in pursuance of section nine of the Act of May 8th, 1792, chapter thirty-six. (Sec. 1004.)

Prior to the passage of the act referred to in this section, it was held, in *West* v. *Barnes*, 2 Dall. 401, that writs of error to remove causes from inferior courts to the Supreme Court could regularly issue only from the clerk's office of the latter court. Section nine of the Act of May 8th, 1792 (1 U. S. Stat. at Large, 275), authorized the clerks of Circuit Courts to issue writs of

error, returnable to the Supreme Court, in the same manner as issued by the clerk of this court.

Such writs of error are, however, writs of the Supreme Court, and not of the Circuit Courts whose clerks may issue them. (*Mussina* v. *Cavazos*, 6 Wall. 355.)

It is not required that a writ of error to an inferior court of the United States should be allowed by a judge. It is enough that it is issued and served by copy lodged with the clerk of the court to which it is directed. (*Davidson* v. *Lanier*, 4 Wall. 447.)

7. Amendment of a Writ of Error.—The Supreme Court may, at any time in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form; *Provided*, The defect has not prejudiced, and the amendment will not injure, the defendant in error. (Sec. 1005.)

This section is based on section three of the Act of June 1st, 1872. (17 U. S. Stat. at Large, 196.) Prior to the adoption of this act, writs of error could not be amended in the Supreme Court. (*Hodge* v. *Williams*, 22 How. 87, and *The City of Washington* v. *Dennison*, 6 Wall. 495.)

The right of a party, under this statute, to amend a writ of error, is not absolute, but is to be granted by the court in the exercise of its discretion, subject to the provisions contained in the statute. (*Pearson* v. *Yewdall*, 5 Otto, 294.) It was held, in *Atherton* v. *Fowler*, 1 Otto, 143, that, under this section, a writ of error may be amended by inserting the proper return day.

8. Amendments in Prize Appeals.— The Supreme Court may, if in its judgment the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize causes. (Secs. 1006, 4636.)

In *The Nuestra Senora de Regla*, 17 Wall. 29, it was held that "in prize cases, wherein it appears that notice of appeal, or of intention to appeal to" the Supreme Court "was filed with the

clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed to this court whenever the purposes of justice require it."

9. Supersedeas.—In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward, with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days. (Sec. 1007, and 18 U. S. Stat. at Large, 318.)

The twenty-second section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provided for the removal of causes from a Circuit Court to the Supreme Court by writ of error, and that in such a case the citation to the adverse party shall be signed by a judge of the Circuit Court from which the cause was removed, or by a justice of the Supreme Court, and that that such party shall have at least thirty days notice. The same section provided that "every justice or judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fails to make good his plea."

The twenty-third section of the same act provided "that a writ of error as aforesaid shall be a *supersedeas*, and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of," and that until the expiration of this term of ten days, "executions shall not issue in any case where a writ of error may be a *supersedeas*."

Congress, by the Act of December 12th, 1794 (1 U. S. Stat. at Large, 404), provided that the security to be required and

taken on the signing of a citation on any writ of error, which shall not be a *supersedeas* and stay execution, shall be only to such an amount as in the opinion of the justice or judge taking the same, will be sufficient to answer all costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error.

The second section of the Act of March 3d, 1803 (2 U. S. Stat. at Large, 244), provided for the removal of equity and admiralty causes from the Circuit Courts to the Supreme Court by the process of appeal, instead of the writ of error, as had hitherto been the practice, and made such appeals "subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error."

Such was the state of the law on this subject until 1872. The established doctrine of the Supreme Court, in the construction of this law, was that where the writ of error did not operate as a *supersedeas*, the security to be given by the plaintiff in error was to be only to such an amount as would be sufficient to cover the costs, in case the judgment was affirmed; that where the writ of error operated as a *supersedeas*, the security given by the plaintiff in error must be sufficient to answer all damages and costs if he failed to make his plea good; that when the judgment or decree was for the recovery of money, not otherwise secured, the security "must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on appeal;" and that where the writ of error was meant to operate as a *supersedeas*, the security must be approved and filed within the ten days assigned for the service of the writ of error. (Rule No. 29 of the Supreme Court; *Adams* v. *Law*, 16 How. 144; and *Hudgins* v. *Kemp*, 18 How. 530.)

The law, as thus construed and applied, was found to work many practical inconveniences, and sometimes serious injury, owing to the narrow limit of time within which the security must be given, in order to make the writ of error operate as a *supersedeas*. It was to remedy these inconveniences that Congress, in the eleventh section of the Act of June 1st, 1872 (17 U. S. Stat. at Large, 196), provided as follows:

"That any party or person desiring to have any judgment, decree, or order of any District or Circuit Court reviewed on writ of error or appeal, and to stay proceedings thereon during the

pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree, or order, or afterward with the permission of a justice or judge of said appellate court."

The construction of this section came before the Supreme Court in *The Telegraph Company* v. *Eyser*, 19 Wall. 419. Mr. Justice Swayne, in stating the opinion of the court, said:

"These provisions are remedial, and, therefore, to be construed liberally. So far as there is any conflict with pre-existing rules, the latter must yield. The intention of the law-maker constitutes the law. What is clearly implied in a statute is as effectual as what is expressed. It is expressly declared that the *supersedeas* bond may be executed within sixty days after the rendition of the judgment, and later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before, or simultaneously with, the filing of the bond. Indeed, the giving of the bond is made the condition of the stay. The section is silent as to the writ. A construction which requires the service to be still within ten days from the rendering of the judgment, is, we think, too narrow. It is sustained by no sufficient reason, and would largely defeat the salutary purposes of the statute."

The Act of 1872, according to this explanation, changed the time within which a bond, in order to operate as a *supersedeas*, might be given by the plaintiff in error upon suing out a writ of error. It might be given at any time within sixty days, instead of ten, Sundays exclusive, after the rendition of the judgment, decree, or order, or afterward by the permission of the designated judge. And although nothing is expressly said as to when the writ of error must be served in the manner previously prescribed, the court was of opinion that, under the act, this service might be made at any time, either before or simultaneously with the filing of the bond, instead of being limited to ten days, Sundays exclusive, after the rendering of the judgment or passing the decree complained of, as prescribed by the twenty-third section of the Judiciary Act of 1789. In these respects the law was changed by the Act of 1872.

The Supreme Court, in *The Board of Commissioners* v. *Gor-*

man, 19 Wall. 661, had occasion to consider the same subject again. The court in this case said:

"In order that a writ of error may operate as a *supersedeas*, it is necessary that a copy of the writ should be lodged for the adverse party in the clerk's office where the record remains, and that the bond approved by the judge allowing the writ should also be filed there. Execution cannot issue upon the judgment until the expiration of ten days, exclusive of Sundays, from the entry thereof. If the writ of error and bond are filed before the expiration of ten days, no execution can issue so long as the case in error remains undisposed of. After the expiration of ten days an execution may issue. Notwithstanding this, under the provisions of the Act of 1872, upon the filing of the bond within sixty days from the time of the entry of the judgment a *supersedeas* may be obtained. Such a *supersedeas*, however, stays proceedings only from the filing of the bond. It prevents further proceeding under an execution which has been issued, but does not interfere with what has already been done."

In this case it was held that a writ of error or appeal, under the Act of 1872, operates as a *supersedeas*, when it is applied for and the bond is filed within sixty days from the rendition of the judgment or decree, and that the *supersedeas* under the act by filing the bond within sixty days, simply stays further proceedings, without interfering with what has already been done. But this does not prevent an execution from being issued after the lapse of ten days, as contemplated by the twenty-third section of the Judiciary Act, when, as in the case before the court, one has been ousted from office by virtue of a writ on a judgment on the 20th of January, and the writ was executed by ousting him on the 3d of February, and on the latter day a *supersedeas* bond was filed, but subsequently to the execution of the writ. The execution, after the lapse of ten days, carried into effect the judgment of the court below; and the filing of the *supersedeas* bond, being subsequent to the execution, was too late to stay the execution, or to interfere with what had already been done. Neither the writ of error nor the bond was filed within ten days after the entry of the judgment; and when the judgment had been executed, after the lapse of this period, there was nothing in the act of 1872 authorizing the Supreme Court to interfere with such execution, as a legal consequence of the filing of the *supersedeas* bond thereafter. The case was hence dismissed.

In *Kitchen* v. *Randolph*, 3 Otto, 86, the direct question before

the court related to the power of a justice of the Supreme Court "to allow a *supersedeas* in cases where an appeal was not taken or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the decree or judgment complained of." Chief Justice Waite, in stating the opinion of the court, briefly reviewed the legislation of Congress on the subject down to the adoption of the Revised Statutes, including section 1007.

This section, in the last sentence as originally adopted, provided that in "cases where a writ of error may be a *supersedeas*, execution shall not issue until the expiration of the said term of sixty days." Congress, by the Act of February 18th, 1875 (18 U. S. Stat. at Large, 318), provided that the words "the said term of sixty" should be stricken out, and the word "ten" should be inserted in their place, thus re-establishing the previously adopted period within which executions shall not issue in a case where a writ of error may be a *supersedeas*.

Commenting on this section as it now stands, Chief Justice Waite said:

"If a *supersedeas* is asked for when the writ is obtained, the writ must be sued out and served within the sixty days, and the requisite bond executed when the citation is signed. The policy of the old law is thus restored, the only modification being in the extension of the time allowed for action. Sixty days are given instead of ten."

"Had the section stopped here, a plaintiff in error or appellant would have been compelled to elect, when he sued out his writ of error or took his appeal, whether he would have a *supersedeas* or not, because it is made one of the conditions of the stay of proceedings that the requisite security shall be given upon the issuing of the citation. Having once made his election, he would be concluded by what he had done. But Congress, foreseeing undoubtedly that cases might arise in which serious loss would result from such a rule, went further, and in a subsequent part of the section, provided that if a writ of error had been served, as provided in the first paragraph, a stay might be had as a matter of right by giving the required security within sixty days, and afterwards, as a matter of favor, if permission could be obtained from the designated justice or judge. Thus prompt action in respect to the writ was required, and indulgence granted only as to the security."

The answer to the question before the court was given in these words:

"We are, therefore, of the opinion that under the law as it now

stands, the service of a writ of error, or the perfection of an appeal within sixty days, Sundays exclusive, after the rendition of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a *supersedeas*, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done."

In *Sage* v. *The Central Railroad Co.* 3 Otto, 412, Chief Justice Waite, in stating the opinion of the court, said:

"A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. (*Hogan* v. *Ross*, 11 How. 297; *Railroad Co.* v. *Harris*, 7 Wall. 575.) Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law. The court can no more give effect to a *supersedeas* by ordering that the appeal shall relate back to a time within sixty days, than it can to an appeal taken after the expiration of two years by dating it back to a time within the limitation. To make a *nunc pro tunc* offer effectual for such purposes, it must appear that the delay was the act of the court, and not of the parties, and that injustice will not be done."

In *Ex parte Railroad Co.*, 5 Otto, 221, it was held that "a writ of *mandamus* may issue directing the circuit judge, or the Circuit Court of the United States for the Middle district of Alabama, to allow the appeal prayed for as of July 3d, 1877, and upon the allowance of the appeal, to accept as of the same date good and sufficient security for a *supersedeas* if offered." It was so ordered in this case on the ground that the appeal had been improperly refused by the court below.

These cases settle the general construction of the law in respect to a *supersedeas* in writs of error or appeal. The writ of error must be served in the manner prescribed, or the appeal perfected, within sixty days after the rendition of the judgment or the passing of the decree complained of, in order to make the writ or the appeal a *supersedeas*, as a matter of right, by giving the requisite security. If the writ of error has been served or the appeal perfected within this period, then, with the permission of the desig-

nated justice or judge, a *supersedeas* may be obtained after the lapse of the period, as a matter of favor. And in cases where a writ of error may be a *supersedeas*, executions cannot issue until the expiration of ten days after the rendition of the judgment.

10. Damages and Costs on Affirmance in Error. — Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion. (Sec. 1010.)

Rules 23 and 24 of the Supreme Court contain regulations adopted by the court in giving effect to this provision.

11. Limitation of Reversal on Error. — There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. (Sec. 1011, and 18 U. S. Stat. at Large, 318.) In *Piquignot* v. *The Pennsylvania R. R. Co.*, 16 How. 104, Mr. Justice Grier, in stating the opinion of the Court, said: "The question raised by the plea in abatement, in this case, is one of considerable importance, and on which there is some conflict of opinion and decision, but the judgment of the court below on the plea is not subject to our revision on a writ of error."

12. Appeals to the Supreme Court.—Appeals from the Circuit Courts and District Courts acting as Circuit Courts, and from District Courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error. (Sec. 1012.)

In *The San Pedro*, 2 Wheat. 132, it was held that the rules, regulations, and restrictions of law respecting the time within which a writ of error shall be brought, and in what instances it shall operate as a *supersedeas*, the citation to the adverse party, the security to be given by the plaintiff in error for prosecuting his suit, and the restrictions upon the appellate court as to reversals in certain enumerated cases, are applicable to appeals under the Act of 1803, and are to be substantially observed, except that where the appeal is prayed at the same time when the decree or sentence is pronounced, a citation is not necessary. This ruling

was founded on the second section of the Act of March 3d, 1803 (2 U. S. Stat. at Large, 244), which furnished the basis of section 1012 of the Revised Statutes.

The right of appeal being given by law, the court cannot refuse it, and there is no necessity for a petition to the judge to grant an appeal. (*The United States* v. *Curry*, 6 How. 106, 112.)

In *Hudgins* v. *Kemp*, 18 How. 530, it was held that an appeal may be allowed by a judge in vacation or by the court in term; that the only difference in the effect of such allowance is, that notice will be presumed in the latter case, but that a citation must be served in the former case; that the allowance of the appeal need not be a matter of record in the court below; that the knowledge of the clerk that an appeal was actually allowed in open court is sufficient to justify him in certifying it to the Supreme Court; and that the party cannot be divested of his right by the failure of the clerk to make the proper entry of the allowance on his record book.

No citation is necessary where the appeal is allowed in open court during the term at which the decree was rendered. (*Brockett* v. *Brockett*, 2 How. 238, and *Milner* v. *Meek*, 5 Otto, 252, 258.) When an appeal is asked for in open court, and the security is not taken until after the term, a citation must be issued to bring in the parties, unless they voluntarily appear. (*The National Bank* v. *Omaha*, 6 Otto, 737.)

13. Cases where Both Parties Appeal.—Where appeal is duly taken by both parties, from the judgment or decree of a Circuit or District Court to the Supreme Court, a transcript of the record filed in the Supreme Court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases. (Sec. 1013.) This makes one transcript of the record sufficient for the hearing of both appeals.

SECTION VIII.

LIMITATION OF TIME.

1. Writs of Error and Appeals.—No judgment, decree, or order of a Circuit or District Court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought or the appeal is taken, within two years after the entry of such judgment, decree, or order; *Provided*, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability. (Sec. 1008.)

This fixes the period within which, in the cases specified, writs of error may be brought or appeals may be taken to the Supreme Court. The period, as established by the twenty-second section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), was five years. Congress, by the second section of the Act of June 1st, 1872 (14 U. S. Stat. at Large, 196), made the period two years after the entry of the judgment, decree, or order, with the exceptions specified.

The time at which a writ of error is regarded as being "brought" within the meaning of the statute, is not when it is simply issued from the clerk's office, but when it is actually filed in the office of the clerk of the court which rendered the judgment complained of. It must hence be so filed within two years after the entry of the judgment, or be barred by the statute of limitation, except in the cases named. (*Brooks* v. *Norris*, 11 How. 204, and *Thomas* v. *Brockenbrough*, 10 Wheat. 146.)

If, however, a writ of error or an appeal has been dismissed for some defect or informality in prosecuting it, the party may sue out a second writ of error, or take a second appeal, if he does so within the time designated by the statute. (*Yeaton* v. *Lenox*, 8 Pet. 123, and *The Steamer Virginia*, 19 How. 182.)

In *Hanger* v. *Abbott*, 6 Wall. 532, it was held that statutes of limitation do not apply to a case in which a non-resident of one of the lately rebellious States was prevented, in consequence of the rebellion, from bringing suit against a resident thereof, for the re-

covery of a debt. The time of such rebellion was not to be computed in the application of such statutes. This principle was, in *The Protector*, 9 Wall. 687, held to apply to the limitation of time within which writs of error must be sued out or appeals taken to the Supreme Court.

In *The United States* v. *Gomez*, 1 Wall. 690, it was held that there is no final decree until the decree is filed, and that if a decree is amended by the substitution of another decree, the last is the final decree, and hence that the limitation of time runs from the filing of this decree.

In *The Dos Hermanos*, 10 Wheat. 306, it was held that if the security was not given within the time prescribed by law, the court may disallow the appeal and refuse the security, although the appeal was prayed within that time. But if the court accepts the security, this must be considered as a sufficient compliance with its order, and relates back to the time of the allowance of the appeal. "The mode of taking the security," said Chief Justice Marshall, "and the time for perfecting it, are matters of discretion, to be regulated by the court granting the appeal; and when its order is complied with, the whole has relation back to the time when the appeal was prayed."

It is worthy of notice that this statute of limitation applies only, in express terms, to "any civil action, at law or in equity," and does not expressly say anything about the review of final decrees in cases of admiralty and maritime jurisdiction, for which provision is made in section 692 of the Revised Statutes. What then is the period within which an appeal must be taken in an admiralty case, which is not a prize cause elsewhere provided for, but is, for example, a case of marine contract, or marine tort?

The twenty-second section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73) provided that the "final judgments and decrees in civil actions and suits in equity in any Circuit Court" might be reviewed in the Supreme Court, provided the proper writs of error were brought within five years after rendering or passing the decree or judgment complained of. The writ of error was in all cases the method of review, until by the Act of March 3d, 1803 (2 U. S. Stat. at Large, 244), an appeal was substituted for the writ of error in "cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize," in which cases the appeal was declared to be "subject to the same rules, regulations

and restrictions as are prescribed in law in cases of writs of error."

Cases of admiralty and maritime jurisdiction were, in the twenty-second section of the Judiciary Act, evidently included in the general title of "civil actions," as distinguished from "suits in equity," and were subject to the limitation of five years. When, by the Act of 1803, an appeal was in these cases substituted for a writ of error, the same limitation of time was continued. And, under these two acts, the same limitation of time existed whether the case was removed to the Supreme Court by writ of error or appeal.

The second section of the Act of June 1st, 1872 (17 U. S. Stat. at Large, 196), which furnished the basis for section 1008 of the Revised Statutes, substituted two instead of five years as the period within which writs of error must be brought or appeals be taken to the Supreme Court, in order to enable the court to review the judgments or decrees of any Circuit or District Court, "in any civil action at law or in equity." Mr. Phillips expresses the opinion that the phrase "civil action at law," as used in this statute and transferred to section 1008 of the Revised Statutes, was intended to embrace cases of admiralty and maritime jurisdiction, and is equivalent to the phrase "civil actions," as employed in the twenty-second section of the Judiciary Act of 1789. (Phillips' Practice, revised ed. p. 111.)

This is the reasonable view. Unless this view be adopted, there is no legal provision as to the time within which appeals in admiralty and maritime cases must be taken to the Supreme Court. The Revised Statutes do not, unless it be in section 1008, contain any limitation of time in such cases.

2. Appeals in Prize Causes.—Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time for cause shown in the particular case; *Provided*, That the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal or of intention to appeal was filed with the clerk of the District Court within thirty days next after the rendition of the final decree therein. (Sec. 1009.)

This section is founded on section thirteen of the Act of June

30th, 1864 (13 U. S. Stat. at Large, 306), and section two of the Act of March 3d, 1873. (17 U. S. Stat. at Large, 556.) Congress, in enacting the Revised Statutes, incorporated provisions in both of these sections into section 1009 of these Statutes.

In *The Nuestra Senora de Regla*, 17 Wall. 29, Chief Justice Chase said: "In prize causes, whenever it appears that notice of appeal or of intention to appeal to this court was filed with the clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed to this court whenever the purposes of justice require it."

SECTION IX.

WRIT POWERS OF THE COURT.

The Revised Statutes of the United States confer these powers upon the Supreme Court in the following provisions:

1. Writs of Scire Facias and other Writs.—The Supreme Court, and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (Sec. 716.) The powers here granted are equally bestowed on all these courts.

The writ of *scire facias* is the only writ specifically designated in this section. This writ, with the proceedings thereon, is founded upon public records of some kind, either judicial or non-judicial. The judicial records are judgments in former suits and recognizances which are of the nature of judgments. The non-judicial records are letters patent and corporate charters. (Bouvier's Law Dictionary.)

The writ may be resorted to for repealing letters patent, or for ascertaining and enforcing the forfeiture of corporate charters. It recites the judgment or other record involved in the case, and also the suggestions which the plaintiff must make to the court to entitle him to the proceeding by *scire facias*, and hence sets forth the plaintiff's whole case, and constitutes the declaration to which the defendant must plead.

Mr. Justice Grier, in *Winder* v. *Caldwell*, 14 How. 434, 443,

said: "A *scire facias* is a judicial writ to enforce the execution of some matter of record on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original [process] that the defendant may plead to it. As it discloses the facts on which it is founded and requires an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ. In the present case the bill of particulars of the plaintiff's claim is filed of record under the statute which gives this remedy, and it is recited in the writ and thereby made part of it, so that any further pleading on his part, to set forth the nature of his demand, would be wholly superfluous."

In *Ex parte Wood*, 9 Wheat. 603, the tenth section of the Patent Act of February 21st, 1793 (1 U. S. Stat. at Large, 318), which provided for the repeal of patents that had been surreptitiously obtained, came under the consideration of the Supreme Court. It was held in this case that, under the provisions of the section, a writ, in the nature of a *scire facias*, to the patentee to show cause why the patent should not be repealed, with costs of suit, was the proper process to be adopted, and that a *mandamus* should be issued to the judge of the District Court, directing him thus to proceed.

The other writs which the Supreme Court is, in this section, authorized to issue, are not designated except in general terms. These terms embrace "all writs" which are not elsewhere specifically provided for by statute, which may be necessary for the exercise of the jurisdiction of the court, and which are agreeable to the usages and principles of law.

One of the conditions specified in general terms is the necessity of the writ for the exercise of the jurisdiction of the court. This assumes that the jurisdiction already exists, and is to be exercised by the issue of the writ, and hence that it is not to be acquired by the means of the writ. The necessity of the writ to the exercise of such jurisdiction is the statutory condition precedent to the power of issuing it. It is to be issued as a proper method of exercising such jurisdiction; and of this the court is to judge in each case. (*The United States* v. *Plumer*, 3 Cliff. 28.)

The other condition is that the writ must be "agreeable to the usages and principles of law." Mr. Justice Clifford, in *Riggs* v. *Johnson County*, 6 Wall. 166, 190, said: "Usages of law, and not of the common law, it will be observed, are the words of the

provision, which doubtless refers to the principles and usages of law as known and understood in the State courts, at the date of that enactment." The date of the original enactment was in 1789. (1 U. S. Stat. at Large, 73, 81.)

Mr. Justice Thompson, in *The Bank of the United States* v. *Halsted*, 10 Wheat. 51, 56, having referred to the fourteenth section of the Judiciary Act of 1789, proceeded to say: "The precise limitations and qualifications of this power, under the terms, 'agreeable to the principles and usages of law,' is not, perhaps, so obvious. It doubtless embraces writs sanctioned by the principles and usages of the common law. But it would be too limited a construction, as it respects writs of execution, to restrict it to such only as were authorized by the common law. It was well known to Congress that there were in use in the State courts writs of execution other than such as were conformable to the usages of the common law. And it is reasonable to conclude that such were intended to be included under the general description of writs agreeable to the principles and usages of law."

"The usages and principles of law, as referred to in the section, then mean not only those found in the common law, but also those that existed in the practice of State courts. It is enough that the writ is agreeable to these usages and principles in either sense. Writs of *mandamus*, of *certiorari*, of injunction, of *supersedeas*, of *subpœna*, of *subpœna ducis tecum*, of attachment, of execution, of inhibition, and of assistance, are agreeable to the usages and principles of law, and, when necessary for the exercise of the jurisdiction of the Supreme Court, may be issued by that court, and may under like circumstances, be issued by the District and Circuit Courts of the United States.

The power to issue writs is not simply that which respects proceedings prior to judgments or decrees, but extends to all proceedings necessary to carry those judgments or decrees into effect. The power is equally applicable in both cases, and in both equally necessary for the exercise of the jurisdiction of the court. (*Wayman* v. *Southard*, 10 Wheat. 1, and *The Bank of the United States* v. *Halsted*, 10 Wheat. 51.)

2. Writs of Ne Exeat.—Writs of *ne exeat* may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any circuit justice or

circuit judge in cases where they might be granted by the Circuit Court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same, that the defendant designs quickly to depart from the United States. (Sec. 717.)

This writ is a chancery writ, issued upon the motion of the complainant, setting forth that the defendant is about to depart beyond the jurisdiction of the court, and directing that he be required to give bail in a certain sum that he will not depart without the permission of the court, and in a failure to furnish such bail, ordering his commitment to prison. The design of the writ is to prevent debtors from escaping from their creditors.

It is assumed, in this section, that the Supreme Court and also the Circuit Courts, upon the showing of the requisite facts, have the power to issue the writ. The exercise of the power is necessary to their jurisdiction, and agreeable to the usages and principles of law, in cases to which the writ is applicable.

The direct provision of the section is, that the writ may be issued by any justice of the Supreme Court, in any case in which the court could issue it, or by any circuit justice or judge in any case in which the Circuit Court of which he is a judge could issue the writ. The qualification of the power granted is that no writ of *ne exeat* shall be issued unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

No power is here given to district judges of the United States to issue writs of *ne exeat*. (*Gernon* v. *Boccaline*, 2 Wash. 130.)

Mr. Justice Nelson, in *Graham* v. *Stucken*, 4 Blatch. 50, held that, in order to the issue of the writ, the demand must be an equitable debt or pecuniary claim, and be certain or capable of being reduced to certainty, and that a general unliquidated demand, or one in the nature of a claim for damages, which cannot be regarded as a debt until the decree, will not lay a foundation for the writ. He held that the case before the court did not come within this principle, and on this ground dismissed the application for the writ.

3. Writs of Injunction.—Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any judge of a Circuit Court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of a Circuit Court, in any case where a party has had reasonable time to apply to the Circuit Court for the writ; nor shall any injunction so issued by a district judge continue longer than to the Circuit Court next ensuing, unless so ordered by the Circuit Court. (Sec. 719.)

An injunction is a prohibitory writ issued by the authority of, and generally under the seal of, a court of equity, to restrain one or more of the defendant parties or *quasi* parties to a suit or proceeding in equity from doing, or from permitting his servants or others who are under his control to do, an act which is deemed to be unjust or inequitable so far as regards the rights of some other party to such suit or proceedings in equity. (Bouvier's Law Dictionary.)

Only a part of the above section applies exclusively to the justices of the Supreme Court, in their character as such justices; and this part expressly declares that any such justice may grant writs of injunction in cases where the court could grant them. The cases in which the court may issue these writs are those in which they are necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law. A justice of the court in any such case may issue the writ. His powers in this respect are the same as those of the court.

The Supreme Court, in *Georgia* v. *Brailsford*, 2 Dall. 402, was asked to grant and did grant a writ of injunction staying certain funds in the hands of the marshal until the title of the State could be tried. The court here had jurisdiction of the case because a State was a party to the suit, and issued the writ as a means of exercising that jurisdiction.

In *New York* v. *Connecticut*, 4 Dall. 1, it was held that nei-

ther the Supreme Court nor any single justice thereof can grant a writ of injunction without reasonable notice to the adverse party; that what is reasonable notice depends on the circumstances of the case; and that an injunction to stay proceedings at law will not be granted at the instance of one not a party to or interested in those proceedings.

The Supreme Court, in *The Cherokee Nation* v. *Georgia*, 5 Pet. 1, declined to grant a temporary injunction to restrain the State from enforcing the laws of Georgia within the territory alleged to belong exclusively to the Cherokee Nation, on the ground that it had no jurisdiction, since the Cherokee Nation, not being a foreign State and not a State of the Union, was not entitled to bring the suit. Chief Justice Marshall, in stating the opinion of the court, said that what the bill of complaint asked the court to do, "savors too much of political power, to be within the proper province of the judicial department."

In *Mississippi* v. *Johnson*, 4 Wall. 475, it was held that the President of the United States cannot be restrained by an injunction from carrying into effect an act of Congress alleged to be unconstitutional, and that a bill having such a purpose will not be allowed to be filed.

In *Georgia* v. *Stanton*, 6 Wall. 50, it was held that a bill in equity filed by one of the United States to enjoin the Secretary of War and other officers who represent the executive authority of the United States from carrying into execution certain acts of Congress, on the ground that such execution would annul and totally abolish the existing State government of the State and establish another and different one in its place, calls for a judgment upon a political question, and will not therefore be entertained by the Supreme Court.

The Supreme Court, in *Hill* v. *The United States*, 9 How. 386, laid down the broad principle that a bill in equity to enjoin the Government of the United States cannot be entertained by any Federal court. The same principle had been previously asserted in *The United States* v. *McLemore*, 4 How. 286.

No justice of the Supreme Court, acting as such, and not as a circuit justice allotted to a particular circuit, has any power to grant writs of injunction in cases where the court is without the power. It is only in cases where the court has the power to grant such writs, that he can grant them.

4. Injunctions to Stay Proceedings in State Courts.—The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (Sec. 720.)

This prohibition applies alike to all the courts of the United States. The only exception is that which is authorized by any law relating to proceedings in bankruptcy. Section 5106 of the Revised Statutes, founded on the twenty-first section of the Act of March 2d, 1867 (14 U. S. Stat. at Large, 526), authorizes an injunction in such cases to stay proceedings in a State court. The subsequent repeal of the National Bankrupt Law by Congress makes this section inoperative, and leaves the general provision of section 720 without any exception. The basis of this provision is found in the fifth section of the Act of March 2d, 1793 (1 U. S. Stat. at Large, 333.)

The Supreme Court has repeatedly affirmed the doctrine that no court of the United States can enjoin proceedings in a State court, with the single exception made by a national Bankrupt Law when such law is in operation. (*Diggs* v. *Wolcott*, 4 Cranch, 179; *Peck* v. *Jenness*, 7 How. 612; *Watson* v. *Jones*, 13 Wall. 679; and *Haines* v. *Carpenter*, 1 Otto, 254.)

In *The Slaughter-House Cases*, 10 Wall. 273, 298, it was held that the provision of the statute applies to the Supreme Court, as well as to the Circuit Courts of the United States, and that the former cannot by injunction stay proceedings in a subordinate State court, even when a writ of error to the appellate State court has been allowed. Mr. Justice Clifford said in these cases "that there is no appellate relation between a subordinate State court and the Supreme Court of the United States, and where no such relation is established by law the prohibition" of the statute "applies to the Supreme Court as well as to the Circuit Court."

In *French* v. *Hay*, 22 Wall. 250, it was held that when, in a case which is properly removed from a State court, under one of the acts of Congress relating to removals, into the Circuit Court of the United States, a complainant getting a decree in the State court and sending a transcript of it into another State, sues the defendant on it there, the Circuit Court into which the case was removed may enjoin the complainant from proceedings in any such or other distant court until *it* hears the case; and if, after hearing,

it annuls the decree in the State court, and dismisses, as wanting in equity, the bill on which the decree was made, may make the injunction perpetual. Mr. Justice Swayne said in this case: "The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

Judge Blatchford, in *Fisk* v. *The Union Pacific R. R. Co.*, 10 Blatch. 518, held that the prohibition of the statute has application only to proceedings commenced in a State court before proceedings are commenced in a Federal court, and that where proceedings have already been instituted in a Federal court against a defendant company, the court, in order to continue its jurisdiction over the company, may, if necessary, restrain it by injunction from taking steps in a State court to put itself out of existence.

In construing the statute in *Fisk* v. *The Union Pacific R. R. Co.*, 6 Blatch. 362, 399, Judge Blatchford said: "The statute uses, indeed, the words 'a writ of injunction;' but the spirit of it is that this court shall not in any manner stay a proceeding in a court of a State. It is not an inhibition merely against issuing an injunction in the shape of a writ of injunction, *mandamus*, or prohibition, directed to the State court itself, but it has been construed always as an inhibition against staying a party from conducting such proceedings in a State court." (*The City Bank of New York* v. *Skelton*, 2 Blatch. 14, 18.)

Judge Hall, in *The United States* v. *Collins*, 4 Blatch. 142, 156, expressed the opinion that the term "proceedings," as occurring in the statute of prohibition, "must necessarily include all steps taken by the court, or by its officers under its process, from the institution of the suit until the close of the final process of execution which may issue therein." (*Cropper* v. *Coburn*, 2 Curt. 465, 468, 469.)

These cases illustrate the construction which has been placed upon this statute by the courts of the United States. The statute is one of restraint; and the design of Congress in enacting it was to prevent the Federal courts from interference by writs of injunction with proceedings in State courts, alike in respect to the courts themselves and the parties to such proceedings in these courts. The same principle equally applies to the power of a State court

to stay proceedings in a Federal court. (*McKim* v. *Voorhies*, 7 Cranch, 279.)

5. Writs of Habeas Corpus.—The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*. (Sec. 751.)

The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty. (Sec. 752.)

The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof; or unless it is necessary to bring the prisoner into court to testify. (Sec. 753.)

The first two of the above sections grant the power to issue writs of *habeas corpus;* and the third provides that the writ shall not extend to any prisoner in jail, except in the cases specified, and implies that in these cases it may be issued.

The words "writs of *habeas corpus*," as used in the statute, evidently embrace all kinds or forms of this writ, as known to the common law; and hence the common law may be referred to in ascertaining their meaning. Chief Justice Marshall, in *Ex parte Bollman* and *Ex parte Swartwout*, 4 Cranch, 75, said "that, for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States must be given by written law."

The Chief Justice further said in this case: "The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and, therefore, appellate

in its nature." This view was taken in *The United States* v. *Hamilton*, 3 Dall. 17, and in *Ex parte Burford*, 3 Cranch, 448.

The general object of the writ of *habeas corpus*, as conferred by the statute, with the single exception of those cases in which prisoners are wanted as witnesses, is to afford prompt relief to persons who may be illegally restrained of their liberty. These persons are described as prisoners, and as being "in jail," or "in custody." The inquiry instituted in each case is into the cause of the restraint; and if the restraint be without legal authority, the court or judge issuing the writ, and for the time being taking judicial custody of the party, discharges him therefrom, and at once restores him to his liberty. If, on the other hand, the custody be according to due legal authority, the writ is dismissed and the party remanded thereto. It is not the purpose of the writ to release those who are imprisoned under the proper exercise of legal authority, or to pass upon the question of their guilt or innocence.

The power to issue this writ is given to the Supreme Court, and to the several justices thereof who may issue the writ when the court is not in session. This power includes the power of determining the points involved in a *habeas corpus* proceeding.

Mr. Justice Story, after stating the case in *Ex parte Barry*, 2 How. 65, proceeded to say: "It is plain, therefore, that this court has no original jurisdiction to entertain the present petition; and we cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the Constitution or laws of the United States." The Supreme Court, if having no jurisdiction, either original or appellate, of the case, must, of course, dismiss the application for a writ of *habeas corpus*.

In *The Matter of Metzger*, 5 How. 176, it was held that the court was without jurisdiction to issue a writ of *habeas corpus*. Metzger was imprisoned as a fugitive from justice, under a warrant from a district judge of the United States, to abide the order of the President for his delivery to the Government of France. The case was considered and decided by the judge at chambers, and not in court; and the question before the Supreme Court was whether, in such a state of facts, it had any jurisdiction to inquire into the cause of the imprisonment. This question was answered in the negative.

Mr. Justice McLean, in stating the opinion of the court, said: "There is no form in which an appellate power can be exercised by this court over the proceedings of a district judge at his chambers. He exercises a special authority, and the law has made no provision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently, it cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding, and this has not been given by Congress, if they have the power to confer it." Reference was made to the case of *Bollman & Swartwout*, 4 Cranch, 75, of *Ex parte Kearney*, 7 Wheat. 38, and of *Ex parte Watkins*, 3 Pet. 193, as cases in which the court had based the power of issuing the writ on its appellate jurisdiction, which did not apply in the case of Metzger.

In *Ex parte Tobias Watkins*, 7 Pet. 568, it was held that the court had power to issue a writ of *habeas corpus* to inquire into the legality of imprisonment under a writ of *capias ad satisfaciendum* issued by the Circuit Court of the District of Columbia, since it was a case for the exercise of appellate jurisdiction. Mr. Justice Story remarked in this case: "The question turns upon this, whether it is an exercise of original or appellate jurisdiction. If it be the former, then, as the present is not one of the cases in which the Constitution allows this court to exercise original jurisdiction, the writ must be denied." He, however, held that the appellate jurisdiction of the court applied to the case. On this ground the writ was issued, and the prisoner was discharged.

In *Ex parte Yerger*, 8 Wall. 85, it was held that, in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, the Supreme Court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and, if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

The case of *Ex parte Milligan*, 4 Wall. 2, came before the Supreme Court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition of Milligan for a writ of *habeas corpus* to discharge him from unlawful imprisonment.

The Supreme Court held that where a Circuit Court renders a final judgment refusing to discharge the prisoner on *habeas corpus*, he may bring the case to the Supreme Court by writ of error, and that if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to the Supreme Court. The Supreme Court answered the questions certified to it in this case as follows: 1. That a writ of *habeas corpus* ought to be issued by the Circuit Court. 2. That Milligan ought to be discharged according to the prayer in his petition. 3. That the military commission by which he was tried and sentenced to death, had no jurisdiction of the case, and hence that the whole proceeding was null and void.

In *Ex parte Lange*, 18 Wall. 163, the doctrine was laid down that, where a prisoner shows that he is held under a judgment of a Federal court, made without authority of law, the Supreme Court will, by writs of *habeas corpus* and *certiorari*, look into the record, so far as to ascertain that fact, and, if it is found to be so, will discharge the prisoner.

In *Ex parte Parks*, 3 Otto, 18, it was held: 1. That where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies from the Supreme Court, it will not on *habeas corpus* review the legality of the proceedings. 2. That it is only where the proceedings below are entirely void, either for want of jurisdiction or other cause, that such relief will be given. 3. That whether a matter for which a party is indicted in the District Court is, or is not, a crime against the laws of the United States, is a question within the jurisdiction of that court which it must decide, and that its decision will not be reviewed by the Supreme Court on *habeas corpus*.

In *Ex parte Virginia*, 10 Otto, 339, it was held that while a writ of *habeas corpus* cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order which an inferior court of the United States had no jurisdiction to make, the Supreme Court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.

In *Ex parte Siebold*, 10 Otto, 371, the following principles were laid down: 1. That the appellate jurisdiction of the Supreme Court, exercisible by the writ of *habeas corpus*, extends to a case

of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether the Supreme Court has jurisdiction to review the judgment of conviction by writ of error or not. 2. That the jurisdiction of the Supreme Court by *habeas corpus*, when not restrained by some special law, extends generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous, and that such a case occurs when the proceedings are had under an unconstitutional act. 3. That when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error, and cannot be reviewed at all if no writ of error lies. 4. That where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ.

These cases embody the general principles which have been adopted by the Supreme Court in respect to the writ of *habeas corpus* as an exercise of its appellate power. Chief Justice Chase, in *Ex parte Yerger*, 8 Wall. 85, 99, said: "We regard as established upon principle and authority, that the appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress." This is a broader proposition, and in the light of all the cases a truer one, than that adopted in *Metzger's Case*, 5 How. 176. The general doctrine which seems to be established is that, if a party is imprisoned under the authority or the color of the authority of the United States, the Supreme Court may by writ of *habeas corpus* inquire into the lawfulness of that imprisonment, and afford relief if such imprisonment be without due legal authority.

The writ of *habeas corpus* may also be issued by any justice of the Supreme Court, as well as by the court itself; and, in regard to it when so issued, Mr. Justice Bradley, in stating the opinion of the court in *Ex parte Clarke*, 10 Otto, 399, said:

"This appellate character of the proceeding attaches to a large portion of the cases on *habeas corpus*, whether issued by a single

judge or by a court. The presence of this feature in the case was no objection to the issue of the writ by the associate justice, and is essential to the jurisdiction of this court. The justice who issued it could undoubtedly have disposed of the case himself, though not, at the time, within his own circuit. A justice of this court can exercise the power of issuing the writ of *habeas corpus* in any part of the United States where he happens to be. But as the case is one of which this court also has jurisdiction, if the justice who issued the writ found the questions involved to be of great moment and difficulty, and could postpone the case here for the consideration of the whole court without injury to the petitioner, we see no good reason why he should not have taken this course, as he did. It had merely the effect of making the application for a discharge one addressed to the court, instead of one addressed to a single justice. This has always been the practice of English judges in cases of great consequence and difficulty, and we do not see why it may not be done here."

The writ of *habeas corpus* in this case was granted by Mr. Justice Strong, who admitted the petitioner to bail, and made an order for the hearing of the case before the whole court. This raised the question whether the Supreme Court could proceed upon a writ of *habeas corpus* which was originally issued by a justice thereof, and was postponed and referred by him to the whole court for determination.

This question was answered in the affirmative, and the remarks of Mr. Justice Bradley, above quoted, were designed to give a reason for the answer. Referring to *Kaine's Case*, 14 How. 103, in which the Supreme Court held that it could not act upon a writ thus referred to it by Mr. Justice Nelson, he said:

"But the ground taken there was, that the writ had been issued by him in virtue of his original jurisdiction, though the court was of opinion that it could issue a new writ upon the papers before it in virtue of its own appellate jurisdiction, and would do so if the case required it; but, being of opinion that there was no case on the merits, the application was discharged. But in this case, however it may have been in that, it is clear that the writ, whether acted upon by the justice who issued it, or by this court, would in fact require a revision of the action of the Circuit Court by which the petitioner was committed, and such revision would necessarily be appellate in its character."

The doctrine established by this case is, that any justice of the Supreme Court may, in vacation, issue a writ of *habeas corpus* in any case in which the Supreme Court could do so, and, the case

being one which contemplates a revision of the action of an inferior court, the justice issuing the writ may dispose of the case himself, or may remit it to the whole court for determination. The provisions of the statute, regulating proceedings under the writ, imply that a justice of the Supreme Court, if issuing the writ, may exercise all the powers of the court in disposing of the case.

6. Writs of Prohibition and Mandamus. — The Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador or other public minister, or consul or vice-consul is a party. (Sec. 688.)

(1.) *Prohibition.*—The power of the Supreme Court to issue a writ of prohibition, as here given, is qualified by two conditions. The first is that the writ must be issued to a District Court of the United States; and the second is that it is to be issued to this court only when proceeding as a court of admiralty and maritime jurisdiction. The power, as thus qualified, is not a general power of issuing writs of prohibition, whenever necessary to the jurisdiction of the Supreme Court, but only a specific power, to be exercised subject to the conditions stated.

Mr. Justice Miller, in *The United States* v. *Hoffman*, 4 Wall. 158, said: "The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction. In the case before us the writ, from its very nature, could do no more than forbid the judge of the District Court from proceeding any further in the case in admiralty."

The case had been disposed of by the court below, and hence was not one to which the writ of prohibition was applicable, since it could not undo what had already been done. Nor would the

writ be issued, though the final disposition of the case in the court below was made by the judge after the service on him of a rule to show cause why the writ should not be issued, and though other cases of the same character might be pending in the same court. On this point Mr. Justice Miller said: "We are not prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases."

In *Ex parte Eaton*, 5 Otto, 68, 77, it was held that whether a writ of prohibition should be issued to a District Court, when proceeding as a court of admiralty and maritime jurisdiction, depends upon the facts stated in the record upon which the court is called to act. Matters, *dehors* that record, which are set forth in the petition for the writ, will not be considered by the Supreme Court.

In *Ex parte Christy*, 3 How. 292, it was held that the Supreme Court has no power, by a writ of prohibition, to revise the proceedings of a District Court when sitting in bankruptcy, and that it could not issue the writ to the court except when the proceeding was one of admiralty and maritime jurisdiction.

In *Ex parte Gordon*, 1 Black, 503, the Supreme Court held that it has no power to issue a writ of prohibition in a case where it has no appellate jurisdiction over the court to which the writ must go, nor any special authority by statute. The doctrine laid down in *Ex parte Christy*, *supra*, was re-affirmed in this case.

Proceedings to confiscate real estate under the Act of July 17th, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," &c., are not proceedings in admiralty, although the act declares that "they shall be *in rem*, and conform as near as may be to proceedings in admiralty and revenue cases," and in such proceedings the Supreme Court will not issue a writ of prohibition to a District Court, since the writ is confined to cases in which the District Courts are proceeding as courts of admiralty. (*Ex parte Graham*, 10 Wall. 541.)

In *Ex parte Warmouth*, 17 Wall. 64, an application was made for a writ of prohibition to the Circuit Court for the district of Louisiana, on the ground that the court was proceeding without authority of law. The application was dismissed. Chief Justice Chase said; "We are all of opinion that when a final decree shall

be rendered in the Circuit Court in this case, an appeal will lie to this court. We are also of opinion that this court has no jurisdiction in this case to issue a writ of prohibition until an appeal is taken."

(2.) *Mandamus.*—The provision for writs of *mandamus*, as made in the thirteenth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), was that the Supreme Court shall have power to issue "writs of *mandamus*, in cases warranted by the principles and usages of law, to any court appointed, or persons holding office, under the authority of the United States." This provision, as reproduced in section 688 of the Revised Statutes, declares that the Supreme Court shall have power to issue "writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, *where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party.*" The words in italics are, in the Revised Statutes, added to the original provision as it stood in the Judiciary Act of 1789.

The writ of *mandamus*, according to these provisions, may be issued by the Supreme Court, either to the courts or to the public officers designated.

(*a.*) *Mandamus to Courts.*—The Circuit and District Courts of the United States, the Court of Claims, the courts of the District of Columbia, and the courts of the several Territories, are appointed and exist under the authority of the United States, and hence come within the description of the statute, as courts to which the Supreme Court may, in cases warranted by the principles and usages of law, issue writs of *mandamus*.

Mr. Justice Blackstone defines the writ of *mandamus* to be "a command issuing in the King's name, from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right and justice." He also says: "It issues to the judges of any inferior courts, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar

business of the Court of King's Bench to superintend all other inferior tribunals, and therein to enforce the exercise of those judicial or ministerial powers with which the Crown or legislature have invested them, and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice." (3 Bl. Comm. 110.)

Lord Mansfield, in *The King* v. *Barker et al.*, 3 Burrow, 1266, said; "Whenever there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be a matter of public concern or attendant with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by *mandamus*, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order, and good government." He added that "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

This writ, when issued by the Supreme Court to inferior courts, is so issued in the exercise of its appellate jurisdiction, or in aid thereof. Chief Justice Marshall, in *Ex parte Crane*, 5 Pet. 190, 193, said; "A *mandamus* to an inferior court of the United States is in the nature of appellate jurisdiction." In regard to the term "appellate," as used in the Constitution, Mr. Justice Field, in *Virginia* v. *Rives*, 10 Otto, 327, said; "The term 'appellate,' in the Constitution, is not used in a restricted sense, but in the broadest sense, as embracing the power to review and correct the proceedings of subordinate tribunals, brought before it [the Supreme Court] for examination in the modes provided by law."

Congress, being by the Constitution invested with the requisite authority, has prescribed the various modes in which the Supreme Court may exercise its appellate jurisdiction over the proceedings of inferior courts. One of these modes is by the issue of a writ of *mandamus* to "any court appointed under the authority of the United States." The power to issue the writ does not extend to State courts.

The restriction placed by Congress upon the exercise of this power consists in the fact that the writ is authorized to be issued only "in cases warranted by the principles and usages of law." The power is not an arbitrary and unregulated power, to be exer-

cised at the mere pleasure of the court, without any reference to established rules. Congress, in giving the power, refers to "the principles and usages of law" as a guide to its proper exercise.

The Supreme Court has, from time to time, exercised this power, and not infrequently refused to do so, and has thus, by a series of precedents in its own practice, settled the character of the cases in which the power should be exercised, as distinguished from those in which it should not be exercised. These precedents constitute its exposition of the principles and usages of law, as referred to in the statute.

Mr. Justice Nelson, in *Ex parte Bradley*, 7 Wall. 364, 376, laid down the following general principle on this subject: "This writ is applicable only in the supervision of the proceedings of inferior courts, in cases where there is a legal right without an existing legal remedy. It is upon this ground that the remedy has been applied from an early day, indeed, since the organization of courts and the admission of attorneys to practice therein down to the present time, to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counselors of the courts." He remarks that, in such cases, the wrong, however, flagrant, would, without this remedy, be incapable of any redress.

Mr. Justice McLean, in *Crawford* v. *Addison*, 22 How. 174, 183, remarked that "a *mandamus* is a remedy where there is no other appropriate relief, and it is only resorted to on extraordinary occasions."

Chief Justice Waite, in *Ex parte Cutting*, 4 Otto, 14, 20, said: "The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to such a performance, and who has no other adequate remedy. It is never granted in anticipation of an omission of duty, but only after actual default."

Mr. Justice Strong, in *Virginia* v. *Rives*, 10 Otto, 313, 323, said that the writ of *mandamus* is "an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do."

Mr. Justice Clifford, in *Ex parte Newman*, 14 Wall. 152, 165, said: "The principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judg-

ment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy. (*The Insurance Co.* v. *Wilson*, 8 Pet. 302; *The United States* v. *Peters*, 5 Cranch, 135; *Ex parte Bradstreet*, 7 Pet. 648; *Ex parte, Many*, 14 How. 24; *The United States* v. *Lawrence*, 3 Dall. 42; *The Commissioner* v. *Whiteley*, 4 Wall. 522; and *The Insurance Co.* v. *Adams*, 9 Pet. 602.)

Mr. Justice Harlan, in *Ex parte Railway Company*, 11 Otto, 711, 720, said: "We recognize, in its fullest extent, the power of this court by *mandamus* to enforce prompt compliance with its mandates; but it is not consistent with the principles and usages of law that we should, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion. The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record acting within the scope of its judicial authority."

These deliverances set forth the general principles and usages of law, as adopted by the Supreme Court, with reference to the issuing of a writ of *mandamus*. Whether the court will or will not issue the writ in a specific case depends upon the character of the case, considered with reference to the principles and usages of law.

In *Ex parte Robinson*, 19 Wall. 505, it was held that a *mandamus* is an appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter; and accordingly a peremptory *mandamus* was issued in this case, requiring the judge of the court below to vacate the order disbarring the petitioner, and to restore him to his office. The same ground was taken in *Ex parte Bradley*, 7 Wall, 364.

If an inferior court refuses to act upon a subject properly before it and requiring its action, or if it refuses to sign a bill of exceptions, then a writ of *mandamus* may be issued, in the one case,

not to direct in what manner the court shall act, but to compel action, and, in the other case, to sign a bill of exceptions, without prescribing the particular bill which it shall sign. (*Life & Fire Ins. Co.* v. *Wilson*, 8 Pet. 291, 304; *Ex parte Crane*, 5 Pet. 190; and *Bradstreet* v. *Thomas*, 4 Pet. 102.)

The refusal of a Circuit Court to allow an appeal is a proper case for a *mandamus* to compel the allowance, provided the petitioner shows that he has a right to such allowance. (*Ex parte Jordan*, 5 Otto, 248; and *Ex parte Cutting*, 4 Otto, 14.)

If a Circuit Court, without authority of law, takes jurisdiction over a case removed thereto from a State court, a writ of *mandamus* is a proper remedy to compel it to remand the case to the court from which it was improperly removed. (*Virginia* v. *Rives*, 10 Otto, 313.)

Where a Circuit Court dismisses a case on the ground that it has no jurisdiction, the proper remedy is not a writ of error, but a *mandamus* from the Supreme Court, directing it to proceed with the case. (*The Insurance Co.* v. *Comstock*, 16 Wall. 258, 270; and *The Railroad Company* v. *Wiswall*, 23 Wall. 507.)

On the other hand, a motion for a new trial is always addressed to the discretion of the court, and the Supreme Court will not, by a *mandamus*, control its exercise by the court below. (*Life & Fire Ins. Co.* v. *Wilson*, 8 Pet. 291, 303.)

The Supreme Court will not, by *mandamus*, compel an inferior court to reverse a decision made in the exercise of its jurisdiction. (*Ex parte Perry*, 12 Otto, 183.)

Nor will the Supreme Court use the writ in cases for which the proper remedy is a writ of error or an appeal. (*Ex parte Hoyt*, 13 Pet. 279; *Ex parte Whitney*, 13 Pet. 404; *The Commissioner* v. *Whiteley*, 4 Wall. 522; and *Ex parte Schwab*, 8 Otto, 240.) Hence a *mandamus* will not be issued to compel an inferior court to grant a motion to vacate an order setting aside a judgment of nonsuit, since a writ of error is the proper remedy in such a case. (*Ex parte Loring*, 4 Otto, 418.)

The allowance of double pleading is not a matter of absolute right, and hence a *mandamus* will not be issued to compel an inferior court to permit more than one plea to be filed. (*Ex parte Davenport*, 6 Pet. 661.)

A mandamus cannot be used to control the discretion of an inferior court as to the proceedings intermediate between the insti-

tution of a suit and its trial, and if the judge acts oppressively, the Supreme Court is not the tribunal to which to apply. (*Ex parte Bradstreet*, 8 Pet. 588.) Nor will the Supreme Court interfere by *mandamus* with the discretion of an inferior court in approving or rejecting a bond offered for its approval. (*Ex parte Milwaukee Railroad Co.* 5 Wall. 188.)

Where an inferior court has issued a writ of execution, and refuses to grant a motion for quashing it, a *mandamus* cannot be issued to compel it to grant the motion, since it is not the proper remedy. (*Ex parte Flippin*, 4 Otto, 848.)

Such are some of the cases, among the many, in which the Supreme Court has construed its power to issue the writ of *mandamus* "in cases warranted by the principles and usages of law." It has exercised the power in the way of general supervision so far, and so far only, as was necessary to correct abuses and misuses of power by inferior courts when there was no other remedy, and carefully abstained from all interference with these courts when proceeding in the proper exercise of their own powers. The applications for this writ have been numerous, and have been more often rejected than granted.

(*b.*) *Mandamus to Public Officers.*—Section 688 of the Revised Statutes provides that the Supreme Court shall have power to issue writs of *mandamus* "to persons holding office under the authority of the United States, *where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party.*" The words in italics, as already remarked, are not in the original provision as found in the thirteenth section of the Judiciary Act of 1789.

The effect of adding these words is to give the power of issuing the writ, when it acts upon the persons described, in those cases in which a State, or an ambassador or other public minister, or a consul or vice-consul is a party. These are the cases in which the Supreme Court has original jurisdiction. The meaning of the statute then is, that the court may, in the exercise of its original jurisdiction or in aid thereof, issue the writ to the officers named.

Chief Justice Marshall, in *Ex parte Crane*, 5 Pet. 190, 193, said; "A *mandamus* to an officer is held to be an exercise of original jurisdiction, but a *mandamus* to an inferior court of the United States, is in the nature of appellate jurisdiction." The

provision of the statute now under consideration is not for a *mandamus* to courts, which is an exercise of appellate jurisdiction, but for a *mandamus* to officers of the United States, in the cases specified, which is an exercise of original jurisdiction, or in aid thereof.

The case of *Marbury* v. *Madison*, 1 Cranch, 137, which came before the Supreme Court in 1803, was an application to the court for a writ of *mandamus* to compel Mr. Madison, who was Secretary of State, to deliver to Mr. Marbury, as a justice of the peace in the District of Columbia duly appointed by President Adams, a commission which had been signed by the President and was in the office of the Secretary, but which he refused to deliver.

One of the questions considered was whether the case itself was a proper one for a *mandamus* if the court had power to award the writ. This question was answered in the affirmative. Marbury, as the court held, was entitled to the paper withheld from him, and Mr. Madison was a person holding office under the authority of the United States. Moreover, Marbury was "without any other specific and legal remedy;" and Mr. Madison, in such a case as was presented, was an officer of the United States to whom the writ of *mandamus* could be directed. He came within the letter of the law, and the duty which he was required to perform was simply ministerial, and not one of executive discretion. These points Chief Justice Marshall, in stating the opinion of the court, argued elaborately, and finally came to the question whether the court had power to issue the writ sought in this case.

This question was answered in the negative, not on the ground that the thirteenth section of the Judiciary Act of 1789 did not confer the power, but because the section itself, so far as it conferred such a power, was unconstitutional, and "therefore absolutely incapable of conferring the authority." On this point Chief Justice Marshall said that, although "a *mandamus* may be directed to courts," as an exercise of appellate jurisdiction, "yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and therefore seems not to belong to appellate but to original jurisdiction." The action asked for in this case was not for the exercise of appellate jurisdiction, since this was applicable only to courts; and the Chief Justice correctly argued that it did not come within the limits of the original jurisdiction of the Supreme Court, as

defined in the Constitution, to which Congress could not by statute make any additions.

The language of Chief Justice Marshall, in this case, should be construed with reference to the facts of the case before the court. It does not by any means imply that, in a case which is in fact one of original jurisdiction under the provisions of the Constitution, Congress could not give to the Supreme Court the power, in the exercise of such jurisdiction or in aid thereof, to issue a *mandamus* to persons holding office under the authority of the United States. The difficulty with the provision, as made in the Judiciary Act of 1789, was that it embraced cases that clearly did not come within the appellate authority of the Supreme Court, of which the case of *Marbury* v. *Madison* was an example, and just as clearly did not come within the original jurisdictiou of this court as defined in the Constitution, of which the same case was an example.

Congress, in enacting the Revised Statutes, sought to remedy this difficulty, not by withdrawing all power to issue writs of *mandamus* to public officers, but by giving the power in those cases in which "a State, or an ambassador, or other public minister, or a consul or a vice-consul is a party," and which are the very cases specified in the Constitution as those in which the Supreme Court shall have original jurisdiction. Under the statute, as it now reads, the Supreme Court cannot issue a *mandamus* in such a case as that of *Marbury* v. *Madison*, since it would not come within the letter or intent of the law. But, under this statute, the court can, in the exercise of its original jurisdiction or in aid thereof, issue a *mandamus* to any person holding office under the authority of the United States, in any case "where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party." The statute gives express authority to this effect, and is not in conflict with the ruling of the Supreme Court in *Marbury* v. *Madison*.

Chief Justice Marshall, in *Marbury* v. *Madison*, *supra*, said that "to render the *mandamus* a proper remedy, the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be directed." On this point he further said: "Where the heads of Departments are the political and confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more per-

fectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

The principle here laid down is that an officer of the United States, even though he should be a member of the President's Cabinet, is not exempt from the writ of *mandamus* in respect to a duty imposed by law, the performance of which is not a matter of executive discretion, and concerns individual rights secured by law. In such a case a *mandamus* is a proper remedy, especially when the person applying is "without any other specific and legal remedy."

The case of *Kentucky* v. *Dennison*, 24 How. 66, which came before the Supreme Court in 1860, was an application to the court for a *mandamus* to compel the Governor of Ohio to deliver up a fugitive from justice to the authorities of Kentucky. This was prior to the adoption of the Revised Statutes, and hence prior to the modification of the thirteenth section of the Judiciary Act of 1789 by these Statutes. Chief Justice Taney, in delivering the opinion of the court, took the ground that, in the light of previous decisions, the parties were properly before the court. Coming to the question of the writ sought by Kentucky, he proceeded to say:

"It is equally well settled, that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of *Kendall* v. *United States*, 12 Pet. 615; *Kendall* v. *Stokes and others*, 3 How. 100."

Kentucky, in this case, invoked the original jurisdiction of the Supreme Court; and Chief Justice Taney, after explaining the nature of the writ of *mandamus* in modern practice, and saying that it is "an ordinary process of a court of justice to which every one is entitled, where it is the appropriate process for asserting the right he claims," added: "We may therefore dismiss the question of jurisdiction without further comment, as it is clear

that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by *mandamus* is the only mode in which the object can be accomplished."

Having thus disposed of the question of jurisdiction, the Chief Justice proceeded to show that, under the Constitution and the Act of February 12th, 1793, for giving effect to the constitutional provision, it was the duty of the Governor of Ohio to deliver up the fugitive from justice claimed by the State of Kentucky.

As to the question whether the Court could by *mandamus* compel the Governor of Ohio to perform this duty, Chief Justice Taney said:

"But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."

On this ground the court declined to issue the writ, holding that it had no power, by *mandamus*, to compel the Governor of Ohio, or any other State officer, as such, to perform any duty whatever. This declinature was clearly according to the letter of the statute, which, as it then read, provided for the issue of "writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The Governor of Ohio was neither a court, nor a person holding office, under the authority of the United States, and hence did not come within the description of the statute.

The requisite condition for the exercise of original jurisdiction was in this case supplied by the fact that a State was a party, and in this respect it differed from the case of *Marbury* v. *Madison*, *supra*; but the requisite condition for issuing a writ of *manda-*

mus, as defined in the statute, was not supplied. Chief Justice Taney said nothing to imply that the writ could not be issued in the exercise of the original jurisdiction of the court. What he said was that it could not be issued in such a case as the one presented.

The case of *Virginia* v. *Rives*, 10 Otto, 313, was an application of Virginia to the Supreme Court for a *mandamus* to compel Judge Rives, a district judge of the United States, to restore to the custody of that State two prisoners who, as alleged in the application, had been unlawfully taken from that custody by his order. It was claimed, in opposition to this application, that the court could issue the writ only in the exercise or in aid of its appellate jurisdiction, and that the writ sought in this case was prayed for in a proceeding which was not appellate but original, because it had its commencement in the petition of the State of Virginia.

Mr. Justice Field delivered a separate opinion, with which Mr. Justice Clifford concurred, and in which he concurred with the judgment of the court as to jurisdiction, and also the merits of the case, but not with all the views of Mr. Justice Strong, in stating the opinion of the court. In this opinion he refers to the question of jurisdiction as a point which Mr. Justice Strong had not treated in detail. On this point he said:

"It is undoubtedly true that, except in cases where, under the Constitution, this court has original jurisdiction, the writ can be issued only in the exercise or in aid of its appellate authority. This was held as long ago as the case of *Marbury* v. *Madison*, decided in 1803, and the doctrine has been adhered to ever since, for the obvious reason that, the jurisdiction of the court being original in only a few enumerated cases, all exercise of power in other cases must be in virtue of its appellate jurisdiction."

Referring to the language of Chief Justice Marshall, in *Marbury* v. *Madison*, *supra*, he further said:

"It was not intended to deny the authority of this court to issue the writ to public officers, when the case is one in which it can exercise original jurisdiction; and probably to avoid such an inference, the addition was made to the clause we have cited, which now appears in the Revised Statutes, so as to allow the writ to issue to public officers only 'when a State, or an ambassador, or other public minister, or a consul or vice-consul is a party'—that is, in cases where the court has original jurisdiction. Indeed, it is only by such writ that the original jurisdiction of this court can

in many cases be exercised. (*Kentucky* v. *Dennison*, 24 How. 66.) Nor was the language intended to deny that this court can issue the writ to judicial officers, where the object is to revise and correct their action in legal proceedings pending in the courts held by them. Though the writ to a subordinate or inferior court may be addressed to the court as such, it is usually directed to the judge thereof, or, if the court is composed of several judges, to such one or more of them as may be authorized to hold its sessions or participate in holding them. The reason assigned is that, in case of disobedience to the writ, the authority to enforce it is exercised over the judges personally who are vested with the power of exercising the functions of the court. (High's Extraordinary Legal Remedies, sec. 275.) In the present case the remedy is asked against the district judge, who, while holding the Circuit Court of the Western district of Virginia, made the order which is the subject of complaint, and who, if the writ be granted, will be able to hold that court and carry out its command. There is no sound objection to its issue in this form."

When the statute speaks of "persons holding office under the authority of the United States," and authorizes the Supreme Court to issue writs of *mandamus* to such persons "where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party," in distinction from "courts appointed under the authority of the United States," it evidently does not mean judicial officers, but does mean other officers of the United States than such as are judicial. Writs of *mandamus* to judicial officers are provided for in the power to issue them to the courts of the United States, since they hold these courts; and they may be addressed either to the courts as such or to the judicial officers by whom they are held, and in either case they are so addressed in the exercise of appellate jurisdiction. When, however, they are addressed to other Federal officers, the jurisdiction is not appellate but original, and is to be exercised in cases "where a State, or an ambassador or other public minister, or a consul or vice-consul is a party."

In the case of *Virginia* v. *Rives*, *supra*, the writ was asked for to Judge Rives, who was a judicial officer, and whose action as such was complained of; and although the petition came from a State, the Supreme Court treated the case as one appropriate for the exercise of its appellate jurisdiction. It manifestly could not review the proceedings of Judge Rives, when holding the Circuit Court of the Western district of Virginia, in the exercise of its

original jurisdiction. The fact that it did award a *mandamus* to Judge Rives, at the petition of a State, shows that the court will not decline to exercise its appellate jurisdiction in such a case, because a State happens to be the party asking for a writ.

7. Summary Writs or Orders for Contempts of Court.—The said courts [of the United States] shall have power to impose and administer all necessary oaths, and to punish by fine and imprisonment, at the discretion of the court, contempts of their authority; *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of said courts. (Sec. 725.)

The Supreme Court is not here expressly mentioned, yet it is one of the courts included in the words, "the said courts." The words refer to the courts of the United States, and the power granted is bestowed upon them all alike, and is hence common to them all.

The power to punish for contempts is summarily exercised by the court itself without the intervention of a jury, and is inherent in all courts as a necessity for the exercise of their other powers. Mr. Justice Johnson, in delivering the opinion of the court, in *The United States* v. *Hudson & Goodwin*, 7 Cranch, 32, said: "To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others, and so far our courts no doubt possess powers not immediately derived from statute."

The mode of punishment, as provided in this section, is by "fine or imprisonment." This enactment was, in *Ex parte Robinson*, 19 Wall. 505, 512, held to be a limitation upon the manner in which the power shall be exercised, and hence a negation of all other modes of punishment. In this case it was decided that a court of the United States has no power to disbar an attorney for contempt. He is an officer of the court, and can be disbarred only for conduct showing him to be unfit to be a member

of the legal profession, and in such a proceeding is entitled to due notice of the grounds of complaint, and to an ample opportunity for explanation and defense.

The proviso of the section limits the power of punishment for contempt to three classes of cases: 1, Cases in which there has been a misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice; 2, Cases in which there has been a misbehavior of any of the officers of the court, in their official transactions; 3, Cases in which there has been any disobedience or resistance by any officer of the court, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the court. (*Ex parte Robinson*, 19 Wall. 505, 511.) A punishable contempt must come within one or the other of these categories.

As to what is a misbehavior, or a disobedience, or resistance, within the meaning of the statute, so as to constitute the offense of contempt, the court is the sole judge. And the same is true as to the degree of punishment, whether by "fine or imprisonment." This point is left with "the discretion of the court."

Mr. Justice Miller, in commenting on this section, in *In re Chiles*, 22 Wall. 157, 168, said: "The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order; and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform. In the former case the court must judge for itself the nature and extent of the punishment with reference to the gravity of the offense. In the latter case the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it. (*Stimpson* v. *Putnam*, 41 Vermont, 238.)

The proviso of this section is taken from the first section of the Act of March 2d, 1831 (4 U. S. Stat. at Large, 487), in reference to which Mr. Justice Field, in *Ex parte Robinson*, 19 Wall. 505, 510, said: "The act, in terms, applies to all courts, but whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt." Be this as it may, it limits the authority of the other courts of the United States. The plain intention of Congress was to define the cases in which

the Federal courts, including the Supreme Court, may summarily punish contempts of their authority by fine or imprisonment.

SECTION X.

RULES OF THE SUPREME COURT.

The Supreme Court has adopted a series of rules for the regulation of its own proceedings, and of practice therein. These rules are as follows:

RULE No. 1.

CLERK.

1. Place of Office and Residence.—The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice, either as an attorney or counselor, in this court or in any other court, while he shall continue to be clerk of this court.

2. Duties.—The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court, but records on appeal and writs of error, exclusive of original papers sent up therewith, may be taken to a printer to be printed under the requirements of rule 10.

RULE No. 2.

ATTORNEYS.

1. Admission.—It shall be requisite to the admission of attorneys or counselors to practice in this court, that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

2. Oath.—They shall respectively take and subscribe the following oath or affirmation, viz.:

I, ————, do solemnly swear (or affirm, as the case may be) that I will demean myself, as an attorney and counselor of this court, uprightly and according to law, and that I will support the Constitution of the United States.

3. Admission of Women.—Congress, by the Act of February 15th, 1879 (20 U. S. Stat. at Large, 292), added the following provision to these rules: That any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the Supreme Court of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character shall, on motion and the production of such record, be admitted to practice before the Supreme Court of the United States.

Rule No. 3.

PRACTICE.

Regulation.—This court consider the practice of the Courts of King's Bench and of Chancery, in England, as affording outlines for the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary.

Rule No. 4.

BILL OF EXCEPTIONS.

Allowance.—Hereafter the judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge, to which he excepts; and such matters of law, and those only shall be inserted in the bill of exceptions, and allowed by the court.

Rule No. 5.

PROCESS.

1. In name of the President.—All process of this court shall be in the name of the President of the United States.

2. Process against a State.—When process at common law or in equity shall issue against a State, the same shall be served on the governor or chief executive magistrate, and attorney-general of such State.

3. Service of Subpœna.—Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the

return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

Rule No. 6.

MOTIONS.

1. In Writing.—All motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Argument thereon.—One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins.

3. Previous Notice.—No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. Submission of Motions.—All motions to dismiss appeals and writs of error, except motions to docket and dismiss under the ninth rule, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days.

5. Notice by Mail.—Affidavit of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

6. Motion to Affirm.—There may be united, with a motion to dismiss a writ of error or appeal, a motion to affirm on the ground that although the record may show that this court has jurisdiction, it is manifest the appeal or writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

7. Motion Day. — The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week in lieu of Friday; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.

Rule No. 7.

Law Library.

1. Use of Books.—During the session of the court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And it shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, as also one dollar per day for each day's detention beyond the limited time.

2. Conference-Room.—The clerk shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the judges of the court.

3. Deposit of the Printed Record.—The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

Rule No. 8.

Return to Writ of Error and Return-Day.

1. Mode of Return.—The clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause under his hand and the seal of the court.

2. A Copy of the Opinion.—In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. A Complete Record.—No cause will hereafter be heard until a complete record containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Original Papers.—Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court or District Court, exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in this court upon appeal or writ of error, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. Return-Day.—In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day.

6. Record in Admiralty Cases.—The record in causes of admiralty and maritime jurisdiction, when, under the requirements of law, the facts have been found in the court below, and our power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case. (Promulgated May 2d, 1881.)

Rule No. 9.

DOCKETING CASES.

1. Duty of Appellant.—In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term,

it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. Right of Appellee.—But the defendant in error or appellee may, at his option, docket the cause and file a copy of the record with the clerk of the court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant, within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee, at any time thereafter during the term, the case shall stand for argument at the term.

3. Appearance for Appellant. — Upon the filing of the transcript of a record, brought up by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant shall be entered.

4. Extension of Time.—In all cases where the period of thirty days is mentioned in this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, Utah, Nevada, Arizona, Montana, and Idaho.

Rule No. 10.

SECURITY FOR COSTS.

1. The Bond for Costs.—In all cases the plaintiff in error or appellant, on docketing a cause and filing the record, shall enter into an undertaking to the clerk with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf.

PRINTING RECORDS.

2. Costs of Printing. — In all cases the clerk shall have twenty copies of the records printed for the court, and the costs of printing shall be charged to the Government in the expenses of the court.

3. The Clerk's Duty.—The clerk shall take to the printer the original record in the office except in cases prohibited by the rules. When the original copy cannot be taken, he shall furnish the printer with a manuscript copy. He shall supervise the printing, and see that the printed copy is properly indexed. He shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time, as required.

4. Manuscript—Costs.—In cases where a manuscript copy of the record is not furnished the printer, the fee of the clerk for his service under the last preceding paragraph shall be one-half the rates now allowed by law for making a manuscript copy, and that shall be charged to the party bringing the cause into court, unless the court shall otherwise direct. When a manuscript copy is required to be made full fees for a copy may be charged, but nothing in addition for the other services required.

5. Copy to Each Party.—In all cases the clerk shall deliver a copy of the printed record to each party without extra charge. In cases of dismissal, reversal, or affirmance, with costs, the fee allowed in the last paragraph shall be taxed against the party against whom the costs are given. In cases of dismissal for want of jurisdiction, such fees shall be taxed against the party bringing the cause into court, unless the court shall otherwise direct.

ATTACHMENT FOR COSTS.

6. When to Issue.—Upon the clerk of this court producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

Rule No. 11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not

also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

Rule No. 12.

EVIDENCE.

1. Further Proof. — In all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission, to be issued from this court, or from any Circuit Court of the United States.

2. In Admiralty Cases.—In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however*, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible.

Rule No. 13.

DEEDS, &C., NOT OBJECTED TO, &C., ADMITTED, &C.

In all cases of equity and admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Rule No. 14.

CERTIORARI.

No *certiorari* for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not

admitted by the other party, be verified by affidavit. And all motions for such *certiorari* shall be made at the first term of the entry of the cause, otherwise the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

Rule No. 15.

DEATH OF A PARTY.

1. Abatement and Revivor.—Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed if it be erroneous: provided, however, that a copy of every such order shall be printed in some newspaper at the seat of Government, of general circulation, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. Abatement—When.—When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. Appeal when Appellee is Dead.—When either party to a suit in the Circuit Courts of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree rendered in said Circuit Courts, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may supersede or stay proceedings on such judgment or decree in the same manner as is now allowed by law in other cases, and shall thereupon proceed

with such writ of error or appeal as in other cases. And within thirty days after the commencement of the court to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous; provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing; and provided also that in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided also that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the cause shall proceed, and be heard and determined as in other cases.

Rule No. 16.

NO APPEARANCE OF PLAINTIFF.

Where there is no appearance for the plaintiff when the case is called for trial, the defendant may have the plaintiff called and dismiss the writ of error, or may open the record and pray for an affirmance.

Rule No. 17.

NO APPEARANCE OF DEFENDANT.

Where the defendant fails to appear when the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

Rule No. 18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed at the cost of the plaintiff.

Rule No. 19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term, neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

Rule No. 20.

PRINTED ARGUMENTS.

1. Distribution of Copies.—In all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments without regard to number of the case on the docket, if the counsel on both sides shall choose so to submit the same, within the first ninety days of the term; but twenty copies of the arguments, signed by attorneys or counselors of this court, must be first filed; ten of these copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel.

2. Effect of Filing.—When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. Oral Arguments.—When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. Briefs after Arguments.—No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

Rule No. 21.

ARGUMENT—BRIEFS.

1. Two Counsel.—Only two counsel shall be heard for each party on the argument of a cause.

2. Two Hours.—Two hours on each side shall be allowed to the argument, and no more without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided always that a fair opening of the case shall be made by the party having the opening and closing arguments.

3. Brief by Plaintiff.—The counsel for the plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

4. Contents.—This brief shall contain, in the order here stated,—

(1.) *Statement.*—A concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

(2.) *Assignment of Errors.*—An assignment of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged; and in cases brought up by appeal, the assignment shall state, as specifically as may be, in what the decree is alleged to be erroneous. If error is assigned to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3.) *Statement of Points.*—A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

5. Charge of the Court.—When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused.

6. Errors.—When the error alleged is to the admission or to

the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

7. Appellee's Argument and Brief.—Counsel for a defendant in error, or an appellee, shall file with the clerk twenty printed copies of his argument, at least three days before the cause is called for hearing. His brief shall be of a like character with that required of the plaintiff or appellant, except that no assignment of errors is required, and no statement of the case, unless that presented by the plaintiff or appellant is controverted.

8. Errors not Assigned.—Without such assignment of errors, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court, at its option, may notice a plain error not assigned.

9. Default.—When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion, and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and with request of the court.

10. Default on Argument.—When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

Rule No. 22.

ORDER OF ARGUMENT.

The plaintiff or appellant in this court shall be entitled to open and conclude the case. But when there are cross appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

Rule No. 23.

INTEREST.

1. On Affirmance.—In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. Damages for Delay.—In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of ten per cent. in addition to interest, shall be awarded upon the amount of the judgment.

3. Same Rule.—The same rule shall be applied to decrees for the payment of money in cases of chancery, unless otherwise ordered by this court.

Rule No. 24.

COSTS.

1. On Dismissal.—In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise agreed by the parties.

2. On Affirmance.—In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the court.

3. On Reversal.—In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. The United States a Party.—Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. Process of Procedendo.—In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. Insertion of Costs.—When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

Rule No. 25.

OPINIONS OF THE COURT.

1. Record of.—All opinions delivered by the court shall, immediately upon the delivery thereof, be delivered over to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

2. When Recorded.—The opinions of the court, as far as practicable, shall be recorded during the term, so that the publication of the reports shall not be delayed thereby.

3. Filing of Opinions.—The original opinions of the court shall be filed with the clerk of this court for preservation.

4. Printing of Opinions.—Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records, but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Rule No. 26.

CALL OF THE DOCKET.

1. When to Begin.—The court on the second day in each term, will commence calling the cases for argument, in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. The Number a Day.—Ten causes only shall be considered as liable to be called on each day during the term, including the one under argument.

3. Criminal Causes.—Criminal cases may be advanced, by leave of the court, on motion of either party.

4. Civil Cases Advanced.—Revenue cases and cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the Attorney-General. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

5. Order of Hearing.—No other cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Every cause which shall have been called in its order and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

6. Hearing Causes together.—Two or more cases, also involving the same question, may, by the leave of the court, be heard together; but they must be argued as one case.

7. Re-instatement of a Cause.—If, after a cause has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the cause shall then be by him re-instated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the cause, and it shall then be assigned to such a place upon the docket as the court may direct.

No stipulation to pass a cause without placing it at the foot of the docket will be recognized as binding upon the court. A cause can only be so passed upon application made and leave granted in open court.

Rule No. 27.

ADJOURNMENT.

The court will, at every session, announce on what day it will adjourn, at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

Rule No. 28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party which may request it a copy of the agreement filed; but no mandate or other process is to issue without an order by the court.

Rule No. 29.

SUPERSEDEAS.

Supersedeas bonds in the Circuit Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and "just damages for delay," and costs and interest on the appeal.

Rule No. 30.

INJUNCTIONS.

In cases where appeals of the character mentioned in rule 93, regulating equity practice, have already been taken, this court will, after the cause has been docketed, entertain an application for a suspension or modification of the injunction, based upon a statement of the facts affecting the application, by a justice or judge who took part in the decision. All such applications must be printed and submitted on briefs. No oral arguments will be heard unless specially ordered.

Rule No. 31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records and arguments printed for the use of the court must be in such form and size that they can be conveniently cut and bound so as to make an ordinary octavo volume.

Rule No. 32.

WRITS OF ERROR AND APPEALS UNDER SECTION FIVE OF THE ACT OF MARCH 3D, 1875.

1. When returnable.—Writs of error and citations, under section 5 of the Act of March 3d, 1875, "to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State courts, and for other pur-

poses," for the review of orders of Circuit Courts dismissing suits, or remanding suits to a State court, must be made returnable within thirty days after date, and be served before the return day.

2. Time of Docketing the Cause.—In all cases where a writ of error or an appeal is brought to this court under the provisions of such act, it shall be the duty of the plaintiff in error or the appellant to docket the cause and file the record in this court within thirty-six days after the date of the writ, or the taking of the appeal, if there shall be a term of the court pending at that time; and if not, then during the first six days of the next term. If default be made in this particular, proceedings to docket and dismiss may be had as in other cases.

3. Printing of the Record.—As soon as such a case is docketed, the record shall be printed, unless the parties stipulate to the contrary, and file their stipulation with the clerk.

4. Advance of such Cases.—All such cases will be advanced on motion, and heard under the rules applicable to motions to dismiss.

5. Cases Brought before the Rule.—When a writ of error or appeal has already been brought, or may hereafter be brought before this rule takes effect, the defendant in error or the appellee may docket the cause and file the record without waiting for the return day, and move under this rule.

6. Extension of the Time.—In all cases where a period of thirty days is included in the times fixed by this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, and Nevada.

7. Time of taking Effect.—This rule shall take effect from and after the first day of May next.

(Promulgated January 16th, 1882.)

Rule No. 33.

Models, Diagrams, and Exhibits.—All models, diagrams, and exhibits of material placed in the custody of the marshal, for the inspection of the court on the hearing of a cause, must be taken away by the parties within one month after the cause is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the cause, by mail or otherwise, of the requirements of this rule, and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

(Promulgated November 13th, 1882.)

CHAPTER IV.

THE COURT OF CLAIMS.

1. Creation of the Court.—Congress, by the Act of February 24th, 1855 (10 U. S. Stat. at Large, 612), entitled "An Act to establish a Court for the Investigation of Claims against the United States," and by subsequent acts amendatory thereof, provided for the organization of a court, to be called "the Court of Claims," in which parties might, within the limits of the jurisdiction granted to this court, bring suits against the United States. This legislation gives the consent of Congress that the Government of the United States may, in the cases specified, be sued by claimants against it, and establishes a special court to hear and determine such claims.

The Constitution extends the judicial power of the United States to "controversies to which the United States shall be a party." The Judiciary Act of 1789, and other acts of Congress prior to 1855, had made provision for suits in which the United States shall be a party in the sense of being the plaintiff or petitioner. But no provision had been made for bringing suits against the United States. Congress was the only body that had power to consider and determine claims against the Government. Mr. Justice Story, in his Commentaries on the Constitution, alludes to this fact as a defect in the state of the law, and often a serious injustice which it was the duty of Congress to correct.

The Act of February 24th, 1855, and subsequent acts having in view the same purpose, establishing a Court of Claims, and defining its jurisdiction, were designed to furnish a judicial remedy for parties who had claims against the United States. To this extent the Government relinquished its immunity from suits on the ground of its sovereignty, and consented to be sued in a court of its own creation. There has never been any doubt as to the power of Congress to give this consent.

The substance of the legislation on this subject, in force on the 1st of December, 1873, with amendments made by Congress, and

approved on the 2d of March, 1877, as compiled and re-stated in the second edition of the Revised Statutes of the United States, may be found in chapters twenty and twenty-one of Title XIII of these Statutes. The purpose of this chapter is to present an outline of this legislation.

2. Organization and Sessions of the Court.—The court consists of a chief justice and four associate judges, appointed by the President with the advice and consent of the Senate, and holding office during good behavior, each of whom is entitled to receive an annual salary of four thousand five hundred dollars. (Sec. 1049.) It is authorized and directed to devise a seal, and appoint a chief clerk, an assistant clerk if necessary, a bailiff, and a messenger. The clerks are required to take an oath for the faithful performance of their duties under the direction of the court, and may by the court at any time be removed for misconduct or incapacity; and, if removed, the fact of such removal, with the cause, is to be reported to Congress. The bailiff holds office for the term of four years, unless sooner removed by the court for cause. (Secs. 1050, 1053.)

The court is required to hold one annual session at the city of Washington, beginning on the first Monday in December in each year, and continuing as long as may be necessary for the prompt discharge of the business before it. (Sec. 1052.) Congress, by the Act of June 23d, 1874 (18 U. S. Stat. at Large, 252), provided that three judges shall be necessary to constitute a quorum, and that the same number must concur in order to render a decision.

It is not permitted to the members of either house of Congress to practice in this court. (Sec. 1058.)

The clerk of the court, who must give a bond to the United States, and has the custody of the contingent fund which may be appropriated for the use of the court, is required, on the first day of every December session of Congress, to transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts and the parties in whose favor they were rendered, and giving a brief synopsis of the claims upon which they were rendered. The clerk must also, at the end of every term, transmit a copy of the decisions of the court to the heads of Departments, to the Solicitor, the Comptrollers, and Auditors of the Treasury, to the Commissioners of the

General Land Office and of Indian Affairs, to the Chiefs of Bureaus, and to other officers charged with the adjustment of claims against the United States. (Secs. 1055, 1056, and 1057.)

This court is created for the whole United States, and not for any particular part or district thereof, and, hence, it has power to issue and enforce writs throughout the entire country. (*Jones* v. *The United States*, 1 Ct. Cl. 383.) It also takes judicial notice of the laws of the several States, so far as may be necessary in the exercise of its powers. (*Sykes* v. *The United States*, 8 Ct. Cl. 330.) The rules of evidence, as found in the common law, govern the action of the court where Congress has not otherwise provided and no reason demands the application of different rules. (*Moore* v. *The United States*, 1 Otto, 270.)

3. General Jurisdiction of the Court.—Section 1059 of the Revised Statutes gives the court jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either house of Congress.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the Government in said court.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the Act of March 12th, 1863, chapter 120, or by the Act of July 2d, 1864, chapter 225, being an act in addition thereto: *Provided*, That the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said acts from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims: *Provided, also*, That the jurisdiction of the Court of Claims shall not extend to

any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy engaged in the suppression of the Rebellion.

It was not the intention of Congress, in the establishment of a Court of Claims, to confer upon it equitable jurisdiction. On this point Mr. Justice Davis, in stating the opinion of the court in *Bonner* v. *The United States*, 9 Wall. 156, 159, said: "The Court of Claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them."

In *Nichols* v. *The United States*, 7 Wall. 122, it was held that "cases under the revenue laws are not within the jurisdiction of the Court of Claims." The same doctrine was stated in *Dorsheimer* v. *The United States*, 7 Wall. 166.

It was held, in *The United States* v. *Russell*, 13 Wall. 623, 628, that "where the Government, in emergencies, takes private property into its own use, a contract to reimburse the owner is implied." Mr. Justice Clifford said in this case: "The rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the Government is bound to make full compensation to the owner." (*Mitchell* v. *Harmony*, 13 How. 115, 134.) The Court of Claims, in such a case, would have jurisdiction on the basis of an implied contract.

In *The United States* v. *Alire*, 6 Wall. 573, the court held that the only judgment which the Court of Claims has power to render against the United States is a judgment for money found due from the Government to the claimant. (*Gordon* v. *The United States*, 2 Wall. 561.)

The court has no jurisdiction in cases of merely nominal damages. (*Grant* v. *The United States*, 7 Wall. 331.) Nor has the court jurisdiction in cases founded on alleged tort by the United States. (*Gibbons* v. *The United States*, 8 Wall. 269.)

The general principle which the Supreme Court has adopted, in construing the powers of the Court of Claims, is that it is a court of limited jurisdiction, and, consequently, that it has no jurisdiction whatever, except in the classes of cases expressly assigned to it by Congress.

4. Special Regulations.—Congress has provided a series of regulations relating to the powers and functions of the Court of Claims, of which the following is a statement:

(1.) All petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, shall, unless otherwise ordered by the House in which they were introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims. (Sec. 1060.)

(2.) In the trial of any cause in which any set-off, counter-claim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government, the court is to hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it must render judgment to that effect, which judgment is final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any District or Circuit Court, is to be entered upon the records thereof, and becomes a judgment of such court, and is to be enforced as other judgments in such courts are enforced. (Sec. 1061.) This section, in *M'Elrath* v. *The United States*, 12 Ct. Cl. 312, was held to be constitutional, although it does not provide for trial by jury.

(3.) Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quarter-master, commissary of subsistence, or other disbursing officer, in the cases previously specified, to have been without fault or negligence of such officer, it is to make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury are required to allow to such officer the amount so decreed, as a credit in the settlement of his accounts. (Sec. 1062.) The terms "fault or negligence," as here used, are to be taken in their popular acceptation, the one as importing error or mistake, and the other as importing omission. (*Malone* v. *The United States*, 5 Ct. Cl. 486.)

(4.) Whenever any claim is made against any Executive Department, involving disputed facts or controverted questions of

law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department, in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same is there to proceed as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the Court of Claims, for trial and adjudication: *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the court might, under existing laws, take jurisdiction of on such voluntary action of the claimant. (Sec. 1063.)

All cases transmitted by the head of any Department, or upon the certificate of any Auditor or Comptroller, according to the provisions of the preceding section, are to be proceeded in as other cases pending in the Court of Claims, and, in all respects, to be subject to the same rules and regulations. (Sec. 1064.)

The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, is to be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree is to be paid in the same manner as other judgments of the Court of Claims. (Sec. 1065.)

(5.) The jurisdiction of the Court of Claims does not extend to any claim against the Government not pending therein on December 1st, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes. (Sec. 1066.) Congress may, however, make such a claim thus cognizable by a special act; and this is what it did by the Act of March 3d, 1881 (21 U. S. Stat. at Large, 504), in respect

to certain claims of the Choctaw Nation, giving to either party the right of appeal to the Supreme Court.

(6.) No person can file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. (Sec. 1067.) The design of this section is to exclude from the Court of Claims cases pending in other courts.

(7.) Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, are granted the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction. (Sec. 1068; *The United States* v. *O'Keefe*, 11 Wall. 178; *Carlisle* v. *The United States*, 16 Wall. 147; and *Fichera's Case*, 9 Ct. Cl. 254.)

(8.) Every claim against the United States, cognizable in the Court of Claims, is forever barred unless the petition setting forth the claim is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, and insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of these disabilities operate cumulatively. (Sec. 1069.) This fixes the limitation of time within which the claim must be presented, in order that the court may take jurisdiction of the same.

In *The United States* v. *Lippitt*, 10 Otto, 663, it was held that this limitation does not bar claims referred to the Court of Claims for determination by the head of an Executive Department, provided they were presented for settlement at the proper department within six years after they had first accrued. In *Clark* v.

The United States, 9 Otto, 493, it was held that where money is paid into the Treasury of the United States, the claim for the same "first accrues" at the time of such payment, and that the suit must be brought within six years from that time, unless the case falls under one of the exceptions named in the proviso of the statute. In *Fulenweider* v. *The United States*, 9 Ct. Cl. 403, it was held that if the claimant dies before the claim becomes due, the limitation does not begin to run until the appointment of some person qualified to sue upon it.

(9.) The Court of Claims has power to establish rules for its government and for the regulation of practice therein, and may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law. (Sec. 1070.) The judges and clerks of the court are authorized to administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same. (Sec. 1071.)

5. Procedure.—Cases may arise in the Court of Claims for determination in either of two ways. The first is where private claims against the Government have been presented to either house of Congress and transmitted to the court for judicial determination, or where, being presented to any Executive Department, they are transmitted to the court by the head thereof for trial and adjudication. The court is to hear and determine such cases as if they had been directly brought there by the claimants. (Secs. 1060, 1063–1065.)

The other method is by that of petition to the court itself by the claimant. The petitioner must in all cases fully set forth the claim, the action thereon in Congress, or by any of the Departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance

to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government, and that he believes the facts as stated in the petition to be true. The petition must be verified by the affidavit of the claimant, his agent or attorney. (Sec. 1072.)

In *The United States* v. *The Insurance Companies*, 22 Wall. 99, it was held that corporations created by a rebel State while in armed rebellion against the Government of the United States, may, nevertheless, bring suits in the Court of Claims under the "Captured and Abandoned Property Act," if the acts of incorporation had no relation to anything else than the domestic concerns of the State, and were neither in their apparent purpose nor in their operation hostile to the Union, or in conflict with the Constitution, but were mere ordinary legislation, such as might have been, had there been no war or no attempted secession, and such as is of yearly occurrence in all the States.

The petition must, with precision and without ambiguity, set forth all the facts upon which the right of the claimant rests. (*Merchants' Exchange Co.* v. *The United States*, 1 Ct. Cl. 332.) If the petition be defective, it may be amended with the permission of the court. (*Jones* v. *The United States*, 1 Ct. Cl. 383, and *Shaw* v. *The United States*, 9 Ct. Cl. 301.)

All the allegations of the petition as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government, may be traversed by the Government; and if on the trial such issues shall be decided against the claimant, his petition is to be at once dismissed. (Sec. 1073.)

If it be material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion must affirmatively prove that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion. The voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, is to be deemed *prima facie* evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein. (Sec. 1074.)

Any person who corruptly practices or attempts to practice

any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States, forfeits *ipso facto* the same to the Government; and it is made the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant is forever barred from prosecuting the same. (Sec. 1086.)

In regard to testimony the law provides as follows: (1.) Authority is given to the court to appoint commissioners to take testimony to be used in the investigation of claims which come before it, to prescribe the fees for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States. (Sec. 1075.)

(2.) The court has power to call upon any of the Departments for any information or papers it may deem necessary, and has the right to use all recorded and printed reports made by the committees of each house of Congress, when deemed necessary in the prosecution of its business. The head of any Department may, however, refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest. (Sec. 1076.)

(3.) When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it is not the duty of the court to authorize the taking of any testimony therein. (Sec. 1077.)

(4.) No witness can be excluded in any suit in this court on account of color; and no claimant, nor any person from or through whom any such claimant derives his alleged title, claim, or right against the United States, nor any person interested in any such title, claim, or right, is a competent witness in the Court of Claims in supporting the same, and no testimony given by such claimant or person is to be used, except as provided in section 1080. (Secs. 1078, 1079.)

The intention of Congress, in the latter of these sections, was simply to restore the common law rule of excluding parties as witnesses, which had been abolished by the Act of July 2d, 1864. (*The United States* v. *Clark*, 6 Otto, 37.)

(5.) The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any

case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court, and be examined on oath touching any or all matters pertaining to said claim. Such examination is to be reduced to writing by the commissioner, and to be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence in the trial thereof. And if any claimant, after such order is made, and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises. (Sec. 1080). The examination here provided for applies only to the claimant, and can be extended to no other person. (*Macauley* v. *The United States*, 11 Ct. Cl. 575.)

(6.) The testimony in cases pending before the Court of Claims is required to be taken in the county where the witness resides, when the same can be conveniently done. (Sec. 1081.)

(7.) The court is authorized to issue subpœnas requiring the attendance of witnesses in order to be examined before any person commissioned to take testimony therein, and such subpœnas have the same force as if issued from a District Court, and compliance therewith is to be compelled under such rules and orders as the court shall establish. (Sec. 1082.)

(8.) In taking testimony to be used in support of any claim, opportunity is to be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as the court shall prescribe, and like opportunity is to be afforded to the claimant, in cases where testimony is taken in behalf of the United States, under like regulations. (Sec. 1083.)

(9.) The commissioner, taking testimony to be used in the Court of Claims, is required to administer an oath or affirmation to the witnesses brought before him for examination. (Sec. 1084.)

(10.) When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, are to be paid by such claimant; and when it is taken at the instance of the Government, such fees, together with all postage incurred by the Assistant Attorney-General, are

to be paid out of the contingent fund provided for the Court of Claims, or of other appropriation made by Congress for that purpose. (Sec. 1085.)

6. New Trials.—The law specifies two cases in which a new trial may be granted. The first is as follows: When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery, in suits between individuals, would furnish sufficient ground for granting a new trial. (Sec. 1087.) The fact that an appeal has been allowed does not exclude the motion for a new trial, if the record is still in the possession of the court. (*Ex parte Roberts*, 15 Wall. 384.) A new trial will not be granted on the ground of newly-discovered evidence if the evidence could have been discovered by the exercise of proper diligence, nor will it be granted unless it appears that a different result would probably be reached. (*Armstrong* v. *The United States*, 6 Ct. Cl. 226, and *Bramhall* v. *The United States*, 6 Ct. Cl. 238.)

The other case for granting a new trial is the following: The Court of Claims, at any time while any claim is pending before it, or on an appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law. (Sec. 1088.)

The wrong or injustice here referred to is not that of mere judicial error. (*Child* v. *The United States*, 6 Ct. Cl. 44.) In *Ex parte Russell*, 13 Wall. 664, it was held that the words "final disposition," as used in this section, "mean the final determination of the suit on appeal, if an appeal is taken, or, if none is taken, then its final determination in the Court of Claims," and that the court has "power to grant a new trial, if the same is done within two years next after the final disposition, although the case may have been decided on appeal in" the Supreme Court, "and its mandate have been issued."

In *Young* v. *The United States*, 5 Otto, 641, it was held that "the decision of the Court of Claims awarding, on motion of the

United States, a new trial, while a claim is pending before it, or on an appeal from it, or within two years next after the final disposition of such claim, cannot be reviewed" by the Supreme Court.

In *The United States* v. *Ayres*, 9 Wall. 608, it was held that if a new trial is granted while an appeal is pending in the Supreme Court, this vacates the judgment appealed from, and the appeal will be dismissed. (*The United States* v. *Young*, 4 Otto, 258.)

7. Payment of Judgments.—In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby is to be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the Chief Justice, or, in his absence, by the presiding judge of the court. (Sec. 1089.)

In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the Supreme Court, interest thereon at the rate of five *per centum*, is to be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest is to be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid. (Sec. 1090.) And no interest is to be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. (Sec. 1091.)

The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as hereinbefore provided, is a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy. (Sec. 1092.) And any final judgment against the claimant, on any claim prosecuted as provided for by law, forever bars any further claim or demand against the United States, arising out of the matters involved in the controversy. (Sec. 1093.)

Congress, by the act of March 3d, 1875 (18 U. S. Stat. at Large, 481), provided as follows:

"That when any final judgment recovered against the United States, or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment, or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff or claimant denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debts and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary, with six per cent. interest thereon for the time it has been withheld from the plaintiff."

Such are the provisions of law in conformity with which claimants may, in the first instance, prosecute their claims against the United States. The Government of the United States provides a court in which suits may be brought against it, and thus waives the immunity from suits which is incidental to sovereignty. And, as shown in a previous chapter, it provides that either party, subject to the conditions specified, may, by an appeal, bring the judgments of this court before the Supreme Court for review.

CHAPTER V.

COMMISSIONERS OF CIRCUIT COURTS.

1. Creation of the Office.—Congress, at an early period, created the office of "Commissioners of Circuit Courts" for the convenience of the people, and gave to these Commissioners certain powers, as a sort of supplement to the Circuit and District Courts of the United States. The first legislation on the subject is found in the fourth section of the Act of March 2d, 1793 (1 U. S. Stat. at Large, 333), which authorized any Circuit Court, where, from the extent of the district, it might, in the opinion of the court, be necessary, to appoint one or more discreet persons learned in the law in any district for which the court is held, with authority to take bail for appearance in any court of the United States in any criminal cause in which bail is by law allowed. This is the only duty assigned to the office by the statute which originally created it.

The first section of the Act of February 20th, 1812 (2 U. S. Stat. at Large, 679), provided that the Circuit Court of the United States, to be held in any district in which the then provision of law for taking bail and affidavits in civil causes was inadequate, or, on account of the extent of the district, was inconvenient, might appoint such and so many discreet persons in different parts of the district as the court should judge necessary for the taking of acknowledgments of bail and affidavits. Such acknowledgments were to have the same force and effect as if taken before any judge of the court.

Subsequent legislation has not only continued the office, but, as new exigencies have arisen from time to time, largely added to its powers and duties, until the law on this subject has reached its present shape. These Commissioners, as the law now stands, render a very important aid to the Circuit and District Courts, especially in criminal cases, while they perform other duties, not judicial, which have been assigned to them by Congress. The law relating to them, in force on the 1st of December, 1873, is scat-

tered through different parts of the Revised Statutes of the United States, and the purpose of this chapter is to present an outline of this law.

2. Appointment.—Each Circuit Court is authorized to appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who are to be called "Commissioners of the Circuit Courts," and to exercise the powers which are or may be expressly conferred on them by law, with the provision that no marshal or deputy marshal of any of the courts of the United States shall hold or exercise the duties of any such Commissioner of these courts. (Secs. 627, 628.)

The mere fact that Commissioners are appointed by Circuit Courts does not make them officers of these courts, or subject them to their supervisory control. The courts simply exercise, in their discretion, the power conferred by Congress to make the appointment. The powers of a Commissioner, when appointed, are expressly conferred by law. On this point, Judge Betts, in *Ex parte Van Orden*, 3 Blatch. 166, said: "The court, in making the appointment of Commissioners, fulfils an agency imposed on it by Congress, and no more acquires thereby a supervisory authority over him, or his proceedings in the office, than the President or the Senate has over judges appointed by them. He is not an officer of the court."

The law prescribes a schedule of fees for the different services and duties which these Commissioners are authorized to perform, and also directs that their accounts, before presentation to the accounting officers of the Treasury Department, shall be examined and certified by the district judge of the district for which they are appointed, and shall be subject to revision by these officers, as other public accounts. (Secs. 846, 847.)

3. General Judicial Powers.—The general judicial powers of these Commissioners are the following:

(1.) For any crime or offense against the United States, the offender may, by any Commissioner of a Circuit Court to take bail, in any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the

United States as by law has cognizance of the offense. The rule in regard to bail is that bail must be admitted upon all arrests in criminal cases, where the offense is not punishable by death. (Secs. 1014, 1015.)

In *Ex parte Thomas Kaine*, 10 N. Y. Leg. Obs. 257, it was held that a Commissioner has all the powers of a justice of the peace or State magistrate in the arrest and commitment of offenders under the laws of the United States, and by such functions becomes a magistrate. Mr. Justice Nelson, in *The United States* v. *Worms*, 4 Blatch. 332, held that any commitment, while a preliminary hearing of the case before the Commissioner is pending, should be for only a short and definite period, not exceeding twenty-four hours, except for special causes shown, unless at the request of the prisoner. The order for imprisonment or bail should never be made without a preliminary examination into the probable guilt of the prisoner, unless he himself voluntarily waives such examination, and should not be made at all except upon probable proof of guilt. (*Anon.* 1 Wool. 422, and *In re Robert M. Martin*, 5 Blatch. 303.)

In *The United States* v. *Case*, 8 Blatch. 250, it was held that the Commissioner acts simply "as an arresting, examining and committing magistrate," and that he has "no power to take recognizance for the appearance before himself, at a future day, of a person charged with a criminal offense against the laws of the United States," if State magistrates in the State of the arrest have no such power.

(2.) These Commissioners have the same authority to hold to security of the peace, and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States in cases cognizable before them. (Sec. 727.)

(3.) Bail and affidavits, when required or allowed in any civil cause in any Circuit or District Court, may be taken by a Commissioner of the Circuit Court for the district; and such acknowledgments of bail and affidavits have the same effect as if taken before any judge of such courts. (Sec. 945.)

(4.) In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may be also taken or made by or before any of the

Commissioners of Circuit Courts, and when certified under the hand and official seal of such Commissioner, they have the same force and effect as if taken or made by or before such justice of the peace. (Sec. 1778.)

(5.) Power is given to these Commissioners to discharge poor convicts, after a confinement in prison for thirty days under a sentence of any court of the United States solely for the non-payment of fines or fines and cost, and after proper notice to the district attorney of the United States, if upon examination into the facts the Commissioner to whom an application has been made in a given case is satisfied that the convict is not able to pay the fine or the fine and cost, and if he shall take the oath prescribed in relation to the question of his ability. (Secs. 1042, 5296.)

(6.) These Commissioners may, within their respective jurisdictions, issue search-warrants, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of such premises. (Sec. 3462.) Such warrants must of course conform to the conditions prescribed in the Fourth Amendment to the Constitution.

These are the general judicial powers which Congress has assigned to the Commissioners of Circuit Courts, not by any means exclusively, but concurrently, with other judicial officers, some of whom in some cases are State magistrates.

4. Civil Rights Cases.—Title XXIV of the Revised Statutes, "CIVIL RIGHTS," imposes the following duties and confers the following powers upon Commissioners of Circuit Courts:

(1.) They are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of chapter seven of Title "CRIMES," relating to "crimes against the elective franchise and the civil rights of citizens," and to cause such persons to be arrested and imprisoned or bailed for trial before the court of the United States having cognizance of the offense. (Sec. 1982.)

(2.) The Circuit Courts are required to increase the number of these Commissioners from time to time, so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes referred to in the preceding section; and

such Commissioners are authorized and required to exercise all the powers and duties conferred on them with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the laws of the United States. (Sec. 1983.)

(3.) The Commissioners authorized to be appointed by the preceding section are empowered, within their respective counties, to appoint one or more suitable persons, from time to time, who are to execute all such warrants or other process as the Commissioners may issue in the lawful performance of their duties, with authority to summon to their aid the bystanders or *posse comitatus* of the proper county, or such portion of the land and naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged; and all such warrants run and may be executed anywhere in the State within which they are issued. (Sec. 1984.)

These provisions were originally made by laws enacted in 1866 and 1870; and their special object was to give protection to the civil and political rights of the freedman as guaranteed by the recent amendments to the Constitution, and by law in pursuance thereof.

Congress, by the Act of March 1st, 1875 (18 U. S. Stat. at Large, 335), entitled "An Act to protect all citizens in their civil and legal rights," provided that Commissioners of Circuit Courts, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, shall be specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved. This act was passed subsequently to the enactment of the Revised Statutes.

5. Extradition Cases. — Commissioners of Circuit Courts, when empowered so to do by any of the courts of the United States, have authority, upon complaint made under oath and charging any person found within the limits of any State, district, or Territory of the United States, with having committed within the jurisdiction of a foreign government any of the crimes for

which extradition may be had according to the terms of a treaty between the United States and such government, to issue a warrant for the apprehension of the person so charged, that he may be brought before the Commissioner issuing the warrant, in order that the evidence of his criminality may be heard and considered. If the Commissioner, upon such hearing, deems the evidence sufficient to sustain the charge under the provisions of the treaty applicable to the case, he is then to certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, and to issue his warrant for the commitment of the person so charged to the proper jail, there to await the action of the Executive authority at Washington. (Sec. 5270.)

These Commissioners in such cases, when properly authorized by any of the courts of the United States, have the same judicial power to order the arrest of alleged fugitives from justice, to conduct their examination, and, if deeming the evidence sufficient under the proper treaty, to commit them to prison, that is possessed by any justice of the Supreme Court, or any judge of a District or Circuit Court. Judge Blatchford, *In re Francois Farez*, 7 Blatch. 345, held that it is not necessary that the warrant of the Commissioner should show that he was authorized to issue a warrant of arrest in that particular case, and that it is sufficient if it shows that he was authorized to issue warrants in extradition cases, embracing the one covered by the warrant.

Judge Shipman held, in *Henrich's Case*, 5 Blatch. 414, that the warrant of arrest runs throughout the United States, and that it may, by any justice of the Supreme Court, or judge of a Circuit or District Court, or any authorized Commissioner, be issued to arrest the fugitive anywhere within the territory of the United States, and may be executed by any marshal or deputy marshal to whom the duty is assigned. Henrich was arrested in Wisconsin by a deputy marshal of the Southern district of New York; and Judge Shipman held the arrest to be legal.

The commitment of the fugitive to prison for extradition, after his examination by the Commissioner, is the end of the case, so far as judicial action is concerned, unless he sues out a writ of *habeas corpus* to test the legality of the imprisonment; and, in this event, the court granting the writ will not review the Commissioner's decision as to the weight and sufficiency of the evidence on which it was based, if, having jurisdiction of the case, he had before

him legal and competent evidence of criminality. (*In re Joseph Stupp*, 12 Blatch. 501; *In re Vandervelpen*, 14 Blatch. 137; and *In re Wahl*, 15 Blatch. 334.)

So, also, on application of a consul or vice-consul of any foreign government, having a treaty with the United States for the restoration of deserting seamen, made in writing and stating that the person named therein has deserted from a vessel of any such government, while in a port of the United States, accompanied with the proof specified that the person belonged at the time of the desertion to the crew of such vessel, the Commissioner of any Circuit Court to whom such application is made, is required to issue his warrant for the apprehension and examination of such person. If, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, is to be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, to be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. The detention after the arrest cannot, however, be continued for more than two months; and the party being set at liberty at the end of this period, cannot be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case may be depending, or be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect. (Sec. 5280.)

6. Consular Awards and Decrees.—Authority is given to these Commissioners to carry into effect, according to the true intent and meaning thereof, the award, or arbitration, or decree of any consul, vice-consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice-consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of vessels belonging to the nation whose interests are committed to his charge. Application for the exercise of this power must first be made to the Commissioner by petition of such consul, vice-consul, or commercial agent.

And, for the purpose in question, the Commissioner is authorized to issue all proper remedial process, mesne and final, to carry

into full effect such award, arbitration, or decree, and to enforce obedience thereto, by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom by the consent in writing of such consul, vice-consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice-consul, or commercial agent.

The expenses of the imprisonment and maintenance of the prisoners and the cost of the proceedings are to be borne by the foreign government or by its consul, vice-consul, or commercial agent requiring the imprisonment. The marshals of the United States are commanded to serve all processes and do all other acts necessary and proper to carry into effect the premises, under the authority of the Commissioners. (Sec. 728.) The powers granted to these Commissioners in this section are possessed by them concurrently with the District and Circuit Courts of the United States.

7. Foreign Seamen.—Whenever it is stipulated by treaty or convention between the United States and any foreign nation that the consul-general, consuls, vice-consuls, or consular or commercial agents of each nation shall have exclusive jurisdiction of controversies, difficulties, or disorders arising at sea or in the waters or ports of the other nation, between the master or officers and any of the crew, or between any of the crew themselves, of any vessel belonging to the nation represented by such consular officer, such stipulations shall be executed and enforced within the jurisdiction of the United States as hereinafter declared. But before this section shall take effect as to the vessels of any particular nation having such treaty with the United States, the President shall be satisfied that similar provisions have been made for the execution of such treaty by the other contracting party, and shall issue his proclamation to that effect, declaring this section to be in force as to such nation. (Sec. 4079.)

In all cases within the purview of the preceding section the consul-general, consul, or other consular or commercial authority of such foreign nation, charged with the appropriate duty in the

particular case, may make application to * * * any Commissioner of a Circuit Court, setting forth that such controversy, difficulty, or disorder has arisen, briefly stating the nature thereof, and when and where the same occurred, and exhibiting a certified copy or extract of the shipping articles, roll, or other proper paper of the vessel, to the effect that the person is of the crew or ship's company of such vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of such consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States. This application must be in writing and duly authenticated by the consular or other sufficient official seal. Thereupon the Commissioner to whom the application has been made, is required to issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person, being a citizen of the United States, whom he may specially depute for the purpose, requiring such person to be brought before him for examination at a certain time and place. (Sec. 4080.)

If on such examination, it appears that the person so arrested is a citizen of the United States, he is to be forthwith discharged, and to be left to the ordinary course of law. But if this does not appear, and the Commissioner finds upon the papers, before referred to, a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he is required forthwith, by his warrant, to commit such person to prison, where persons under sentence of a court of the United States may be lawfully committed, or, in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control, and discipline of such master or chief officer, and to the jurisdiction of the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or jurisdiction in the premises of the United States or any State thereof.

No person can be detained more than two months after his arrest, but at the end of this time must be set at liberty, and not be again arrested for the same cause. The expenses of the arrest and the detention of the person so arrested are to be paid by the consular officer making the application. (Sec. 4081.)

The powers, in these sections granted to Commissioners, are also given to any court of record of the United States, or to any judge thereof.

8. The Wages of Seamen.—Whenever the wages of any seaman are not paid within ten days after the time when the same ought to be paid according to the provisions of law regulating this subject, or any dispute arises between the master and seamen touching wages, any Commissioner of a Circuit Court, if the district judge of the district where the vessel is, resides more than three miles from the place, or is absent from the place of his residence, may summon the master of such vessel to appear before him, to show cause why process should not issue against such vessel, her tackel, apparel, and furniture, according to the course of admiralty courts, to answer for the wages. (Sec. 4546.)

If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the Commissioner is directed to certify to the clerk of the District Court that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk is required to issue process against the vessel, and the suit is to proceed in the court, and judgment is to be given according to the usual course of admiralty courts in such cases. (Sec. 4547.)

The powers here granted to Commissioners are also granted to the judge of the judicial district where the vessel is, and to any judge or justice of the peace. Their exercise is preliminary to the issue of a libel against the vessel in the case specified.

9. Federal Elections.—Title XXVI of the Revised Statutes, "The Elective Franchise," contains the following provisions relating to elections at which Representatives in Congress are to be chosen, and giving certain powers to and imposing certain duties upon Commissioners of Circuit Courts:

(1.) The Circuit Courts of the United States for each judicial

district are directed to appoint, from among the Circuit Court Commissioners for each judicial district in each judicial circuit, one of such officers, who in respect to the duties required of him in this Title is to be known as the Chief Supervisor of elections of the judicial district for which he is a Commissioner, and, so long as faithful and capable, to discharge the duties imposed on him in the Title. When any vacancies occur from any cause they are to be filled by new appointments. (Sec. 2025.)

(2.) The Chief Supervisor of elections in each judicial district is charged with a series of duties in relation to the supervisors of election in the same district, and in relation to elections therein, for the purpose of securing a correct registration of voters and preventing and detecting election frauds. (Sec. 2026.)

(3.) Upon the reception of certain specified reports from any supervisor of elections, the Chief Supervisor, acting both in such capacity and officially as a Commissioner of the Circuit Court, is required forthwith to examine into all the facts; and for this purpose he has power to subpœna and compel the attendance before him of any witness, and administer oaths and take testimony in respect to the charges made; and, before the assembling of the Congress for which any Representative was voted for, he is required to file with the clerk of the House of Representatives all the evidence by him taken, all information by him obtained, and all reports to him made. (Sec. 2020.)

(4.) United States marshals and commissioners, who perform any of the duties provided for in the Title, are directed to forward to the Chief Supervisor of elections, in and for their judicial district, all complaints, examinations, and records pertaining thereto, and all oaths of office by them administered to any supervisor of election or special deputy marshal, in order that the same may be properly preserved and filed. (Sec. 2027.)

(5.) Whenever any arrest is made under any provision of this Title, the person so arrested is to be forthwith brought before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court is to proceed in respect thereto as authorized by law in case of crimes against the United States. (Sec. 2023.)

These provisions, with others contained in the same Title, were designed by Congress to interpose the power of the General Government for the protection and regulation of the elective

franchise at elections in which Representatives in Congress are chosen. Their authority rests upon article 1, section 4, of the Constitution, which provides as follows: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." Circumstances, growing out of the war of the rebellion, led Congress to this exercise of the power conferred in the latter clause of the section.

The Supreme Court of the United States had occasion, in *Ex parte Siebold*, 10 Otto, 371, to consider this clause of the Constitution, and so much of the legislation under it as was involved in the case before the court, and held the legislation to be constitutional.

10. Bankruptcy Cases.—The Revised Statutes give to the Commissioners of Circuit Courts authority to take evidence in bankruptcy proceedings; and in such proceedings creditors are privileged to prove their debts before them. (Secs. 5003, 5076.) The repeal of the National Bankrupt Law by the Act of June 7th, 1878 (20 U. S. Stat. at Large, 99), renders these provisions inoperative.

Such, then, is the outline of existing law in relation to the powers and duties of Commissioners of Circuit Courts. Congress, beginning originally with a single duty, has from time to time utilized the office for a great variety of legal purposes, some of them being strictly judicial in their nature, and others being ministerial and executive. The office itself, considered in its purely judicial character as an appendage to the Federal courts, is one of very considerable importance in the judicial system of the United States.

CHAPTER VI.

OFFICERS OF FEDERAL COURTS.

It is a universal principle of judicial practice that courts themselves do not originate the suits and prosecutions which they consider and decide, and that they do not directly execute their own orders, judgments, and decrees. They are not parties or the representatives of parties in the suits of which they take cognizance, and do not perform the ministerial function of giving effect to their own decisions. They judge and determine as between parties, hearing them in the first place, and then, in the light of law and evidence, disposing of the cases presented to them. Their judgments or decrees, when made, are carried into effect by officers who in this respect are subject to their order.

It necessarily follows that causes, in order to be considered and determined by courts, must, in the way prescribed by law, be presented to them. This may be done, either by the parties themselves, if the law so permits, or by those who are authorized to appear in courts, to bring suits therein, and try causes in behalf of their clients. So, also, ministerial officers are needed, having the power and charged with the duty of giving effect to the orders and decisions made by courts.

1. Attorneys and Counselors.—Attorneys and counselors at law form a class of persons who are specially educated for the practice of law, and who make it a business to pursue this practice in the courts of the country. Being thus educated in the principles and practice of law, and having, by a proper examination, been tested as to their legal knowledge and proficiency, they have been formally admitted to the bar of courts, for the express purpose of bringing suits therein as the representatives of others, examining witnesses, making arguments, and, in general, conducting legal trials. Parties having cases which they wish to bring before courts, or parties sued or prosecuted by others, may

avail themselves of the services of these legal experts, and be heard through them.

Section 747 of the Revised Statutes of the United States, reproducing the first clause of the thirty-fifth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provides, that "in all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."

Section 748 of the same statutes declares that "no clerk, assistant or deputy clerk, of any Territorial, District, or Circuit Court, or of the Court of Claims, or the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in either of said courts, or in any district for which he is acting as such officer." The immediately following section also declares that "whoever violates the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice, and be heard in his defense, and, in the case of a marshal or deputy marshal, so acting, he shall be recommended by the court for dismissal from office."

This legislation gives the right of pleading and the management of causes in the Federal courts to the parties themselves; yet as they are not generally learned in the law, their nearly universal practice, whether as plaintiffs or defendants, is to employ some person who, in the character of an attorney and counselor, is permitted to practice his profession in the courts of the United States.

Rule No. 2 of the Supreme Court provides that "it shall be requisite to the admission of attorneys and counselors to practice in this court, that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair," and that they shall take and subscribe the oath prescribed by the court.

The court having construed this rule as having no application to women, Congress, by the Act of February 15th, 1879 (20 U. S. Stat. at Large, 292), provided that "any woman who shall have been a member of the bar of the highest court of any State or

Territory, or of the Supreme Court of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion and the production of such record, be admitted to practice before the Supreme Court of the United States." The method of such admission is by an application with the proper evidence as to the necessary facts, and an order of the court admitting the applicant, upon his or her taking the oath prescribed.

The Supreme Court, in *Ex parte Tillinghast*, 4 Pet. 108, decided that it would not exclude an applicant, if coming within its rule on this subject, because his name had for contempt of court been stricken from the roll of attorneys and counselors of a District Court of the United States. Chief Justice Marshall said in this case: "This court does not consider itself authorized to punish here for contempts which may have been committed in that court."

The Circuit and District Courts of the United States have the same authority as that possessed by the Supreme Court, to establish the rule for the admission of attorneys and counselors, solicitors and counselors, and proctors and advocates to practice therein; and, as a general principle, they regulate the admission by the requisites adopted by the Supreme Court.

Attorneys and counselors, thus admitted to practice their profession in Federal courts, are members of the bar of these courts, and in this sense officers of the courts. Their admission is by the authority of the courts, and remains a permanent fact unless the same authority shall disbar or exclude them, as it may do for conduct showing them unfit to be members of the bar. They hold the office during good behavior, and are always subject to the direct and summary jurisdiction of the court for what are deemed offenses against its dignity and authority, or against the ethics of the legal profession. For this purpose, when the offense is not committed in open court, they may be charged by complaint and affidavit; and, in such cases, the court, after giving them notice to appear and answer to the charge, may proceed to examine into the facts, and, if justice so requires, disbar them. (*Bradley* v. *Fisher*, 13 Wall. 335.)

The power of a court of the United States to disbar an attorney, by a summary process, for the commission of an indictable

offense, was recently considered by the Supreme Court in the case of *Ex parte Wall*, 2 Supreme Ct. Rep. 569. In this case the court held:

1. That although not strictly regular to grant a rule to show cause why an attorney should not be struck off the roll, without an affidavit making charges against him, yet that, under the special circumstances of this case, the want of such affidavit did not render the proceeding void as *coram non judice*.

2. That the acts charged against the attorney constituted a sufficient ground for striking his name from the roll.

3. That although in ordinary cases, where an attorney commits an indictable offense, not in his character of attorney, and does not admit the charge, the courts will not strike his name from the roll until he has been regularly indicted and convicted, yet this rule is not inflexible; that there may be cases in which it is proper for the court to proceed without such previous conviction; and that the present case, in view of its special circumstances, the evasive denial of the charge, the clearness of the proof, and the failure to offer any counter-proof, was one in which the court might lawfully exercise its summary powers.

Judge Locke, ascertaining, upon what he regarded as reliable information, that Mr. Wall had joined with others in an act of murderous lynching, ordered him to show cause why he should not be disbarred, and, upon proof of the offense, proceeded to disbar him. Wall applied to the Supreme Court for a *mandamus* to compel the judge to vacate the order, and the court declined to issue the writ.

The mere admission of certain persons to practice, as attorneys and counselors in the Federal courts, does not make them officers of the United States. It simply secures to them the right or privilege of appearing in these courts in behalf of their clients, either to bring suits or to make a defense against suits. They do not represent the Government, and, unless specially appointed for the purpose, have no authority to act for it.

The General Government has frequent occasion to resort to its own courts, in the character of plaintiff or petitioner; and since the establishment of the Court of Claims, it may, in the cases specified, be sued in that court. It needs the services of attorneys and counselors to conduct suits and prosecutions in its name and by its authority, and also defend it against suits in the Court of

Claims; and, to perform these services, Congress has provided by law for the appointment of a designated class of officers.

2. The Attorney-General.—At the head of this list of officers, and highest in rank, stands the Attorney-General of the United States. The Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provided for the appointment of "a meet person, learned in the law, to act as Attorney-General of the United States," and made it his duty "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned." Congress, by the Act of June 22d, 1870 (16 U. S. Stat. at Large, 162), created a Department of Justice, and made the Attorney-General the head of the same. Provision is made, in the organization of this department, for the appointment of a Solicitor-General, who performs the duties of Attorney-General in case of vacancy in the office, or his absence or inability, and also of three Assistant Attorney-Generals, who are to assist the Attorney-General or Solicitor-General in the performance of their duties. (Rev. Stat. 347, 348.)

The duties and powers assigned to the Attorney-General and his official subordinates, that relate specially to courts and the trial of causes therein, as stated in the Revised Statutes, are the following:

(1.) Except when the Attorney-General in particular cases shall otherwise direct, it is his duty and that of the Solicitor-General to conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States are interested; and, whenever the Attorney-General deems it for the interest of the United States, he may either in person conduct and argue any case in any court of the United States in which the United States are interested, or may direct the Solicitor-General or any officer of the Department of Justice to do so. (Sec. 359.)

(2.) The officers of the Department of Justice are required, under the direction of the Attorney-General, and on behalf of the United States, to procure the proper evidence for, and conduct, prosecute or defend, all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any officer thereof, as such, is a party or may be interested. (Sec. 361.)

(3.) The Attorney-General is authorized and required to exercise a general superintendence and direction over the attorneys and marshals of all the districts in the United States and Territories, as to the manner of discharging their respective duties; and these attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as he may direct. (Sec. 362.)

(4.) The Attorney-General is authorized, whenever in his judgment the public interest requires it, to employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, to stipulate with such assistants as to the amount of their compensation, and take supervision of their conduct and proceedings. (Sec. 363.)

(5.) The Solicitor-General or any officer of the Department of Justice may be sent by the Attorney-General, to any State or district in the United States, to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State. (Sec. 367.)

(6.) The Attorney-General is required to exercise general supervisory powers over the accounts of district attorneys, marshals, clerks, and other officers of the courts of the United States. (Sec. 368.)

Many other duties are assigned to the Attorney-General, or his subordinates acting under his direction; yet, the above statement gives the duties which specially relate to judicial proceedings in the courts of the United States, and also in State courts, in cases which involve the interests of the United States. The Attorney-General is, in this respect, the head of the law officers of the Government, and exercises a supervisory control over them all.

3. District Attorneys.—The Revised Statutes provide that, with certain exceptions in which district attorneys are required to perform their duties in more than one district, there shall be appointed in each district a person learned in the law to act as an attorney for the United States in such district. (Sec. 767.) The appointment of district attorneys is for the term of four years, and their commissions cease at the expiration of four years from their respective dates. (Sec. 769.)

The general duties of these officers are thus described in the Revised Statutes: "It shall be the duty of any district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any acts done by them, or for the recovery of any money exacted by or paid to such officers and by them paid into the Treasury." (Sec. 771.)

This statute makes each district attorney the regular prosecuting officer of the United States in the district for which he was appointed, alike in respect to civil and criminal proceedings, subject only to the general direction and supervision of the Attorney-General, as elsewhere provided for. It is his business to prosecute the crimes and offenses and the civil actions referred to in the statute. The Federal court, sitting in his district, whether it be the District Court or the Circuit Court, can take no cognizance of a suit, civil or criminal, as legally before it for adjudication in the name of the United States, unless it is instituted and prosecuted by the district attorney. He is the law officer of the Government for the purpose of bringing and prosecuting suits, and must be so recognized by the court. The matter is under his exclusive charge until by his action it comes within the cognizance and under the control of the court. (*The Pueblo Case*, 4 Saw. 553; *The United States* v. *McAvoy*, 4 Blatch. 418; *The United States* v. *Doughty*, 7 Blatch. 424; *The United States* v. *Corrie*, 23 Law Rep. 145; *The Anna*, Blatch. Prize Cas. 337; and *The Peterhoff*, Blatch. Prize Cas. 463.)

The locality of the district attorney's action and power is the district for which he was appointed. He is there, and not elsewhere, the law officer of the Government before the courts of the United States held in that district. If he there appears in behalf of collectors or other revenue officers in suits brought against them, these suits or proceedings must arise in his district.

The crimes and offenses which are to be prosecuted by the district attorney are such as are cognizable in his district under the authority of the United States. If committed in that district, then they are there cognizable. But if committed upon the high seas

or elsewhere, out of the jurisdiction of any particular State or district, then the trial and of course the prosecution must be in the district where the offenders are found, or into which they are first brought. (Rev. Stat. sec. 730.) If committed partly in one district and partly in another district, the trial and prosecution may be in either. (Sec. 731). If the offense be punishable with death, the trial must be in the county where it was committed, if this can be done without great inconvenience. (Sec. 729.)

The term "prosecute," as used in the statute, means that the district attorney shall perform all the duties belonging to his office, and necessary to be performed, in order to bring offenses and civil actions properly before the court, and give effect to its orders, judgments or decrees. He is to aid the grand jury in framing indictments in criminal cases; to procure and examine witnesses; to submit arguments to the court; to provide the marshal with all necessary process to carry into execution the judgment of the court; in short, to manage and conduct civil and criminal trials and proceedings in the name, and as the representative, of the United States. His appointment and acceptance of the office make him an attorney *for* as well as *of* the United States. (*The United States* v. *Shumann*, 2 Abb. C. C. 523; and *Levy Court* v. *Ringgold*, 5 Pet. 451.)

If the district attorney moves for the trial of a party, the fact that he has received different instructions from the Attorney-General will be no reason for denying the motion, since these instructions are for him alone and cannot be considered by the court. (*The United States* v. *Davis*, 6 Blatch. 464.) The district attorney is in his district the recognized officer of the Government, and it is through him, and him alone, that the court can have communication with the executive thereof. (*The United States* v. *Blaisdell*, 3 Ben. 132.) He has the general power, with the consent of the court, to enter a *nolle prosequi* at any time before a jury is impanelled. (*The United States* v. *Stowell*, 2 Curt. 153.) His signature, while no part of an indictment, is, nevertheless, necessary as evidence to the court that he is prosecuting the party charged with an offense in conformity with his duty. (*The United States* v. *McAvoy*, 4 Blatch. 418.)

The district attorney in performing the duties and exercising the powers of his office, is not regarded as having a general authority, except in extraordinary cases that do not admit of delay,

to commence suits in the name of the United States, upon his own motion. He is ordinarily to await the orders of the President, or of some proper authority at the seat of Government. (Abb. U. S. Pr. vol. I, p. 121.) Being the attorney for and of the Government, he is of course subject to its control.

The Revised Statutes impose upon each district attorney the duty of making detailed statements and returns, in respect to suits in his district, to the designated officers of the Government. (Secs. 772–775.) The Act of June 20th, 1874 (18 U. S. Stat. at Large, 109), makes it his duty to reside permanently in the district where his official duties are to be performed, and in case of his removal therefrom his office is declared to be vacant: *Provided*, That in the Southern District of New York he may reside within twenty miles of the district.

4. Marshals.—The Revised Statutes (secs. 776–792) contain the general provisions of law in respect to the appointment, powers, and duties of marshals of the United States.

A marshal is to be appointed in each judicial district, except in the middle district of Alabama, the Northern district of Georgia, and the Western district of South Carolina. (Sec. 776.) His appointment is for the term of four years. (Sec. 779.) He has the power to appoint one or more deputies, who are removable from office by the judge of the District Court, or by the Circuit Court for the district, at the pleasure of either. (Sec. 780.) Every marshal is required to take the oath prescribed and give a sufficient bond for the faithful performance of the duties of his office by himself and his deputies. (Secs. 782, 783.) Any person, who may have been injured by the breach of the condition of a marshal's bond, may institute a suit in his own name and for his sole use on the bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form. If such party fails to recover in the suit, then the judgment is to be rendered, and the execution to issue, against him for costs in favor of the defendant; and in no case are the United States liable for the same. (Sec. 784.) The bond is to remain, after any judgment rendered thereon, as a security for the benefit of any person injured by the breach of the same, until the whole penalty is recovered. (Sec. 785.) No suit on such a bond can be maintained unless commenced within six years after the

right of action accrues, saving the rights of infants, married women and insane persons, if they sue within three years after their disabilities are removed. (Sec. 786.)

The general duties of a marshal are thus specified: "It shall be the duty of the marshal of each district to attend the District and Circuit Courts when sitting therein, and to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty." (Sec. 787.) Marshals, in their relation to courts, are ministerial officers, and are bound to execute the process issued to them and make due returns thereon. If resisted by unlawful combinations in the performance of their duty, they have authority to summon the entire able-bodied force of their respective precincts as a *posse comitatus*, including the militia and the officers, soldiers and marines of the United States. (3 Op. Att.-Gen. 496, and 6 Id. 466.)

Marshals and their deputies possess, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State have by law in executing the laws thereof. (Sec. 788.) This is not necessarily the limit of their powers, but simply a reference to the powers of a sheriff or his deputies, as one means of determining what powers they may lawfully exercise. They have all the powers which Congress has conferred upon them, and every duty imposed upon them by law implies the rightful power to perform it. In case of the death of a marshal, his deputy or deputies continue in office, unless otherwise specially removed, and execute the same until another marshal is appointed and duly qualified. (Sec. 789.) The circuit justice of any circuit may temporarily appoint a marshal in case of a vacancy in the office within such circuit, who is authorized to serve until an appointment is made by the President and the appointee is duly qualified. (Sec. 793.) Marshals and deputy marshals, when removed from office, or when the term of office expires, have the authority to execute whatever process may at the time be in their hands. (Sec. 790.)

Each marshal is required, within thirty days before the commencement of each term of the Circuit and District Court in his district, to make returns, to the Solicitor of the Treasury, of the proceedings had upon all writs of execution or other process, which have been placed in his hands, for the collec-

tion of moneys adjudged and decreed to the United States in either of these courts respectively. (Sec. 791.) So also every marshal, to whom any execution upon a judgment in a suit for moneys due on account of the Post Office Department has been directed, is required to make returns to the Sixth Auditor, at such times as he may direct, of the proceedings which have taken place upon the process of execution. (Sec. 792.)

Congress, by the Act of June 20th, 1874 (18 U. S. Stat. at Large, 109), provided that every United States marshal shall reside permanently in the district where his official duties are to be performed, and that, in case of removal therefrom, his office shall be deemed vacant, with the qualification that in the Southern district of New York he may reside within twenty miles of the district.

The Supreme Court of the United States is authorized to appoint a special marshal for that court, to attend the court at its sessions; to serve and execute all process and orders issuing from it, or made by the Chief Justice or an assistant justice in pursuance of law; and to take charge of all property of the United States used by the court or its members. With the consent of the Chief Justice he may appoint assistants and messengers to attend the court. (Secs. 677, 680.)

Such is the general outline of the provisions of law relating to marshals, as found in the Revised Statutes of the United States. The office is attached to courts as a ministerial office for the execution of the process, orders, judgments and decrees thereof.

5. Clerks.—The Supreme Court, the District and Circuit Courts, and the Court of Claims, are courts of record, and, consequently, need the services of clerks. The provisions of the Revised Statutes of the United States in relation to these officers are as follows:

The Supreme Court is authorized to appoint a clerk, and, on application of the clerk, one or more deputies who may be removed at the pleasure of the court, and who, in case of the death of the clerk, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified. (Secs. 677, 678.) It is made the duty of the judge of each District Court to appoint a clerk, except in cases otherwise provided for by law; and power is given to the court, on applica-

tion of the clerk, to appoint one or more deputies, who are subject to provisions similar to those that apply to deputy clerks of the Supreme Court. (Secs. 555, 558.) The circuit judge of each Circuit Court is directed to appoint a clerk, except in cases otherwise provided for by law; and, as to deputy clerks, the provision of law is similar to that made in respect to District Courts. (Secs. 619, 624.) The Court of Claims is required to appoint a chief clerk and an assistant clerk, who perform their duties under the direction of the court. (Sec. 1053.)

The clerks of these courts are required to take an oath and give bonds for the faithful performance of their duties. (Secs. 794, 795, 1053, 1055.) The primary duty of each clerk is to make a true and faithful record of all the orders, judgments, decrees and proceedings of the court.

The clerks of the District and Circuit Courts are directed to render semi-annual accounts to the Attorney-General in such form as he may prescribe, and, within thirty days after every term of each court, to report to the Solicitor of the Treasury all judgments or decrees to which the United States are a party. (Secs. 833, 797.) These clerks may, in the absence or disability of the judges, take recognizances of special bail *de bene esse*, in any action depending in either of the courts, where special bail is demandable, and may, in the absence or disability of the judges, administer oaths to all persons identifying papers found on board of vessels or elsewhere to be used on trials in admiralty causes. (Secs. 947, 799.)

At each regular session of any court of the United States, the clerk is required to present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments have been made; and these accounts and the vouchers thereof are to be filed in the court. (Sec. 798.)

It is the duty of every clerk of a District or Circuit Court to reside permanently in the district where his official duties are to be performed; and if he removes therefrom, his office is to be deemed vacant, except that in the Southern district of New York he may reside within twenty miles of the district. (18 U. S. Stat. at Large, 109.)

6. Criers.—The Circuit and District Courts are authorized to

appoint criers for their courts, to be allowed the sum of two dollars per day; and the marshals may appoint such a number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other purposes, who are to be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation is to be paid only for actual attendance, and, when both courts are in session at the same time, only for attendance on one court. (Sec. 715.)

7. Commissioners to take Testimony.—The Act of August 15th, 1876 (19 U. S. Stat. at Large, 206), provides as follows: "That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as Commissioners of the United States Circuit Court may now lawfully take or do."

8. Registers in Bankruptcy.—The Revised Statutes provide for the appointment of Registers to assist the District Courts in the administration of bankrupt estates, and define their powers and duties. (Secs. 4993–4997.) The repeal of the National Bankrupt Law by the Act of June 7th, 1878 (20 U. S. Stat. at Large, 99), renders this office obsolete, at least for the present, except as to cases pending before the law took effect.

CHAPTER VII.

THE FEDERAL JURY.

SECTION I.

CONSTITUTIONAL PROVISIONS.

The Constitution of the United States contains four provisions relating to the jury system, including in this phrase the petit or trial jury and the grand jury. These provisions are the following:

1. Criminal Trials.—Article 3, section 2, and sub-section 3 of this Constitution reads as follows:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

The exception to the rule here prescribed is furnished by cases of impeachments. The Constitution in these cases provides a special mode of trial. The persons subject to impeachment are "the President, Vice-President, and all civil officers of the United States," who are to be "removed from office on impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors." (Art. 2, sec. 4.) The power of framing and adopting articles of impeachment belongs exclusively to the House of Representatives. (Art. 1, sec. 2, sub-sec. 5.) The power of trying impeachments is given to the Senate, with the provision that "no person shall be convicted without the concurrence of two-thirds of the members present," and also that the judgment shall extend only to "removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States," and with the further provision that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." (Art. 1, sec. 3, sub-

secs. 6, 7.) To these cases trial by jury has no application, since they are expressly excepted and specially provided for.

The jury, here referred to, is evidently the petit or trial jury, which was known to the common law of England long before the adoption of the Constitution, and which our English ancestors brought with them when they came to this country. The framers of the Constitution did not invent it. They found it already here, established in the laws and practice of the people; and what they did was to incorporate it into the judicial system of the United States.

A jury, in itself considered, is not a court, and is not in all cases essential to a judicial trial. It is rather an appendage to courts, and, in certain defined cases, so indispensable that they cannot determine a controversy between parties, or render a judgment, without a jury.

The trial jury of the common law, adopted by the Constitution as a part of its judicial system, meant then, as it means now, a body of twelve men, legally competent to act as jurors, legally impanelled, sitting together in the jural capacity, and rendering a verdict only by the concurrence of the whole number. The essential attributes of such a jury are the number of jurors, which must be neither more nor less than twelve, and the necessity of unanimity in rendering a verdict. These attributes the Constitution transfers to the Federal jury; and any law of Congress changing either would be unconstitutional. Congress may prescribe the qualifications of jurors, and regulate the procedure of their selection; but it cannot alter the essential nature of the institution itself, as understood when the Constitution was adopted and established by this instrument. The institution itself is a part of the fundamental law of the land. (*Work* v. *The State*, 2 Ohio St. R. 296; *The State* v. *Cox*, 3 English, 436; *The People* v. *Johnson*, 2 Parker's C. C. 322, 329, 363, 402; and 2 Leading Criminal Cases, 327.)

The specific function of such a jury in a criminal trial is to decide whether the crime legally charged against an accused party is by the evidence proved to have been committed by that party; and this question of fact it must determine, if at all, by a verdict of acquittal or conviction. The plea of not guilty, which the accused is always entitled to make, raises an issue of fact; and of

this issue the jury, after having heard the evidence, is the sole judge.

The prerogative of the court is to decide all mere questions of law; and it is the duty of the jury to receive the law at its hands. (*The United States* v. *Battiste*, 2 Sum. 240; *Stittimus* v. *The United States*, 5 Cranch's C. C. 573; *The United States* v. *Gilbert*, 2 Sum. 19; *The United States* v. *Morris*, 1 Curt. C. C. 53; and *The United States* v. *Riley*, 5 Blatch. 206.)

Mr. Justice Curtis, in an elaborate argument on this point, in *The United States* v. *Morris*, *supra*, showed that, when the Constitution was adopted, the settled rule of English common law was that, in criminal cases, the court decides the law, while the jury decides the facts. He said: "My firm conviction is that, under the Constitution of the United States, juries in criminal trials have not the right to decide any questions of law; and if they render a general verdict, their duty and their oath require them to apply to the facts, as they find them, the law given them by the court." This conclusion is referred to approvingly and adopted by Judge Shipman in *The United States* v. *Riley*, *supra*. It is certainly the sensible view of the subject, as it is the one most likely to promote the ends of public justice. Ordinarily, jurors are not competent, independently of the instructions of the court, to decide questions of law.

The jury meant by this constitutional clause is a Federal jury, summoned and impanelled under the laws of the United States, and rendering its service in connection with and under the direction of a Federal court. The clause has no reference to juries constituted and rendering verdicts under State laws. (*Murphy* v. *The People*, 2 Cow. 815; and *Barron* v. *The Mayor of Baltimore*, 7 Pet. 243.) And so the crimes here mentioned are offenses against the United States, and cognizable by courts appointed and acting under the authority thereof. The people of the United States adopted this clause for the government of their own courts, and not for the government of State courts.

The Supreme Court of the United States, in *Ex parte Milligan*, 4 Wall. 2, held that this and other provisions of the Constitution, relating to trial by jury in criminal cases, were "intended for a state of war as well as for a state of peace;" and, consequently, that where the Federal courts are "open for the trial of offenses and the redress of grievances, the usages of war could not, under

the Constitution, afford any sanction for the trial of a citizen in civil life, not connected with the military or naval power, by a military tribunal, for any offense whatever." Milligan, who was a citizen of Indiana, in civil life, having no connection with the army, was, in October, 1864, brought before a military commissioner created by the order of General Hovey; and, having been tried by the commission on certain charges and specifications, he was found guilty and sentenced to be hanged. The Supreme Court of the United States held this proceeding to be unconstitutional, and therefore void.

The clause under consideration not only provides for trial by jury in criminal cases, with the exceptions stated, but also determines where the trial shall be had. If the crime was committed in any State, then the trial must be in that State. The design of this provision is to protect the accused, charged with committing an offense in a given State, against being transported for trial to another and perhaps a distant State, which might seriously impair his means of making a defense.

A crime against the United States committed out of the limits of any State, is not local in respect to any State; and in such a case the trial may be had at such place as Congress has designated by law. (*The United States* v. *Dawson*, 15 How. 467, 488.) The language implies that such designation must be made before and not after the commission of the crime.

2. Criminal Indictments.—The Fifth Amendment to the Constitution provides as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself."

This provision, like the one just considered and found in the body of the Constitution, is simply a limitation upon the Government of the United States, and has no relation to the constitutions and laws of the several States, or to criminal proceedings under them. (*Barron* v. *The Mayor of Baltimore*, 7 Pet. 243;

Livingston v. *The Mayor*, 8 Wend. 85; *Murphy* v. *The People*, 2 Cow. 815; *Withers* v. *Buckley*, 20 How. 84; *Clark* v. *Dick*, 1 Dill. 8; and *Prescott* v. *The State*, 19 Ohio St. 184.)

"Cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger," are expressly excepted from the application of the rule here stated. Congress, in article 1, section 8, of the Constitution, is authorized "to raise and support armies," "to provide and maintain a navy," and "to make rules for the government and regulation of the land and naval forces," and may, under this authority, provide for the trial and punishment of offenses in the army and navy, and in the militia when in actual service in time of war or public danger, by military tribunals, without a jury. The judicial power granted in the third article of the Constitution does not apply to these cases; and civil courts have no jurisdiction in respect to them, unless it be to inquire in a given case whether the military tribunal had jurisdiction over the subject-matter, or has inflicted a punishment forbidden by the law, and to afford the proper redress if the law and the facts call for it. (*Dynes* v. *Hoover*, 20 How. 65; *Harman* v. *Tappenden*, East, 555; *Marshall's Case*, 10 Cr. 76; *Morrison* v. *Slopper*, Wells, 30; and *Parton* v. *Williams*, B. & A. 330.)

So also crimes that are not "capital or otherwise infamous," are not included in the rule that "no person shall be held to answer for" a crime, "unless on a presentment or indictment of a grand jury." The rule does not exclude indictments for such crimes, and does not make them absolutely necessary as a preliminary to their tiral. It simply provides that crimes, coming within the description of "capital or otherwise infamous" crimes, shall be prosecuted by the indictment of a grand jury. This implies that other offenses, not coming within this description, may be prosecuted otherwise than by the intervention of a grand jury. Congress may provide that other offenses shall be brought to trial upon an information by the proper district attorney, which, being an accusation presented to the court by the prosecuting officer of the Government, would, so far as trial is concerned, have the same effect as the indictment of a grand jury in cases of "capital or otherwise infamous" crimes. (*The United States* v. *Maxwell*, 3 Dill. 275.)

The term "capital" is, by established usage, applied only to crimes punishable with death; and all such crimes must be prose-

cuted by indictment. The Constitution characterizes them by referring to their punishment.

The term "otherwise," as here used to qualify the word "infamous," contains two implications. One is that a capital crime is "infamous" in the legal sense; and the other is that there are crimes which are not "capital," but which in law are deemed to be "infamous."

What, then, are the crimes, not "capital," but "infamous" in the legal sense, for which no person can be held to answer, "unless on a presentment or indictment of a grand jury?" The answer generally given to this question is that, although the mere fact that a crime is punishable by imprisonment in the penitentiary does not of itself necessarily make the crime "infamous" in the legal sense, still the phrase "infamous crime" is used to describe an offense which subjects the offender to infamous punishment, or incapacitates him to be a witness. (*The United States* v. *Maxwell*, 3 Dill. 275; *The United States* v. *Sheppard*, 1 Abb. C. C. 431; and *The United States* v. *Waller*, 1 Saw. 701.)

Mr. Wharton, in his Criminal Pleading and Practice (8th ed.), sec. 89, says: "In the United States courts the conclusion is that, for misdemeanors which do not preclude the person convicted from being a witness, there can be a proceeding by information, and hence a person may be prosecuted by information for a violation of the revenue laws. Severity of imprisonment does not by itself make a crime infamous." (*The United States* v. *Mann*, 1 Gall. C. C. 3; *The United States* v. *Isham*, 17 Wall. 496; *The United States* v. *Bozzo*, 18 Wall. 125; *The United States* v. *Waller*, 1 Saw. 701; *The United States* v. *Ebert*, 1 Cent. L. J. 205; *Stockwell* v. *The United States*, 13 Wall. 531; *The United States* v. *Maxwell*, 3 Dill. 275; and *The United States* v. *Block*, 15 Bank. Reg. 325.)

The inference from this statement is that a misdemeanor which does not, on conviction thereof, incapacitate the party to be a witness, is not to be deemed an "infamous crime;" and for this reason it may, in the absence of any statutory regulation to the contrary, be prosecuted by an information, without the indictment of a grand jury. If, on the other hand, the misdemeanor does thus incapacitate the party, it would be "infamous," and could be prosecuted only by such indictment.

Professor Greenleaf, in his Law of Evidence, vol. I, sec. 373

(13th ed.), refers to "treason, felony, and the *crimen falsi*," as "infamous" crimes. In regard to treason and felony he observes: "As all treasons and almost all felonies were punishable with death, it was very natural that crimes deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a court of justice." In regard to the *crimen falsi* he says: "But the extent and meaning of the term *crimen falsi*, in our law, is nowhere laid down with precision." Further on in the same section, he says: "It has been adjudged that persons are rendered infamous, and therefore incompetent to testify, by having been convicted of forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, or other conspiracy to accuse one of a crime, and barratry. And from these decisions it may be deduced, that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud." (Wharton's Criminal Evidence, sec. 363, 8th ed.)

Judge Benedict, in *The United States* v. *Yates*, 6 Fed. Rep. 861, decided that the crime of passing counterfeit trade dollars is not an "infamous" crime within the meaning of the Fifth Amendment to the Constitution, and that a prosecution for such an offense, upon information filed by the District Attorney, does not, therefore, violate the Constitution of the United States. In his deliverance upon the subject, the Judge said:

"In early times the character of the crime was determined by the punishment inflicted, but in modern times the act itself, its purpose, nature, and effect are looked at for the purpose of determining whether it be infamous or not. (*The People* v. *Whipple*, 9 Cow. 708; and Starkie on Ev. part 4, p. 715.) And while, under our Constitution, the legality of an information may be affected by the nature of the punishment to this extent, that by virtue of the Fifth Amendment an information is not legal in any case where the punishment is death, * * * in all other cases, the legality of a prosecution by information, not prohibited by positive statute, must, as I conceive, depend upon the judicial question whether the nature, purpose, and effect of the act made criminal are such as to bring it within the term 'infamous crime,' as that term was understood at common law, and cannot be determined by a reference to any declaration on the subject contained

in the statute, or by the nature of the punishment which the statute prescribes."

The conclusion from these authorities is that the nature and character of the crime, rather than its punishment in itself considered, determine whether an offense is an "infamous crime" in the sense of the Fifth Amendment, with the exception of a "capital" crime. The punishment inflicted, so far as it enters into the question at all, is regarded as indicating the nature and character of the crime, rather than as constituting it "infamous" in the legal sense.

Excluding, then, all offenses in the army and navy of the United States, and in the militia when in actual service in time of war or public danger, and also crimes not "capital or otherwise infamous," we have the constitutional rule for the courts of the United States, that "no person shall be held to answer for" a crime, "unless on a presentment or indictment of a grand jury." The rule, with these exceptions, is mandatory and absolute, and must be observed in all criminal trials to which it applies.

The grand jury, here referred to, is the grand jury of the common law, and may consist of any number of qualified persons, duly impanelled, not less than twelve and not more than twenty-three, twelve of whom, at least, must concur in any accusation made by it. The special business of a Federal grand jury is to make inquiry and present offenses against the authority of the United States, committed within, or cognizable in, the district for which the jury is impanelled. This may be done in what is called a "presentment," without an indictment, or it may be done in a formal indictment of particular persons, which is a written accusation making the charge of crime against them, and clearly specifying the time, place, nature, and circumstances of the crime so charged, in order that the accused party may have adequate notice beforehand of the offense to which he is called to plead. (*The United States* v. *Cruikshank*, 2 Otto, 542; Wharton's Criminal Pleading and Practice (8th ed.), sec. 86; and Story's Const. secs. 1784, 1785.)

The action of a grand jury in finding a bill of indictment determines nothing in respect to the guilt or innocence of the party accused. It simply supplies the condition without which, in the case of "capital or otherwise infamous" crimes, no person can be

held to answer in a Federal court. A Federal grand jury must charge such a crime before it can be tried by a petit jury.

That part of the constitutional provision which declares that no person shall "be subject, for the same offense, to be twice put in jeopardy of life and limb," simply means that no one shall be tried a second time for the same offense, after he has been once acquitted or convicted of the offense by the verdict of a jury, and judgment has passed thereon for or against him. This does not preclude a second trial if no verdict was rendered by the jury, or if, a verdict being rendered, judgment was arrested, and a new trial was granted in his favor. (Story's Const. sec. 1787; *The People* v. *Goodwin*,.18 Johns. 187; *The United States* v. *Perez*, 9 Wheat. 529; *The United States* v. *Haskell*, 4 Wash. 402; and *Ex parte Lange*, 18 Wall. 163.)

The design of the provision is to afford protection against repeated trials for the same offense. A trial for an offense that has proceeded to conviction or acquittal, and to a judgment, thereon, ends the case, so far as another trial is concerned, unless the party himself waives the protection and asks for a new trial, which he has a right to do. (*The United States* v. *Williams*, 1 Cliff. 5; and *The United States* v. *Conner*, 3 McLean, 573.)

The remaining part of the provision declares that no person "shall be compelled in any criminal case to be a witness against himself." This applies only to criminal cases, and was designed to protect the accused against any process of compulsion or extortion in order to procure a confession of guilt. It does not, however, exclude the accused from testifying in his own behalf if the law so provides. Whether he shall do so or not, even with the provision, is a matter of his own choice. (*Ex parte Meador*, 1 Abb. C. C. 317; *The United States* v. *Collins*, 1 Woods, 499; Story's Const. 1788; and 3 Wilson's Law Lect. secs. 154-159.)

3. Rights of the Accused.—The Sixth Amendment provides as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process

for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

This amendment was evidently intended to be supplementary to the clause in the body of the Constitution, relating to jury trials, and already considered. Like that clause, it applies only to criminal prosecutions under the authority of the United States, and hence has no relation to such prosecutions in State courts. (*Barron* v. *The Mayor of Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 410; *Twitchell* v. *The Commonwealth*, 7 Wall. 321; and *Jackson* v. *Wood*, 2 Cow. 819.)

The following propositions are contained in this amendment:

(1.) That "the accused"—namely, the party indicted by a grand jury or prosecuted upon information in cases of crimes not "capital or otherwise infamous"—shall, in all prosecutions for offenses in respect to which the right of trial by jury is guaranteed, enjoy the right of "a speedy and public trial." This requirement has no application to cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. It applies only to criminal prosecutions, whether by indictment or by information, in which the trial is by jury. It was designed to secure promptitude and publicity in the trial, as against undue delay after the arrest of the party and secrecy in the judicial proceeding. It guarantees to the accused the right to "a speedy and public trial."

(2.) That the trial shall be "by an impartial jury," which means that the law shall so regulate the process of selecting jurors, and that the courts shall so administer the law, as to secure the greatest possible certainty of their impartiality as respects the accused.

(3.) That the jury shall be composed of persons resident in the State and district in which the crime was committed, if committed in any State and district, which district must have been previously established by law. If the crime was not committed in any State and district, then this provision has no application to the case. (*The United States* v. *Dawson*, 15 How. 467.)

Mr. Justice Nelson, in *The United States* v. *Maxon*, 5 Blatch. 360, held that the district here referred to is the one in which the crime was committed, and that it must by law be established before the commission of the offense.

(4.) That the accused shall be informed of the nature and cause of the accusation. This means that he shall have the opportunity of understanding, before the trial, for what he is to be tried, whether the trial is upon an indictment or an information.

(5.) That the accused shall be confronted with the witnesses against him. This means that he shall have the right of being present in court at the time of his trial, and of seeing, hearing, and confronting the witnesses against him. The court has no right to exclude him from the place of trial, and then proceed with the case in his absence.

Judge Benedict, in *The United States* v. *Davis*, 6 Blatch. 464, said: "The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance." The prisoner's conduct in this case was so violent that the court ordered his removal for the time being to an adjacent room, with liberty of access to his counsel, and then proceeded with the case in his absence, and afterward, on a motion for arrest of judgment and a new trial on the ground of such absence, held that no error was committed, and hence denied the motion. It is conceivable that a prisoner's conduct in the court room may be so disorderly as to make it physically impossible to proceed with the trial in his presence; and, in such a case, it is not unreasonable that he should forfeit the right of being present until he will consent to behave himself. Any other rule would enable him to prevent his trial altogether.

(6.) That the accused shall have the right to compulsory process for obtaining witnesses in his favor. This makes it the duty of the court to issue subpœnas for the summoning of such witnesses as the accused may desire and name for the purposes of his defense, and to exercise, if necessary, its power to compel their attendance. The design of the provision is to give the accused party an ample opportunity to respond by proof to the charge made against him. This important right was not always secured by the common law in the earlier days of English history.

(7.) That the accused shall have the right to the assistance of counsel for his defense. This important right was not always secured by the laws of England. It was not until after the Revolution of 1688 that a full defense was permitted in trials for treason, and not until 1836 that the same privilege was conceded to persons charged with other felonies. (Statute 6 and 7 William

IV, ch. 114.) The Sixth Amendment guarantees this right to every accused person, no matter what may be the grade of the crime with which he is charged. The right includes the right of the accused to employ counsel, and the right of such counsel to conduct his defense in the examination of witnesses, and in submitting arguments to the court and jury in his behalf. It carries with it all the legally recognized incidents of the relation subsisting between a client and his counsel.

Moreover, the usual practice of the Federal courts is to assign counsel for the defense of the accused when he himself is unable to employ counsel; and the members of the legal profession, unless excused from the service, recognize the obligation imposed by such an appointment. The right to counsel, and to all the privileges which it involves, is a thoroughly established principle of American jurisprudence. (Cooley's Const. Limitations, 4th ed. 408-418.)

Such, then, are the rights which the Sixth Amendment to the Constitution guarantees to all accused persons in reference to criminal proceedings against them in the Federal courts. The guaranty, by its own terms, applies only to "criminal prosecutions."

4. Suits at Common Law."—The Seventh Amendment to the Constitution provides as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This amendment has no relation or application to suits in State courts, but is confined exclusively to courts of the United States. (*Livingston's Lessee* v. *Moore*, 7 Pet. 469; *The Justices* v. *Murray*, 9 Wall. 274; *Edwards* v. *Elliott*, 21 Wall. 532; and *Walker* v. *Sauvinet*, 2 Otto, 90.)

"Suits at common law," as here referred to, include all suits of a civil nature, not belonging to equity or admiralty jurisdiction, in which legal rights are considered and determined. The phrase "common law" is used in contradistinction from equity and admiralty proceedings and remedies which do not embrace trial by jury. The distinction between common law, on the one hand,

and equity and admiralty on the other, and the difference in their respective methods of administering remedial justice, were well known to the Congress that framed and proposed this amendment. The intention was to confine its application to common law suits of a civil nature, in which a jury by the rules of the common law constitutes an element of the trial. (*Parsons* v. *Bedford*, 3 Pet. 433; *Waring* v. *Clarke*, 5 How. 441; *Shields* v. *Thomas*, 18 How. 253; *The Insurance Company* v. *Comstock*, 16 Wall. 258; and Story's Const. sec. 1769.)

The first clause of this amendment declares that, if the value in controversy in a suit at common law exceeds twenty dollars, "the right of trial by jury shall be preserved." The language is not that the trial shall be by jury in every such suit, but that the *right* of such trial shall be preserved, which means that it shall not be denied to either party by law or by the court. The provision is for the benefit of the parties in litigation, and secures to either or both the right to claim that the issue of fact shall be determined by a jury. This, however, does not preclude their right by mutual consent to waive a jury trial. (*The Bank of Columbia* v. *Okley*, 4 Wheat. 235; *Parsons* v. *Armor*, 3 Pet. 413.)

The second clause of the amendment declares that no fact which has been tried and determined by a jury in a suit at common law, "shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This, by the Supreme Court of the United States, has been held to be an independent clause, applicable not only to suits arising in a Federal court and transferred to a higher court, but also to suits arising in a State court and transferred to a Federal court for a review of the judgment. (*The Justices* v. *Murray*, 9 Wall. 274.)

There are only two modes known to the common law for the re-examination of facts that have been ascertained and determined by a jury. One is the granting of a new trial by the court before which the issue was tried, or to which the record was returnable. The other is by awarding a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. (*Parsons* v. *Bedford*, 3 Pet. 433; and *The Insurance Company* v. *Comstock*, 16 Wall. 258, 269.)

The design of this provision is to deny to the Federal courts, in the exercise of their jurisdiction, the power directly to re-

examine the facts ascertained by a jury in a suit at common law, or reverse or change the verdict thus rendered. These courts have the power to grant new trials for reasons agreeable to the principles and usages of law, and in this way secure a re-examination of the facts that have been ascertained and determined by a jury; but they have no power directly to modify or change the verdict of a jury, and thus virtually perform the function of a jury. "The rules of the common law"—that is to say, the common law of England, when this amendment was adopted—exclude this power; and these rules are by the amendment made the law for the Federal courts in reference to the re-examination of facts that have been ascertained by a jury.

These four provisions of the Constitution—one of them found in the body of the instrument, and the other three in amendments thereto—establish the Federal jury in the judicial system of the United States, and, while furnishing a series of regulations in regard to it, lay the foundation for the legislation of Congress on this subject. It is well known that one of the objections to the Constitution, as originally proposed and adopted, was that it did not sufficiently provide for the cherished right of trial by jury. A leading object of Congress, in proposing at an early period to amend it, was to obviate this objection. Twelve amendments were proposed, and ten of them were adopted, and, among these, the three that relate to the Federal jury. (1 U. S. Stat. at Large, 97.) The jury system was regarded by the people as the great bulwark of liberty and justice; and they were anxious that it should be fully recognized and established in the government provided for by the Constitution.

SECTION II.

STATUTORY REGULATIONS.

The provisions of the Constitution, relating to juries as an appendage to the courts of the United States, not being self-executing, need, in order to be carried into effect, to be supplemented by legislative action. Congress has accordingly, at different times, legislated upon this subject; and what is proposed

in this section is to present a general outline of this legislation.

1. The Qualifications of Jurors.—The Revised Statutes of the United States contain the following provisions on this subject:

(1.) Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to provisions hereinafter stated, and be entitled to the same exemptions as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned. (Sec. 800.) The design of this provision is to assimilate the Federal to the State jury in the State in which the Federal court is held. The qualifications established by State law are adopted by Congress.

The term "qualifications" relates to such circumstances as age, citizenship, the possession of property, or anything else belonging to the personal standing of the juror, and not to special reasons that may exclude him from sitting as a juror in a particular case. (*The United States* v. *Collins*, 1 Woods, 499; *The United States* v. *Williams*, 1 Dill. 485; and *The United States* v. *Wilson*, 6 McLean, 604.) State laws regulating challenges to jurors, whether to favor or to the array, relate to their qualifications, and are to be observed by Federal courts. (*The United States* v. *Reed*, 2 Blatch. 435; *The United States* v. *Douglas*, 2 Blatch. 207; *The United States* v. *Tallman*, 10 Blatch. 21; and *The United States* v. *Tuska*, 14 Blatch. 5.)

(2.) No person shall be a grand or petit juror in any court of the United States, upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of Title "Civil Rights" and of Title "Crimes," for enforcing the provisions of the Fourteenth Amendment to the Constitution, who is, in the judgment of the court, in complicity with any combination or conspiracy in said Titles set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath, in open court, that he has never, directly or indirectly, counseled, advised, or voluntarily aided any such combination or conspiracy. (Sec. 822.) This section relates to the qualifications of jurors, and, in the cases specified and for the reasons stated, excludes persons, who may be otherwise qualified, from serving as jurors in the courts of the United States.

(3.) Congress, by the fourth section of the Act of March 1st, 1875 (18 U. S. Stat. at Large, 335), passed since the enactment of the Revised Statutes, provided as follows:

"That no citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude: and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

The first clause of this act was, in the second section of the Act of June 30th, 1879 (21 U. S. Stat. at Large, 43), re-enacted, with the exception of that part which relates to jurors in State courts. The Supreme Court of the United States, in *Ex parte Virginia*, 10 Otto, 339, 347, considered and affirmed the constitutionality of the fourth section of the Act of 1875. The ground of the decision was that the act is appropriate legislation for the enforcement of the Fourteenth Amendment, which, as the court held, protects all citizens of the United States from being excluded by law from serving on juries, on account of race, color, or previous condition of servitude. Such exclusion was held to be incompatible with "the equal protection of the laws" guaranteed by the amendment.

2. Selection of Jurors.—The following are the provisions of the Revised Statutes in relation to this point:

(1.) Jurors shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in the highest court in the State where the Federal court is held, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impanelling of juries, in substance, to the laws and usages relating to jurors in State courts, from time to time in force in such State. (Sec. 800.) The object of this provision is to conform the selection of Federal jurors, as nearly as may be, to the practice pursued in the respective States in which the Federal courts are held; and these courts are authorized to make rules for the attainment of this end. (*The United States* v. *Collins*, 1 Woods, 499; and *The United States* v. *Wilson*, 6 McLean, 604.)

(2.) Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such services. (Sec. 802.) The court is clothed with discretion as to the part of the district from which jurors shall be summoned. (*The United States* v. *Stowell*, 2 Curt. 153.)

(3.) Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. (Sec. 803.)

(4.) When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section. (Sec. 804.) Judge Benedict, in *The United States* v. *Loughery*, 13 Blatch. 267, held that if the persons returned by the marshal were present in court when they were returned, and their names were placed on the panel and their ballots placed in the wheel, they are to be deemed bystanders within the meaning of this statute, whether they were present or not when they were summoned by the marshal.

(5.) When special juries are ordered in any Circuit Court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several States. (Sec. 805.)

(6.) No person shall be summoned as a juror in any Circuit or District Court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge. (Sec. 812.) In *The United States* v. *Reeves*, 3 Woods, 199, it was held that the fact that a grand juror

has served within two years as a juror is not a sufficient reason for quashing an indictment in which he participated.

Congress, by the Act of June 30th, 1879 (21 U. S. Stat. at Large, 43), passed since the enactment of the Revised Statutes, provided as follows in respect to the selection of jurors:

"That all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State; and no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith."

This act supersedes and repeals so much of section 800 of the Revised Statutes as relates to the manner of selecting jurors, with the exception that the boxes used by the State authorities may, by the order of the Federal judge, be used for the purpose. The act is mandatory, and must be complied with in good faith. (*The United States* v. *Ambrose*, 3 Fed. Rep. 283.) The ostensible purpose of the act is to secure impartial jurors; but it is a grave question whether it is not adapted to promote the very end which it seeks to avoid. It introduces the element of partisanship in the persons who select the names to be placed in the box from which jurors are to be drawn. They must be of opposite political parties; and standing opposed to each other in this respect, they are likely to carry out the opposition in their selection of jurors.

3. Compensation of Jurors.—The Act of June 30th, 1879, above referred to, provides that the *per diem* pay of each juror, grand or petit, in any court of the United States shall be two dollars.

4. Grand Jurors.—The following are the provisions of the Revised Statutes in respect to grand juries:

(1.) Every grand jury impanelled before any District or Circuit Court, shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose. (Sec. 808.)

(2.) From the persons summoned and accepted as grand jurors the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury. (Sec. 809.)

(3.) No grand jury shall be summoned to attend any Circuit or District Court unless one of the judges of such Circuit Court, or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed, orders a *venire* to issue therefor. And either of the said courts may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found. (Sec. 810.)

(4.) The Circuit and District Courts, the District Courts of the Territories, and the Supreme Court of the District of Columbia, may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary. (Sec. 811.)

(5.) The grand jury impanelled and sworn in any District Court may take cognizance of all crimes and offenses within the jurisdiction of the Circuit Court for said district as well as of said District Court. (Sec. 813.)

5. Challenges.—The following are the provisions of the Revised Statutes in relation to the challenge of the jurors:

(1.) When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors, for cause or favor, shall be tried by the court without the aid of triers. (Sec. 819.)

This section regulates the number of peremptory challenges in the cases specified; and, in *Georgia* v. *O'Grady*, 3 Woods, 496, it was held to be the rule of such number, rather than a State law, in cases where a criminal cause is removed from a State to a Federal court.

(2.) If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made. (Sec. 1031.)

(3.) At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause, in such cases, shall be tried by the court without the aid of triers. (Sec. 4303.)

6. Special Provisions.—Sections 807, 814, 815, 816, 817 and 818 of the Revised Statutes, contain a series of special provisions in regard to juries that relate to particular States, and hence are not general in their operation. So, also, Congress, by the Act of June 8th, 1878 (20 U. S. Stat. at Large, 102), by the Act of January 29th, 1880 (21 Id. 63), by the Act of February 4th, 1880 (21 Id. 64), by the Act of April 20th, 1880 (21 Id. 76), and by the Act of June 11th, 1880 (21 Id. 176), has added other special provisions in relation to particular States. These provisions, being purely local in their operation, need not be here stated.

7. The Function of Juries.—The function of the Federal grand jury is to institute inquiry, by the examination of witnesses, in respect to crimes and offenses against the laws of the United States, to find indictments upon *ex parte* and probable proof of guilt, and make presentments to the court by whose authority the jurors have been summoned and constituted a grand jury. The rule of the Revised Statutes is that no indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors. (Sec. 1021.)

The same Statutes also provide that all crimes and offenses committed against the provisions of chapter seven, Title "CRIMES," which are not infamous, may be prosecuted, either by indictment or by information filed by a district attorney. (Sec. 1022.) The general principle is that either method of prosecution for crimes not "infamous" is legal; and this principle Congress applies to the crimes specified in chapter seven, Title "CRIMES," of the Revised Statutes, leaving the method to the discretion of the court. (*The United States* v. *Maxwell*, 3 Dill. 275.)

The petit or trial jury, alike in civil and criminal cases, performs the judicial function of deciding issues of fact submitted to it under the regulations of law. Congress has provided the following regulations on this subject:

(1.) *District Courts.*—Section 566 of the Revised Statutes provides as follows: "The trial of issues of fact in the District Courts, in all causes except cases in equity and cases in admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury. In cases of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

The issues of fact, referred to in the first clause of this section, embrace all issues of fact whether civil or criminal, with the exception stated. The second clause is a reproduction of the Act of February 26th, 1845 (5 U. S. Stat. at Large, 726), providing for a trial of issues of fact by jury, upon the requirement of either

party, in the specified class of admiralty cases. Such trial in admiralty cases is confined exclusively to the class specified. (*Hine* v. *Trevor*, 4 Wall. 555.)

(2.) *Circuit Courts.*—Sections 648 and 649 of the Revised Statutes provide that the trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and with the further exception that issues of fact in civil cases may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury, in which event the finding of the court upon the facts, which may be either general or special, has the same effect as the verdict of a jury.

Congress, by the third section of the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), provided that "the trial of issues of fact in the Circuit Courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury." This provision was, in *Phillips* v. *Moore*, 10 Otto, 208, held not to repeal the previous law contained in the Revised Statutes, and authorizing a trial of issues of fact by the court, without the intervention of a jury, upon the written stipulation of the parties waiving a jury trial. The provision was only intended, as the court held, to conserve to parties in the cases removed to the Circuit Courts the same right of jury trial which parties possess in cases brought originally in these courts, not to prevent the waiver of a jury by consent.

So also Congress, by the Act of February 16th, 1875 (18 U. S. Stat. at Large, 315), provided that the Circuit Courts, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which judgments or decrees are rendered, and shall state the facts and conclusions of law separately, and that, in finding the facts, as before provided, the court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of

the court, as in cases at common law, with the provision that the finding of such jury, unless set aside for lawful cause, shall be entered as of record, and stand as the finding of the court, upon which judgment shall be entered according to law.

The same act provided that a Circuit Court, when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may, from time to time, be made by the Supreme Court, and submit to them such questions of fact arising in such cause as such Circuit Court shall deem expedient, and that the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings.

(3.) *The Supreme Court.*—Section 689 of the Revised Statutes provides that the trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.

These statutory provisions, relating to juries and trials by jury, contain the existing law as to the qualifications, selection, and organization of juries, and to the cases in which jury trials must be had in the courts of the United States. The jury trial applies to all criminal cases, with the exception of cases of impeachment, and with the further exception of certain specified offenses against navigation laws, as set forth in chapter nine of Title XLVIII of the Revised Statutes of the United States, in which the trial is to be summary by a District Court, without indictment, but upon complaint by the proper district attorney, and in which the issues of fact are to be determined by the court, unless at the time for pleading and answering the accused shall demand a jury, in which event the trial is to be upon the complaint and plea of not guilty. (Rev. Stat. 4300–4305.)

So also the jury trial applies to all suits at law of a civil nature, except where in the Circuit Courts the parties waive the right, and is made applicable by Congress in admiralty and maritime cases of the character and upon the conditions specified, and also in equity patent cases.

The Constitution itself not only ordains the existence of the Federal jury, but jealously guards the right of trial by jury. It

expressly declares that "the trial of all crimes, except in cases of impeachment, shall be by jury," and that "in suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved." The statutory provisions of Congress, in regard to the Federal jury, are designed to give effect to the provisions on this subject found in the fundamental law of the land.

CHAPTER VIII.

THE FEDERAL LAW OF EVIDENCE.

Every case litigated before a court involves questions of fact; and if the parties are not agreed as to the facts in a given case, then it is by evidence that the truth must be juridically ascertained and established, with sufficient certainty to be the basis for a judgment or decree.

Professor Greenleaf defines the term *evidence* as follows: "The word EVIDENCE, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." (Green. on Ev. 13th ed. vol. I, p. 2.) The case before a court, as to its facts, is made what it is by this process, where the parties themselves do not agree as to these facts.

The law of evidence in any country consists in those general principles relating to the introduction and use of evidence which, in application to specific issues of fact, are deemed best adapted to bring before courts the truth, with the least admixture of error. In the United States, as also in England, these principles are very largely a matter of judicial usage and adoption. Courts, by a series of precedents, make the law of evidence, except where it rests upon express statutes. The great mass of it is of judicial origin. Treatises upon this law are mainly mere compilations of the rules and principles which courts have established for their own guidance in the hearing of cases, especially when juries are used to determine questions of fact. These principles represent their best aggregate wisdom on the subject; and although there is some diversity among courts as to what this wisdom is, especially when it is to be applied to particular cases, still there is sufficient uniformity and agreement to establish a general law of evidence which courts usually apply.

The Federal law of evidence consists in the general principles which the Federal courts have adopted and established, together with such statutory regulations as Congress has seen fit to enact

for their guidance. The first part of this law is to be found in the reported decisions and deliverances of the Federal courts, which is substantially analogous to the law as established and applied by the State courts of this country; and the second part is found in the statutes of Congress. The special object of this chapter will be to state the Federal law of evidence as contained in Title XIII, chapter 17, of the Revised Statutes of the United States. The following are the provisions of Congress on this subject:

1. Prohibitions as to the Exclusion of Witnesses. (Sec. 858.) —In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law and in equity and admiralty. (*U. S.* v. *Murphy*, 16 Pet. 203; *Smyth* v. *Strader*, 4 How. 420; *U. S.* v. *Reed*, 12 How. 331; *Wright* v. *Bales*, 2 Bl. 535; *Green* v. *U. S.* 9 Wall. 655; *Lucas* v. *Brooks*, 18 Wall. 436; *Cornett* v. *Williams*, 20 Wall. 226; *Packet Company* v. *Clough*, 20 Wall. 528; *Texas* v. *Chiles*, 21 Wall. 488; *Railroad Company* v. *Pollard*, 22 Wall. 321; *Johnson* v. *Owens*, 2 Dill. 475; *Eslava* v. *Magange's Administrator*, 1 Woods, 623.)

The provisions of this section were supplemented by the Act of March 16th, 1878 (20 U. S. Stat. at Large, 30), providing as follows: "That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

2. Testimony before Congress. (Sec. 859.)—No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

3. Pleadings, Disclosures, &c. (Sec. 860.)—No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid. (*U. S.* v. *Hughes*, 12 Blatch. 553; *U. S.* v. *Three Tons Coal*, 6 Biss. 379; *U. S.* v. *Distillery*, 6 Biss. 483; *Johnson* v. *Donaldson*, 3 Fed. Rep. 22.)

4. Proof in Common Law Actions. (Sec. 861.)—The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided. (*Beardsley* v. *Littell*, 14 Blatch. 102.)

5. Proof in Equity and Admiralty Cases. (Sec. 862.)—The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided. (*Blease* v. *Garlington*, 2 Otto, 1.)

6. Depositions de bene esse. (Sec. 863.)—The testimony of any witness may be taken in any civil cause, depending in a District or Circuit Court, by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and

infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a Circuit Court, or any clerk of a District or Circuit Court, or any chancellor, justice, or judge of a Supreme or Superior Court, mayor or chief magistrate of a city, judge of a County Court or Court of Common Pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing, by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

This statute specifies the circumstances in which, the magistrates before whom, and the conditions upon which, depositions *de bene esse* may be taken; and, in order that such depositions may be used as testimony, all the specifications must be complied with. (*The Samuel*, 1 Wheat. 16; *The Argo*, 2 Wheat. 287; *The London Packet*, 2 Wheat. 371; *Mechanics' Bank* v. *Seaton*, 1 Pet. 299; *Bell* v. *Morrison*, 1 Pet. 355; *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 616; *Dick* v. *Runnels*, 5 How. 7; *Harris* v. *Wall*, 7 How. 693; *Fowler* v. *Merrill*, 11 How. 375; *Walsh* v. *Rogers*, 13 How. 283; *Hoyt* v. *Hammekin*, 14 How. 350; *Nelson* v. *Woodruff*, 1 Bl. 156; *The Ottawa*, 3 Wall. 271; *Tappan* v. *Beardsley*, 10 Wall. 427; *Shutte* v. *Thompson*, 15 Wall. 151.)

7. Mode of taking Depositions de bene esse. (Sec. 864.)—Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the

magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent. (*Bell* v. *Morrison*, 1 Pet. 351; *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 604; *Cook* v. *Burnley*, 11 Wall. 659; *Shutte* v. *Thompson*, 15 Wall. 151.)

8. Transmission to the Court of Depositions de bene esse. (Sec. 865.)—Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. (*Beale* v. *Thompson*, 8 Cr. 70; *Evans* v. *Hettich*, 7 Wheat. 453; *Stein* v. *Bowman*, 13 Pet. 209; *Harris* v. *Wall*, 7 How. 693.)

9. Depositions under a dedimus potestatem and in perpetuam, &c. (Sec. 866.)—In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections 863, 864, and 865 shall not apply to any deposition to be taken under the authority of this section. (*Guppy* v. *Brown*, 4 Dall. 410; *Buddecum* v. *Kirk*, 3 Cr. 293; *Sergeant* v. *Biddle*, 4 Wheat. 508; *Evans* v. *Hettich*, 7 Wheat. 453.)

10. Depositions in perpetuam, &c., admissible at the discretion of the Court. (Sec. 867.)—Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken *in perpetuam rei memoriam*, which would

be so admissible in a court of the State wherein such cause is pending, according to the laws thereof. (*Gould* v. *Gould*, 3 Story, 516.)

11. Deposition under a dedimus potestatem, how taken. (**Sec. 868.**)—When a commission is issued by any court of the United States for taking the testimony of a witness named therein, at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpœna; and if any witness, after being duly served with such subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court.

12. Subpœna ducis tecum under a dedimus potestatem. (**Sec. 869.**)—When either party in such suit applies to any judge of a United States court in such district or Territory for a subpœna commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied by the affidavit of the person applying or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner, at the time and place stated in the subpœna, any such paper, writing, written instrument,

book, or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties.

13. Witness under a dedimus potestatem, when required to attend. (Sec. 870.)—No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at, the place of examination, are paid or tendered to him at the time of the service of the subpœna.

14. Depositions in the District of Columbia in suits pending elsewhere. (Sec. 871.)—When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the Supreme Court of said District, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said District therein specified.

15. The same subject—when no Commission nor Notice. (Sec. 872.)—When it satisfactorily appears by affidavit to any justice of the Supreme Court of the District of Columbia, or to any commissioner for taking depositions appointed by said court—

First. That any person within said District is a material wit-

ness for either party in a suit pending in any State or territorial or foreign court;

Second. That no commission nor notice to take the testimony of such witness has been issued or given; and

Third. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof, such officer shall issue his summons, requiring the witness to appear before him at a place within the District, at some reasonable time, to be stated therein, to testify in such suit.

16. The same subject—manner of taking and transmitting the Deposition. (Sec. 873.)—Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of the suit.

17. The same subject—Witness Fees. (Sec. 874.)—Every witness appearing and testifying under the said provisions relating to the District of Columbia, shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.

18. Letters rogatory from United States Courts. (Sec. 875.)—When any commission or letter rogatory issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the

clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the Government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. When letters rogatory are addressed from any court of a foreign country to any Circuit Court of the United States, a commissioner of such Circuit Court designated by such court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts. (19 U. S. Stat. at Large, 241.)

19. Subpœnas for Witnesses to run into another District. (Sec. 876.)—Subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: *Provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same. (*Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 616.)

20. Witnesses, the form of Subpœna, attendance under. (Sec. 877.)—Witnesses who are required to attend any term of a Circuit or District Court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

21. Witnesses in behalf of Indigent Defendants in Criminal Cases. (Sec. 878.)—Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed, if found within the limits aforesaid. In such case the costs in-

curred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States.

22. Recognizance of Witnesses at the hearing of charges in Criminal Cases. (Sec. 879.)—Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost.

23. Vermont, Recognizance of Witnesses, how taken. (Sec. 880.)—In the district of Vermont, all recognizances of witnesses, taken by any magistrate in said district, for their appearance to testify in any case cognizable either in the District or Circuit Court thereof, shall be to the Circuit Court next thereafter to be held in the said district.

24. Recognizance of Witnesses required at any time on application of District Attorney. (Sec. 881.)—Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said

person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.

25. Copies of Department Records and Papers. (Sec. 882.)—Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.

26. Copies of Records, &c., in the Office of the Solicitor of the Treasury. (Sec. 883.)—Copies of any documents, records, books or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as Solicitor for the time, shall be evidence equally with the originals.

27. Instruments and Papers of the Comptroller of the Currency. (Sec. 884.)—Every certificate, assignment and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

28. Organization Certificate of National Banks. (Sec. 885.)—Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence, in all courts and places within the jurisdiction of the United States, of the existence of the association, and of every matter which could be proved by the production of the original certificate.

29. Transcripts from Books, &c., of the Treasury in Suits against Delinquents. (Sec. 886.)—When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified

by the Auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: *Provided*, That where suit is brought upon a bond, or other sealed instrument, and the defendant pleads "*non est factum*," or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit.

The following cases illustrate the construction and application of this statute: *Walton* v. *U. S.* 9 Wheat. 651; *U. S.* v. *Buford*, 3 Pet. 12; *Smith* v. *U. S.* 5 Pet. 292; *Cox* v. *U. S.* 6 Pet. 172; *U. S.* v. *Jones*, 8 Pet. 375; *Gratiot* v. *U. S.* 15 Pet. 336; *U. S.* v. *Irving*, 1 How. 250; *Hoyt* v. *U. S.* 10 How. 109; *Bruce* v. *U. S.* 17 How. 437.

30. Transcripts from Books of the Treasury in Indictments for Embezzlement of the Public Moneys. (Sec. 887.)—Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section. (*U. S.* v. *Gaussen*, 19 Wall. 198.)

31. Copies of Returns in Returns-Office. (Sec. 888.)—A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and cor-

ruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns-office.

32. Copies of Post-office Records and of Auditor's Statement of Accounts. (Sec. 889.)—Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account-books of the Post-office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits. (*U. S.* v. *Hodge*, 13 How. 478; *U. S.* v. *Wilkinson*, 12 How. 246; *Lawrence* v. *U. S.* 2 McLean, 581.)

33. Copies of Statements of Demands by Post-office Department. (Sec. 890.)—In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the Sixth Auditor, of the statement of any postmaster, special agent, or other person employed by the Postmaster-General, or the Auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the post-office where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due.

34. Copies of Records, &c., of the General Land Office. (Sec. 891.)—Copies of any records, books, or papers in the General Land Office, authenticated by the seal and certified by the

Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record. (*Galt* v. *Galloway*, 4 Pet. 331; *Hanrick* v. *Barton*, 16 Wall. 166; *McGarrahan* v. *Mining Co.* 6 Otto, 316.)

35. Copies of Records, &c., of Patent Office. (Sec. 892.)—Written or printed copies of any records, books, papers or drawings belonging to the Patent Office, and of letters patent authenticated by the seal and certified by the Commissioner or Acting Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof. (*Brooks et al.* v. *Jenkins et al.* 3 McLean, 432; *Parker* v. *Haworth*, 4 McLean, 370; *Pettibone* v. *Derringer*, 4 Wash. 215; *Lee* v. *Blandy*, 2 Fish. 89; *Woodworth* v. *Hall*, 1 Wood. & Min. 260; *Emerson* v. *Hogg*, 2 Blatch. 12.)

36. Copies of Foreign Letters Patent. (Sec. 893.)—Copies of the specifications and drawings of foreign letters patent certified as provided in the next preceding section, shall be *prima facie* evidence of the fact of the granting of such letters patent and of the date and contents thereof.

37. Printed Copies of Specifications and Drawings of Patents. (Sec. 894.)—The printed copies of specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerk's offices of the District Courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein continued.

38. Extracts from the Journals of Congress. (Sec. 895.)—Extracts from the Journals of the Senate, or of the House of Representatives, and of the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or by the Clerk of the House of Representatives, shall be

admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court.

39. Copies of Records, &c., in Offices of United States Consuls, &c. (Sec. 896.)—Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.

40. Certain Books and Papers in Offices of the District and Circuit Courts in Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas. (Sec. 897.)—The transcripts into new books, made by the clerks of the District Courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the Act of June 27th, 1864, chapter 165, from the records and journals transferred by them respectively, under the said act, to the clerks of the Circuit Courts in said districts, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect, as records, as the originals. And the certificates of the clerks of said Circuit Courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had.

41. Transcribed Records in the Clerks' Offices of the Western District of North Carolina. (Sec. 898.)—The transcripts into new books made by the clerks of the Circuit and District Courts for the Western district of North Carolina, in pursuance of the Act of June 4th, 1872, chapter 282, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect, as records, as the originals. And the certificates of the clerks of said Circuit and District Courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed.

42. When original Records are Lost or Destroyed. (Sec. 899.)—When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had.

43. The same subject. (Sec. 900.)—When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed.

44. The same subject. (Sec. 901.)—When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same

effect as the original record would have had if the same had not been lost or destroyed.

45. Restoration of Court Records. (Sec. 902.)—This section was, by the Act of January 31st, 1879 (20 U. S. Stat. at Large, 277), so amended as to read as follows: In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal.

46. The same subject. (Sec. 903.)—This section was also amended by the same act so as to read as follows: A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the Government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would be entitled to.

47. The same subject. (Sec. 904.)—This section was also amended by the same act so as to read as follows: That whenever

any of the records or files in which the United States are interested, of any court of the United States, have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.

48. Authentication of Legislative Acts and Proof of Judicial Proceedings of States, &c. (Sec. 905.)—The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.

The following cases may be consulted as to the construction of this section: *Ferguson* v. *Harwood*, 7 Cr. 408; *Mills* v. *Duryee*, 7 Cr. 481; *U. S.* v. *Amedy*, 11 Wheat. 392; *Buckner* v. *Finley*, 2 Pet. 592; *Owings* v. *Hull*, 9 Pet. 627; *Urtetiqui* v. *D'Arbel*, 9 Pet. 700; *McElmoyle* v. *Cohen*, 13 Pet. 312; *Stacey* v. *Thrasher*, 6 How. 44; *Bank of Alabama* v. *Dalton*, 9 How. 522; *D'Arcy*

v. *Ketchum*, 11 How. 165; *Railroad* v. *Howard*, 13 How. 307; *Booth* v. *Clark*, 17 How. 322.

49. Proofs of Records, &c., kept in offices not pertaining to Courts. (Sec. 906.)—All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor or secretary of State, the chancellor or keeper of the great seal of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of the court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.

50. Copies of Foreign Record, &c., relating to Land Titles in the United States. (Sec. 907.)—It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the Departments, the Solicitor of the Treasury, or the Commissioner of the General Land Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively;

and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals.

51. Little & Brown's Edition of the Statutes to be Evidence. (Sec. 908.) — The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.

52. Burden of Proof, when it lies on Claimant in Seizure Cases. (Sec. 909.)—In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: *Provided*, That probable cause is shown for such prosecution, to be judged of by the court. (*Locke* v. *U. S.* 7 Cr. 339; *The Luminary*, 8 Wheat. 407; *Clifton* v. *U. S.* 4 How. 242; *Buckley* v. *U. S.* 4 How. 251; *Cliquot's Champagne*, 3 Wall. 143; *The John Griffin*, 15 Wall. 29.)

53. Possessory Actions for the Recovery of Mining Titles. (Sec. 910.)—No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.

Congress, by the Act of June 20th, 1874 (18 U. S. Stat. at Large, 113), providing for the publication of the laws of the

United States, declared, in the eighth section of the act, "that the said printed copies of the said acts of each session, and of the said bound copies of the acts of each Congress, shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several States therein."

So also Congress, by joint resolution, June 7th, 1880 (21 U. S. Stat. at Large, 308), declared that "the publication [Supplement to the Revised Statutes] herein authorized, shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States and of the several States and Territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress: *Provided*, That nothing herein contained shall be construed to change or alter any existing law."

Here, then, are the statutory regulations of Congress relating to the subject of evidence. These regulations refer, for the most part, to depositions, the recognizance of witnesses, and copies of various documents and records which, being authenticated in the manner specified, may be used as evidence in the courts of the United States. It is the duty of these courts to follow and apply the law of evidence as thus laid down by Congress.

This law, while imperative in relation to all the matters to which it refers, is but the merest fragment of the whole law of evidence as recognized and applied by the Federal courts. The great mass of this law rests on no statutory enactment whatever, but exists in the form of established maxims and principles, largely borrowed from the common law of England, which have been adopted by the Federal courts, as well as by State courts, and which, being thus adopted, have the force and effect of law. There can be no doubt that Congress has the power to establish a complete code of evidence for the courts of the United States; but it has wisely omitted to exercise this power, except within a comparatively narrow field. This leaves the law of evidence, in the great bulk of its principles and rules, to rest on judicial adoption and authority.

PART IV.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS.

CHAPTER I.

CONSTITUTIONAL AUTHORITY.

1. The Judiciary Act of 1789.—The twelfth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provided that "if a suit be commenced in a State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court," the defendant party might, "at the time of entering his appearance in such State court," and by the process specified in the section, cause the suit to be removed "for trial to the next Circuit Court to be held in the district where the suit is pending."

The suit being thus removed, the section directed the State court to "proceed no further in the cause," and also provided that the Circuit Court should proceed with the cause "in the same manner as if it had been brought there by original process."

Provision is made in the same section that, where the parties to a suit commenced in a State court are citizens of the same State, and claim lands under grants from different States, and the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, the suit may, before trial and in the manner specified, be removed to the next Circuit Court to be held in the district where the suit is pending.

The twenty-fifth section of the act provided 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,"

might, in the cases specified, "be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error."

Both of these sections agree in providing for a transfer of the case from a State court to a Federal court; one of them, before trial and judgment, and the other, after trial and judgment or decree in the State court. The transfer or removal of causes, by appeal or writ of error, from one court to another, is a very common process in the administration of justice; yet ordinarily these courts are organized and exist and act under the authority of the same government, differing from each other only in their rank. Here, however, the transfer or removal is from a court existing under the authority of a State to one existing under the authority of the United States.

2. Validity of this Legislation.—The first Congress, some of whose members participated in framing the Constitution, assumed that Congress was competent, under this Constitution, legislatively to provide for such removals. No such authority is, in express words, given to Congress. The Constitution, however, specifies the cases and controversies to which the judicial power of the United States shall extend, and gives to the Supreme Court original jurisdiction in two of these cases, and appellate jurisdiction in all the others, with such exceptions and under such regulations as Congress may see fit to make. It also authorizes Congress "to institute tribunals inferior to the Supreme Court," to vest judicial power in these tribunals, and to make all laws "necessary and proper for carrying" into effect the judicial power of the United States.

It was in the light of these provisions of the Constitution—some of them granting and defining the judicial power of the United States, and others granting and defining the legislative power of Congress—that the first Congress inferred its authority to provide by law for the transfer, in the cases named, of causes from State to Federal courts, both before and after trial and judgment or decree. The legislation rests for its validity solely on this basis. The authority, if it exists at all, results by implication from the judicial power of the United States and the necessity of the legislation for the proper execution or exercise of that power.

It is evident, upon the very face of the Constitution, that its

framers contemplated that at least some of the cases and controversies enumerated as those of Federal cognizance, as, for example, controversies between citizens and aliens, or between citizens of different States, or between citizens of the same State claiming lands under grants of different States, might and would arise in State courts. They hence provided that the Constitution, laws, and treaties of the United States should be binding upon State courts as "the supreme law of the land."

This supposes that these courts, in the exercise of their ordinary jurisdiction, might and would come in contact with what are called "Federal questions," and that, in at least some of the cases and controversies enumerated as those of Federal cognizance, they would exercise concurrent jurisdiction with the courts of the United States. It supposes that suits in some of these cases and controversies might, at the option of the suitor, be originally brought in either class of courts. The provision binding the judges of State courts by the Constitution, laws, and treaties of the United States, would be meaningless, if these courts were absolutely excluded from the whole field assigned to the judicial power of the United States. There would, upon this supposition, be no possible application of the provision to these judges.

The question, then, which confronted the first Congress in the organization of the judicial department of the General Government, was this: What shall be done in cases and controversies coming within the scope of Federal cognizance, which, nevertheless, first arise in State courts? The answer, as already stated, was given in the twelfth and twenty-fifth sections of the Judiciary Act of 1789, providing for a transfer or removal of these cases and controversies to the courts of the United States, either before trial and judgment or decree, or afterward.

Congress might have made the jurisdiction of the courts of the United States exclusive in all the cases of Federal cognizance; but this it did not think it expedient to do. A concurrent jurisdiction being permitted to State courts in some of the enumerated cases, then these cases must, either before or after trial and judgment or decree, be capable, at the option of at least one of the parties, of being transferred to some court or courts of the United States, or there would be some cases, coming within the scope of the judicial power of the United States, to which the Federal cognizance would not extend.

If, for example, the citizen of a given State chose to sue the citizen of another State in a State court, and the suit could not before trial be removed to a Federal court, and the judgment or decree of the State court could not be reviewed by any Federal court, then the necessary consequence would be that in that case the judicial power of the United States would not extend to a controversy between citizens of different States, which is contrary to the express language of the Constitution.

The fact that a suit which, by reason of the parties or the subject-matter, comes within Federal cognizance, is first brought in a State court, does not affect the question of Federal jurisdiction at all, since it is the case itself, and not the court in which the proceedings are first taken, that, according to the Constitution, gives the jurisdiction. The Federal cognizance of a case, either directly conferred by the Constitution, or authorized to be conferred by Congress, is not excluded because it first arises in or is determined by a State court. If it were excluded for this reason, then either State courts must have no jurisdiction within the limits of such cognizance, or the cognizance could not be extended to all the cases and controversies expressly assigned to it by the Constitution.

The first Congress solved the judicial problem thus existing, not by excluding all concurrent jurisdiction by State courts in cases of Federal cognizance, but by providing that certain specified cases of this cognizance, first arising in State courts, might be transferred to the courts of the United States, in some instances before trial and judgment or decree, and in others afterward. The design of this legislation was to carry into effect the judicial power of the United States; and this is what the Constitution authorizes Congress to do. The legislation is "proper" for this purpose, and on this ground constitutional.

3. The View of Alexander Hamilton.—Alexander Hamilton, having expressed the opinion that the State courts would exercise a concurrent jurisdiction with the courts of the United States, in at least some of the cases of Federal cognizance, proceeded to say:

"Here another question occurs: What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie

from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of Federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior Federal courts. The objects of appeal, and not the tribunals from which it is made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved. The latter would be utterly inadmissible, as it would defeat some of the most important and avowed purposes of the proposed Government, and would essentially embarrass its measures." (The Federalist No. 82.)

In the same number of the Federalist, Mr. Hamilton considered the question whether "an appeal would lie from the State courts to the subordinate Federal judicatories." In answer to this inquiry, he remarks: "All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of Federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of Federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie to the District Courts of the Union."

Such was the construction of the Constitution by Alexander Hamilton, before its adoption by the people, and before a single line of legislation had been enacted for carrying it into effect. The provisions of the twelfth and twenty-fifth sections of the Judiciary Act of 1789 are in harmony with the views of this distinguished statesman and jurist.

4. Decisions of the Supreme Court.—This whole question was, in 1816, considered by Mr. Justice Story, in stating the opinion of the court in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304.

The Court of Appeals of Virginia had refused to obey the mandate of the Supreme Court of the United States, and placed the refusal on the following grounds: "The court is unanimously of the opinion, that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States: that so much of the twenty-fifth section of the Act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court; and that obedience to its mandate be declined by the court."

This was a direct and emphatic denial of the appellate jurisdiction of the Supreme Court over the judgments and decrees of State courts, as conferred and defined in the twenty-fifth section of the Judiciary Act of 1789; and the ground of the denial was not that the section did not in terms confer the jurisdiction, but that it was not in pursuance of the Constitution of the United States, or, in other words, that Congress had no authority thus to legislate. The Supreme Court had repeatedly exercised this jurisdiction, and State courts had obeyed its mandates; and hence, until this case arose, there had been no occasion to discuss and determine the constitutionality of the jurisdiction. The jurisdiction had been assumed as a point not controverted, and acquiesced in by State courts.

Mr. Justice Story, in stating the opinion of the court, explained the general nature of the Constitution as "the supreme law of the land," and as "ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the people of the United States," who had the right to vest in the General Government "all the powers which they might deem proper and necessary," and "to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact." Having made this general statement, he then proceeded to a careful examination of the judiciary article of the Constitution which Congress was both authorized and commanded to carry into effect by the requisite legislation, and, for this purpose, to provide for the organ-

ization of courts, and, as he contended, to vest in these courts taken collectively, in either the original or appellate form, *all* the judicial power granted in the third article of the Constitution.

In respect to the appellate jurisdiction of the Supreme Court, Mr. Justice Story took the ground that, by the express language of the Constitution, it extends to all the enumerated cases in which its jurisdiction is not original, with nothing in the letter of the instrument, and nothing by necessary implication, "to restrain its exercise over State tribunals" in these cases. "It is the case, then," he remarks, "and not the court, that gives the jurisdiction." No matter where the case is depending, whether in a State or Federal court, if it comes within the appellate jurisdiction of the Supreme Court, as defined in the Constitution, then that court, under the regulation of Congress, and in conformity therewith, may take cognizance of it and exercise its appellate power over it. This regulation was furnished by the twenty-fifth section of the Judiciary Act of 1879; and in regard to this section Mr. Justice Story says:

"On the whole, the court are of the opinion that the appellate power of the United States does extend to cases pending in the State courts, and that the twenty-fifth section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one."

The twelfth section of the Judiciary Act provided for the transfer or removal of causes, before trial and judgment or decree, from State courts to the Circuit Courts of the United States; and although this section was not directly involved in the case before the court, still the general argument of Mr. Justice Story sustained its validity. He regarded such a transfer as only one mode of exercising appellate jurisdiction; "and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control." He said that precisely the same objections "exist as to the right of removal before judgment as after," and hence that "both must stand or fall together."

The argument, in its general principles, applies alike to the

twelfth and twenty-fifth sections of the Judiciary Act, and supports the constitutional validity of both.

One of the points considered and determined in *Cohens* v. *Virginia*, 6 Wheat. 264, was whether the appellate power of the Supreme Court can, in any case, be exercised over the judgment of a State court; and so far this case was identical with that of *Martin* v. *Hunter's Lessee*. Chief Justice Marshall, in stating the opinion of the court, said:

"The propriety of intrusting the construction of the Constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet been drawn into question. It seems to be a corollary from this political axiom, that the Federal courts should either possess exclusive jurisdiction in such cases, or the power to revise the judgment rendered in them by the State tribunals. If the Federal and State courts have concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States, and if a case of this description brought in a State court cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws and treaties of the United States is not confided particularly to their judicial departments, but is confided equally to that department and to the State courts, however they may be constituted."

Referring to the words of the Constitution, the Chief Justice further said: "They give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever courts they may be decided. * * * * Let the nature and object of our Union be considered; let the great fundamental principles on which the fabric stands be examined; and we think the result must be that there is nothing so extravagantly absurd in giving to the court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction."

Mr. Justice Field, in stating the opinion of the court in *The Moses Taylor*, 4 Wall. 411, spoke as follows of the Judiciary Act of 1789:

"Thus cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed,

from their commencement, exclusively under the cognizance of the Federal courts. On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a Federal or a State court, at the option of the plaintiff, and, if brought in the State court, may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the Federal courts. Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the Federal courts upon appeal or writ of error, after final judgment. * * * The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both State and Federal courts."

In *The Mayor* v. *Cooper*, 6 Wall. 247, Mr. Justice Swayne, referring to the judicial power of the United States, said:

"The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. None are excluded. How jurisdiction shall be acquired by the 'inferior courts,' whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature. * * * Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction, within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal causes. Both are within its scope. Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

The substance of these views was re-affirmed in *The Railway Company* v. *Whitton*, 13 Wall. 270. Mr. Justice Field, in *Gaines* v. *Fuentes et al.*, 2 Otto, 10, referring to the grant of judicial power in the third article of the Constitution, said: "The conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative discretion." Applying this principle to controversies between citizens of different States, he further said: "It rests entirely with Congress to determine at

what time the power may be invoked, and upon what conditions—whether originally in the Federal court, or after suit brought in the State court, and, in the latter case, at what stage of the proceedings, whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error." This observation, though applied specially to a certain class of controversies, is equally applicable to all the cases in respect to which it rests with Congress to determine the exercise of Federal jurisdiction, whether in the original or appellate form.

5. The Result.—The result then, as assumed by law, as derivable from the Constitution, and settled by the Supreme Court of the United States, is that Congress may, in all the cases enumerated as those of Federal cognizance, make the jurisdiction of the Federal courts exclusive of State courts, or permit in at least some of these cases a concurrent jurisdiction by the latter courts, and, if permitting such jurisdiction, may provide either for a review of the judgments and decrees of State courts by the Supreme Court, or for a removal of the cases from State courts to Federal courts before trial and judgment, or may, in its discretion, adopt both of these methods. The power of Congress thus to legislate, in carrying into effect the judicial power of the United States, though not expressly granted in the Constitution, is now so well settled that it admits of no further dispute.

There are good and sufficient reasons why Congress should not exclude the jurisdiction of State courts in all cases of Federal cognizance. Congress has never done so, and it is not likely that it ever will. The practical inconvenience resulting therefrom would be a very serious objection to such legislation. And yet a much more serious difficulty would arise, if it were true that cases of Federal cognizance, when first brought in State courts, could not be transferred to Federal courts, either before or after trial and judgment. This would make State courts in these cases the ultimate expounders of the Constitution, laws, and treaties of the United States, and would deprive the General Government, in such cases, of the power to expound and apply its own fundamental law. State courts would so far become the supreme authority in the land, and there would be no judicial method for reviewing and correcting their errors by the Federal judiciary. Rather than accept this consequence, it would be far better to exclude State courts from all jurisdiction in cases of Federal cognizance.

It is to be remembered, however, that the transfer of causes, whether before or after trial and judgment or decree, from State to Federal courts, is and must be limited to the cases that come within the judicial power of the United States. Congress clearly has no right to authorize such a transfer in any other cases. These, and these only, are the cases to which the Constitution extends Federal cognizance at all; and hence no other cases can be considered or determined by the courts of the United States. Any legislation of Congress that should attempt to vest in these courts judicial power beyond this limit, would itself be unconstitutional.

It should be equally remembered that Federal courts, established in the several States by the authority of Congress, and there exercising jurisdiction within the limits of the Constitution, and by virtue of laws made in pursuance thereof, are not foreign courts in those States, any more than the Constitution of the United States is foreign there. They are not State courts, and are not established by State authority; yet they administer the Constitution, laws, and treaties of the United States within the States, as "the supreme law of the land" in every State, and, in certain cases coming within their jurisdiction, they administer State laws. (*Tennessee* v. *Davis*, 10 Otto, 271.)

The thirty-fourth section of the Judiciary Act of 1789, reproduced as section 721 of the Revised Statutes of the United States, expressly provided that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." (1 U. S. Stat. at Large, 73.) One of the important functions of these courts is to administer State laws in cases which depend upon such laws, but which, nevertheless, come within their jurisdiction. They surely are not foreign courts or trespassers upon State sovereignty when performing this judicial service; and so far as State courts are subordinate to them, or may be superseded by them, in cases removed from such courts, whether before or after trial and judgment or decree, this subordination is established by the Constitution itself.

6. Removals before Trial.—Mr. Justice Story, in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, regarded the removal of causes from State to Federal courts, before trial and judgment or decree,

as being an exercise of appellate jurisdiction by the latter courts. (Story's Const. sec. 1745.)

Mr. Justice Nelson, however, in *Dennistoun* v. *Draper*, 5 Blatch. 336, spoke of the cognizance thus obtained as being "original jurisdiction acquired indirectly by a removal from the State court." Mr. Justice Field, in *The Railway Company* v. *Whitton*, 13 Wall. 270, said: "We may doubt, with counsel, whether such removal before issue or trial can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the Federal court acquires original jurisdiction of the causes."

Chief Justice Chase, in *Bushnell* v. *Kennedy*, 9 Wall. 387, said: "The jurisdiction thus acquired by the Circuit Court was in no sense appellate. Removal, under our peculiar system of State and National jurisdictions, is simply a mode in which the right to resort under certain circumstances to the latter rather than the former is secured to defendants as well as plaintiffs." This was said in view of the fact that Congress had generally limited the right of removal to the defendant party in the State court. The plaintiff, in bringing his suit there, had already selected his forum.

It is true that causes thus removed before trial, first originated in State courts; and their transfer therefrom to Federal courts is analogous to the method by which appellate jurisdiction is exercised. The Federal courts, however, to which the causes are removed, do not review and reverse or affirm judgments or decrees rendered by State courts, but proceed to try the causes as if they had been originally brought there; and in this view the removal seems analogous to the exercise of original jurisdiction by these courts.

The law of Congress forbids the State courts to proceed any further with causes which have been removed therefrom in the manner prescribed, and directs the Circuit Courts to take cognizance of these causes. This is equivalent to superseding or excluding the jurisdiction of the former courts at a specific stage of the procedure, and in the presence of given conditions, and vesting the jurisdiction exclusively in the latter courts.

The truth would then seem to be, that the removal of causes before trial and judgment or decree, at the option of the party who has the right to procure such removal, is a process of dispossessing State courts of a jurisdiction which they might otherwise exercise,

and bringing the causes removed directly within the jurisdiction of Federal courts for trial and judgment or decree. This is what actually occurs. The jurisdiction of the Federal courts in these cases is not appellate, but original, being brought into action in this way.

CHAPTER II.

REMOVAL OF CAUSES FROM STATE TO THE CIRCUIT COURTS.

The legislation of Congress for the transfer of causes, before trial and judgment, from State courts to the Circuit Courts of the United States, in force on the 1st of December, 1873, is compiled, re-stated, and re-enacted in the Revised Statutes of the United States. This legislation was subsequently supplemented, and in some respects modified and repealed, by the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), entitled: "An Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

The design of this chapter is to state the law on this subject, as derived from these two sources. It is true, as will appear in the sequel, that the Act of March 3d, 1875, has superseded and repealed some of the provisions of the Revised Statutes relating to the removal of causes; and yet the state of the law, as it now is, will be better understood by presenting all these provisions, the repealed as well as the unrepealed, and then showing what provisions are still in force.

SECTION I.

THE REVISED STATUTES.

The regulations of the Revised Statutes, relating to such removals, are as follows:

1. Suits against Aliens, &c. (Sec. 639.)—This section contains a series of provisions, which may be conveniently considered in the following order:

(1.) *General provisions.*—The first provision declares that "any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court,

may be removed, for trial, into the Circuit Court for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section."

It was held in *Fuller* v. *The County of Colfax*, 14 Fed. Rep. 177, that the term "suit," as used in the removal acts of Congress, has no application to the presentation of a claim to a board of county commissioners created by statute to estimate and award damages sustained by the owners of land through which a road is located. Such a board was held not to be a "court," and the proceeding before it was held not to be a "suit," in the sense of these acts.

The "suit," referred to, is described as a proceeding "commenced in any State court," by which the plaintiff brought his case before that court for judicial determination. Such a court has the power to issue compulsory process, to examine witnesses, to make authoritative orders, to conduct a trial, to render a judgment or decree, and, in general, administer justice as between the parties to the suit or proceeding. It must have this power, or it will not be a court, and the proceeding before it will not be a "suit."

It was held in *The Rathbone Oil Co.* v. *Rausch*, 5 W. Va. 79, that an ordinary justice's court is not a State court, within the meaning of the removal acts of Congress, and hence that a suit could not be removed from such a court to the Circuit Court of the United States.

The right of removal does not extend to suits brought in Territorial courts, or in the courts of the District of Columbia. (*Ames* v. *The Colorado Cent. R. Co.* 4 Dill. 251; *Watson* v. *Brooks*, 13 Fed. Rep. 540; *Cissel* v. *McDonald*, 16 Blatch. 150; *Hepburn* v. *Ellzey*, 2 Cranch, 445; *New Orleans* v. *Winter*, 1 Wheat. 91; and *Barney* v. *Baltimore City*, 6 Wall. 280, 287.)

The court, from which the suit may be removed, is identified, not only by being a "State court," but also by being the court in which the suit was "commenced." This marks it as the court having original jurisdiction of the suit, and distinguishes it from the court, to which, after trial and judgment, the suit may have been carried by writ of error or appeal. The section has no application to the latter court, or to a case that has reached the stage of appellate review. The removal precedes a trial and final judgment or

decree in the court in which the suit was "commenced," and cannot be had after such judgment or decree. (*Lowe* v. *Williams*, 4 Otto, 650.)

The section declares that a suit, commenced "in *any* State court," may, in the cases and in the manner specified, be removed; and hence, whether the court be one of general or limited jurisdiction, is a matter of no consequence, so far as the right of removal is concerned. (*Gaines* v. *Fuentes et al.* 2 Otto, 10, 19.)

The Federal court, to which the suit may be removed, is "the Circuit Court for the district where such suit is pending, next to be held after the filing of the petition for such removal." This language fixes the particular court to which the case is to be removed, and also the session at which the removal must take place. The suit is removed "for trial" by that court; and the session at which the suit is to be removed, is the one next to be held after the filing of the petition in the State court, as provided for in other parts of the section.

"The amount in dispute, exclusive of costs," must, in order that the suit may be removed, exceed "the sum or value of five hundred dollars." The suit must hence relate to money, or to something that, being capable of a money valuation, can be computed and stated in the terms of money. Unless this is a fact, it will not come within the provisions of the section. What the plaintiff claims in his declaration or complaint, when bringing the suit, is the matter or "amount in dispute," as set up in the State court. (*Kanouse* v. *Martin*, 15 How. 198; *Barry* v. *Mercein*, 5 How. 103; *Walker* v. *The United States*, 4 Wall. 163; *Gordon* v. *Longest*, 16 Pet. 97; and *Keith* v. *Levi*, 2 Fed. Rep. 743.)

The sum thus specified is jurisdictional, and, in regard to this sum, the section provides that it shall "be made to appear to the satisfaction" of the State court that "the amount in dispute, exclusive of costs, exceeds the sum or value" named. This implies the right of the State court to judge on this question of fact, and, if in its judgment the statutory condition as to the amount is not present, to continue its jurisdiction of the case. The absence of this condition is fatal to the right of removal as given by statute. The right depends upon a statute; and the facts as they existed, when the suit was commenced in the State court, in respect to the sum or value in dispute, must determine whether this particular

condition of the statute is present. (*Roberts* v. *Nelson*, 8 Blatch. 74, 77.)

These general provisions of the section apply to all the cases enumerated therein, and constitute a part of the legal requirements in the removal of these cases from State courts to the Circuit Courts of the United States.

(2.) *Suits against aliens or citizens.*—The second provision, founded on the twelfth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), declares that "when the suit is against an alien, or is by a citizen of the State wherein it is brought and against a citizen of another State, it may be removed on the petition of such defendant, filed in said State court at the time of entering his appearance in said State court."

The first case, here provided for, is one in which "the suit is against an alien;" and in this case the other party must be a citizen of a State, since, if both plaintiff and defendant are aliens, the Circuit Court would have no jurisdiction. The law does not expressly designate the party bringing the suit "against an alien" in the State court; yet it implies that this party is a citizen of the State in which the suit is brought. The judicial power of the United States does not extend to controversies that are between aliens. (*Orosco* v. *Gazliardo*, 22 Cal. 83.)

The other case is one in which the suit "is by a citizen of the State wherein it is brought, and against a citizen of another State." This gives no authority for the removal of the suit where neither of the parties is a citizen of the State in which the suit is brought, or where both are citizens of such State. The plaintiff must be a resident citizen, and the defendant a non-resident citizen. The relation of citizenship existing between them, as here set forth, is assumed to have existed when the suit was commenced in the State court. On this point, Chief Justice Waite, referring, in *The Insurance Company* v. *Pechner*, 5 Otto, 183, 185, to the language of the statute, remarks: "Clearly this has reference to the citizenship of the parties when the suit is begun."

The right of removal in both of these cases is given exclusively to the defendant, who is either an alien or a non-resident citizen. The plaintiff selected his forum in bringing the suit, and no provision is made for its removal by him to a Federal court.

If there be several citizen plaintiffs bringing the suit in the State court, or several aliens or several non-resident citizens against

whom the suit is brought, then, in order to the removal of the suit, all the plaintiffs must be citizens of the State in which the suit is brought, and all the defendants must be aliens, or citizens of some other State or States. And, in order to the removal, where there is more than one defendant, all the defendants must concur in the petition therefor. (*Hubbard* v. *The Northern Railroad Co.* 3 Blatch. 84; *Beardsley* v. *Torrey*, 4 Wash. 286; *Smith* v. *Rines*, 2 Sum. 338; *Ward* v. *Arredondo*, 1 Paine, 410; and *Denniston* v. *Potts*, 19 Miss. 36.)

Corporations, whether private or municipal and public, are, in this section, regarded as citizens of the State in which they are organized, and under whose authority they exist and possess their powers. They are, hence, subject to the same rules as individual citizens in respect to the removal of suits from State courts. (*Barney* v. *The Globe Bank*, 5 Blatch. 107; *Bliven* v. *The New England Screw Co.* 3 Blatch. 111; *The Railway Company* v. *Whitton*, 13 Wall. 270; and *Barclay* v. *The Commissioners*, 1 Woods, 254.)

A corporation organized under the laws of a foreign country is regarded as an alien, and, like an individual alien, may, if a defendant, remove a suit from a State court, when the suit is brought by a citizen of the State. (*Terry* v. *The Imperial Fire Ins. Co.* 3 Dill. 408; and *The Steamship Co.* v. *Tugman*, 16 Otto, 118.)

The right of removal depends upon the legislation giving the authority therefor, and not upon the legislation which defines the original jurisdiction of the Circuit Courts of the United States, and is hence not restricted or limited by the latter legislation. (*Bliven* v. *The New England Screw Co.* 3 Blatch. 111; *Green* v. *Custard*, 23 How. 484; and *Bushnell* v. *Kennedy*, 9 Wall. 387.)

The first step in the process of removal is by the filing of a petition, by the defendant or defendants, in the State court. This petition is a written application to the court, in proper legal language, signed by the petitioner, and usually verified by affidavit, stating the facts which entitle him to have the suit transferred to the Circuit Court, and requesting the State court to suspend all further proceedings in the case. The purpose of the petition is to arrest the progress of the suit in the State court; and, to this end, it must bring to the knowledge of the court the facts which, under the statute, entitle the petitioner to remove the suit for trial

to the Federal court. (*The Insurance Co.* v. *Pechner*, 5 Otto, 183; and *Amory* v. *Amory*, 5 Otto, 186.)

The time for filing the petition is "the time of entering his appearance in said State court." It is to be done then, not before or afterward. The two acts are regarded as being simultaneous; and, hence, if the appearance be entered without filing the petition, and the petitioner, thereby recognizing the existence of the suit against him and the jurisdiction of the court over him, "demurs, or pleads, or answers, or otherwise submits himself to the jurisdiction of the State court," he at once waives a right which, if he had it at all, he might have otherwise exercised. The design of Congress, in fixing the time for filing the petition, was that he should act promptly, or not at all. The plaintiff having chosen the State forum in bringing the suit, the defendant may, in the case specified, transfer it for trial to the proper Federal forum, if, when he enters his appearance in response to the summons of the State court, and in whatever manner accords with its usual practice, he files his petition for removal. The omission to do so at that time is fatal to the right. (*Suydam* v. *Smith*, 1 Denio, 263; *Redmond* v. *Russell*, 12 Johns. 153; *Bristol* v. *Chapman*, 34 How. Pr. 140; *Cooley* v. *Lawrence*, 12 How. Pr. 176; *West* v. *Aurora City*, 6 Wall. 139; *The Insurance Company* v. *Pechner*, 5 Otto, 183; *Sweeny* v. *Coffin*, 1 Dill. 73; *Webster* v. *Crothers*, 1 Dill. 301; and *Johnson* v. *Monell*, 1 Woolw. 390.)

Where there are several defendants, and they enter their appearance at different times, the requirements of the law will be complied with if each, on entering his appearance, files a petition for the removal of the suit; and when all have done so, the suit may be removed if their respective petitions present the necessary facts. (*Ward* v. *Arredondo*, 1 Paine, 410.)

(3.) *Separable controversies.*—The third provision, founded on the Act of July 27th, 1866 (14 U. S. Stat. at Large, 306), declares that "when the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same and a citizen of another State, it may be so removed, as against said alien or citizen of another State, upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if, so far as relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns

him, without the presence of the other defendants as parties in the cause:" *Provided*, That "such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the State court, as against the other defendants."

Provision is here made for the removal of two classes of suits, considered with reference to the parties. In the one class the suit is "against an alien and a citizen of the State wherein it is brought," both of whom are jointly defendants; and in the other class the suit is "by a citizen of such State against a citizen of the same and a citizen of another State," both of whom are also jointly defendants. The provision relates only to suits in which there are at least two defendants, one of whom, in the one class, is an alien and the other a citizen of the State in which the suit is brought, and one of whom, in the other class, is a citizen of such State and the other a citizen of another State.

The party entitled to remove the suit by petition is the alien in the one class, and in the other the non-resident citizen defendant. The right of removal does not in any case belong to the plaintiff, and does not in either class belong to *all* the defendants. It is confined exclusively to the alien in the one class, and to the citizen of another State in the other class. (*Sands* v. *Smith*, 1 Dill. 290; *Amory* v. *Amory*, 5 Otto, 186; and *The Case of the Sewing Machine Companies*, 18 Wall. 553.)

There is here no provision for the removal of a suit where the plaintiff is an alien; or where an alien, being a defendant, is not as such sued jointly with a citizen of the State in which the suit is brought; or where the plaintiff is not a citizen of such State; or where all the defendants are citizens of another State than that in which the suit is brought; or where all the defendants are citizens of the State in which the suit is brought. No one of these cases presents the exact elements in reference to the parties set forth in the statute; and, hence, no one of them is removable under the statute.

Two conditions in respect to the suit itself are stated, in the presence of either of which the alien or the non-resident citizen defendant may remove the suit. One is that the suit, so far as it relates to him, "is brought for the purpose of restraining or enjoining him;" and the other is that it "is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the

cause." The presence of either of these conditions authorizes the alien defendant or the non-resident citizen defendant, as the case may be, to remove so much of the suit as relates to him, or as concerns him, while as to the other defendants the plaintiff is left to pursue his remedy in the State court where the suit was brought.

The suits contemplated in the statute are injunction suits, or those involving separable controversies. In the latter case the suit brought by the plaintiff in the State court is split into two suits. The part that is removed goes to the Federal court, and the other part remains in the State court. Whether the suit is capable of division into distinct and separate controversies as to the party to whom the statute gives the right of removing so much of it as concerns him, if such be the fact, is a question to be determined by its character and the relation of this party to the matters in dispute. If it cannot be thus divided, then no removal can be had; and if it can be, then as to this party it may be removed. (*Bixby* v. *Course*, 8 Blatch. 73; *Peters* v. *Peters*, 41 Ga. 242; *Allen* v. *Ryerson*, 2 Dill. 501; *Field* v. *Lamb*, 1 Deady, 430; *Field* v. *Lownsdale*, 1 Deady, 288; *The Case of the Sewing Machine Companies*, 18 Wall. 553; *Ex parte Andrews & Mott*, 40 Ala. 639; *Hodgkins* v. *Hayes*, 9 Abb. Pr. (N. S.) 87; and *Darst* v. *Bates*, 51 Ill. 439.)

The time for filing the petition for a removal of the suit is "any time before the trial or final hearing of the cause." The phrase "trial or final hearing" relates to the court in which the suit was brought, before which it is pending, and from which it may be removed in the cases specified, by the proper party, and in the manner and within the time designated. The term "trial" applies to suits at law, while the words "final hearing" apply to suits in equity. The natural and obvious meaning of the language used by Congress is that when the trial or judicial examination of the facts in issue has been entered upon in the State court, it will then be too late to file a petition for the removal of the suit. The language of the statute is "any time *before* the trial or final hearing of the cause." If Congress meant that the petition for removal might be filed at any time before the *completion* of the trial or final hearing, or before the rendering of a judgment or decree, then the language is certainly not well suited to express the idea. The design of the removal is not to have a new trial or

a new final hearing, but to supersede one that would otherwise take place in the State court; and this design would, in many cases at least, be defeated, if the suit could be removed at any time before final judgment or decree.

Ex-Judge Dillon, in his "Removal of Causes," 3d ed., pp. 73, 75, observes: "Under this language the petition for the removal *may*, it is certain, be made at any time before entering upon the final trial, or the hearing on the merits, and it *must* be made before final judgment in the court of original jurisdiction, and it is too late to make it after the cause has reached and is pending in the State appellate court. * * * It would seem, however, that it would be too late to defer the application until the trial is actually entered on."

Mr. Justice Field, commenting, in *Stevenson* v. *Williams*, 19 Wall. 572, on the phrase "before the final hearing or trial of the suit," as used in the removal act of March 2d, 1867 (14 U. S. Stat. at Large, 558), remarks: "This clearly means before final judgment in the court of original jurisdiction, where the suit is brought. Whether it does not mean still more — before the hearing or trial of the suit has commenced which is to be followed by such judgment—may be questioned; but it is unnecessary to determine that point in this case."

If there has been an actual trial of the suit resulting in a verdict, and the trial court sets aside the verdict and grants a new trial, or if an appellate State court reverses the judgment of the court below and orders a new trial, or if the jury fail to agree and the suit is tried a second time, then, according to the weight of authority, the case is restored to the status in which it was before any trial or hearing was had at all; and the party entitled to remove the suit, may file his petition for removal "at any time before" the second "trial or final hearing of the cause," just as he could have done before the first trial or final hearing. (Dillon's Removal of Causes, 3d ed., pp. 75, 76; *Barber* v. *St. Louis, &c. R. R. Co.* 43 Iowa, 223; *Vannevar* v. *Bryant*, 21 Wall. 41, 43; *Waggener* v. *Cheek*, 2 Dill. 560; *Kellogg* v. *Hughes*, 3 Dill. 357; and *Dart* v. *McKinney*, 9 Blatch. 359.) The theory upon which this view rests is that the first trial, being wholly vacated, or resulting in a disagreement of the jury, was a nullity, and hence that the case stands, as to the right of removal, just as it would have

stood if no such trial had been had. There is some diversity of judicial opinion on this point, yet this seems to be the better view.

In *McGinnity* v. *White*, 3 Dill. 350, it was held to be sufficient for the removal of a suit under the statute, if the defendant, being a citizen, was, at the time of filing his petition, a citizen of another State, and the plaintiff was a citizen of the State in which the suit was brought.

(4.) *Prejudice or local influence.*—The fourth provision of the section, based on the Act of March 2d, 1867 (14 U. S. Stat. at Large, 558), amending the Act of July 27th, 1866, declares that "when a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said State court an affidavit, stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

The suit here described, as to the parties, is "between a citizen of the State in which it is brought and a citizen of another State," without any designation as to which is plaintiff and which is defendant. The right of removing the suit is given exclusively to the citizen of another State, whether he be plaintiff or defendant. There is no provision for a removal by an alien. He is not a party to the suit described.

The rule as to filing the petition for removal by the citizen of another State is the same as in the provision just considered. The language is that the petition may be filed "at any time before the trial or final hearing of the suit." The words are identical with those of the previous provision, with the exception that the term "suit" is substituted for the word "cause." This makes no change of import.

One of the parties must be a citizen of the State in which the suit is brought, and the other party a citizen of another State; and if on each side there be more than one person, then all the persons on one side must be citizens of the State in which the suit is brought, and all the persons on the other side citizens of some other State, and the latter, having the right of removal, must unite in the petition therefor. (*Hurst* v. *W. & A. R. R. Co.* 3 Otto, 71; *The Ins. Co.* v. *Francis*, 11 Wall. 210; *The Bible Society* v.

Grove, 11 Otto, 610; *The Case of the Sewing Machine Companies*, 18 Wall. 553; *Vannevar* v. *Bryant*, 21 Wall. 41; and *Bixby* v. *Course*, 8 Blatch. 73.)

The distinctive peculiarity about the removal of suits, as provided for in this clause of the section, lies in the reason which the petitioner is authorized to assign for the removal in the form of an affidavit filed in the State court, either "before or at the time of filing" his "petition." This affidavit must state "that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court." Being a citizen of a State other than that in which the suit is brought, whether plaintiff or defendant, and filing his petition for the removal of the suit before the trial or final hearing thereof on the merits, and also making and filing the required affidavit before or at the time of filing the petition, then he has the right to have the suit removed. All the conditions of the statute in this respect are complied with.

The general statement, made in the affidavit of the petitioner, is sufficient, without a detailed setting forth of the facts which constitute the reasons of his belief. He is not required to prove these facts, or affirmatively to show, except by the affidavit, that he cannot obtain justice in the State court. It is enough if, under oath, he states the reasons which the statute assigns. (*Goodrich* v. *Hunton*, 29 La. An. 372; *The Meadow Valley Mining Co.* v. *Dodds*, 7 Nev. 143; and *Bowen* v. *Chase*, 7 Blatch. 255.)

Judge Blatchford, in *Bowen* v. *Chase*, *supra*, held that the affidavit, required by the act of Congress, "must, at least in the absence of any controlling statute of the United States, be taken and certified in such manner as the State law requires in respect to the taking and certifying of affidavits to be received and used in the courts of the State." It is presented to a State court, and until Congress shall prescribe a rule on the subject, it is to be taken and authenticated as directed by the laws of the State in respect to other affidavits presented to such a court.

In *Miller* v. *Finn*, 1 Neb. 254, and in *Cooper* v. *Condon*, 15 Kan. 572, it was held that the affidavit must be made personally by the petitioner himself, and could not be made by his attorney or agent. This question arose in *Hart* v. *The City of New Orleans*, 14 Fed. Rep. 180; and the court held that, in the absence of the petitioner, the affidavit might be made by his attorney of record, if the affiant swears that both himself and his client have

reason to believe and do believe that, from prejudice or local influence, he will not be able to obtain justice in the State court. Such an affidavit the court regarded as being made by the petitioner within the meaning and object of the statute. To the same effect is *Dennis* v. *Alachua*, 3 Woods, 683.

If the petitioner be a corporation, then the affidavit must be made by some one authorized to represent and act for the corporation, and this fact must appear. (*Mahone* v. *M. & L. R. R. Co.* 111 Mass. 72; and *Dodge* v. *The Northwestern Union Packet Co.* 13 Minn. 458.)

(5.) *The surety.*—The fifth provision declares that, in order to the removal of a suit, "the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said State court good and sufficient surety for his entering in such Circuit Court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause, or, in said cases where a citizen of the State in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein."

Compliance with this requirement is an indispensable part of the process of removing a suit in any of the cases mentioned in the section. The security for doing the things specified must be given at the time of filing the petition; and if the petitioner fails to do so, the case remains in the State court. The surety must be "good and sufficient;" and whether it possesses this character or not is for the State court to determine, at least, in the first instance. (*Hill* v. *Henderson*, 21 Miss. 688; *Robinson* v. *Potter*, 43 N. H. 188; *Fitz* v. *Hayden*, 4 Mart. (N. S.) 653; *Mix* v. *Andes Ins. Co.* 74 N. Y. 53; and *Yulee* v. *Vose*, 9 Otto, 539.)

(6.) *Duty of the State court.*—The sixth provision declares that, the petition being properly filed and the good and sufficient surety being offered, it shall then "be the duty of the State court to accept the surety and to proceed no further in the cause against the petitioner," and that "any bail that may have been originally taken shall be discharged."

The theory of this provision is that the jurisdiction of the State court in the case shall terminate at the point at which

the process of removing the cause therefrom is completed. Whether the petition presents the necessary facts according to the statute, and whether the surety offered is good and sufficient, are matters which, in the first instance, are submitted to the judgment of that court; and if all the requisites of the law have been complied with, then, but not otherwise, the jurisdiction of the court is at an end. The State court in these circumstances has no discretion in the premises, and no legal right to continue the exercise of jurisdiction. Any further proceeding in that court is *ipso facto* void. (*Fisk* v. *The Union Pacific R. R. Co.* 6 Blatch. 362; *Gordon* v. *Longest*, 16 Pet. 97; *Yulee* v. *Vose*, 9 Otto, 539; and *The Steamship Co.* v. *Tugman*, 16 Otto, 118.)

If the State court overrules the application of the petitioner and proceeds to consider and determine the case, he does not thereby lose his right to have it removed. He may take an appeal from the decision to the highest court of the State; and if the decision be there affirmed, he may carry the case by writ of error to the Supreme Court of the United States. It was held in *The Insurance Co.* v. *Dunn*, 19 Wall. 214, that if "the State court still goes on to adjudicate the case, against the resistance of the party who got the removal, such action on its part is a usurpation, and the fact that such a party has contested the suit in such State court does not, after a judgment against him, on his bringing the proceedings here for reversal and direction to proceed no further, constitute a waiver, on his part, of the question of the jurisdiction of the State court to have tried the cause." The Supreme Court has repeatedly laid down this principle in application to removal cases.

(7.) *The Circuit Court.*—The seventh and last provision of the section declares that "when the said copies are entered as aforesaid in the Circuit Court, the cause shall there proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such State if the cause had remained in the State court."

The jurisdiction of the Circuit Court actually attaches to the case when all the requisite steps for its removal have been taken; and the exercise of that jurisdiction begins when the copies of the pleadings are properly entered in that court. (*The Railroad Co.* v. *Koontz*, 14 Otto, 5, 14.)

The case being transferred to the Circuit Court, that court takes up the case just as it stood in the State court at the time of removal, and proceeds to dispose of it, giving to the copies of the pleadings the same force and effect that they would have had in the State court if the suit had not been removed therefrom. The plaintiff, therefore, has no occasion to begin his suit *de novo* in the Circuit Court. The removal does not vacate or change what has already been done in the State court, but simply carries the suit to the Circuit Court for further proceedings. (*Duncan* v. *Gegan*, 11 Otto, 810.)

It is necessary, however, that the copies of the proceedings in the State court should, as provided in the statute, be entered in the Circuit Court, in order to enable that court to proceed with the case, although its jurisdiction does not depend upon such entrance. (*Fisk* v. *The Union Pacific R. R. Co.* 6 Blatch. 362.)

The question whether the case has been properly removed, as required in the statute, and hence whether the Circuit Court has jurisdiction, is one for that court to determine when the case comes before it. If it has not been, then no jurisdiction has really been acquired; and it will be the duty of the Circuit Court to remand it to the State court, in which event the jurisdiction of the latter court re-attaches to the case. (*Pollard* v. *Dwight*, 4 Cranch, 421; *Calvin* v. *Boutwell*, 9 Blatch. 470; *Thatcher* v. *Mc Williams*, 47 Ga. 306; and *The Germania Fire Ins. Co.* v. *Francis*, 52 Miss. 457.)

In *French* v. *Hay*, 22 Wall. 238, it was held that when a case has, under one of the removal acts of Congress, been removed from a State court into a Circuit Court of the United States, the the objection that the requirements of the act were not complied with, if made after the testimony has all been taken and the case is ready for a hearing on the merits, will not be considered by the Supreme Court, and that in such circumstances it ought not to be considered if presented to the Circuit Court. The objection comes too late, and must be held to have been conclusively waived.

The general principle that applies to all the cases, for whose removal provision is made in this section, is that they are, by reason of the parties, such cases as come within the judicial power of the United States, and such as, with the necessary legislation by Congress, might have been brought in the Circuit Courts by original process. (*Smith* v. *Rives*, 2 Sumn. 338.) The removal

of these cases simply enables the Circuit Courts to exercise a jurisdiction for which the Constitution provides.

2. Suits against Corporations organized under a Law of the United States. (Sec. 640.)—This section provides that "any suit commenced in any court other than a Circuit or District Court of the United States against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member for any alleged liability of such corporation, or of such member as a member thereof, may be removed, for trial, in the Circuit Court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States." The section further provides that "such removal, in all other respects, shall be governed by the provisions of the preceding section" (639).

No jurisdictional sum is here specified as a condition of the right of removal. The section says that "any suit commenced," being of the character indicated, may be removed, no matter what is the amount in dispute, or whether it be a suit in law or in equity, or who may be the plaintiff. The suit is known by the twofold fact that it is commenced in some "court other than a Circuit or District Court of the United States," and that it is "against a corporation other than a banking corporation, organized under a law of the United States, or against a member thereof as such member for any alleged liability of such corporation, or of such member as a member thereof." This excludes national banks and all corporations not organized under the laws of the United States, and includes all other corporations so organized and the members thereof when sued as such. (*Jones* v. *The Oceanic Steam Nav. Co.* 11 Blatch. 406; *Pettilon* v. *Noble*, 7 Biss. 449; *Texas* v. *Tex. & Pacific R. R. Co.* 3 Woods, 308; and *Gard* v. *Durant*, 4 Cliff. 113.)

The requisite facts as to the suit being present, the defendant, whether the corporation itself, or a member thereof as such member, has a right to remove it "for trial in the Circuit Court for the district where the suit is pending," by petition in accordance with the provisions of section 639, except as provided in this section. The exception is that the petition, being verified by oath,

must state that the defendant has a defense arising under or by virtue of the Constitution or some treaty or law of the United States. If the petitioner has no such defense he cannot, under this statute, remove the suit. If he has, then it is sufficient to state the fact under oath, without setting forth its particulars. The right of removal depends upon the papers presented to the State court; and if these conform to the statute, the court has no discretion in the premises. (*Magee* v. *The Union Pacific R. R. Co.* 2 Saw. 447; *Jones* v. *The Oceanic Steam Nav. Co.* 11 Blatch. 406; and *Fisk* v. *The Union Pacific R. R. Co.* 8 Blatch. 243.)

If the defense arises under the charter of the corporation, which is granted by a law of the United States, this will be sufficient for a removal of the suit. (*Turton* v. *The Union Pacific R. R. Co.* 3 Dill. 366.)

The power of Congress to authorize the removal of these suits depends upon the character of the defense. If they involve no question arising under the Constitution or a law or treaty of the United States, then not only is there no provision for their removal, but none could be made by Congress, without exceeding the limits of the judicial power of the United States. The corporations being organized under the laws of the United States, then any question in suits brought against them, arising under the Constitution or a law or treaty of the United States, is, at the pleasure of Congress, within the scope of Federal jurisdiction. The right of removal does not depend on the citizenship of the parties. (*Texas* v. *The Railroad Co.* 3 Woods, 318.)

3. Suits and Criminal Prosecutions against Persons Denied any Civil Right, &c. (Secs. 641 and 642.)—These sections contain the following provisions:

(1.) That "when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal

rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending."

(2.) That, "upon the filing of such petition, all further proceedings in the State court shall cease, and shall not be resumed, except as hereinafter provided;" that "all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court;" and that "it shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case."

(3.) That "if such copies are filed by said petitioner in the Circuit Court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process;" that "if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the Circuit Court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and that, "in case of his default," the court "may order a non-suit and dismiss the case at the costs of the plaintiff;" and that "such dismissal shall be a bar to any further suit touching the matter in controversy."

(4.) That "if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the Circuit Court as herein provided, a certificate, under the seal of the Circuit Court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed."

(5.) That "when all the acts necessary for the removal of any suit or prosecution," as above described, "have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said Circuit Court to issue a writ of *habeas corpus cum*

causa, and of the marshal by virtue of said writ to take the body of the defendant into his custody, to be dealt with in said Circuit Court according to law and the orders of said court, or, in vacation, of any judge thereof," and that "the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ."

The statutory provisions, found in these sections, embody the substance of the antecedent legislation of Congress on the subject to which they refer. The design of Congress was to afford the protection of the Federal courts to two classes of persons; first, those against whom suits or criminal prosecutions might be commenced in State courts, and who might be denied or could not enforce the equal civil rights secured to them by any law of the United States; secondly, officers, whether civil or military, prosecuted in State courts for their acts under such a law, or their refusal to act on the ground that the action would be inconsistent therewith.

The law referred to, as reproduced in section 1977 of the Revised Statutes, reads as follows: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Congress intended that this law should be made effective to its end, and, for this purpose, provided for a removal of suits and criminal prosecutions in the cases and in the manner specified.

The right of removal applies equally to civil suits and criminal prosecutions, and is given exclusively to the defendant, who is to exercise the right by filing a petition in the State court within the time named, stating the facts and verifying the statement by oath. No jurisdictional sum is specified as a condition of the right in any case, and no surety is required for the appearance of the defendant in the Circuit Court. If he fails to perfect the process of removal without his fault, but in consequence of the fault of the clerk of the State court, then the statute provides for him a remedy. If the failure is by his fault, then, upon proper notification thereof,

the State court may resume jurisdiction, and proceed with the case as if no petition for removal had been filed.

The constitutionality of this legislation was, in *Strauder* v. *West Virginia*, 10 Otto, 303, considered and affirmed by the Supreme Court of the United States. It was held that if a colored person is indicted for a crime, and the law of the State excludes colored persons from serving on juries, simply because of their color, this legal exclusion would give the defendant the right to have his case removed for trial to the proper Circuit Court. It was, however, held, in *Virginia* v. *Rives*, 10 Otto, 313, that the mere fact that a grand or petit jury in a given case was not a mixed jury, without any State law excluding colored persons from serving on juries, would not under the statute give any right of removal.

The denial of rights or the inability to enforce them, as referred to in the statute, relates to legal disabilities and impediments created by the constitution or laws of a State, and not to private infringements of these rights when the laws of the State are impartial. (*Virginia* v. *Rives*, 10 Otto, 313; *The State* v. *Gaines*, 2 Woods, 342; *Fitzgerald* v. *Allman*, 82 N. C. 492; *Thomas* v. *The State*, 58 Ala. 365; and *The State* v. *Gleason*, 12 Fla. 190.) The State laws being impartial, and in themselves involving no denial of the rights secured by a law of the United States, the statutory provision for the removal of a civil suit or criminal prosecution, before trial or final hearing, does not apply.

Nor does the provision apply to any denial of rights or inability to enforce them, resulting not from State laws, but from the action of the court when engaged in the trial or hearing of a cause. The remedy for such denials or inability in the process of actual trial is not a removal of the suit or prosecution, for which the statute makes no provision, but an appeal to a higher State court, and ultimately, if necessary, to the revisory power of the Supreme Court of the United States. This is the view stated by Mr. Justice Strong in *Virginia* v. *Rives*, 10 Otto, 313.

In *Ex parte Wells*, 3 Woods, 128, it was held that a petition for the removal of a cause, under section 641 of the Revised Statutes, that simply alleges that the law for the selection of jurors, which itself is constitutional, will be so administered as to secure a jury inimical to the petitioner, and also alleges a general prejudice against him in the minds of the court, jurors and of-

ficers, does not state facts enough to authorize the removal under this statute. It was held in this case that, in order to a removal, there must be some State law, ordinance, regulation, or custom hostile to the rights of the petitioner and to their enforcement. It was also held that the State court to which the petition is presented in the first instance, has the right to examine into its sufficiency, and that, at the same time, the Federal court has the superior right to try the case, if a proper one for removal, and to assert its jurisdiction by suitable process directed to the State court.

In *Neal* v. *Delaware*, 13 Otto, 370, the Supreme Court held: 1. That the presumption is that the State recognizes as binding on all her citizens and every department of her government an amendment to the Constitution of the United States, from the time of its adoption, and her duty to enforce it, within her limits, without reference to any inconsistent provisions in her own constitution. 2. That, in the case before the court, this presumption is strengthened and becomes conclusive, not only by the adjudication of the highest court of the State of Delaware that her constitution had been modified by force of the amendments to the Constitution of the United States, but by the entire absence of any statutory enactment, since their adoption, indicating that she does not recognize, in the fullest legal sense, their effect upon her constitution and laws. 3. That, therefore, where a negro indicted in one of her courts for a felony, presented a petition alleging that persons of African descent were, by reason of their race and color, excluded by those laws from service on juries, and praying that the prosecution against him may be removed to the Circuit Court of the United States, the prayer of the petition was properly denied. 4. That had the State, since the adoption of the Fourteenth Amendment, enacted any statute in conflict with its provisions, or had her judicial tribunals repudiated it as a part of the supreme law of the land, or declared that the acts passed to enforce it were inoperative and void, there would have been just ground to hold that the case was one embraced by section 641 of the Revised Statutes, and, therefore, removable into the Circuit Court.

The court in this case re-affirmed the doctrines announced in *Strauder* v. *West Virginia*, 10 Otto, 303, in *Virginia* v. *Rives*, Id. 315, and in *Ex parte Virginia*, Id. 339.

If the petitioner for removal be an officer, civil or military,

sued or prosecuted in a State court for the acts specified in the statute, then, in order to effect a removal of the cause, he must, in his petition, set forth the facts as recited in the statute. The burden is upon him to make out a *prima facie* case, showing that he acted under the color of the authority of the law referred to in the statute. If, being an officer, the petitioner acted in good faith under a warrant from his superior whom it was his duty to obey, then he was acting under color of such authority; and this is sufficient to make the case removable to the proper Circuit Court, and actually to remove it by compliance with the conditions named in the statute. (*Hodson* v. *Milward*, 3 Grant, 412; *Jones* v. *Seward*, 40 Barb. 563; *Patrie* v. *Murray*, 43 Barb. 323; *Skeen* v. *Huntington*, 25 Ind. 510; and *Short* v. *Wilson*, 1 Bush. 350.)

4. Suits and Criminal Prosecutions against Revenue Officers and Officers acting under Registration and Election Laws. (Sec. 643.)—The provisions of this section are as follows:

(1.) That "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States or other person, on account of any act done under the provisions of Title XXVI, 'THE ELECTIVE FRANCHISE,' or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit Court."

(2.) That the "petition shall set forth the nature of the suit or prosecution, and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for

the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said Circuit Court, if in session, or, if it be not, to the clerk thereof at his office, and shall be filed in said office."

(3.) That "the cause shall thereupon be entered on the docket of the Circuit Court, and shall proceed as a cause originally commenced in that court," and that "all bail or other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court."

(4.) That "when the suit is commenced in the State Court by summons, subpœna, petition, or another process except *capias*, the clerk of the Circuit Court shall issue a writ of *certiorari* to the State court, requiring it to send to the Circuit Court the record and proceedings in the cause."

(5.) That when the suit or prosecution "is commenced by *capias*, or by any other similar form of proceeding by which a personal arrest is ordered," the clerk of the Circuit Court "shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto," and that "thereupon it shall be the duty of the State Court to stay all further proceedings in the cause, and the suit or prosecution, upon the delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceedings, trial or judgment therein in the State court shall be void."

(6.) That "if the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the Circuit Court, or, in vacation, of any judge thereof."

(7.) That "if, upon the removal of such suit or prosecution, it is made to appear to the Circuit Court that no copy of the record and proceedings therein in the State court can be obtained, the Circuit Court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in

said Circuit Court," and that, "on failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant."

The constitutionality of so much of this section as relates to revenue officers of the Government was, in *Tennessee* v. *Davis*, 10 Otto, 257, considered and affirmed by the Supreme Court of the United States. Davis, who was such an officer, had been indicted for murder in a State court of Tennessee. He sought, under this section, to remove his case for trial to the proper Circuit Court. The Supreme Court held that the section was valid for this purpose, that Davis had filed the requisite petition for removal, and that the Circuit Court had jurisdiction to dispose of the case. The argument of Mr. Justice Strong, in stating the opinion of the court, is equally applicable to the entire section.

The civil suit or criminal prosecution, referred to in the section, is spoken of as having been commenced in a State court against any one of the following classes of persons: 1. An officer appointed under or acting by authority of any revenue law of the United States. 2. Any person acting under or by authority of such officer. 3. Any person holding property or estate by title derived from any such officer, when the suit affects the validity of any such revenue law. 4. Any officer of the United States or other person acting under the provisions of Title XXVI, relating to the "Elective Franchise." The ground of the suit or criminal prosecution is some act done, or some right, title, or authority claimed, by any one of these parties, under these provisions of Federal law.

The suit or criminal prosecution, commenced in a State court, is a procedure under State authority, and has its basis in State law. It is brought for the purpose of judicially enforcing some right claimed under this law, or punishing some offense committed against it. Neither the suit nor the prosecution is under the laws of the United States. Mr. Justice Strong, in *Tennessee* v. *Davis*, 10 Otto, 257, said: "If, therefore, the statute is to be allowed any meaning, when it speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws, in which defenses are set up or claimed under United States laws or authority."

The same remark would equally apply to civil suits commenced in State courts, on any of the grounds specified, against any of

the persons named. The theory of the section is that the procedure in the State court, whether civil or criminal, has its entire basis in State law.

The constitutional ground on which Congress has power to provide for the removal of the suit or prosecution, as the case may be, is that the validity or application of a Federal law is involved in the defense. The defendant is, by the terms of the section, an officer or other person acting under the authority of the United States, or claiming some right or title under this authority. This fact, if existing in any given case, brings that case within the judicial power of the United States. The Federal courts, at the pleasure of Congress, may take cognizance of the case, no matter in what court the suit or prosecution was commenced. Congress has indicated its pleasure in the section under consideration, and provided for the removal of such a case from a State court to the proper Circuit Court of the United States. The design of the section is to give the party sued or prosecuted in a State court, on the ground set forth, the right of trial in a Federal court.

The section applies alike to civil and criminal cases, and includes any case that comes within its terms, without any reference to the amount in dispute, if the suit be of a civil nature. (*Wood* v. *Matthews*, 2 Blatch. 370.) Any law for the imposition of taxes, whether direct or otherwise, and for the collection of revenue, and any officer or person acting under the authority of such law, or claiming a right, title or authority under it, comes within the terms of the section. (*Warner* v. *Fowler*, 4 Blatch. 311, and *Peyton* v. *Bliss*, 1 Woolw. 170.) So any provision under Title XXVI, relating to the "Elective Franchise," or any officer of the United States or other person acting under such provision, or claiming any right, title, or authority under the same, is equally within these terms.

The suit or prosecution, when actually removed from the State court, goes as a whole to the Circuit Court, with all the parties thereto. (*Fisk* v. *The Union Pacific R. R. Co.* 6 Blatch. 362.)

If the case thus removed be a criminal prosecution, then it is the province of the Circuit Court to administer State laws in application to it, subject to whatever qualification may be made by the laws of the United States. Mr. Justice Strong, referring to this point in *Tennessee* v. *Davis*, 10 Otto, 257, said: "The Circuit Courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply

the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case." (*Georgia* v. *O'Grady*, 3 Woods, 469, and *Findley* v. *Satterfield*, 3 Woods, 504.)

The method of removal, as provided for in this section, differs materially, in one respect, from that adopted in the previously considered cases. The defendant makes no application whatever to the State court and files no petition therein. He is required to present his petition to the Circuit Court in the first instance, "at any time before the trial or final hearing" of the case in the State court, stating the nature of the suit and verifying the same by affidavit, accompanied by the certificate specified in the section. This being done, then, if the petition upon its face shows a case within the terms of the section, the suit or prosecution is *ipso facto* removed into the Circuit Court, and is to be proceeded with as if originally commenced in that court. The jurisdiction of the State court is at an end unless the case shall be remanded thereto.

The subsequent proceedings in the Circuit Court are taken in the exercise of a jurisdiction which is already perfected. That court decides every question relating to the sufficiency of the petition and its own jurisdiction in the matter. (*Dennistoun* v. *Draper*, 5 Blatch. 336.) The writ of *certiorari*, authorized to be issued for the purpose of obtaining the record and proceedings in the State court, assumes that jurisdiction has attached to the case, and informs the State court to this effect. (*Fisk* v. *The Union Pacific R. R. Co.* 6 Blatch. 362.)

The writ of *habeas corpus cum causa*, authorized to be issued in the case specified, brings the body of the defendant into the Circuit Court. The power of the court to require the plaintiff to proceed *de novo* when no record can be obtained from the State court, and, in the event of his failure to do so, to render a judgment of *non prosequitur* against him, is designed to provide against an omission of the State court to send up the record, and enable the Circuit Court to proceed with the case without it.

If the petition verified by affidavit, and accompanied by the required certificate of counsel, on examination in the Circuit Court, fails to bring the case within the terms of the statute, then

the court really has no jurisdiction; and it will be its duty, at any stage of the proceeding when this fact appears, to remand the case back to the State court. (*Dennistoun* v. *Draper*, 5 Blatch. 336, and *Murray* v. *Patrie*, 5 Blatch. 343.)

5. Personal Actions by Aliens in Particular Cases. (Sec. 644.)—This section provides that "whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State, who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court by personal service of process, such action may be removed into the Circuit Court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section" (643).

The provision here made applies only to an action that, in the language of the law, is known as "personal." The parties are an alien bringing the suit in a State court, and a citizen of a State against whom the suit is brought; and this makes a case to which the judicial power of the United States extends. This citizen defendant is, or, at the time the alleged action accrued, was, a civil officer of the United States, and is also a non-resident of the State in which the State court has obtained jurisdiction by personal service of process.

Such being the facts, the citizen defendant may remove the suit into the Circuit Court in and for the district in which the process was served. The method of removal, being the same as provided in section 643, is by petition to the Circuit Court, setting forth the nature of the suit and verified by affidavit, and accompanied by the prescribed certificate of counsel.

6. General Auxiliary Provisions. (Secs. 645 and 646.)—The first of these sections (645) provides that "in any case where a party is entitled to copies of the record and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court

of the United States in which such record and proceedings are needed, may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit, or otherwise, as the circumstances of the case may require and allow, and, thereupon, such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court." This enables the Federal court to proceed with any case properly before it, even though the needed copy of the record in the State court cannot be obtained. (*Akerly* v. *Villas*, 2 Biss. 110.)

The other section (646) provides as follows: "When a suit is removed for trial from a State court to a Circuit Court, as provided in the foregoing sections, any attachment of the goods or estate of the defendant by the original process shall hold the same to answer the final judgment, in the same manner as by the laws of such State they would have been held to answer final judgment had it been rendered by the court in which the suit was commenced; and any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into which the cause is removed; and any bond of indemnity or other obligation, given by the plaintiff upon the issuing or granting of any attachment, writ of injunction, or other restraining process against the defendant petitioning for the removal of the cause, shall also continue in full force, and may be prosecuted by the defendant and made available for his indemnity in case the attachment, injunction, or other restraining process be set aside or dissolved, or judgment be rendered in his favor, in the same manner and with the same effect as if such attachment, injunction, or other restraining process had been granted, and such bond had been originally filed or given in such State court."

The Circuit Court, having acquired jurisdiction, takes up the case as it was at the time of its removal from the State court; and the general design of this section is to perpetuate in the former court the remedies that would have been available in the latter court, if the cause had not been removed. (*The Garden City Manuf. Co.* v. *Smith*, 1 Dill. 305, and *Lamar* v. *Dana*, 10 Blatch. 34.)

7. Suits in which Parties claim Lands under Grants of Different States. (Sec. 647.)—The provisions of this section are as follows:

(1.) That "if, in any action commenced in a State court, where the title of land is concerned, and the parties are citizens of the same State, and the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, states to the court, and makes affidavit if they require it, that he claims and shall rely upon a right or title to the land under a grant from a State other than that in which the suit is pending, and produces the original grant, or an exemplification of it, except where the loss of public records shall put it out of his power, and moves that the adverse party inform the court whether he claims a right or title to the land under a grant from the State in which the suit is pending, the said adverse party shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial."

(2.) That if the adverse party "gives information that he does claim under such grant, the party claiming under the grant first mentioned may, on motion, remove the cause for trial into the next Circuit Court to be holden in the district where such suit is pending."

(3.) That "if the party so removing the cause is defendant, the removal shall be made under the regulations governing removals of a cause into such court by an alien," and that "neither party removing the cause shall be allowed to plead or give evidence of any other title than that stated by him as aforesaid as the ground of his claim."

The controversy in the State court being between citizens of the same State, and a title to land being concerned therein, then either party, under the provisions of this section, may, in the way prescribed, remove the suit to the proper Circuit Court for trial, provided he claims the land under the alleged grant of a State other than that in which the suit is pending, and the other party rests his claim to the land upon the alleged grant of the State in which the suit is pending, and provided the value of the land, exclusive of costs, exceeds the sum of five hundred dollars. The controversy is then "between citizens of the same State claiming lands under grants of different States." (*The Town of Pawlet* v.

Clark et al. 9 Cranch, 292; *Colson* v. *Lewis*, 2 Wheat. 377; *Shepherd* v. *Young*, 1 T. B. Mon. 203; and *Thompson* v. *Kendricks*, 5 Hayw. 115.)

This presents the six classes of suits or prosecutions, commenced in State courts, which, under the provisions of the Revised Statutes, may be removed to the Circuit Courts of the United States. The first and sixth classes, which embrace only civil suits, require the proper conditions as to citizenship, and also that the matter in dispute, exclusive of costs, shall exceed the sum or value of five hundred dollars. In the other four classes no jurisdictional sum is specified; and two of them, namely, the third and fourth, embrace criminal prosecutions, as well as civil suits, commenced in State courts. In the first, second, third, and sixth classes the initiatory proceedings for removal are taken in the State court where the suit is commenced; but, in the fourth and fifth classes, these proceedings are taken in the Circuit Court to which the suit is to be removed.

All the classes, either by reason of the parties or by the subject-matter involved, are assumed to come within the judicial power of the United States, as defined in the Constitution. Congress has seen fit to give this jurisdiction, by removal of suits and prosecutions before trial, to the Circuit Courts of the General Government.

SECTION II.

THE ACT OF MARCH 3D, 1875.

The provisions of the first section of this act relate to the original and appellate jurisdiction of the Circuit Courts of the United States. The remaining provisions of the act are chiefly devoted to the regulation of the removal of causes from State courts to these courts. So much of the act as relates to such removals will be considered in the following order:

1. Removable Causes. **(Sec. 2.)** — This section provides as follows:

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the

United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

(1.) *General Observations.*—A comparison of this section with the first section of the act defining the original jurisdiction of the Circuit Courts of the United States in suits of a civil nature at law or in equity, and permitting a concurrent jurisdiction by State courts in these suits, shows that the five classes of suits which, under the second section of the act, may be removed from State courts to Circuit Courts, correspond with the suits in which the latter courts have original jurisdiction, and hence that the suits first brought in State courts, and for whose removal provision is made, might have been originally brought in the Circuit Courts of the United States. The removal simply brings such suits before these courts for the exercise of their original jurisdiction, as defined by the act.

In two of these classes—namely, suits arising under the Constitution, laws, or treaties of the United States, and those in which the United States shall be plaintiff or petitioner—the jurisdiction is given without any reference to the question of citizenship. In the other three classes—namely, controversies between citizens of different States, or between citizens of the same State claiming lands under grants of different States, or between citizens of a State and foreign states, citizens, or subjects—the jurisdiction rests upon the specified conditions as to citizenship, without regard to the subject-matter involved in the suits, except in the second of these classes.

There was no provision, in any previous legislation of Congress, for the removal of suits from State courts, when arising under the Constitution, laws, or treaties of the United States, or when brought

by the United States in State courts, or when the controversy was between citizens of a State and foreign states. This section is, consequently, an enlargement of the jurisdiction of the Circuit Courts in removal cases. It gives to the jurisdiction in these cases the same scope which is given to the Circuit Courts in cases originally brought therein.

That which is common to all the suits mentioned in the section is the fact that they are originally brought in State courts, that they are suits of a civil nature at law or in equity, and that in each suit the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars. These jurisdictional conditions are indispensable in each case; and hence no suit can be removed to a Circuit Court, under the provisions of this section, unless they are present.

The subject-matter in controversy between the parties must be money, or something which can be valued and expressed in the terms of money, and which, being capable of such estimate, exceeds the sum specified. (*Barry* v. *Mercein*, 5 How. 103; *Walker* v. *The United States*, 4 Wall. 163; *Gaines* v. *Fuentes et al.* 2 Otto, 10; *Pratt* v. *Fitzhugh*, 1 Black, 271; *The Youngstown Bank* v. *Hughes*, 16 Otto, 523; and *Rison* v. *Cribbs*, 1 Dill. 181.)

The section contains two distinct and separate clauses, the first of which applies to all the cases therein mentioned, while the second is specific and relates only to the particular case described.

(2.) *Inseparable Controversies.*—The first clause of the section, providing for the removal of a suit that is not separable into different controversies, gives the right of removal in cases arising under the Constitution, laws, or treaties of the United States, or where the United States shall be plaintiff or petitioner, or where there is a controversy between citizens of different States, or between citizens of the same State claiming lands under grants of different States, or between citizens of a State and foreign states, citizens, or subjects. And, where the right is based on the citizenship of the parties, it is not necessary, as was the fact under the twelfth section of the Judiciary Act of 1789, and also under the removal acts of 1866 and 1867, that one of the parties should be a citizen of the State in which the suit is brought. This restriction of previous legislation is omitted in the Act of 1875. (*Warner* v. *The Pennsylvania R. R. Co.* 13 N. Y. Supr. 197.)

The right of removal, as given by the Judiciary Act of 1789, and also by the removal Act of 1866, was limited exclusively to the defendant; and, in the removal Act of 1867, it was confined to the citizen of a State other than that in which the suit was brought, whether he was plaintiff or defendant. But, in the Act of 1875, this right is given to "either party," whether plaintiff or defendant, without any discrimination in respect to either. This is a marked change in the policy of Congress on the subject.

The suits to which the clause refers are those that were then pending, or that might afterward be brought, in State courts of *original* jurisdiction; and hence the clause has no application to suits that have been tried and passed to a final judgment or decree in the court below, and may, on appeal, be pending in an appellate State court. Congress has made no provision for the removal of a suit from a State court to a Circuit Court, when it has reached this stage in its history. In *Lowe* v. *Williams*, 4 Otto, 650, it was held that "a suit pending in an appellate State court, after it has been prosecuted to final judgment in a court of original jurisdiction, cannot be removed to the Circuit Court of the United States." To the same effect was the ruling in *Stevenson* v. *Williams*, 19 Wall. 572.

The language of the clause is that "any suit" of the character described, "now pending or hereafter brought in *any* State court," may, upon the conditions and in the manner specified in the act, be removed "into the Circuit Court of the United States for the proper district." It is immaterial, for the purpose of such removal, whether the court in which the suit is pending, or in which it may be brought, is one of general or limited jurisdiction. It is in either case included in the language of this clause, Mr. Justice Field, in *Gaines* v. *Fuentes et al.* 2 Otto, 10, construing the words "any State court," as occurring in the removal act of March 2d, 1867 (14 U. S. Stat. at Large, 558), said: "It mattered not whether the suit was brought in a court of limited or general jurisdiction." The same remark is equally applicable to similar words used in the Act of March 3d, 1875.

(*a.*) The first class of removable suits mentioned embraces those that arise under the Constitution, laws, or treaties of the United States. These suits, first brought in a State court, may be removed therefrom, without reference to the citizenship of the parties, since the jurisdiction depends, not on citizenship, but on

the subject-matter involved in the suits. (*Wilder* v. *The Union National Bank*, 12 C. L. N. 75.) In order that suits may be removed on this ground, they must so involve the Constitution, or a law, or treaty of the United States that the construction and application thereof are necessary to their correct decision. Ex-Judge Dillon, in his "Removal of Causes," 3d ed. p. 40, says that "there must be some question actually involved in the case, depending for its determination upon the correct construction of the Constitution, or some law of Congress, or some treaty of the United States."

One such Federal question will suffice. Mr. Justice Swayne, in *The Mayor* v. *Cooper*, 6 Wall. 247, said: "Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction." Judge McCrary, in *Van Allen* v. *The A. C. & P. R. R. Co.* 3 Fed. Rep. 545, held that "a case arises under the Constitution or laws of the United States whenever, upon the whole record, there is a controversy involving the construction of either," and that such a case is removable under the Act of 1875. (*Cohens* v. *Virginia*, 6 Wheat. 264; *Tennessee* v. *Davis*, 10 Otto, 257; *G. W. & W. Co.* v. *Keyes*, 6 Otto, 199; and *Hoadley* v. *San Francisco*, 4 Otto, 4.)

It was held, in *Myers* v. *The Union Pacific R. R. Co.* 16 Fed. Rep. 292, that "a suit by or against a corporation created by an act of Congress, is not necessarily a case which arises under a law of the United States, within the meaning of the second section of the Act of March 3d, 1875, providing for the removal of causes from the State to the Federal courts." The mere fact that a corporation, sued or suing, was organized under the laws of the United States, does not, as Judge McCrary held in this case, bring the case within the provision of the Act of 1875 for the removal of causes. On this point he remarked: "It is necessary that the record should affirmatively show that the cause of action or defense arises upon the construction of, or upon a claim of right arising under, some law of the United States, or of a treaty, or of some provision of the Constitution of the United States." This is not shown by the mere fact that the corporation is organized under Federal law. The case was remanded to the State court, Mr.

Justice Miller concurring with the opinion expressed by Judge McCrary.

Suits "arising under the Constitution and laws of the United States" were, in *The Adams Express Co.* v. *The D. & R. G. Railway Co.* 15 Chicago Legal News, 343, held to be suits "in which some question is presented involving the construction of some provision of the Constitution, or of an act of Congress, or in which some right or privilege is claimed under or by virtue thereof." If this is not a fact, then the case does not thus arise, and no jurisdiction attaches to the case on this ground.

(*b.*) The next class of cases for whose removal provision is made, embraces those in which the United States, as plaintiff or petitioner, bring the suits in a State court, as they have a right to do. Such suits are removable because the United States are a party thereto.

(*c.*) The fourth and fifth classes embrace suits between citizens of the same State claiming lands under grants of different States, or between citizens of a State and foreign states, citizens, or subjects. These suits seldom arise in State courts, yet if they are originally brought there, they may be removed into the proper Circuit Court.

(*d.*) Suits belonging to the third class—namely, those in which the controversy is between citizens of different States—are the ones whose removal is most frequently sought. Chief Justice Waite, in *The Removal Cases*, 10 Otto, 457, 468, referred to the first clause of the second section of the Act of March 3d, 1875, and then proceeded to say in reference to this class of suits:

"The second section of that act contains, among others, the following provision: That any suit of a civil nature, at law or in equity, now pending * * * in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars * * * in which there shall be a controversy between citizens of different States, * * * either party may remove said suit into the Circuit Court of the United States for the proper district."

"This we understand to mean that when the controversy about which the suit in the State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in dispute may be ascertained, and the parties

to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on one side are all citizens of different States from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. (*Coal Company* v. *Blatchford*, 11 Wall. 174.) Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal, it may be had if the necessary citizenship exists."

Mr. Justice Harlan, in *Barney* v. *Latham*, 13 Otto, 205, 211, referred to this statement by Chief Justice Waite, and then proceeded to say:

"We had occasion to consider the meaning of the first clause of this section in Removal Cases, 100 U. S. 457. Disregarding as immaterial the mere form of the pleadings, and placing the parties on opposite sides of the real matter in dispute according to the facts, we found that the only controversy there was between citizens of Ohio and Pennsylvania on one side and certain corporations created under the laws of Iowa on the other. And we held that if, in arranging the parties upon the respective sides of the real matter in dispute, all those on one side are citizens of different States from those on the other, the suit is removable under the first clause of the second section of the Act of 1875, those upon the side seeking a removal uniting in the petition therefor."

The legal propositions embraced in these deliverances are these: 1. That, in order to the removal of a suit under the first clause of the second section of the Act of 1875, when the ground of removal is diversity of citizenship, the party to the suit on the one side, whether consisting of one or more persons, must have a State citizenship different from that of the party to the suit on the other side, whether consisting of one or more persons. 2. That, for the purpose of removing the suit, these parties may be "placed on different sides of the matter in dispute according to the facts," so that those on one side will be "citizens of different States from those on the other." 3. That, this being done, then those on either side may remove the suit, provided they all unite in the petition therefor.

Such is the construction given by the Supreme Court to this clause of the second section of the Act of 1875, when applied to the removal of controversies between citizens of different States.

(*Petterson* v. *Chapman*, 13 Blatch. 395; *Van Brunt* v. *Corbin*, 14 Blatch. 496; *Connell* v. *The Utica, U. & E. R. Co.* 13 Fed. Rep. 241; *Burke* v. *Flood*, 1 Fed. Rep. 541; *Smith* v. *McKay*, 4 Fed. Rep. 353; and *Tuedt* v. *Carson*, 13 Fed. Rep. 353.)

The Supreme Court, in *King* v. *Cornell*, 16 Otto, 395, considered the question, whether, when a citizen of a State sues in a court thereof a citizen of the same State and an alien, the latter is entitled to remove the suit to the Circuit Court, and answered the question in the negative, holding that the Act of 1875 not only gives no such right, but has superseded and repealed the second paragraph of section 639 of the Revised Statutes on which the right depended.

The language of the clause under consideration is that "either party may remove said suit into the Circuit Court of the United States for the proper district." This seems to imply an intention on the part of Congress that the *whole* suit, and not simply a fragment or fragments of it shall be removed to the Circuit Court. A part of the suit in certain cases was removable under the removal Act of 1866, without removing the whole, which split up the suit between two jurisdictions; and it seems to have been the design of Congress in the Act of 1875, as we shall see in the sequel, to get rid of this judicial anomaly. It, hence, provided that "either party may remove said suit"—that is to say, the *whole* of said suit. Such is the natural import of the words.

Chief Justice Waite, in *King* v. *Cornell*, 16 Otto, 395, 398, said that the first clause of the second section of the Act of 1875 "relates to the removal of a controversy that is not separable." If not separable, then it is a single controversy; and if so, then the whole of it must be removed, if any removal is had. It cannot be divided into parts. All the parties on the one side of the suit are citizens of different States from those on the other side; and this supplies the necessary condition for enabling the Circuit Court to take jurisdiction of the entire suit. If all the plaintiffs, there being more than one, or all the defendants, there being more than one, must, in order to remove the suit, unite in the petition, and if the suit to be removed be inseparable, then plainly, when it is removed, no part of it can be left in the State court. (*Burch* v. *The Davenport, &c. R. R. Co.* 46 Iowa, 449; *Chicago* v. *Gage*, 6 Biss. 467; *Osgood* v. *Chicago, &c. R. R. Co.* 6 Biss. 330; *Ruck-*

man v. *Ruckman*, 1 Fed. Rep. 587; *Carraher* v. *Brennan*, 7 Biss. 497; and *Board* v. *Kansas Pacific R. R. Co.* 4 Dill. 277.)

(3.) *Separable Controversies.*—The second clause of the section provides as follows:

"And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit into the Circuit Court of the United States for the proper district."

Chief Justice Waite, in *King* v. *Cornell*, 16 Otto, 395, 398, said that this clause of the section "relates to separable controversies." Judge Brown, in *Smith* v. *McKay*, 4 Fed. Rep. 353, said: "The second clause evidently contemplates not only a controversy wholly between citizens of different States, and which can be fully determined as between them, but the existence of other plaintiffs or defendants who are not necessary to such controversy." Judge Nixon, in *Ruckman* v. *The Palisade Land Co.* 1 Fed. Rep. 367, said: "It is conceded that a suit may include more than one controversy. There may be several. Many different subjects of controversy are often involved in a suit, in some of which one or more of the defendants are actually interested, and the other defendants are not."

Mr. Justice Strong, interpreting this clause, in *Taylor* v. *Rockefeller*, 18 Am. Law. Reg. 307, said: "The right of removal is given where any one of these controversies is wholly between citizens of different States, and can be fully determined as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause 'a controversy which can be fully determined as between them,' read in connection with the other words 'actually interested in such controversy,' implies that there may be other parties to the suit, and even necessary parties, who are not entitled to remove it. Such other parties must be indispensable to a determination of that controversy which is wholly between citizens of different States, or their being parties to the action is no obstacle to the removal of the case into the Circuit Court."

Judge Johnson, in *Petterson* v. *Chapman*, 13 Blatch. 395, referring to this clause, said: "The second section of the act referred to consists of two branches, the latter of which relates to

cases in which the application to remove the cause into the Circuit Court is made by less than the whole number of plaintiffs or of defendants. It provides for cases in which more than one controversy, or a principal and subordinate controversies, are involved in one suit."

Mr. Justice Blatchford, in *Connell* v. *The Utica, U. & E. R. R. Co.* 13 Fed. Rep. 241, said: "Nor was the suit removable under the second clause of that section, because there was not in the suit a separate controversy wholly between citizens of different States. To entitle a party to a removal under the second clause there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different States from those on the other."

Judge Treat, in *Tuedt* v. *Carson*, 13 Fed. Rep. 353, said: "The whole case must be removed, or no removal had. The Act of 1875 is quite explicit. All of the actual parties on the one side or the other must be citizens of different States, in which event one of the non-residents, even if the others on the same side do not join, may cause the whole controversy to be removed. The Act of 1875, however, is guarded in its terms, so as to prevent injustice; for it, as it were, emphasizes the clause that either one or more of the plaintiffs or defendants (under the conditions stated) *actually interested* in such controversy, may remove," &c.

Judge Drummond, in *Osgood* v. *The Railroad Company*, 6 Biss. 339, said: "If the whole suit is removed because of the principal controversy between citizens of different States, and in order fully to determine that, as between them, other controversies between citizens of the same State arise in the suit, there is no objection to the Federal court taking jurisdiction of the latter. It is a matter of common practice to do this in the settlement of legal and equitable rights. Having control and jurisdiction of the principal, the incidents go with it."

Judge Nixon, in *Ruckman* v. *Ruckman*, 1 Fed. Rep. 587, 589, referring to the clause under consideration, and also to the question whether a suit ceases to be a suit between citizens of different States, because there happens to be other defendants in the cause, one of whom is a citizen of the same State with the complainant, remarks: "I had occasion to examine the question in a recent case, and I came to the conclusion that when the real controversy in a suit was between citizens of different States,

these parties were entitled to have the cause adjudicated by the courts of the United States, although there might be other persons in the suit who were citizens of the same State with a person or persons on the opposite side." (*Bank of Dover* v. *Dodge, Meigs, et al.* 25 Int. Rev. Rec. 304.)

These judicial utterances, taken in connection with the language of the statute, throw light upon its construction. The right secured in the second clause of the second section of the Act of 1875, relates to the case described in that clause. The generic description of the case is that it is a "suit mentioned in this section"—that is to say, a "suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars."

The specific description of this "suit," as set forth in the clause, is the following: 1. That there is in this suit "a controversy which is wholly between citizens of different States," which implies that the controversy does not embrace the *whole* suit, and not necessarily all the parties to the suit as appearing in the record of the State court. 2. That this particular controversy in the suit, which is wholly between citizens of different States, "can be fully determined, as between them," by the Circuit Court.

These conditions being present, "then either one or more of the plaintiffs or defendants *actually interested* in such controversy," which implies that there may be plaintiffs or defendants not thus interested, "may remove," not merely this particular controversy, but "said suit into the Circuit Court of the United States for the proper district." The term "suit," twice used in the clause, evidently means the whole case as brought in the State court. The statute speaks of a "suit" and of a "controversy" in that suit, and provides for the removal of the suit, giving the right of such removal to any one or more of the plaintiffs or defendants, who, being citizens of different States, have an actual interest in such controversy. If there be other plaintiffs or defendants not coming within the description, they cannot remove the suit; and the fact that there are such plaintiffs or defendants in the suit would not seem to destroy the right of removal as given to those who do come within the description.

The jurisdiction of the Circuit Court over the suit rests upon

the fact that in it there is a controversy which is wholly between citizens of different States, and which by that court can be fully determined as between them, and upon the further fact that the suit has been removed to that court by one or more of the plaintiffs or defendants actually interested in such controversy. The intention of Congress was not to split the suit by reason of this controversy, as was provided for under the removal Act of 1866, but rather to make the controversy the reason for transferring the suit, as a whole, to the Circuit Court.

Mr. Justice Harlan, in *Barney* v. *Latham*, 13 Otto, 205, remarked that the case before the court involved the construction of the second clause of the second section of the Act of 1875. Having stated the case, and explained the prior legislation of Congress for the removal of causes from State courts to the Circuit Courts of the United States, he proceeded to say:

"We are of opinion that the intention of Congress, by the clause under consideration, was not only to preserve some of the substantial features and principles of the Act of 1866, but to make radical changes in the law regulating the removal of causes from State courts. One difference between that act and the second clause of the second section of the Act of 1875 is, that whereas the former accorded the right of removal to the defendants who were citizens of a State other than that one in which the suit was brought, if between them and the plaintiff or plaintiffs there was in the suit a controversy finally determinable as between them, without the presence of their co-defendants, or any of them, citizens of the same State with plaintiffs, the latter gave such right to any one or more of the plaintiffs or the defendants actually interested in such separate controversy. Both acts alike recognized the fact that a suit might, consistently with the rules of pleadings, embrace several distinct controversies. But while the Act of 1866 in express terms authorized the removal only of the separable controversy between the plaintiff and the defendant or defendants seeking such removal—leaving the remainder of the suit, at the election of the plaintiff, in the State court—the Act of 1875 provides, in that class of cases, for the removal of the entire suit."

It was held in this case that there were two distinct and separable controversies, one of which was wholly between citizens of different States, and capable of being fully determined as between them, and that, therefore, the suit was removable by the express words of the statute. On this ground Mr. Justice Harlan said: "We are of opinion that, upon the filing of the petition and bond

by the individual defendants in the separable controversy between them and the plaintiffs, the entire suit, although all the defendants may have been proper parties thereto, was removed to the Circuit Court of the United States, and that the order remanding it to the State court was erroneous."

Chief Justice Waite, referring, in *Hyde* v. *Ruble*, 14 Otto, 407, to the same clause in the Act of 1875, said: "To entitle a party to a removal under this clause there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other." Referring to the case of *Barney* v. *Latham*, *supra*, in which "two separate and distinct controversies were involved," he further said: "When two such causes of action are found united in one suit, we held in the case last cited there could be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants interested in the controversy, which, if it had been sued on alone, would be removable. But that, we think, does not meet the requirements of this case. This suit presents but a single cause of action, that is to say, a single controversy. The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to their one controversy."

This case was held to be not removable under the first clause of the second section of the Act of 1875, "because all the parties on one side of the controversy were not citizens of different States from those on the other." It was not removable under the second clause of the same section, because it involved only a single controversy, and not two or more controversies, one of which was wholly between citizens of different States, and capable of being fully determined as between them. And hence the order of the court below remanding the case to the State court was affirmed.

These two cases in the Supreme Court of the United States, taken in connection with *Removal Cases*, 10 Otto, 457, authoritatively settle the construction of the second section of the Act of 1875, and overrule all judicial opinions expressed by the lower courts inconsistent therewith. Both clauses of the section contemplate a removal of the entire suit in the cases, and under the conditions specified.

(4.) *The Time of the Citizen Status.*—The question has been considered, and differently answered, by the courts, whether it is

sufficient for the purpose of jurisdiction by the Circuit Court, if the petition for the removal of the suit shows the requisite diversity of citizenship as existing between the parties at the time of filing the petition in the State court, without also showing the same fact at the time when the suit was commenced in that court. The statute itself does not, in express words, answer this question.

In *The Insurance Company* v. *Pechner*, 5 Otto, 183, it was held that "a person not a citizen of the State, in the court whereof he is sued, cannot, under the twelfth section of the Judiciary Act of 1789, remove the suit to the Circuit Court of the United States, by reason of the citizenship of the parties, unless his petition for removal affirmatively shows that the plaintiff was, at the time of the commencement of the suit, a citizen of such State." Chief Justice Waite said in this case, that the section referred to "has reference to the citizenship of the parties when the suit is begun." He added that the phraseology employed in the removal Acts of 1866, 1867, and 1875, is somewhat different, and that the court was not called upon to give a construction to the language used in these acts.

In *Bondurant* v. *Watson*, 13 Otto, 281, the question arose whether, in removing a suit under the Act of 1875, it is necessary to aver the requisite citizenship of the parties at the commencement of the suit in the State court; but it was not decided, since the record of the case was sufficient without determining this point. The point has never been decided by the Supreme Court.

In one class of decisions by the lower courts, it has been held that if the petition shows the requisite citizenship at the time when the application for removal was made, this is sufficient, even though it does not aver such citizenship when the suit was commenced in the State court. This is the view taken by Mr. Justice Woods in *Jackson* v. *The Ins. Co.* 3 Woods, 413. To the same effect is the ruling of Judge Dyer in *Curtin* v. *Decker*, 5 Fed. Rep. 385. Judge Baxter, in *Bruce* v. *Gibson*, 9 Fed. Rep. 540, held that "under the removal Act of 1875 a case is not removable unless the required diversity in citizenship exists at the time the application for removal is made," and that "it is not sufficient that the required diversity in citizenship existed when the suit was commenced in the State court." Judge Blatchford, in *McLean* v. *The St. Paul & Chicago R. R. Co.* 16 Blatch. 309, held that it was not necessary, in removing a cause, to aver the diversity of

citizenship at the commencement of the suit in the State court. (*Jackson* v. *The Ins. Co.* 60 Ga. 423; and *The Ins. Co.* v. *Laettel*, 7 Cent. L. Jour. 398.)

Judge Bunn, in *Glover* v. *Shepperd*, 15 Fed. Rep. 833, held that "it is enough that the proper diversity of citizenship of the respective parties exists at the time the application for removal is made," and that "it need not be shown to have existed at the time suit was commenced." This doctrine was stated with reference to the Act of March 3d, 1875. The following cases were cited in support of this view: *Johnson* v. *Monell*, 1 Woolw. 390; *Jackson* v. *The Ins. Co.* 3 Woods, 413; *McGinnity* v. *White*, 3 Dill. 350; and *McLean* v. *The St. Paul and C. R. Co.* 16 Blatch. 309.

Ex-Judge Dillon says: "Under the Act of March 3d, 1875, it is sufficient, to entitle a party to a removal of the cause, if the requisite citizenship exists at the date of the timely filing of the petition for removal; and hence it need not be stated in such petition that the plaintiff was, at the date of the commencement of the suit in the State court, a citizen of a State other than that of which the defendant is a citizen." (Removal of Causes, 3d ed. p. 88.)

Mr. Justice Bradley, on the other hand, held, in *Houser* v. *Clayton*, 3 Woods, 273, that, under the Act of 1875, a case cannot be removed from a State court to a Circuit Court, unless the petition for its removal shows that the required diversity of citizenship existed at the commencement of the suit in the former court. Judge McCrary, in *Beede* v. *Cheeney*, 5 Fed. Rep. 388, took the ground that a cause cannot be removed, under the Act of 1875, unless the required citizenship existed, not only when the petition for removal was filed, but also at the time when the action was begun in the State court. In *Kaeiser* v. *The Illinois Cent. R. R. Co.* 6 Fed. Rep. 1, it was held that "a case cannot be removed from a State to a Federal court, on the ground of citizenship of the parties, unless it appears from the record that at the time the suit was commenced the parties to it were citizens of different States." (See also *Tapley* v. *Martin*, 116 Mass. 276; *Holden* v. *The Ins. Co.* 46 N. Y. 1; and *Ind. R. R. Co.* v. *Risley*, 50 Ind. 60.)

These two classes of decisions contradict each other, not as to the necessity of the required diversity of citizenship at the time of removal, but as to its necessity at the time when the suit was commenced in the State court. The better opinion would seem to be

that if the diversity of citizenship exists and is shown when the suit is sought to be removed, this is sufficient to enable the Circuit Court to take jurisdiction of the case. It is not necessary to the jurisdiction of the State court, but is necessary to that of the Circuit Court; and if it exists when the application for removal is made, then the requisite fact is supplied, whether it existed or not when the suit was commenced. If the parties were citizens of the same State at the commencement of the suit, and one of them has *bona fide* become a citizen of another State before any attempt to remove the suit to a Federal court, this would not make it less true that they are citizens of different States at the time of the attempted removal.

(5.) *Waiver as to Citizenship.*—It was held, in *Davies* v. *Lathrop*, 13 Fed. Rep. 565, that if a cause has been removed from a State court on the ground of diverse citizenship of the parties, and a party goes to trial and actually tries the cause in the Circuit Court, he loses his right to object to the removal on the ground that such diversity of citizenship did not exist. The verdict in this case was in favor of the defendant who had removed the cause; and the fact, known to the plaintiffs at the time of the trial, but not known to the defendant or the court, was that one of the plaintiffs was a citizen of the same State with the defendant. The plaintiffs, after the trial in the Circuit Court and the verdict against them, moved to remand the case to the State court.

Judge Wallace refused to grant the motion, remarking: "The question now is, however, whether the plaintiffs, by their conduct, have not lost their right to have the action remanded. If it can be lost by waiver in any case, it has been lost here. * * * The plaintiffs, knowing the truth, chose, instead of moving to remand, and thereby correcting the mistake, to permit the defendant to incur the burden of a trial. Apparently they concluded to take the chances of a trial, with the view of remaining silent if it should result favorably, but of springing the objection if it should result adversely. Such practice will not be willingly tolerated, because it is unjust to the party who has been subjected to the expense of a futile trial, and because it imposes upon the court the labor of a nugatory proceeding." The plaintiffs, having omitted to raise the point at the proper time, lost the right to do so. (*D' Wolf* v. *Rabaud*, 1 Pet. 476; *Evans* v. *Gee*, 11 Pet. 80;

Sims v. *Hundley*, 6 How. 1; *Sheppard* v. *Graves*, 14 How. 505; and *De Sobry* v. *Nicholson*, 3 Wall. 420.)

Chief Justice Waite, in *The Railway Company* v. *Ramsey*, 22 Wall. 322, remarked: "Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such admission."

(6.) *Assignees.*—The first section of the Act of March 3d, 1875, provides that no Circuit Court of the United States shall "have cognizance of any suit, founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." The second section of the same act designates the cases in which suits may be removed from State courts to the Circuit Courts of the United States, without expressly stating this qualification as to the jurisdiction of the latter courts.

Judge McCrary, in *Berger* v. *The County Commissioners of Douglass County*, 5 Fed. Rep. 23, held that the two sections of this act should be construed together as *in pari materia*. "It is impossible," he observes, "to imagine a case in which a suit in this court, by an assignee, is prohibited by the first section of the Act of March 3d, 1875, and in which the same suit may not be indirectly brought here, if the two sections are not construed together, or if it be held that a non-resident assignee may, in all cases of suits founded on contract, remove the cause on the ground of his citizenship. By this construction of the Act of 1875 we would point out the mode whereby one citizen of Nebraska, holding a claim against another citizen of that State for more than five hundred dollars, may assign his claim to a citizen of a neighboring State, who can bring his suit thereon into this court provided only he comes through a State court."

Such was the fact in this case; and, on motion, Judge McCrary remanded the suit to the State court, holding that when the first and second sections of the Act of March 3d, 1875, are construed together, as they should be on the question involved, "the right of removal should not be allowed in a case where the plaintiff is an assignee, unless his assignor might have sued in this court." The same ruling was adopted in *Hardin* v. *Olson*, 14 Fed. Rep. 705.

There is force in the reasoning of Judge McCrary; yet the ruling does not accord with the doctrine laid down by the Supreme Court. (*Green* v. *Custard*, 23 How. 484; *Bushnell* v. *Kennedy*, 9 Wall. 387; and *The City of Lexington* v. *Butler*, 14 Wall. 282.) Mr. Justice Clifford, in the last of these cases, alluded to the decision in *Bushnell* v. *Kennedy*, and then proceeded to say: "All doubt upon the subject is removed, as it is here expressly determined that the restriction incorporated in the eleventh section of the Judiciary Act has no application to cases removed into the Circuit Court from a State court, and it is quite clear that the same rule must be applied in the construction of the subsequent acts of Congress extending that privilege to other suitors not embraced in the twelfth section of the Judiciary Act."

The restriction in the Judiciary Act, here referred to, is the one that provided that, with the exception of foreign bills of exchange, the Circuit and District Courts of the United States shall not "have cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made." In *Bushnell* v. *Kennedy*, 9 Wall. 387, it was held that this restriction upon suits when sought to be brought in a Circuit Court, as contained in the eleventh section of the Judiciary Act, not being found in the twelfth section of the act which provides for the removal of suits, has no application to suits transferred, under the latter section, from State courts to Circuit Courts. The same view was adopted in *The City of Lexington* v. *Butler*, *supra*.

The language of Mr. Justice Clifford, as above quoted, though uttered before the enactment of the removal Act of 1875, is equally applicable to that act, and is not consistent with the view taken by Judge McCrary.

2. The Mode of Removal. (Sec. 3.)—This section provides as follows:

"That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could

be first tried and before the trial thereof for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

These are the general provisions of the section, the remainder of it being specially devoted to the removal of suits from State courts where citizens of the same State claim lands under grants of different States. These general provisions are as follows:

(1.) *The Petition.*—The party or parties, whether plaintiffs or defendants, desiring to remove a suit, must file a petition to this effect in the State court where the suit is pending. If the removal is sought under the first clause of the preceding section, then all the plaintiffs on the one side or all the defendants on the other side must unite in the petition. If the removal be sought under the second clause, then it is enough if one or more of the plaintiffs or defendants file the petition.

Chief Justice Waite, in *The Gold W. & W. Co.* v. *Keyes*, 6 Otto, 199, said: "For the purposes of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. Upon its statements, in connection with the other parts of the record, the courts must act in declaring the law upon the question it presents. It should, therefore, set forth the essential facts, not otherwise appearing in the case, which the law has made conditions precedent to the change of jurisdiction. If it fails in this, it is defective in substance, and must be treated accordingly."

The record in the State court, including therein the petition for removal, must be in such a condition when the removal is effected as to show jurisdiction in the court to which it goes. If

it is not, and the omission is not afterward supplied, no right of removal exists, and the suit, if removed, must be remanded. The right is statutory, and hence it is only by compliance with the statute that it can be secured. (*The Insurance Co.* v. *Pechner*, 5 Otto, 183.)

In *Amory* v. *Amory*, 5 Otto, 186, Chief Justice Waite said: "Holding, as we do, that a State court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed, which, upon its face, shows the right of the petitioner to the transfer, it was not error of the court to retain these causes."

(2.) *The time of Filing the Petition.*—The statute provides that the petition must be filed in the State court "before or at the term at which said cause could be first tried and before the trial thereof." Judge Johnson held, in *The Merch. & Manuf. Nat. Bank* v. *Wheeler*, 13 Blatch. 218, that this relates to "a term occurring after the passage of the act, and not to a term before such passage." The same view was taken in *The Removal Cases*, 10 Otto, 457, 473. (*Baker* v. *Peterson*, 4 Dill. 562; *Hoadley* v. *San Francisco*, 3 Saw. 353; *Andrews* v. *Garrett*, 2 Cent. Law Jour. 797; and *Crane* v. *Reeder*, 28 Mich. 527.)

The petition must be filed "before the trial" of the suit in the State court. In regard to this specific limitation Chief Justice Waite, in *The Removal Cases*, 10 Otto, 457, 473, remarked: "We agree that, as a general rule, the petition must be filed in a way that it may be said to have been in law presented to the court before the trial is in good faith entered upon. There may be exceptions to this rule; but we think it clear that Congress did not intend by the expression 'before trial,' to allow a party to experiment on his case in the State court, and, if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal. But, to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to get himself on the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone."

This settles the proper construction of the phrase "before the trial thereof," as occurring in the statute. The plain intention of Congress is that, after the issue has been made up between the

parties and the trial of the suit has actually been entered upon in the State court, there shall be no removal of the suit to a Circuit Court. A petition for removal then will be too late to oust the jurisdiction of the State court.

This is not the only limitation fixed by the statute, since it also provides that the petition must be filed in the State court "before or at the term at which said cause could be first tried" in the State court. The filing of the petition may precede the commencement of this term, or it may be at this term, if "before the trial" of the suit is entered upon.

The trying or "trial" of a suit, whether in actions at law or those in equity, as referred to in the statute, evidently does not relate to the consideration and determination of merely preliminary questions in getting the suit ready for an examination and the settlement of the facts put in issue. "The most that can be said" of such proceedings "is that preparations were being made for a trial." There can be no actual trial of a suit until an issue in some form is made up for this purpose; and then the suit can be tried. It is in a condition for trial. (*Lewis* v. *Smythe*, 2 Woods, 117; *The Removal Cases*, 10 Otto, 457, 474; *Yulee* v. *Vose*, 9 Otto, 539, 545; *The Phœnix Life Ins. Co.* v. *Saetter*, 33 Ohio St. 278; and *Greene* v. *Kingler*, 10 Cent. Law Jour. 47.)

What, then, is "the term at which said suit could be first tried?" This is a question of fact in part, and, in part, of the practice of the court. Ex-Judge Dillon, in his "Removal of Causes," 3d ed. p. 78, answers the question as follows:

"The word 'term,' as here used, means, according to the construction which it has received in the eighth judicial circuit, the term at which, under the legislation of the State and the rules of practice pursuant thereto, the cause is first triable, *i. e.*, subject to be tried on its merits; not necessarily the term when, owing to press of business or arrearages, it may be reached, in its order, for actual trial. The act gives the right of removal to either party—the resident as well as the non-resident party—and no affidavit of prejudice is required; and it was the obvious purpose of Congress, by the use of the words 'before or at, &c., the term at which the cause *could* be *first* tried,' &c., to require the election to be taken at the first term at which, under the law, the cause was triable on its merits. The judicial construction elsewhere of the Act of 1875 is in accordance with these views."

In *Stough* v. *Hatch*, 16 Blatch. 233, Judge Benedict held that

the application for removal, though granted by the State court, was not in time; and hence the cause was remanded to the State court. The cause was at issue, duly noticed for trial in the State court, and subject to be tried at the January term, 1879, but by agreement of the parties went off the calendar for that term. The defendant, after the expiration of the term, applied for the removal of the cause to the Circuit Court, but, as Judge Benedict held, too late to come within the provision of the Act of 1875. The consent of the parties to postponement did not affect the operation of the law.

Mr. Justice Blatchford, in *Forrest* v. *Keeler*, 17 Blatch. 522, said: "Although the plaintiff in the present case did not notice the case for trial at an earlier term, the defendant could have done so. The plaintiff had a right to regard the defendant as having waived his right to remove the cause, when, in the absence of any stay, the defendant did not remove the cause before or at the first term at which, the cause being at issue and triable on the merits, the defendant might have noticed it for trial. The proper construction of the statute is such as to make it necessary to hold that the removal in this case was too late."

In *Knowlton* v. *The Congress & Empire Spring Co.* 13 Blatch. 170, Judge Benedict remanded the cause, because, after one trial had been had in the State court and a judgment entered which was thereafter set aside, the cause, after the reversal of the judgment, could have been again brought to trial in the State court before the filing of the petition for its removal.

Chief Justice Waite, in *Gurnee* v. *The County of Brunswick*, 1 Hughes, 270, 277, said: "A cause cannot be tried until in some form an issue is made up for trial. The pleadings or statements necessary to make the issue are regulated by the practice in the court where the trial is to be had. As soon as the issue is made up the cause is ready for trial. The parties and the court may not be ready, but the cause is. The first term, therefore, at which a case can be tried is the first term at which there is an issue for trial. An application for removal, to be in time, must be made before or at this term."

In *Ames* v. *The Colorado Cent. R. R. Co.* 4 Dill. 260, 263, it was said that the term referred to in the Act of 1875, "appears to be that at which the cause may be heard or tried on the merits, according to the practice of the court, without regard to the special

circumstances of the case, as whether the parties are ready for trial and the like."

Judge McCrary, in *Murray* v. *Holden*, 2 Fed. Rep. 740, said: "If the local law makes the first term after suit is brought an appearance term merely, and declares that the second term is the one at which the case may be brought to trial, then the latter is the term, at or before which the petition for removal must be filed. But where the first term after service of process is the term at which by law a case is triable, then that is the term to which the act of Congress refers. In other words, the term at which a case can 'first be tried,' is the first term at which it may by law be tried."

Judge Wallace, in *Cramer* v. *Mack*, 12 Fed. Rep. 803, said: "It was obviously the intention of the removal act [of 1875] to preclude a party from resorting to the expedient of a removal in order to deprive his adversary of the opportunity to try the cause, and the decisions in the construction of the act are to the effect that a party loses his right to remove if he permits the term to pass at which he could have placed the cause in a position to be tried upon the merits if he had conformed to the rule of practice of the State court. When there is an issue which, by the practice of the court, can be brought to trial, the cause is triable; and if noticed for trial the court can entertain it, and it matters not whether the parties are otherwise ready for trial or not, or whether the court shall see fit to entertain the trial or not."

Judge Brown, in *Johnson* v. *Johnson*, 13 Fed. Rep. 193, said: "When a cause is removed on account of the citizenship of the parties, it must, under the Act of 1875, be removed at the first term during which the cause might have been tried in the State court. This means the first term when the cause was legally triable, not a subsequent term to which it may have been legally postponed by agreement or by order of the court; and it has no reference to the presence or absence of witnesses, or to the crowded state of the docket."

In *Warner* v. *The Pennsylvania R. R. Co.* 13 Blatch. 231, it was held that "if the term at which the cause could otherwise be first tried is one which occurs during the time a trial of the cause is stayed by an order of the State court, it is not such a term as is meant by the statute."

In *The Bible Society* v. *Grove*, 11 Otto, 610, Chief Justice

Waite said: "The act took effect from the time of its approval, March 3d. The case was actually tried once in the State court, on the 14th of April following. The jury disagreeing, it was continued at that term and also at the May term. The petition for removal was not filed until September afterward. Clearly this was too late."

In *The Public Grain and Stock Exchange* v. *The Western Union Tel. Co.* 16 Fed. Rep. 289, it was held by Judge Drummond that "when, in consequence of the want of diligence on the part of an applicant for the removal of a cause from a State court, the issue has not been made up, or where the right exists to have the cause heard, or set down for hearing at the first term, and he does not ask for it, he cannot afterwards be permitted to apply to the State court for the removal of the cause." (*Kerting* v. *The Amer. Oleograph Co.* 10 Fed. Rep. 17; *Aldrich* v. *Crouch*, Id. 305; *Murray* v. *Holden*, 2 Fed. Rep. 740; and *Scott* v. *The Clinton & S. R. Co.* 6 Biss. 529.)

These judicial constructions of the statute, though somewhat different in phraseology, are essentially identical in import. The petition for removal must always be filed before trial. It may be filed at any time before the term at which the suit could be first tried. If not so filed, then it may be filed at any time during that term, provided it be before the actual trial of the suit is entered upon. The term at which the suit can be first tried is the one at which, by the law and practice of the court, it is triable upon the merits at issue in the case.

(3.) *The Bond.*—The statute provides that the party who files a petition for the removal of a cause, "shall make and file therewith a bond." The petition is to be filed "before or at the term at which said suit could be first tried and before trial" in the State court; and the requirement is that the petitioner "shall make and file therewith a bond." The obvious implication is that he shall do so at the *time* of filing the petition, or, at least, within the time limited for the filing of the petition. The petition, without the bond, has no legal force. Both are conditions precedent to removal, and if either be absent, the right of removal does not exist. (*Burdick* v. *Hale*, 7 Biss. 96.)

In *Stevens* v. *Richardson*, 9 Fed. Rep. 191, it was held that the bond need not be executed by the petitioners, but that it is

sufficient if executed by others who are named in it as obligors, and if conditioned that the petitioners shall comply with the provisions of the statute, and if it recites that the petitioners have petitioned for the removal, although the obligors are not otherwise called sureties for the petitioners. "The statute is satisfied," said Judge Blatchford, "if a bond with sufficient surety is filed. The petitioner for removal makes the bond, in the sense of the statute, if he offers it to the court as the bond required. By section 639 of the Revised Statutes he was required to offer good and sufficient surety. The Act of 1875 means no more."

In *Hervey* v. *The Illinois M. R. R. Co.* 3 Fed. Rep. 707, it was held that "an irregularity or defect in the form of the removal bond will be deemed waived after the expiration of eighteen months, where the cause was removed with the consent of all parties."

If the place where the penal sum should be inserted is left blank, the bond is deemed insufficient. (*Burdick* v. *Hale*, 7 Biss. 96.) If the bond is defective, it can be perfected only during the term at which the suit could be first tried. (*Wilcox & Gibbs S. M. Co.* v. *Follett*, 3 C. L. B. 49.) If it lacks a seal, the State court may allow the seal to be affixed. (*Chamberlain* v. *The Amer. N. L. & T. Co.* 18 N. Y. Supr. 370.) If executed by a corporation, it may be so executed with the corporate name by the attorney of record. (*Swan* v. *The M. C. & L. M. R. R. Co.* 4 C. L. B. 898.)

(4.) *The Surety of the Bond.*—The statute requires that the bond filed shall be accompanied "with good and sufficient surety," which means sufficient to guarantee the fulfillment of the conditions specified in the statute. It is not necessary that two persons should sign the bond as sureties. "Good and sufficient" is all that is required; and this is satisfied if there is one surety able to respond to the condition. The surety being "good and sufficient" in law, the State court has no discretion in the matter, but is bound to accept it. (*The Removal Cases*, 10 Otto, 457, 472.)

No objection being made to the surety, the State court will presume it to be sufficient; and if the point was not raised in the State court, the Circut Court to which the cause is removed will assume the same thing. (*The Empire Trans. Co.* v. *Richards*, 88 Ill. 404; and *Fulton* v. *Golden*, 20 A. L. J. 229.)

In *Van Allen* v. *The A. C. & P. R. Co.* 3 Fed. Rep. 545,

Judge McCrary said: "There appears in the record a bond conditioned as required by the removal Act, and approved by the State court. This court will not, upon a motion to remand, enter upon any inquiry as to the sufficiency of the sureties on said bond. That was a question for the State court." The State court having accepted the sureties, the Circuit Court will not inquire into the correctness of its action.

(5.) *Stipulations of the Bond.*—The statute requires that the party filing the bond shall therein stipulate to do the following things:

(*a.*) The first is that he will enter in the Circuit Court to be held in the district where the suit is pending, on the first day of its then next session, a copy of the record of the suit in the State Court. The law makes it his duty to furnish such a copy of the case up to the time of its removal; and this duty in the bond he pledges himself to perform. The time for entering this copy is the first day of the session of the Circuit Court next after the filing of the bond. The petition and bond are parts of the record, and are necessary to the jurisdiction of the Circuit Court over the case.

In *Bright* v. *The Milwaukee & St. Paul R. R. Co.* 14 Blatch. 214, it appeared that the plaintiff filed his petition in the State court for removal on the 4th of February, 1876; that the next session of the Circuit Court began on the last Monday of the same month; and that the copy of the record was not filed in the Circuit Court until the first day of the ensuing April. The suit was remanded to the State Court because the copy of the record was not entered in the Circuit Court on the first day of the term next ensuing after the filing of the petition, as directed in the statute.

The same ruling, in principle, was adopted in *Broadnax* v. *Eisner*, 13 Blatch. 366, and in *McLean* v. *The St. Paul & Chicago R. R. Co.* 16 Blatch. 309.

Judge Hammond, however, in *Woolridge* v. *McKenna*, 8 Fed. Rep. 650, held as follows: "The provision of the Act of March 3d, 1875, sec. 3, requiring the transcript of the record of the State court to be filed on the first day of the succeeding term of the Federal court, is not mandatory as a condition precedent to the jurisdiction of the Federal court, but is directory only as a mode of practice. The statute should be strictly obeyed, but the court, under the Revised Statutes, secs. 948, 954, may, and on good

cause shown should, enlarge the time for filing, or cure the defect by allowing the trauscript to be filed *nunc pro tunc*." Judge McCrary took substantially the same view in *Kidder* v. *Featteau*, 2 Fed. Rep. 616, holding that delay in not filing the record at the time specified in the statute is not necessarily sufficient ground for remanding the cause to the State court. He held that "unnecessary delay, amounting to laches, in filing such record, prejudicing the other party, may be ground for remanding the case; but the party is not entitled for such cause, as a matter of right, to have it remanded."

Upon this point Chief Justice Waite, in *The Removal Cases*, 10 Otto, 457, 475, remarks: "While the act of Congress requires security that the transcript shall be filed on the first day, it nowhere appears that the Circuit Court is to be deprived of its jurisdiction, if, by accident, the party is delayed until a later day in the term. If the Circuit Court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete, and the removal properly effected."

The conclusion to be derived from these cases is that, while the party seeking a removal should rigidly follow the statute as to the time of filing a copy of the record, the Circuit Court, in deciding whether non-compliance shall be regarded as a cause for remanding the case, may exercise some degree of discretion according to the circumstances of each particular case. This would seem to be the better opinion, especially in view of the language of Chief Justice Waite.

(*b.*) The second stipulation of the bond is that the party filing it will pay "all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto."

In *Torrey* v. *The Grant Locomotive Works*, 14 Blatch. 269, it was held by Judge Blatchford, that the case was not properly removed because the bond required by the statute, which was held to be applicable to the case, contained no provision for the payment of these costs. Judge Blatchford said in this case: "The filing of the bond, conditioned as required by the Act of 1875, is a condition precedent to the removal of the cause to the Federal court; and that, if the required bond has not been filed, that court has no jurisdiction, although it belongs to that Court ex-

clusively, and not to the State court, to decide that fact." This he approvingly quotes as the ruling of Judges McKennan and Cadwalader, in *McMundy* v. *The Connecticut General Life Ins. Co.* 9 Chicago Legal News, 324.

Judge Coxe, in *Webber* v. *Bishop*, 13 Fed. Rep. 49, held that "it is essential that the bond contain a provision for the payment of costs, and the objection that it does not may be taken at any time."

The case of *Deford* v. *Mehaffy*, 13 Fed. Rep. 481, contradicts this view. In this case Judge Hammond held as follows: "If the removal be defective, and omit the condition for the payment of costs required by the act of Congress, the omission is not fatal to the jurisdiction of the Federal court. The defect may be cured by amendment, either in the State or Federal court, or by the substitution of a new bond, containing the proper conditions, filed *nunc pro tunc*." The judge denied the motion to remand the case, and directed the petitioner for removal to amend the bond or substitute a new one, conditioned as required by the statute, and file the same *nunc pro tunc*, and decided that, on his failure to do this, the plaintiffs should have leave to renew the motion to remand.

The point involved in these conflicting opinions turns upon the question whether the Circuit Court can take jurisdiction of the case, in the absence of the required stipulation in the bond respecting the payment of costs. If it cannot, then the proper course is to remand the case.

(*c.*) The third stipulation is that the party filing the bond will appear in the Circuit Court and enter "special bail in such suit, if special bail was originally requisite therein." If there was no special bail in the case, then there will be no necessity for a stipulation in the bond to enter such bail. (*The Removal Cases*, 10 Otto, 457, 472.)

It was objected, in *Cooke* v. *Seligman*, 17 Blatch. 452, 459, that the condition of the bond did not provide for the defendants appearing in the Circuit Court and entering special bail in the suit. To this Judge Blatchford replied: "The clause in the condition, providing that the defendants shall 'do or cause to be done such other and appropriate acts,' &c., is a sufficient compliance with any requirement in sec. 3 of the Act of 1875, that the bond

shall be one for appearing in the Federal court." These general terms were held to embrace this specific stipulation.

Such, then, are the conditions of the bond required to be given and filed with the petition in removing a cause from a State court. The purpose of the bond is to secure the performance of these conditions; and it was undoubtedly the design of Congress to qualify the right of removal by such performance. Any construction by courts, inconsistent with this design, would defeat the purpose of the statute.

(6.) *Duty of the State Court.*—The statute further provides that when, in any of the cases mentioned in the second section of the act, all the conditions of removal specified in the third section of the same act shall have been complied with, "it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged."

The theory of this provision is that, all the steps for the removal of a suit being taken as prescribed, the jurisdiction of the State court at once comes to an end, unless the case shall be remanded, and, consequently, that it has no power to proceed any further in the case. Congress commands the court to accept the petition and bond and suspend all further proceedings. Ex-Judge Dillon, in his "Removal of Causes," 3d ed. p. 92, states the point as follows:

"Under such circumstances the State court has no power to refuse the removal, and can do nothing to affect the right, and its *rightful* jurisdiction ceases *eo instanti;* no order for the removal is necessary; and every subsequent exercise of jurisdiction by the State court, including its judgment, if one is rendered, is erroneous. And if the right of removal has once become perfect, it cannot be taken away by subsequent amendment in the State court or Federal court, or by a release of part of the debt or damages claimed, or otherwise; nor can the State court stay proceedings for removal until the costs are paid, or award costs, or issue execution for costs."

Judge Nixon, in *The New York Silk Manuf. Co.* v. *The Second Nat. Bank of Paterson*, 10 Fed. Rep. 204, held that, the petition and bond being in due form and properly filed, "all further proceedings in the State court are *coram non judice.*" (*Rowland* v. *The Insurance Company*, 2 C. L. B. 56.)

Chief Justice Waite, in stating the opinion of the court in *The Railroad Company* v. *Koontz*, 14 Otto, 5, said: "It is also a well settled rule of decision in this court that when a sufficient case for removal is made in the State court, the rightful jurisdiction of that court comes to an end; and no further proceedings can properly be had there, unless in some form its jurisdiction is restored." (*Gordon* v. *Longest*, 16 Pet. 104; *Kanouse* v. *Martin*, 15 How. 198; *The Insurance Company* v. *Dunn*, 19 Wall. 214; and *The Railroad Company* v. *Mississippi*, 12 Otto, 135.) In the last of these cases the court said that the State court "was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal."

Chief Justice Waite, in *The Railroad Co.* v. *Koontz*, *supra*, further said: "If, after a case has been made, the State court forces the petitioning party to trial and judgment, and the highest court of the State sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error, the case is sent back to the State court with instructions to recognize the removal and proceed no further. Such was in effect the order in *Gordon* v. *Longest*, *supra*. The petitioning party has the right to remain in the State court under protest, and rely on this form of remedy if he choses, or he may enter the record in the Circuit Court, and require the adverse party to litigate with him there, even while the State court is going on. This was actually done in *The Removal Cases*."

As to the question whether the petitioning party, having complied with the provisions of the statute for a removal of the suit, if kept by his adversary and against his will in the State court, and forced to a trial there on the merits, may, after having obtained in the regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter his cause in the Circuit Court, notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered, Chief Justice Waite in this case said: "We have no hesitation in saying that in our opinion we can." The petitioning party, under such circumstances, does not, by contesting the case in the State court, waive or forfeit any of his rights as secured to him by the statute. (*The Insurance Com-*

pany v. *Dunn*, 19 Wall. 214; *Removal Cases*, 10 Otto, 457; and *The Railroad Company* v. *Mississippi*, 12 Otto, 135.)

All this, however, proceeds upon the assumption that the case, as presented to the State court by the petitioning party, is one that comes within the provisions of the second and third sections of the Act of March 3d, 1875. If it is not such a case, then these observations have no application to it; and whether it is or not must in the first instance be decided by the State court. It is made the duty of the State court to accept the petition and bond; and it is not possible intelligently to perform this duty without deciding whether the case presented is within the meaning of the statute.

Chief Justice Waite, in *The Removal Cases*, 10 Otto, 457, 474, said: "We fully recognize the principle, heretofore asserted in many cases, that the State court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the case as a matter of right." The State court surely has the right to examine the case, in order to ascertain whether it be one which demands a surrender of its jurisdiction; and, for this purpose, it may inquire into the truth of facts alleged in the petition as the basis for the right of removal. (*Carswell* v. *Schley*, 59 Ga. 17; *Clark* v. *Opdyke*, 17 N. Y. Supr. 383; *Burch* v. *The D. & St. P. R. R. Co.* 46 Iowa, 449; and *Schwab* v. *Hudson*, 11 C. L. N. 372.)

If the State court decides that no case for removal exists, and on this ground refuses to accept the petition and bond, and hence continues its jurisdiction, the petitioning party can have this decision reviewed without any loss of rights on his part; and if the decision be affirmed by the highest court of the State, then, by a proper procedure, he may carry the question to the Supreme Court of the United States.

The statute does not require the petitioning party to give any notice to the adverse party of his application for the removal of a suit from the State court. In reference to this point Judge Blatchford, in *Wehl* v. *Wald*, 17 Blatch. 342, said: "The act of Congress does not require notice. If, as a matter of discretion, a State court can or does require notice in any case of removal, such notice was dispensed with in this case; and the matter being one of practice, it is for the State court to regulate its own practice,

and this court will not review such a question." The same doctrine was affirmed in *Stevens* v. *Richardson*, 9 Fed. Rep. 191.

The voluntary appearance of the party in the State court, without summons, does not affect his right to insist on the removal of the suit therefrom. It is not a waiver of the right. (*Stevens* v. *Richardson*, 9 Fed. Rep. 191.)

Although it is proper that the State court, upon a sufficient case, should make a formal order for the removal of the cause, this is not necessary to its removal. The removal is a legally accomplished fact whether the order is made or not. It does not depend upon the order, but upon compliance with the prescribed conditions. (*Lalor* v. *Dunning*, 56 How. Pr. 209; *The Commercial and Savings Bank* v. *Corbett*, 5 Saw. 172; and *Jackson* v. *The Mutual Life Ins. Co.* 60 Ga. 423.)

In *Penrose* v. *Penrose*, 1 Fed. Rep. 479, it was held that, the case being removed by the filing of the proper papers, the order of the State court awarding cost, was without jurisdiction, and was therefore void. (*The Mayor* v. *Cooper*, 6 Wall. 247.)

(7.) *The Circuit Court.*—The third section of the act still further provides that "the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court." To this, section sixth adds the following provision: "That the Circuit Court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said Circuit Court, and the same proceedings had been taken in such suit in said Circuit Court as shall have been had therein in said State court prior to its removal."

The "copy" here referred to, is the copy of the record of the suit in the State court, including the petition and the bond for removal filed in that court, which is assumed to have been entered in the Circuit Court at the time specified in the statute. This being done, then the case is in a condition for the exercise of the jurisdiction of the latter court.

Chief Justice Waite, in *The Railroad Company* v. *Koontz*, 14 Otto, 5, 14, said: "The jurisdiction is changed when the removal is demanded in proper form and a case for removal made. Proceedings in the Circuit Court may begin when the copy is entered."

Referring to "the right of the Circuit Court to proceed with the cause," he added: "The entering of the record is necessary for that, but not for the transfer of jurisdiction. The State court must stop when the petition and security are presented, and the Circuit Court go on when the record is entered there, which is in effect docketing the cause." This entrance of the record then is not a condition of the existence of the jurisdiction of the Circuit Court, which is already established, but simply of the exercise of that jurisdiction. The case is not in a condition to come before the court until a copy of the record is entered therein, which is equivalent to putting it on the docket of the court.

Mr. Justice Harlan, in *The Nat. Steamship Co.* v. *Tugman*, 1 Supreme Court Rep. 58, said: "Upon the filing, therefore, of the petition and bond, the suit being removable under the statute, the jurisdiction of the State court absolutely ceased, and that of the Circuit Court of the United States immediately attached. The duty of the State court was to proceed no further in the cause. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored. It could not be restored by the mere failure of the company to file a transcript of the record in the Circuit Court of the United States within the time prescribed by the statute. The jurisdiction of the latter court attached, in advance of the filing of the transcript from the moment it became the duty of the State court to accept the bond and proceed no further; and whether the Circuit Court of the United States should retain jurisdiction, or dismiss or remand the action because of the failure to file the necessary transcript, was for it, and not the State court, to determine." (*St. Paul & C. R. R. Co.* v. *McLean*, 2 Supreme Court Rep. 498.)

Assuming the case to be a proper one for removal, and that the necessary proceedings have been taken for this purpose, the statute directs the Circuit Court to dispose of the case just as it would have done if the suit had been first brought in this court, and if the proceedings in the State court prior to removal had been had in the Circuit Court. The latter court takes up the case as it was at the time of removal. In *Werthein* v. *The Continental Railway & Trust Co.* 11 Fed. Rep. 689, Judge Shipman said: "It cannot now be doubted that the Circuit Court takes the case where the positive affirmative action of the State court has

left it. If the State court has made an order, and thereafter the case is removed, it goes into the Circuit Court, with the order, if unexecuted, to be executed, and, if executed, to remain a valid order."

In *Duncan* v. *Gegan*, 11 Otto, 810, Chief Justice Waite said: "The transfer of the suit from the State court to the Circuit Court did not vacate what had been done in the State court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the State court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State court would have had if the suit had remained there. It takes up the case where the State court left it off."

In *Bills* v. *The New Orleans, St. Louis & Chicago R. R. Co.* 13 Blatch. 227, it was held that as the complaint had been made in the State court before the cause was removed, no further pleading on the part of the plaintiff was necessary in the Circuit Court.

In *West* v. *Smith*, 11 Otto, 263, it was held that where an action has been removed from a State court to the Circuit Court, the latter court may, in accordance with the State practice, grant the plaintiff leave to amend his declaration by inserting new counts for the same cause of action as that alleged in the original counts. Having already filed a declaration in the State court, he need not file a new one in the Circuit Court. Where in an action at law the cause is at issue at the time of removal, no other or different pleadings are necessary than those in the State court before removal. (*The Merch. & Manuf. Nat. Bank* v. *Wheeler*, 13 Blatch. 218.)

It was held, in *The La Mothe Manuf. Co.* v. *The National Tube Works Co.* 15 Blatch, 432, that where the suit in the State court combined purely equitable reliefs and purely legal reliefs in the same suit, the pleadings must, upon the removal of the suit into the Circuit Court, be re-cast into two cases, one at law and the other in equity. (*Fisk* v. *The Union Pac. R. R. Co.* 8 Blatch. 299; *Bennett* v. *Butterworth*, 11 How. 669; *Thompson* v. *The Railroad Companies*, 6 Wall. 134; and *Montejo* v. *Owen*, 14 Blatch. 324.) The general principle of Federal jurisprudence is that equitable and legal causes of action cannot be blended in the

same suit in the courts of the United States, even if they are thus united in State courts. (*Hurt* v. *Hollingsorth*, 10 Otto, 100.)

In *Brooks* v. *Farwell*, 4 Fed. Rep. 166, Judge Hallett said: "We do not, on the removal of a cause from a court of the State, review or attempt to reverse any proceedings that may have been had there before the removal of the cause into this court. As to all questions that are passed upon in the State court before the removal of the cause, they are fully and finally determined so far as this court is concerned, and can only be reviewed in the Supreme Court of the United States, if there be error in them."

These cases illustrate the construction of the statute as to the procedure in the Circuit Court when a cause has been removed thereto. The intention of Congress is that the suit shall, from the point of removal, proceed there just as it would have done if originally commenced there. The Circuit Court, referred to in the statute, is the Circuit Court for the district within the territorial limits of which the suit was pending in the State court. (*Knowlton* v. *The Congress & Empire Spring Co.* 13 Blatch. 170.) It is the province of this court, having obtained jurisdiction in the way prescribed, to dispose of the case and administer all provisional remedies applicable thereto. (*The Mahoney Mining Co.* v. *Bennett*, 4 Saw. 289.)

(8.) *Citizens of the same State.*—The section under consideration makes a special provision for the removal of suits from State courts between citizens of the same State claiming lands under grants of different States, which is as follows:

"And if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for

such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the Circuit Court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, and the trial of issues of fact in the Circuit Courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury."

This, in several respects, changes the law in regard to such removals, as originally enacted in the twelfth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), and, with slight modifications, reproduced in section 647 of the Revised Statutes of the United States. Cases under this provision very rarely occur.

3. Supplementary Provisions. (Secs. 4–7.) — The Act of March 3d, 1875, having defined the suits which may be removed, and prescribed the method of removal, proceeds to give a series of provisions, which may be properly designated as supplementary. These provisions are as follows:

(1.) *Previous Process continued.* (*Sec.* 4.)—This section provides "that when any suit shall be removed from a State court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

This proceeds upon the theory that the proceedings had in the State court are not vacated, and do not become null and void, simply because the suit has been removed to the Circuit Court. The latter court takes the case in the condition in which it was when the State court was deprived of its jurisdiction. (*Duncan* v. *Gegan*, 11 Otto, 810; and *Bills* v. *The New Orleans, St. Louis & Chicago R. R. Co.* 13 Blatch. 227.)

(2.) *Dismissal or Remanding.* (*Sec.* 5.)—This section provides as follows: "That if, in any suit commenced in a Circuit Court or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

The question whether the Circuit Court has jurisdiction of a suit removed thereto from a State court, is one which it may consider and determine at any time after the removal; and if it is without jurisdiction it is directed by this statute to proceed no further in the suit, but to remand it to the State court. In *The Traders' Bank of Chicago* v. *Tallmadge*, 9 Fed. Rep. 363, it was held that, under this statute "the Circuit Court is not precluded by the decision of the State court from determining for itself whether or not the removal was made in time."

Chief Justice Waite, in stating the opinion of the court in *Babbitt* v. *Clark*, 13 Otto, 606, 610, remarked that the language of the statute might be more explicit, and then proceeded to say: "We think it may be fairly construed to include a case where the Circuit Court decides that the controversy is not properly within its jurisdiction because the necessary steps were not taken to get it away from a State court where it was rightfully pending. The right to remove a suit from a State court to the Circuit Court of the United States is statutory, and to effect a transfer of jurisdiction all the requirements of the statute must be followed. If this is done, the controversy is brought properly within the jurisdiction of the Circuit Court, and may be lawfully disposed of there; but if not, the rightful jurisdiction continues in the State court."

A suit removed from a State court may, according to this con-

struction, be remanded for the want of jurisdiction in the Circuit Court, not only when neither the subject-matter of the suit nor the parties give jurisdiction, but also when the necessary steps were not taken for its removal to the Circuit Court. It is enough that the suit has not been lawfully removed for any reason; and when the Circuit Court "remands the suit on that account, it," as remarked by Chief Justice Waite, "in effect determines that the controversy involved is not properly within its own jurisdiction."

So, also, Judge Blatchford, in *McLean* v. *The St. Paul & Chicago R. R. Co.* 16 Blatch. 309, 318, expressed the opinion that the provisions of this section "are enabling and not prohibitory, and that they are such as not to indicate any intention in Congress to take away from the Circuit Court the power of remanding a cause to the State court, on the ground that the prescribed prerequisites necessary to authorize the Circuit Court to proceed in the cause have not been complied with." The Circuit Court has no power to change the statute; and unless the jurisdictional conditions which the law establishes are substantially complied with, the lawful jurisdiction remains in the State court; and if the suit has been removed therefrom, it should be remanded thereto. (*Burdick* v. *Hale*, 7 Biss. 96.)

Judge Hallett, in *Hoyt* v. *Wright*, 4 Fed. Rep. 168, remarked: "In cases removed from a court of the State, if there is in the record, either in the State court or in the petition for removal, anything showing want of jurisdiction in this court, the party objecting to the removal may rely upon that by motion to have the cause remanded. If, taking the facts appearing in the record and petition to be true, this court has jurisdiction, the party objecting to the jurisdiction must make his objection by plea to the jurisdiction—that is, he must allege the facts in a manner in which issue may be joined, and according to the course and practice of the court, so that they may be properly determined."

The result would then seem to be this: That a suit removed from a State court to a Circuit Court of the United States, not within the description of removable suits given in the second section of the Act of March 3d, 1875, or not removed in substantial compliance with the method prescribed in the third section of the same act, should be remanded to the State court, unless the defects or irregularities in the method of removal are immaterial and do not touch the substance of the statute, or unless such de-

fects or omissions were occasioned by some action of the State court or the clerk thereof, which prevented the petitioner from complying with the law of Congress.

The decision of the Circuit Court remanding the suit to the State court is, in express words, made "reviewable by the Supreme Court on writ of error or appeal, as the case may be." The doctrine of the Supreme Court, prior to this enactment, was that it had no power to review such a decision on writ of error or appeal, because it did not partake of the nature of a final judgment or decree in a civil action. (*The Insurance Company* v. *Comstock*, 16 Wall. 258, and *The Railroad Company* v. *Wiswall*, 23 Wall. 507.) This power was given by the section under consideration and may now be exercised. (*Hoadley* v. *San Francisco*, 4 Otto, 4; *Ayers* v. *Chicago*, 11 Otto, 184; and *Babbitt* v. *Clark*, 13 Otto, 606.)

The Supreme Court will not, however, so exercise this power as to interfere with the legal discretion of the Circuit Court in remanding a cause. In *The St. Paul & C. R. R. Co.* v. *McLean*, 2 Supreme Court Rep. 498, it was held that "where, upon the removal of a cause from a State court, the copy of the record is not filed within the time fixed by statute, it is within the legal discretion of the Federal court to remand the cause, and the order remanding it for that reason should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised." The only reason given in this case for the omission to file the transcript of the record in the Circuit Court within the proper time was inadvertence on the part of counsel; and this was not regarded as a sufficient legal reason for not complying with the statute.

(3.) *Time of Filing the Record.* (*Sec.* 7.)—The first provision of this section is "that in all causes removable under this act, if the term of the Circuit Court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said Circuit Court, and enter appearance therein, and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf."

Section third of the act requires a copy of the record in the

State court to be entered in the Circuit Court on the first day of the next session after the filing of the petition in the State court for the removal of the suit. The part of section seven, above quoted, modifies this requirement in the case specified, so as to provide that, if the term of the Circuit Court, next to be held, shall commence within twenty days after filing the petition and bond in the State court, the petitioner shall have twenty days from the time of the application for the removal of the suit, within which he may file the copy of the record in the Circuit Court and enter his appearance therein, and that, if he does so at any time within this limit, this shall in such a case be regarded as satisfying the bond on this point. The design of Congress was to enlarge the petitioner's period of action to at least twenty days when the term of the Circuit Court begins within twenty days after filing the petition and bond in the State court.

(4.) *Refusal of the Clerk of the State Court.* (*Sec.* 7.)—The section further provides "that if the clerk of the State court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same a copy of the record therein, after tender of legal fees for such copy, said clerk so offending, shall be deemed guilty of a misdemeanor, and, on conviction thereof in the Circuit Court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both, in the discretion of the court."

The design of this provision is to compel the clerk of the State court to furnish a copy of the record in that court. It makes his refusal to so, in the circumstances recited, a criminal offense.

(5.) *The Writ of Certiorari, &c.* (*Sec.* 7.)—This section still further provides that "the Circuit Court to which any cause shall be removable under this act, shall have power to issue a writ of *certiorari* to said State court, commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law;" that "if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof,

to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the Circuit Court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine;" that "in default thereof the court shall dismiss the said action or proceeding;" that "if said order shall be complied with, then said Circuit Court shall require the other party to plead, and said action or proceeding shall proceed to final judgment;" that "the said Circuit Court may make an order requiring the parties thereto to plead *de novo;*" and that "the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid."

These provisions authorize the Circuit Court to issue a writ of *certiorari* to the State court, and, in the event of a failure to obtain a copy of the record in that court, to proceed with the case in the way prescribed without the record. The refusal of the clerk of the State court or of the court to furnish a copy of the record will not defeat the jurisdiction of the Circuit Court, when a party entitled to remove a cause has taken all the steps prescribed by law for this purpose.

The fact that the State court decides against the removal of a cause and refuses to allow it, and hence proceeds with its trial, is not conclusive with or binding upon the Circuit Court. (*Cobb* v. *The Globe Mutual Life Ins. Co.* 3 Hughes, 452; and *Hunter* v. *The Royal Canadian Ins. Co.* 3 Hughes, 234.) The jurisdiction of the Circuit Court attaches *ipso facto* to the case the moment the proper steps for its removal have been taken; and this jurisdiction cannot be vacated or ousted by any action or want of action on the part of the State court.

The purpose of issuing a writ of *certiorari* is not to require the State court to remove the cause to the Circuit Court, but simply to require a "return of the record" of the case, duly authenticated by the court through its clerk. The issue of the writ assumes the authority of the Circuit Court over the case. (*Broadnax* v. *Eisner*, 13 Blatch. 366, 369.)

4. The Repealing Section. (Sec. 10.)—This section provides as follows: "That all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

This language does not expressly particularize any act as being repealed by the Act of March 3d, 1875. It applies only to such acts or parts of acts as are in conflict with this act. The question then arises whether there are any prior acts of Congress, or parts of acts, that are repealed in this way. The answer is as follows:

(1.) *Section* 639 *of the Revised Statutes.*—This section contains three subdivisions, each one reproducing a previous act of Congress for the removal of causes of a civil nature at law or in equity from State courts to the Circuit Courts of the United States, and all requiring the matter in dispute, exclusive of costs, to exceed the sum or value of five hundred dollars.

(*a.*) *Subdivision First.*—This subdivision, corresponding to the first part of section twelve of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provides for the removal of a suit from a State court in two classes of cases. The first is "when the suit is against an alien," without any specification of the party by whom the suit is brought. The second is when the suit "is by a citizen of the State wherein it is brought and against a citizen of another State," and is hence a controversy "between citizens of different States."

The second and third sections of the Act of March 3d, 1875, provide for the removal of suits from State courts when the controversy is "between citizens of different States," or "between citizens of a State and foreign States, citizens or subjects." Ex-Judge Dillon, in his "Removal of Causes," 3d ed. p. 28, remarks:

"It would seem that subdivision one of section 639, Revised Statutes (12th section of the Judiciary Act), is practically repealed by reason of being merged in the more enlarged right given by the Act of 1875. If, however, a case should arise which could be removed under this provision, but which could not be removed under the Act of 1875, the former would be held to be still subsisting."

Judge Blatchford, in *The La Mothe Manuf. Co.* v. *The National Tube Works Co.* 15 Blatch. 432, said: "The better opinion is that such provision in subdivision one of sec. 639 was superseded and repealed by the Act of 1875." Judge Ballard, in *Cooke* v. *Ford*, 4 Cent. Law. Jour. 560, held that the provisions of the Act of 1875 are inconsistent "with subdivision one of sec. 639, that each covers precisely the same ground, and that both cannot

stand." Substantially the same view was taken in *Girardey* v. *Moore*, 3 Woods, 397, and in *The Zinc Co.* v. *Trotter*, 17 Amer. Law Rep. (N. S.) 376.

There would seem to be no doubt that the case of a suit, "by a citizen of the State wherein it is brought and against a citizen of another State," is fully provided for in the second and third sections of the Act of 1875, relating to a controversy between citizens of different States, and hence that the removal of such a suit is to be made in accordance with the provisions of this act, and not those of subdivision one of section 639.

How is it with the other case mentioned in the same subdivision, that is, "when the suit is against an alien?" The Act of 1875 provides for the removal of a suit when the controversy is "between citizens of a State and foreign states, citizens, or subjects." If a citizen of a State of the Union and a foreign state, or a citizen of a State and a citizen of a foreign state, be the parties to the suit in a State court, then, under this provision, the suit may be removed. But if a State of the Union and an alien or citizen or subject of a foreign state, be the parties to the suit, then there is no provision for its removal. If, for example, a State of the Union, as it may, sues an alien in its own court, then the Act of 1875 does not provide for the removal of that suit to a Circuit Court of the United States by either party.

Precisely such a case was presented in *The State of Texas* v. *Lewis et al.* 12 Fed. Rep. 1. The State of Texas brought a suit in its own court against the defendants who were aliens, and took the requisite steps for the removal of the suit to the proper Circuit Court. The question, on a motion to remand the suit to the State court, arose whether the first subdivision of section 639 of the Revised Statutes, relating to removal "when the suit is against an alien," was not applicable to the case, and, if so, whether this part of the subdivision was not still in force.

Judge McCormick, the district judge who held the Circuit Court, answered this question in the affirmative. He held that the words "when the suit is against an alien," were broad enough to cover the case before the court, and that the court had jurisdiction thereof, and on this ground refused to remand the suit to the State court. It did not follow, as he claimed, because neither the Constitution nor any act of Congress had authorized a State to sue in the Circuit Court, "that when a suit is properly brought in

a State court, having unquestioned jurisdiction, by a State against an alien, the alien cannot, under section 639, Revised Statutes, remove the cause to the Circuit Court." He treated the provision in section 639 as still operative, and as authorizing a removal for which there was no provision in the Act of 1875.

The motion to remand the suit in this case was, at the suggestion of the district judge, re-argued before Judge Pardee, the circuit judge, who concurred with Judge McCormick, and denied the motion. The doctrine laid down by Judge Pardee was as follows: 1. That the original jurisdiction, given by the Constitution to the Supreme Court in cases where a State is a party, "does not preclude Congress from conferring jurisdiction upon the Circuit Courts in cases brought by a State against an alien," and that "by section 639 of the Revised Statutes, in terms and effect providing for the removal of such cases from the State courts, Congress has conferred such jurisdiction in removal cases." 2. That "section 639 of the Revised Statutes is not repealed by the Act of March 3d, 1875, except by merger," and that "a case which could have been removed under the former provision, but could not under the latter act, may still be removed." (*The State* v. *Lewis*, 14 Fed. Rep. 65.)

This particular clause of section 639, not coming within the provisions of the Act of 1875, and providing for a removal not provided for by the act, and hence not in conflict with the act, is, according to this ruling, to be regarded as still in force. The other clause of the first subdivision relating to a suit in a State court "by a citizen of the State wherein it is brought and against a citizen of another State," is evidently merged in and superseded by the provisions of the Act of 1875, relating to the removal of suits "between citizens of different States." The latter provision covers all the ground occupied by the former, and, being the later act, is of course the rule on the subject.

(*b.*) *Subdivision Second.*—This subdivision, corresponding to the Act of July 27th, 1866 (14 U. S. Stat. at Large, 306) relates to the removal of a suit from a State court "when the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same and a citizen of another State." Ex-Judge Dillon, in his "Removal of Causes," 3d edit. p. 29, thinks that "the better view probably is, that the Act of 1866 is not repealed by the Act of 1875." Judge

Blatchford, in *Wormser* v. *Dahlman*, 16 Blatch. 319, held that this subdivision is not repealed by the Act of 1875; and to the same effect was the opinion of Mr. Justice Bradley, in *Girardey* v. *Moore*, 3 Woods, 397. In *Whitehouse* v. *The Continental Fire Ins. Co.* 2 Fed. Rep. 498, Judge Butler held the same doctrine. (*Ex parte Grimball*, 8 Cent. Law Jour. 151; and *Board* v. *Kans. & Pac. R. R. Co.* 4 Dill. 277.)

All these authorities, however, are overruled by the opinion of the Supreme Court of the United States in *Hyde* v. *Ruble*, 14 Otto, 407. Chief Justice Waite, in stating the opinion of the court, said: "The second clause of sect. 639 of the Revised Statutes was, as we think, repealed by the Act of 1875." So, also, in *King* v. *Cornell*, 16 Otto, 395, the Chief Justice said: "It follows that the whole of the second subdivision of section 639 was repealed by the Act of 1875."

(*c.*) *Subdivision Third.*—This subdivision, founded on the Act of March 2d, 1867 (14 U. S. Stat. at Large, 558), relates to the removal of a suit from a State court when it "is between a citizen of the State in which it is brought and a citizen of another State," in which case the latter citizen, whether plaintiff or defendant, is authorized to remove the suit by filing his petition in the State court as provided; and also filing an affidavit "stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

Chief Justice Waite, referring, in *The Bible Society* v. *Grove*, 11 Otto, 610, to this subdivision, said: "The Act of March 3d, 1875 (18 Stat. 470), has not changed this provision of the Revised Statutes." Judge Ballard held this view in *Cooke* v. *Ford*, 4 Cent. Law Jour. 560. The same view was taken in *Whitehouse* v. *The Continental Fire Ins. Co.* 2 Fed. Rep. 498; in *Johnson* v. *Johnson*, 13 Fed. Rep. 193; in *Hobby* v. *Allison*, 13 Fed. Rep. 401; and in *Dennis* v. *Alachua*, 3 Woods, 683.

(2.) *Section* 640 *of the Revised Statutes.*—This section, corresponding to section second of the Act of July 27th, 1868 (15 U. S. Stat. at Large, 226), relates to the removal of suits from State courts against corporations organized under any law of the United States, not including banking associations, or against any member thereof as such member, and provides for a removal on the ground

that the defendant in any such suit claims a defense arising under the Constitution, or a law or treaty of the United States.

In *Kain* v. *Tex. and Pac. R. R. Co.* 3 Cent. Law Jour. 12, and in *Ely* v. *The North Pac. R. R. Co.* 36 Leg. Int. 164, it was held that this section is not repealed by the Act of 1875. The section applies to "any suit" of the character described, while the Act of 1875 applies only where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars. This shows that the latter does not comprehend or supersede the former.

(3.) *Section* 641 *of the Revised Statutes.*—This section, reproducing portions of acts of Congress in 1863, 1866 and 1870, relates to the removal of civil suits or criminal prosecutions commenced in State courts against persons denied any right secured to them by any law of the United States, or unable to enforce such right in State tribunals, or against officers, civil or military, for acts done or omitted under the authority of such law. The Act of 1875, qualified and limited by a jurisdictional sum as to the matter in dispute, and having no reference to criminal prosecutions in State courts, evidently does not affect this section one way or the other. The Supreme Court, at the October term of 1879, had occasion, in *Virginia* v. *Rives*, 10 Otto, 313, to consider and explain this section, and treated it as still in force. The same was true in *Neal* v. *Delaware*, 13 Otto, 370.

(4.) *Section* 643 *of the Revised Statutes.*—This section, reproducing parts of acts of Congress in 1833, 1866 and 1871, relates to the removal of civil suits or criminal prosecutions commenced in State courts against revenue officers of the United States, or against officers acting under the authority of Federal registration and election laws. The provisions of this section were, in *Tennessee* v. *Davis*, 10 Otto, 257, considered by the Supreme Court at the October term, 1879, and treated as both constitutional and operative. The Act of 1875, limited by a jurisdictional sum, and confined exclusively to suits of a civil nature, manifestly has no relation to the provisions of this section. (*Venable* v. *Richards*, 1 Hughes, 326.)

In *Venable* v. *Richards*, 15 Otto, 636, 638, Mr. Justice Harlan said: "We are of opinion that effect will be given to the intention of Congress by holding, as we now do, that sect. 643 of

the Revised Statutes, not being in conflict with the Act of 1875, is in full force as to all cases embraced by its terms; and, consequently, that the act, so far as it embraces suits arising under the laws of the United States, does not preclude a removal of a suit of the class defined and in the mode prescribed in that section." This settles the question as to the continued operative force of the section.

(5.) *Section* 644 *of the Revised Statutes.*—This section, corresponding to the Act of March 30th, 1872 (17 U. S. Stat. at Large, 44), relates to the removal of a personal action commenced in a State court by an alien against a citizen of a State who is, or, at the time the alleged action accrued, was, a civil officer of the United States, being a non-resident in the State where the jurisdiction was obtained on the part of the State court by personal service, and provides for the removal of such suit into the proper Circuit Court of the United States. Such suits are not simply suits between citizens and aliens, but also suits between aliens and civil officers of the United States; and it is for the latter reason that provision is made for their removal in the cases specified. They are not comprehended in any provision of the Act of 1875; and there is nothing in this section that is in conflict with the act. The conclusion, therefore, is that this section remains in force.

(6.) *Section* 647 *of the Revised Statutes.*—This section, corresponding to the latter part of the twelfth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provides for the removal of suits between citizens of the same State claiming lands under grants of different States, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. The latter part of section third of the Act of 1875 relates to the same subject, and being the later act, and making several changes in the method of removal, has undoubtedly superseded and repealed section 647 of the Revised Statutes.

The result reached by this examination is that the first and second subdivisions of section 639 of the Revised Statutes, except "when the suit is against an alien," and is brought by a State in a State court, and section 647 of these Statutes have been repealed by the Act of 1875, and that all the other provisions of these Statutes which define the cases in which suits may be removed from State courts into the Circuit Courts of the United States, still re-

main in force, and hence that these cases are removable in accordance therewith.

The Act of 1875 has, however, enlarged, not only the original civil jurisdiction of the Circuit Courts, but also their civil jurisdiction by the removal of suits from State courts. It provides, as had not been done by any previous legislation, for such removals where the controversy in a State court arises under the Constitution, or a law, or treaty of the United States, or where the United States shall be plaintiff or petitioner, or where there shall be a controversy between citizens of a State and foreign states.

The proper view, then, of the Act of 1875, is that it is in part a repeal of and substitute for previous acts of Congress, and in part supplementary to such acts, on the subject of the removal of causes from State courts. All cases coming within its provisions, whether included in prior legislation or not, are to be governed by it. Cases provided for by the Revised Statutes, but not included in this act, are to be governed by these Statutes, just as they would have been if the act had never been passed. The whole law on the subject is to be found in this act, and in such parts of the Revised Statutes, relating to the same subject, as have not been superseded or repealed by the act.

The acts of January 29th, 1880, of February 4th, 1880, and of June 11th, 1880, having reference respectively to the States of Georgia, Ohio, and Tennessee, so far as they relate to the removal of causes, simply designate the Circuit Courts in particular divisions of these States to which suits shall be removed, but do not otherwise change the law, and hence need no special notice. (21 U. S. Stat. at Large, 63, 64, 176.)

CHAPTER III.

REMOVAL OF CAUSES FROM STATE COURTS TO THE SUPREME COURT.

The constitutional authority of Congress to extend the appellate jurisdiction of the Supreme Court to a review of the judgments and decrees of State courts, in cases there arising and coming within the judicial power of the United States, as defined in the Constitution, was considered in the first chapter of this Part. The result of that inquiry was that such authority, not expressly, but by necessary implication, is given to Congress.

The peculiarity of the jurisdiction, when thus exercised, consists in the fact that it operates upon the judgments and decrees of courts not organized under the authority of the United States, but organized under the authority of the several States, which States, except as limited by the Constitution, are distinct and independent sovereignties enacting and executing their own laws. The jurisdiction is, in many respects, analogous to that exercised by the Supreme Court over the judgments and decrees of the inferior courts of the United States; but, in several respects, it is different in the laws which regulate it.

It has, for this reason, been thought best to treat of it in a distinct chapter, and to give the *whole* law on the subject, though some parts of that law, being equally applicable to the appellate review, by the Supreme Court, of the judgments and decrees of the inferior Federal courts, have already been presented in chapter third of Part III. This, though involving some repetition, will make the present chapter complete by itself, without referring to any other chapter.

SECTION I.

GRANT OF THE JURISDICTION.

1. The Judiciary Act of 1789.—The first legislation of Congress on the subject is found in the twenty-fifth section of the

Judiciary Act of 1789. (1 U. S. Stat. at Large, 73.) The cases in which the Supreme Court might exercise the revisory power; the State courts and the judgments and decrees to which the power should be applicable; the manner of exercising the power; the limitation imposed upon the power—such, in general terms, are the contents of the section that formed the only law on the subject from 1789 to 1867, covering a period of about seventy-eight years. Under the law, as thus established, a large number of cases was considered and determined by the Supreme Court.

2. The Act of February 5th, 1867. (14 U. S. Stat. at Large, 385.)—The second section of this act, though not changing the substance or general character of the twenty-fifth section of the Judiciary Act of 1789, was designed to be amendatory thereof. It omits some of the words of the original section, and adds others not found therein.

The difference between the two sections raised the question whether the later section had repealed the earlier one; and this question, in *Murdock* v. *The City of Memphis*, 20 Wall. 590, was answered in the affirmative. Mr. Justice Miller, in stating the opinion of the court in this case, said: "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."

While this is true, the changes are not such as materially to affect the jurisdiction of the Supreme Court conferred by the original Act of 1789. The two acts in this respect are substantially identical; and hence the general principles of construction, settled under the one, are equally applicable under the other.

3. The Revised Statutes. — Section 709 of the Revised Statutes continues and re-enacts, almost in exact words, with the omission of the last sentence, the substance of the second section of the Act of February 5th, 1867. This section was amended by the Act of February 18th, 1875 (18 U. S. Stat. at Large, 318), by striking out some of its words; and, as thus amended, it reads as follows:

"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 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 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 upon a writ of error. 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."

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

4. Precedence in Criminal Cases.—Section 710 of the Revised Statutes, reproducing a part of the sixty-ninth section of the Act of July 13th, 1866 (14 U. S. Stat. at Large, 172), provides as follows: "Cases on writ of error, to revise the judgment of a State court in any criminal case, shall have precedence, on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance."

SECTION II.

REVISORY POWERS OF THE COURT.

1. Revisory Powers.—The powers of the Supreme Court over the judgment or decree of a State court, properly before it for re-examination, are expressly declared to be reversal, modification, or affirmance, with the right, in its discretion, to award execution, or remand the case with instructions to the court from which it was removed.

Reversal nullifies the judgment or decree of the State court altogether; modification changes it in some respects; and, in either

event, the Supreme Court may remand the case, with instructions which the lower court is bound to follow. Affirmance leaves the judgment or decree to stand just as it would have stood if there had been no review by the Supreme Court. If the case be dismissed simply for the want of jurisdiction, then no decision is rendered upon its merits.

The Supreme Court, in section 701 of the Revised Statutes, is expressly forbidden, in causes removed thereto from the Circuit and District Courts of the United States, to issue execution, and required to send a special mandate to the inferior court to award execution thereupon. The inferior court is bound in all cases to give effect to this mandate. (*Sibbald* v. *The United States*, 12 Pet. 488; *West* v. *Brashear*, 14 Pet. 51; and *Durant* v. *The Essex Company*, 11 Otto, 555.)

But, in causes transferred to the Supreme Court from State courts, the court, in addition to its power of reversal, modification, or affirmance, may, in its discretion, award execution, or remand the same to these courts, with instructions as to further proceedings. The usual practice of the court, when reversing the judgments or decrees of State courts, is to remand the cases with such instructions.

2. Disobedience of the State Courts.—If, however, a State court, for any reason, refuses to obey the instructions of the Supreme Court, the party aggrieved by such a proceeding may sue out a writ of error based upon the proceeding; and the Supreme Court, in addition to reversing the action of the lower court, may award execution, and thus, by its own direct action, carry its judgment or decree into effect. The State court cannot, by disobedience, evade or nullify the jurisdiction of the Supreme Court.

The Court of Appeals of Virginia refused to obey the mandate of the Supreme Court in a case brought before the latter by writ of error; and this refusal, which denied the validity of the twenty-fifth section of the Judiciary Act of 1789, being regarded as a final judgment in its relation to the rights of the parties, was made the basis of a second writ of error addressed to the same court. (*Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 354.)

In *Magwire* v. *Tyler*, 8 Wall. 650, the Supreme Court reversed the decree of the Supreme Court of Missouri, and remanded the case, "with directions to affirm the decree of the St. Louis Court

of Common Pleas." This decision was subsequently so modified that the cause was directed to "be remanded for further proceedings in conformity to the opinion of the court." The Supreme Court of Missouri did not follow the instruction given by the Supreme Court of the United States, and, on the ground that there was, under the laws and practice of the State, a plain and adequate remedy at law, and that equity consequently had no jurisdiction of the case made by the petition, dismissed the petition. To this decree the complainant sued out a second writ of error; and, in *Tyler* v. *Magwire*, 17 Wall. 253, the Supreme Court not only reversed the decree of the Missouri court dismissing the petition, but proceeded to award execution by ordering a writ of possession in favor of the complainant to be issued by the clerk of the court, directed to the marshal thereof.

3. The Rule of the Court.—It is a settled rule of practice in the Supreme Court, that whatever has been decided by that court, upon a writ of error or appeal, will not be re-examined upon a subsequent writ of error or appeal in the same suit. If another writ of error be sued out in reference to the case, it must relate to the proceedings in the court below taken subsequently to the decision and order of the Supreme Court, and not to the matter already determined by that decision. This principle applies alike to the judgments and decrees of inferior Federal courts and to those of State courts. (*Himely* v. *Rose*, 5 Cranch, 314; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Browden* v. *McArther*, 12 Wheat. 53; *Sibbald* v. *The United States*, 12 Pet. 492; *Corning* v. *The Troy Iron & Nail Co.* 15 How. 466; *Sizer* v. *Maney*, 16 How. 103; *Roberts* v. *Cooper*, 20 How. 481; *Tyler* v. *Magwire*, 17 Wall. 283; *The Supervisors* v. *Kennicott*, 4 Otto, 498; and *Clark* v. *Keith*, 16 Otto, 464.)

This rule, however, does not preclude a second writ of error to review and reverse the proceedings of a State court not in conformity with the order of the Supreme Court in a case decided upon a previous writ; and if the court in such a case shall so determine, it may award execution, as was done in *Tyler* v. *Magwire*, 17 Wall. 283. It was held in this case that under the Judiciary Act, as well as under that of February 5th, 1867, amendatory of it, the Supreme Court may, upon a second writ of error, proceed to a final judgment and award execution. It was the design of

Congress that the judgments or decrees of the Supreme Court, in cases removed thereto from State courts, should have the same force and effect as in cases removed thereto from inferior Federal courts, and to arm the court with ample power to carry its own judgments or decrees into effect, independently of State courts, even against their insubordination or refusal to obey the order of the court.

SECTION III.

THE WRIT OF ERROR.

1. Mode of Exercising the Jurisdiction. — The mode of exercising the jurisdiction conferred upon the Supreme Court, as expressly stated in the statute, is by writ of error, without regard to the question whether the cause be one at law or in equity. The statute makes no provision for such exercise by any other mode; and, hence, no appeal can be taken from the final decision of a State court to the Supreme Court of the United States, whatever may be the character of the cause.

Mr. Justice Catron, in *Verden* v. *Coleman*, 22 How. 192, said: "No appeal can be taken from the final decision of a State court of last resort, under the twenty-fifth section of the Judiciary Act, to the Supreme Court of the United States. A writ of error alone can bring up the cause." The record in this case showed that an appeal had been taken to the Supreme Court of the United States from the Supreme Court of Indiana; and on this ground the case was dismissed, without any inquiry into its merits.

2. Nature of the Writ.—The writ of error is an order of the Supreme Court, formally issued in the name of the President of the United States, and addressed to the judge or judges of the State court, whose judgment or decree is to be examined, or to the State court that may have the legal custody of the record in the case.

This writ specifies the following things: 1. The suit and the parties thereto, in which and with respect to whom the final judgment or decree, complained of, was rendered, together with the date thereof. 2. The court of the State by which the suit was decided, and whose judgment or decree is to be reviewed, it

being the highest court of law or equity of the State in which a decision in the suit could be had. 3. The Federal question or questions arising in that suit and determined by the State court. 4. The character of the decision with reference to such question or questions.

The mandatory part of the writ directs the judge or judges of the State court to transmit, under the seal of the court, together with the writ itself, the record and proceedings in the case, to the Supreme Court of the United States at Washington, and at the time specified in the writ, to the end that the Supreme Court may examine the same, and consider and determine as law and justice may require in respect to the errors alleged.

3. Authentication of the Writ.—Section 911 of the Revised Statutes provides that all writs and processes issuing from the Supreme Court of the United States shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence. The writ of error to a State court must, consequently, bear this teste, and must also be signed by the clerk of the Supreme Court, or by the clerk of the Circuit Court of the United States for the district specified therein, and in either case it must be attested by the seal of the court.

In *Buel* v. *Van Ness*, 8 Wheat. 312, it was held that "the writ of error may be issued by the clerk of the Circuit Court in the State to whose court it is directed." The fact that it is thus issued does not make it any less a writ of error from and by the authority of the Supreme Court. In *Mussina* v. *Cavazos*, 6 Wall. 355, it was held that the writ of error by which a case is transferred from a Circuit Court to the Supreme Court, is the writ of the latter court, although it may be issued by the Circuit Court, and this principle equally applies when the writ is directed to a State court.

4. The Effect of the Writ.—Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 410, said that "the effect of the writ is to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties. It acts only upon the record. It removes the record into the supervising tribunal," and thus supplies the necessary condition of the supervision. It is not, as he

held in this case, the institution of a new suit, but simply a process provided for reviewing the final judgment or decree, in a suit already commenced and determined by the court rendering such judgment or decree.

The writ of error does not compel the parties to come into the appellate court. It is not a summons to either of them to appear in court. What, and all that, it calls for is the record of the case in which the judgment or decree, complained of, was rendered; and this demand is addressed to the court rendering the judgment or decree, or the court having the legal custody of the record. If the parties, one or both, fail to appear when the cause is called in the Supreme Court, they do so at their peril. No process will be issued to compel their appearance. (See Rules 16, 17, and 18 of the Supreme Court.)

5. The Right to the Writ.—The appellate jurisdiction of the Supreme Court over the final judgments or decrees of the inferior Federal courts is, with certain specified exceptions, conditioned by a given sum or value in dispute, which must exceed the amount named in the statute, and is also limited to "civil cases," except when the judges, holding a Circuit Court in a criminal case, certify to the Supreme Court that they were divided in opinion in relation to some question or questions arising in the case.

It is otherwise with writs of error from the Supreme Court to State courts. The right to sue out such a writ does not depend at all upon the sum or value in dispute between the parties, or the amount awarded by the judgment or decree of the State court, or upon the question whether the case was a civil suit or a criminal prosecution. Neither the right to the writ nor the jurisdiction of the Supreme Court is in any way affected by these circumstances. Both depend upon the presence of the conditions specified in the statute, of which these circumstances form no part.

In *Buel* v. *Van Ness*, 8 Wheat. 312, 322, it was held that "the amount of the judgment is not material under the twenty-fifth section of the Judiciary Act." Chief Justice Chase, in *Twitchell* v. *The Commonwealth*, 7 Wall. 321, said: "Neither the Act of 1789, nor the Act of 1867, which in some particulars supersedes and replaces the Act of 1789, makes any distinction between civil and criminal cases in respect to the revision of the judgments of State courts by this court; nor are we aware that it

has ever been contended that any such distinction exists. Certainly none has been recognized here. No objection, therefore, to the allowance of the writ asked for by the petition can arise from the circumstance that the judgment, which we are asked to review, was rendered in a criminal case."

6. Service and Return.—On this point the Digest of Mr. Justice Curtis (p. 598), formerly one of the justices of the Supreme Court, contains the following statement:

"The plaintiff in error should deposit in the office of the court where the record of the judgment or decree remains, the original writ of error, the citation, with its service indorsed thereon, and the bond, together with a copy of each. The clerk of the court to which the writ of error is directed, makes his return by transmitting a true copy of the record without references *aliunde*, and of all the papers, exhibits, depositions, and other proceedings, authenticated by the seal of the court and the signature of the clerk. The original writ of error, the citation, with its service indorsed thereon, and a copy of the bond, are appended to the return. A copy of the writ of error, of the citation, and the original bond, remain in the office of the clerk making the return."

"The entry of the writ in the Supreme Court, and the proceedings thereon, are the same as in writs of error and appeals from the Circuit Courts of the United States, and reference may be had to the directions hereafter given, as to those proceedings."

The Eighth Rule of the Supreme Court provides as follows: 1. That "the clerk of the court to which the writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause under his hand and the seal of the court." 2. That "in all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court, by which such judgment or decree was rendered, shall annex to and transmit with the record a copy of the opinion or opinions filed in the case." 3. That "no cause will hereafter be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed." 4. That, "in cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served

before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day."

7. The Parties.—The parties before the Supreme Court, upon a writ of error, are known as the plaintiff in error, and the defendant in error—the former suing out the writ and seeking to have the judgment or decree of the State court corrected in respect to alleged errors, and the latter seeking to have it affirmed. This designation does not necessarily indicate their relation in the court below, since the plaintiff and defendant in that court have an equal right to sue out a writ of error, and either may be the plaintiff or the defendant in error in the Supreme Court.

The general rule of law is that writs of error can be sued out only by persons, individual or corporate, who have the legal capacity to sue, and only by such persons as were parties to the suit in the court below, and were consequently interested in and affected by the judgment or decree rendered, or by the legal representatives of such persons. Chief Justice Taney, in *Payne* v. *Niles*, 20 How. 219, said:

"Writs of error to remove the judgment of an inferior tribunal to this court are, under the acts of Congress, governed by the principles and usages of the common law. And it is very well settled in all common law courts, that no one can bring up, as a plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error, who was not a party to the judgment in the inferior court."

It was held in *Simpson* v. *Greeley*, 20 Wall. 152, that "all the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal, or it will be dismissed, except sufficient cause for the non-joinder is shown." (*Williams* v. *Bank*, 11 Wheat. 414; and *Masterson* v. *Herndon*, 10 Wall. 416.)

In *O'Dowd* v. *Russell*, 14 Wall. 402, it was held that "a notice by one of three defendants to his co-defendants, of his intention to prosecute a writ of error, and a refusal by them to co-operate, is equivalent to the old proceeding of summons and severance, and the one defendant can take his writ accordingly."

In *The Railroad* v. *Johnson*, 15 Wall. 8, it was held that

"when a mortgagee on a bill of foreclosure filed in an inferior State court against his mortgagor and certain trustees holding collateral securities, obtains in that court a decree against the mortgagor personally and against the trustees as trustees, and the mortgagor alone appeals to the Supreme Court of the State, to which, on affirmance of the decree, he alone takes a writ of error here, it is no ground to dismiss the writ that the trustees are not joined with him as plaintiffs in error in this court."

The fifteenth Rule of the Supreme Court makes provision that, if either party dies, pending a writ of error, the case may be proceeded with by making the proper legal representative of the deceased a party on the record, who, for the purposes of the writ, in effect takes his place.

SECTION IV.

THE RECORD.

1. Indispensable to Jurisdiction.—What is wanted, and, by the writ of error, sought to be obtained and brought to the Supreme Court, as already remarked, is an authenticated copy of the record of the State court that rendered the judgment or decree complained of, as the means of enabling the former court to re-examine such judgment or decree. This record forms the basis, in connection with the law, upon which the Supreme Court proceeds in the exercise of its revisory jurisdiction, and in the light of which it determines whether it has any jurisdiction in the case.

The first question in every case is the one of jurisdiction; and if the record does not show a case within the jurisdiction of the court, as conferred by law, then the writ of error, either upon motion or without motion, will be dismissed without taking up the merits at all. If, however, the record shows jurisdiction under the provisions of law, and the case has been properly brought before the court, then, at the proper time, the court hears the parties upon the merits of the case as presented by the record, and passes judgment upon the question or questions decided by the State court to which such jurisdiction attaches. The record of the court below in the case is, for both purposes, indispensable.

2. Contents of the Record.—Mr. Benjamin R. Curtis makes the following statement on this point:

"In acting on the writ of error, the Supreme Court has before it only the record of the State court. They have nothing before them except the record, which includes * * * the pleadings and the verdict and judgment, if it is a case at law, and if there has been a trial by jury, the bill of exceptions, if any exceptions were taken showing what points were made at the trial, and what the rulings of the court below were upon them; and that bill of exceptions becomes, when properly taken and allowed, a part of the record. In equity, they have the bill, the answer, the replication, the evidence, and the decree, or decrees if there were more than one. These are the records in law and in equity, and they are before the Supreme Court of the United States, from the State court, for them to examine, and thus determine whether any one of those questions has arisen, which is described in this twenty-fifth section." (Jurisdiction, &c., of the Courts of the United States, pp. 35, 36.)

The reference, here made, is to the twenty-fifth section of the Judiciary Act of 1789, and to the Federal questions specified in that section. The record, whether the suit be one at law or in equity, must, in its contents, show the presence of one or more of these questions, and also the decision of the State court touching the same. The Supreme Court examines these contents, in order to ascertain whether a Federal question arose in the case and was decided as specified in the statute, and if so decided, then whether the decision is correct.

3. The Record the Sole Guide.—The Supreme Court, for the purpose of examining the case, depends solely upon the record brought up from the State court. Anything that is not properly a part of this record will not be considered.

Chief Justice Marshall, in *Fisher's Lessee* v. *Cockrell*, 5 Pet. 248, 254, remarked: "In cases at common law, the course of the court has been uniform not to consider any paper as part of the record which is not made so by the pleadings, or by some opinion of the court referring to it. This rule is common to all courts exercising appellate jurisdiction according to the course of the common law. The appellate court cannot know what evidence was given to the jury, unless it be spread on the record in proper legal manner. The unauthorized certificate of the clerk that a document was read, or any evidence given, to the jury, cannot make

that document or that evidence a part of the record, so as to bring it to the cognizance of this court." The court, in this case, refused to regard such a certificate as presenting any matter which it was its province to consider. It was no part of the record of the case.

In *Reed's Lessee* v. *Marsh*, 13 Pet. 153, 155, Chief Justice Taney said: "Can we receive the certificate of the clerk, that certain papers were offered in evidence, and the statement of counsel upon a motion for a new trial, that certain instructions were refused by the court, as sufficient evidence of the facts they set forth, and proceed upon that ground to take jurisdiction and revise the judgment of the State court? We think not." Referring to the case of *Fisher's Lessee* v. *Cockrell*, *supra*, he added: "The doctrine in that case is entirely correct."

In *Williams* v. *Norris*, 12 Wheat. 117, it was held that the written opinion of a State court filed among the papers, is not a part of the record, and cannot be examined under the twenty-fifth section of the Judiciary Act, to ascertain the questions decided, and also that an order made by a court of a State, after the removal of the record by a writ of error, not by way of amendment, but introducing new matter, cannot be deemed a part of the record. This ruling was approvingly referred to in *Rector* v. *Ashley*, 6 Wall. 142; and in *Gibson* v. *Chouteau*, 8 Wall. 314.

In *Inglee* v. *Coolidge*, 2 Wheat. 363, the following was the ruling of the court: "No writ of error lies to the highest court of law or equity of a State, under the twenty-fifth section of the Judiciary Act of 1789, unless there is something apparent on the record, bringing the case within the appellate jurisdiction of the court. The report of the judge who tries the cause at *nisi prius*, containing a statement of the facts, is not to be considered as a part of the record. The judgment being rendered upon a general verdict, and the report being mere matter *in pais* to regulate the discretion of the court as to the propriety of granting a new trial, the writ of error, in such a case, will be dismissed."

The rule to which the Supreme Court has uniformly adhered is that the record of the State court, and nothing else, must be its guide in determining whether it has jurisdiction, and, if this fails to present a case coming within the statute, to dismiss the case for want of jurisdiction.

4. Particularity of Statement.—As to the degree of particularity with which the record of the State court must, in order to give jurisdiction to the Supreme Court, specify the matter on which that jurisdiction depends, the following cases show the doctrine of the court as stated at different times:

In *Lawler* v. *Walker*, 14 How. 149, the record of the Supreme Court of Ohio, including therein the certificate of the court, which by the court was ordered to be made a part of the record, showed that the validity of the statutes of the State of Ohio was drawn in question, and that the plaintiffs in error claimed that these statutes were in violation of the Constitution of the United States, and that the statutes were declared to be valid, as against the objection alleged. The Supreme Court dismissed the writ of error on the ground that, on the basis of such a record, it had no jurisdiction. Mr. Justice Wayne, in stating the opinion of the court, said: "We cannot find in the record, nor can it be inferred from any part of it, the certificate of the Supreme Court included, which of the statutes of Ohio were declared to be valid, which has been alleged to be in conflict with the Constitution of the United States. * * * The statutes complained of in this case should have been stated. Without that, the court cannot apply them to the subject-matter of litigation, to determine whether or not they violated the Constitution and laws of the United States."

In *Maxwell* v. *Newbold*, 18 How. 511, the writ of error was dismissed on the ground of an insufficient specification in the record of the particular clause of the Constitution and of the law under which the alleged right was claimed in the court below. Chief Justice Taney, referring to the only part of the record which set up this point, said:

"The language of that is too general and indefinite to come within the provisions of the act of Congress, or the decisions of this court. It alleges that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the State court? Under what clause of the Constitution did he make his claim? And what right did he claim under an act of Congress? And under what act, in the wide range of our statutes, did he claim it? The record does not show. * * * This case cannot be distinguished from the case of *Lawler* v. *Walker*, 14 How. 149."

Essentially the same doctrine was stated in *Farnley* v. *Towle*,

1 Black, 350, and in *Hoyt* v. *Thompson's Executors*, 1 Black, 518. The writ of error, in both of these cases, was dismissed on the ground of insufficient specification of jurisdictional matter in the record.

Mr. Justice Miller, in stating the opinion of the court in *The Bridge Proprietors* v. *The Hoboken Co.* 1 Wall. 116, 142, said:

"It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the act invalid. It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specifically the provision of the Constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant, in their pleadings, make a case which necessarily comes within the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.'"

In *Furman* v. *Nichol*, 8 Wall. 44, Mr. Justice Davis, in stating the opinion of the court, said:

"It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in application to their case, should be contained in the pleadings; but this is in no case necessary. If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of the court attaches."

In *Messenger* v. *Mason*, 10 Wall. 507, the objection in the court below was that "the law under which the proceedings were had was unconstitutional and void." The Supreme Court of Iowa overruled this objection, and in the record certified "that, on the final hearing, the validity of the partition law of Iowa Territory, approved January 4th, 1839, was drawn in question, on the ground that the same was in conflict with the Ordinance of 1787, the Constitution of the United States, the treaties and laws thereof," and "that the objections thereto were overruled, and the statute held to be valid." Mr. Justice Nelson, in stating the

opinion of the court in the light of this record, said that "the constitutional objection taken in the present case is too general to be noticed on a writ of error under this twenty-fifth section" of the Judiciary Act. The court, in granting the motion for a dismissal of the writ of error on the showing of this record, referred approvingly to the cases of *Maxwell* v. *Newbold*, of *Lawler* v. *Walker*, and *Hoyt* v. *Thompson's Executors*, above cited.

In *Murray* v. *Charleston*, 6 Otto, 432, 441, Mr. Justice Strong said: "The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Constitution. * * * The form and mode in which the Federal question was raised in the State court is of minor importance, if, in fact, it was raised and decided."

In *Edwards* v. *Elliott, et al.* 21 Wall. 532, it was held that an assignment of error in the highest court of a State, to the decision of an inferior State court, that the latter had decided a particular State statute "valid and constitutional," and a judgment entry by the latter court that the statute was not "in any respect repugnant to the Constitution of the United States," is not specific enough to give jurisdiction to the Supreme Court of the United States under section 709 of the Revised Statutes, there being nothing else anywhere in the record to show to which provision of the Constitution of the United States the statute was alleged to be repugnant.

Mr. Justice Clifford, in delivering the opinion of the court in this case, referred to *Messenger* v. *Mason*, 10 Wall. 507, to *The Bridge Proprietors* v. *The Hoboken Co.* 1 Wall. 116, to *Furman* v. *Nichol*, 8 Wall. 44, and to *Maxwell* v. *Newbold*, 18 How. 511.

These cases, when compared together, do not present precisely the same doctrine as to the particularity with which the jurisdictional matter must be shown by the record. It is insisted, in some of them, that the particular clause of the Constitution or of the statute, as the case may be, that is the basis of the Federal question, must be referred to in the record, and this, in others, was held to be not necessary, if a Federal question was involved and decided, and the Supreme Court can ascertain this fact from the record. The safe rule in the pleadings, which form a part of the record, is to act upon the former of these theories, especially as in none of the cases is any objection made to this course.

5. Authentication of the Record.—The record sent up from the State court, in obedience to the writ of error, must be authenticated. Paragraphs first and third of the eighth Rule of the Supreme Court provide that "the clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court," and that "no cause will hereafter be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed."

In *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, it was held that "the return of a copy of the record of a State court, duly certified by the clerk, and annexed to the writ of error, is a sufficient return." In *Worcester* v. *Georgia*, 6 Pet. 515, it was held that "a return to a writ of error from this court to a State court, duly certified by the clerk of the court which pronounced the judgment, and to which the writ is addressed, authenticated by the seal of the court, is in conformity to law, and brings the record regularly before this court."

In *Gelston* v. *Hoyt*, 3 Wheat. 246, the court held that the writ of error may be addressed to any State court that has the legal custody of the record, whether or not the court that rendered the judgment or decree complained of; and in *Webster* v. *Reid*, 11 How. 437, 457, the court said: "If the record contain the judgment duly certified, over which we have jurisdiction, it is not essential that it should be certified by the court rendering the judgment." The proper certification of the record by the clerk of the court that has the legal custody of the record, is sufficient to bring it before the Supreme Court.

SECTION V.

THE PETITION FOR THE WRIT.

The proceeding for a writ of error, in order to obtain the record of the State court, and remove the case to the Supreme Court, is that of a petition, as the first step in the case. This petition is signed by the party or his attorney, and addressed to the judge ap-

plied to and authorized to allow the writ, who, if allowing it, indorses the allowance thereon.

1. Recitals of the Petition.—The petition contains the following statement of facts: 1. The judgment or decree complained of, with the date thereof. 2. The State court that rendered the judgment or decree, it being the highest court of the State in which a decision in the suit could be had. 3. The parties, plaintiff and defendant, in the case. 4. The ground or grounds on which the writ of error is claimed, with a reference to the record and proceedings in the suit as showing that error has been committed to the damage of the petitioner. 5. The fact that the judgment or decree in the case is final.

These materials, placed in proper form, so as to be descriptive of the suit, the parties, the State court, the judgment or decree, and the errors complained of, and thus present a synopsis of the case, as claimed by the petitioner, constitute the recitals in a petition for a writ of error. The party making the petition takes the position of plaintiff in error, whether he was plaintiff or defendant in the State court; and it makes no difference which he was, for the purpose of suing out a writ of error.

2. Prayer of the Petition.—The petition concludes with a prayer for the allowance of a writ of error and such other process as will enable the petitioner to obtain a review of the case, and a correction of the errors alleged, by the Supreme Court of the United States.

SECTION VI.

ALLOWANCE OF THE WRIT.

1. The Rule of the Supreme Court.—The rule of practice adopted by the Supreme Court is that when writs of error are issued from that court to State courts, they must be previously allowed. In *Twitchell* v. *The Commonwealth*, 7 Wall. 321, Chief Justice Chase said: "But writs of error to State courts have never been allowed, as of right. It has always been the practice to submit the record of the State court to a judge of this court, whose duty has been to ascertain upon examination whether any

question, cognizable here upon appeal, was made and decided in the proper State court, and whether the case upon the face of the record will justify the allowance of the writ. In general, the allowance will be made where the decision appears to have involved a question within our appellate jurisdiction; but refusal to allow the writ is the proper course when no such question appears to have been made or decided."

In *Gleason* v. *Florida*, 9 Wall. 779, Chief Justice Chase quoted the above language and then proceeded to say: "And this may now be considered as the settled construction of the Judiciary Act on this subject. The foundation of the jurisdiction of this court over the judgments of State courts is the writ of error; and no writ of error to a State court can issue without allowance, either *by the proper judge of the State court*, or by a judge of this court, after examination as just stated." The words in italics were not in the opinion given in *Twitchell* v. *The Commonwealth*, to which reference was made.

The same ruling was adopted in *The Hartford Fire Ins. Co.* v. *Van Duzer*, 9 Wall. 784, in which the writ was dismissed for the want of the proper allowance. Chief Justice Chase said in this case "that such allowance was indispensable to the jurisdiction of the court in error to revise the judgment of the highest court of a State," and referred to the case of *Gleason* v. *Florida*, *supra*, decided at the same term of the court. The writ of error, in this case, was dismissed because it did not appear on the record that there had been any allowance of the writ.

2. The Legislation of Congress.—The twenty-fifth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provides for the review by the Supreme Court of the judgments or decrees of State courts, "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." As to the signing of the citation, precisely the same words are used in the Act of February 5th, 1867. (14 U. S. Stat. at Large, 385.)

This statute makes no direct mention of the allowance of a writ of error to State courts; yet the construction of the Supreme Court has been that the writ must be allowed by the judge or justice authorized to sign the citation to the adverse party, and that

if not so allowed, no jurisdiction can be had upon the writ of error.

The case of *Bartemeyer* v. *Iowa*, 14 Wall. 26, contains a very definite statement of the doctrine of the court on this point. The Supreme Court of Iowa was composed of a Chief Justice and three associate justices; and the writ of error in this case was allowed by one of these justices. On this ground it was dismissed by the Supreme Court of the United States. Mr. Justice Miller, in delivering the opinion of the court, said:

"In this class of cases the court has been in the habit of examining the record to see if it has jurisdiction whether the question is raised by counsel or not; and the case before us we find ourselves compelled to dismiss, because there is no proper allowance of the writ of error."

"Writs of error to the Circuit Court, under the twenty-second section of the Judiciary Act, issue as a matter of course, and can be obtained from the clerk of the Circuit Court, and when filed in his office by the party, are duly served. But writs of error to the State courts can only issue when one of the questions mentioned in the twenty-fifth section of that act was decided by the court to which the writ is directed; and, in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be 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. It has been the settled doctrine of this court that a writ of error to a State court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction; and the case before us raises the question whether the writ has been allowed by a judge authorized to do so."

"The Supreme Court of Iowa, which rendered the judgment complained of, is composed of a chief justice and three associate justices."

"We are of opinion that the act of Congress requires that, when there is a court so composed, the writ of error can only be allowed by the chief justice of that court, or by a justice of the Supreme Court of the United States. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a justice of the Supreme Court of the United States."

The act of Congress here referred to, which subsequently became part of section 999 of the Revised Statutes, is the twenty-fifth section of the Judiciary Act of 1789, providing for the signing of the citation, and, according to the construction of the Su-

preme Court, for the allowance of writs of error to State courts. The allowance, in the case of *Bartemeyer* v. *Iowa*, *supra*, was plainly not in conformity with the act as thus construed; and for this reason the writ was dismissed.

SECTION VII.

THE CITATION.

1. Revised Statutes.—Section 997 of the Revised Statutes provides that "there shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authentic transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." This applies to all writs of error, as well to those issued from the Supreme Court to State courts as to those issued by that court to inferior Federal courts.

Section 999 of these Statutes provides that when the writ of error "is issued by the Supreme Court to a State court, the citation shall be signed by the Chief Justice, Judge, or Chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice."

2. The Nature of the Citation.—This citation is simply a formal notice to the adverse party, signed in the way prescribed, and informing him that a writ of error has been allowed and filed in the office of the clerk of the State court, in the case in which the party obtaining the writ is plaintiff in error, and he defendant in error, and admonishing him to appear at the Supreme Court, at the time and place specified, to show cause, if any there be, why the judgment or decree referred to in the writ should not be corrected. It has the character of a notice to the adverse party, and does not possess the nature of a compulsory process.

Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 411, said:

"It is simply notice to the opposite party that the record has been transferred into another court, where he may appear, or de-

cline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, as if the party had appeared and argued his cause."

The writ of error makes the adverse party a defendant in error, and the citation simply advises him of this fact. Whether he shall appear or not before the Supreme Court is for him to determine.

3. Judicial Construction.—The general principles of law in relation to citations are equally applicable in writs of error to State courts. And as to those principles, the following cases may be referred to as a guide:

In *Bacon* v. *Hart*, 1 Black, 38, it was held that service of citation on a writ of error, where the defendant in error is dead, cannot be legally made on the widow or executor of his attorney, who is also dead; that it is not sufficient that it was served on the law partner of the deceased attorney, unless the name of such partner appeared of record as attorney in the case; and that the Supreme Court does not take judicial notice of law partnerships in practice in the courts. The service of the citation must be on the party himself, or on his attorney or counsel of record.

Mr. Justice Clifford, in stating the opinion of the court in *Bigler* v. *Waller*, 12 Wall. 142, said: "Notice is required by law, and where none is given and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed; but the defect may be waived in various ways, as by consent of parties, or the fraud of the other party. Service of the citation may be made upon the attorney of record of the proper party. Unquestionably, the attorney of record may also waive service, and acknowledge notice on the citation, as in that behalf he represents the party." (*Grosvenor* v. *Danforth*, 16 Mass. 74; and *Adams* v. *Robinson*, 1 Pickering, 461.)

In *Innerarity* v. *Byrne*, 5 How. 295, Mr. Justice McLean, in answer to a motion to dismiss the writ of error because no citation

appeared in the record, said: "The citation was not necessarily a part of the record, it forming no part of the proceedings of the court below. The presumption is that one was issued when the writ of error was allowed, and it may be proved *aliunde*." The motion to dismiss was overruled.

In *Wilson* v. *Daniel*, 3 Dall. 401, it was held that "the original citation to the defendant in error, signed by the judge, must be returned."

In *Palmer* v. *Downer*, 7 Wall. 541, it was held that a district judge has no authority to sign a citation upon a writ of error to a State court, and that when the citation has been thus signed, the writ of error will be dismissed on motion.

In *Kail* v. *Wetmore* and *Same* v. *Douglas*, 6 Wall. 451, the writs of error were dismissed because the citations did not correspond with the writs in their description of persons. In the one case there were but three plaintiffs in error, while the citation presented four; and in the other the names in the citation were different from those in the writ of error. The doctrine, however, of *Peale* v. *Phipps*, 8 How. 256, is that mere misnomers in a citation, not calculated to mislead the adverse party, and not misleading him, are not a sufficient reason for dismissing a writ of error. In *Davenport* v. *Fletcher*, 16 How. 142, the writ of error was dismissed for three reasons, one of which was the fact that the citation was issued to a person who was not a party on the record.

The law requires that "the adverse party shall have at least thirty days' notice," which is the prescribed period when writs of error are issued to Circuit Courts. The meaning is the same in both classes of writs; and in *The National Bank* v. *The Bank of Commerce*, 9 Otto, 608, Chief Justice Waite said that "the meaning of the statute is not that the citation shall be served thirty days before the return-day, but that the defendant in error shall have at least thirty days' notice before he can be compelled to go to a hearing."

The omission to serve a citation upon the defendant in error or his attorney of record is fatal to the writ, unless the adverse party, without a motion to dismiss the writ for this reason at the first term, waives the right by entering a general appearance in the appellate court. (Phillips' Practice, 1878, pp. 116, 117; *Villabolos* v. *The United States*, 6 How. 81; *The United States* v. *Yates*, 6 How. 605; and *Carroll* v. *Dorsey*, 20 How. 204.)

These cases, for the most part, relate to citations in appeals from, or writs of error to, the inferior Federal courts; yet they illustrate the rules of practice in writs of error to State courts as it respects the citation, with the single exception of the signing thereof. The citation in the latter cases must be signed as required by statute.

SECTION VIII.

THE SECURITY.

1. The Statutory Requirement.—Section 1000 of the Revised Statutes provides as follows:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid."

This statute applies to all cases in which a justice or judge signs a citation or any writ of error, with the exception expressly stated; and it, hence, covers the case of a writ of error sued out from the Supreme Court to a State Court, as well as the cases in which the writ is directed to the inferior Federal courts.

2. The Assignment of the Duty.—The performance of the duty specified is assigned to "the justice or judge," who signs the "citation on any writ of error;" and when the writ of error is from the Supreme Court to a State court, then this duty devolves upon the justice of the former court who signs the citation, or upon the Chief Justice, or Judge, or Chancellor of the latter court, if signing the citation, the court being the one that rendered the judgment or passed the decree complained of.

The duty cannot be delegated to the clerk of the court, but must be performed by the justice or judge himself. (*O'Reilly* v. *Edrington*, 6 Otto, 724; and *The National Bank* v. *Omaha*, 6 Otto, 737.)

The time for the performance of this duty is not expressly

stated. The natural import of the language is that the security should be taken at the time of signing the citation as "part of the same transaction." Yet, according to repeated decisions of the Supreme Court, a case will not be dismissed if the security be given within a reasonable time thereafter, or if the party gives the security within a time fixed by the court. (*The Dos Hermanos*, 10 Wheat. 306, 311; *Catlett* v. *Brodie*, 9 Wheat. 553; *Adams* v. *Law*, 16 How. 144; *Anson, Bangs & Co.* v. *The Blue Ridge R. R. Co.* 23 How. 1; *Brobst* v. *Brobst*, 2 Wall. 96; and *Seymour* v. *Freer*, 5 Wall. 822.)

The presumption of law, until the contrary appears, is that every justice or judge who signs a citation, has complied with the statute in respect to taking security. His omission to do so does not necessarily render the writ of error void, since the statute is merely directory; and if any party is prejudiced thereby, the Supreme Court can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper. (*Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 361; *Davidson* v. *Lanier*, 4 Wall. 447; and *Seymour* v. *Freer*, 5 Wall. 822.)

3. Sufficiency of the Security. — The undertaking of the party who sues out a writ of error, as required by statute, is that he will prosecute the writ to effect, and that, if he fails to make good his plea, he will answer all damages and costs if the writ operates as a *supersedeas*, or all costs only when it does not thus operate. A bond sufficient for these purposes meets all the requirements of the statute for the protection of the opposite party or parties as appearing in the record. (*Gay* v. *Parpart*, 11 Otto, 391.)

The precise form in which the security shall be given, is not expressly stated; yet, by the usual practice of courts, it is a bond with proper sureties, and must be given in favor of the opposite party or parties. (*Bigler* v. *Waller*, 12 Wall. 142, 149.)

The sufficiency of the bond for the purpose in question is, in the first instance, to be determined by the justice or judge who signs the citation; yet this point is cognizable in the Supreme Court, and the court may increase or diminish the amount of the bond as circumstances and justice may require. This doctrine was laid down in *The Rubber Company* v. *Goodyear*, 6 Wall. 153.

If, after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond, have so changed that the security which was good and sufficient at the time it was taken does not continue to be so, the Supreme Court may, upon a proper application, so adjudge and order as justice may require. But, upon the facts as existing at the time the security was taken, the action of the justice or judge signing the citation and accepting the bond, within the statute and the rules of practice adopted for his guidance, will be deemed final. (*Jerome* v. *McCarter*, 21 Wall. 17; and *Martin* v. *The Hazard Powder Co.* 3 Otto, 302.)

The above cases mainly relate to appeals to, or writs of error from, the Supreme Court to the inferior Federal courts; yet they illustrate the principles of law applicable to the security to be taken in writs of error from the Supreme Court to the State courts, except as it may be otherwise specially provided. Section 1003 of the Revised Statutes expressly declares that "writs of error from the Supreme Court to a State court, in cases authorized by law, shall be issued in the same manner, and 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."

SECTION IX.

SUPERSEDEAS.

1. The Judiciary Act of 1789.—Congress, in the twenty-third section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), provided "that a writ of error as aforesaid shall be a *supersedeas* and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of," and further provided that "until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a *supersedeas*."

The writ of error "as aforesaid," here directly referred to, is the one specified in the immediately preceding section, and issued either by a Circuit Court to a District Court, or by the Supreme

Court to a Circuit Court. The provision of the statute is that this writ shall be a *supersedeas* and stay execution, by a compliance with the condition stated, and not without such compliance, and that, in any case in which the writ may be a *supersedeas*, execution shall not issue until ten days after rendering the judgment or passing the decree complained of.

The twenty-fifth section of the same act provided that, in the cases specified, the final judgment or decree of the highest court of a State in which a decision in the suit could be had, might be re-examined and reversed or affirmed in the Supreme Court, upon a writ of error, "in the same manner, and under the same regulations," and with "the same effect," "as if the judgment or decree complained of had been rendered or passed in a Circuit Court." This, in respect to a *supersedeas*, adopts the rule prescribed therefor when the writ of error is issued from the Supreme Court to a Circuit Court, and makes it applicable when the writ is issued from the Supreme Court to a State court. It was hence necessary, under the Judiciary Act of 1789, that the petitioner for a writ of error to a State court, if desiring to have it operate as a *supersedeas*, should comply with this rule within the time specified, and give the requisite security as prescribed by law. (Curtis's Digest, p. 596.)

The effect of a *supersedeas* is to arrest or stay further proceedings in the subordinate court; and this is the effect of a writ of error when the statutory conditions, which make it a *supersedeas*, have been complied with. (*The Slaughter-House Cases*, 10 Wall. 273.)

It is to be observed that the writ of error, under the Judiciary Act, was to be a *supersedeas* "only" in the case and under the conditions specified; and hence it was necessary to comply with each provision of the statute on this subject. All the required conditions must be supplied. (*Hogan* v. *Ross*, 11 How. 294; *The Railroad Company* v. *Harris*, 7 Wall. 574; and *Sage* v. *The Central R. R. Co. of Iowa*, 3 Otto, 412, 417.) Chief Justice Waite, in the last of these cases, remarked: "A *supersedeas* is a statutory remedy. It is obtained by a strict compliance with all the required conditions, none of which can be dispensed with."

In *Green* v. *Van Buskirk*, 3 Wall. 448, it was held that "the ten days" mentioned in the twenty-third section of the Judiciary Act, "run from the day when judgment is entered in the court

where the record remains," and that "when judgment is given in the highest court of a State on appeal or writ of error from an inferior one, and, on affirmance, the record is returned to such inferior court with the order to enter judgment there, they run from the day when judgment is so there entered."

2. The Act of June 1st, 1872.—Congress, by the Act of June 1st, 1872 (17 U. S. Stat. at Large, 196), provided as follows, in the eleventh section of the act:

"That any party or person desiring to have any judgment, decree, or order of any District or Circuit Court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree or order, or afterward with the permission of a justice or judge of the said appellate court."

This section did not repeal the provision of the twenty-fifth section of the Judiciary Act of 1789, which declared that the judgments and decrees of the highest State courts might be reviewed by the Supreme Court, on writ of error, "in the same manner and under the same regulations," and with "the same effect," as if the judgments or decrees had been rendered by Circuit Courts. What the section did was to extend the time from ten to sixty days, or even afterward, with the permission of the designated justice or judge, within which the requisite security might be given, in order to stay proceedings in the lower court during the pendency of the writ of error or appeal; and this extension of time, though expressly referring to the judgments and decrees of Circuit and District Courts, was, according to the unrepealed provisions of the twenty-fifth section of the Judiciary Act of 1789, equally applicable to the judgments and decrees of State courts when reviewed by the Supreme Court. The effect of the section, therefore, in the latter cases, as well as in the former, was to give the period named, instead of the former one of ten days, within which a party, desiring by a *supersedeas* to stay proceedings in the lower court, could do so by furnishing the requisite security.

The section does not, in express terms, say anything about the time within which a copy of the writ of error must be lodged for the adverse party in the clerk's office where the record remains,

in order to make the writ operate as a *supersedeas*. It speaks simply of giving the requisite security within the time specified. The construction, however, placed upon this statute by the Supreme Court, in *The Telegraph Company* v. *Eyser*, 19 Wall. 419, was that not only the *supersedeas* bond or security might be executed within sixty days after the rendition of the judgment complained of, but also that the copy of the writ of error might, in the manner previously prescribed by law, be served upon the adverse party, either before or at the time of filing the *supersedeas* bond in the clerk's office where the record remains. The court held that the section, by obvious implication, included this service of a copy of the writ, as well as the *supersedeas* bond; and the same construction equally applies when the writ of error is issued from the Supreme Court to a State court.

3. The Revised Statutes.—Section 1007 of the Revised Statutes, based upon the twenty-third section of the Judiciary Act of 1789, and the eleventh section of the Act of June 1st, 1872, above referred to, being amended by the Act of February 18th, 1875 (18 U. S. Stat. at Large, 318), provides as follows:

"In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of the justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days."

The last sentence of this section was, in *Doyle* v. *Wisconsin*, 4 Otto, 50, held to refer only to the judgments of the courts of the United States. Chief Justice Waite, in stating the opinion of the court, said "that it was not the intention of Congress, under the Act of 1789, to interfere at all with the practice of the State courts as to executions upon their judgments, until a *supersedeas* was actually perfected, and that the same effect must be given to the corresponding sections of the Revision." This particular part of

the section, according to this ruling, has no relation to the judgments or decrees of State courts.

The two conditions, specified in this statute, of making a writ of error operate as a *supersedeas*, are the lodgment of a copy of the writ for the adverse party in the clerk's office, and giving the required security, within sixty days after the rendition of the judgment complained of, with the qualification that, if the party has served the writ of error "as aforesaid," he may give the security either within the sixty days named, or "afterward with the permission of a justice or judge of the appellate court." These conditions must be supplied, or he cannot make the writ of error operate as a *supersedeas*.

Chief Justice Waite, in *Kitchen* v. *Randolph*, 3 Otto, 86, 92, after examining the several acts of Congress on the subject, came to the following conclusion: "We are, therefore, of the opinion that, under the law as it now stands, the service of a writ of error or the perfection of the appeal within sixty days, Sundays exclusive, after the rendering of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a *supersedeas*, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done."

It was remarked by the Chief Justice in this case, "that if a writ of error had been served as required in the first paragraph" of the section, "a stay might be had as a matter of right by giving the required security within sixty days, and afterwards, as a matter of favor, if permission could be obtained from the designated justice or judge. Thus prompt action in respect to the writ was required, and indulgence granted only as to the security."

The law, as contained in this section of the Revised Statutes, and thus construed, is, with the exception of the last sentence, applicable in writs of error from the Supreme Court to State courts. The reader, by referring to the chapter on the Supreme Court, will find this law more fully explained. (Part III, chap. 3, sect. 8.)

SECTION X.

LIMITATION OF TIME.

1. Writs of Error to State Courts.—Section 1003 of the Revised Statutes provides that "writs of error from the Supreme Court to a State court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed by a court of the United States." This provision is based on a clause in the twenty-fifth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), which was reproduced and continued in the Act of February 5th, 1867. (14 U. S. Stat. at Large, 386.)

The twenty-second section of the first of these acts provided that "writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability."

Mr. Justice Story, referring in *Gelston* v. *Hoyt*, 3 Wheat. 246, 303, to this limitation of time, said: "The Judiciary Act allows the party, who thinks himself aggrieved by the decision of any inferior court, five years within which he may sue out his writ of error, and bring his cause into this court. The same rule applies to judgments and decrees of a State court, in cases within the jurisdiction of this court." The provision in the twenty-fifth section of the Judiciary Act made the rule the same in both cases.

2. Change of the Limitation.—Section 1008 of the Revised Statutes provides as follows:

"No judgment, decree, or order of a Circuit or District Court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order: *Provided*, That where a party entitled to prosecute a writ of error or to take an appeal, is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability."

This section, founded upon the second section of the Act of June 1st, 1872 (17 U. S. Stat. at Large, 196), establishes a shorter limitation of time than that of the Judiciary Act of 1789, fixing two years instead of five. The rule thus established, taken in connection with section 1003 of the Revised Statutes, and with the construction given by Mr. Justice Story in *Gelston* v. *Hoyt*, *supra*, applies to writs of error from the Supreme Court to State courts; and if so, then, with the qualifications annexed to the rule, these writs of error are subject to the same limitation of time. The change as to the extent of the limitation does not affect its application.

In *Brooks* v. *Norris*, 11 How. 204, the following doctrine was adopted as to the date at which a writ of error is deemed to be brought: "A writ of error is not brought until filed in the court to which it is addressed, and whose record is to be removed by it; and, therefore, though the writ is tested within five years, if it be not filed in the court which rendered the judgment, till after the expiration of that period, it is barred." This was said when five years formed the limitation. The case was a writ of error from the Supreme Court to a State court; and it was held to be barred because the writ did not come within the time specified by Congress.

The limitation now being two years, the writ of error must be filed in the proper State court within this period "after the entry of the judgment or decree complained of;" and unless a copy of the writ is lodged for the adverse party in the clerk's office, within sixty days, Sundays excepted, after the rendering of such judgment or the passing of such decree, the writ will not operate as a *supersedeas*. (*Kitchen* v. *Randolph*, 3 Otto, 86.)

SECTION XI.

FORMAL CONDITIONS.

The statute which gives the Supreme Court jurisdiction over the judgments and decrees of State courts, contains five formal conditions, all of which must be present in each case. These conditions are as follows:

1. The Judgment or Decree.—There must be a judgment or decree to be re-examined. Provision is made in other statutes for

the transfer of causes, before trial and judgment or decree, from State courts to the Circuit Courts of the United States. Here, however, no jurisdiction is given to the Supreme Court until the cause has been tried, and a judgment or decree actually rendered. This judgment or decree is in every case the direct subject of the appellate review.

2. A State Court.—The judgment or decree must be that of a court existing and acting under the authority of a State, in distinction from a Federal or Territorial court, or a court of the District of Columbia. The jurisdiction conferred by the statute has no relation to any other class of courts. It is assumed that the Supreme Court, in the exercise of this jurisdiction, will take judicial knowledge of the States as members of the Union, and, so far as necessary, of the courts organized therein, and existing under their authority.

3. A Suit.—The judgment or decree must be rendered in a "suit." A suit within the meaning of the statute was, in *Weston* v. *The City Council of Charleston*, 2 Pet. 449, defined by Chief Justice Marshall as follows: "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision is sought is a suit."

The judgment of the State court in this case reversed the order of a lower court granting a writ of prohibition; and this was held to be a judgment rendered in a "suit," within the meaning of the statute.

The judges of the Supreme Court, in *Holmes* v. *Jennison*, 14 Pet. 540, though divided in opinion on other points in the case, were, nevertheless, agreed that the refusal of the Supreme Court of Vermont to discharge Holmes on *habeas corpus*, was a judgment rendered in a suit.

Chief Justice Chase, in *Twitchell* v. *The Commonwealth*, 7 Wall. 321, said: "Neither the Act of 1789, nor the Act of 1867, which in some particulars supersedes and replaces the Act of 1789, makes any distinction between civil and criminal cases in respect

to the revision of the judgments of State courts by this court; nor are we aware that it has ever been contended that any such distinction exists. Certainly none has ever been recognized here." The term "suit" comprehends both classes of cases.

It was held in *Aldrich* v. *The Ætna Company*, 8 Wall. 491, that the voluntary agreement of parties to submit a case to a State court for judgment, made under the authority of State law, without any compulsory process or proceeding against the defendant, does not take the case out of the category of a "suit," or impair the jurisdiction of the Supreme Court to review the judgment thereon, provided the other necessary conditions are present. The law in such a case provides for the institution of the suit by the voluntary action of the parties, without any compulsory process.

The statute uses the words "any suit," which evidently mean any kind of legal proceeding in a court of justice, whether in law or equity, and whether civil or criminal, that furnishes the occasion for a judgment or decree. The application of the words is not limited or qualified by the amount in dispute. It is enough that the proceeding has resulted in a final judgment or decree by a court of justice. This shows it to be a suit in the sense of the statute.

4. The Highest State Court.—The judgment or decree must be that of "the highest court of a State in which a decision in the suit could be had." This may or may not be absolutely the highest court of the State. If the court rendering the judgment or decree be the highest that, according to the laws of the State, can take cognizance of the case and determine it, this will meet the condition specified in the statute.

It was held, in *Downham* v. *Alexandria*, 9 Wall. 659, that "when the State court in which judgment in a suit is given is the highest court of law or equity in the State in which a decision in that suit can be had, a right of review exists here under the twenty-fifth section of the Judiciary Act, if the case be otherwise one for review here, although that court may not be actually the highest court of law or equity in the State." The same doctrine was stated in *Olney* v. *Arnold*, 3 Dall. 308, and in *Miller* v. *Joseph, et al.* 17 Wall. 655.

It was held, in *Gregory* v. *Mc Veigh*, 23 Wall. 294, that "where, by the laws of a State, an appeal can be taken from an inferior

court of the State to the highest court of the same, only with leave of this latter or of a judge thereof, and that leave has been refused in any particular case in the regular order of proceeding—the refusal not being the subject of appeal to this court—a writ of error, if there be in the case a Federal question, properly lies, under section 709 of the Revised Statutes, to the inferior court, and not to the highest one." The inferior court, in these circumstances, is the highest court of the State in which a decision in the suit can be had.

Ordinarily, the writ of error should be directed to the court that rendered the judgment or decree complained of; yet, if the record of the case, as may be the fact, is in the custody of another court, the writ may be directed to that court. Mr. Justice Story, in *Gelston* v. *Hoyt*, 3 Wheat. 246, said: "The judgment to be examined must be that of the highest court of the State having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ."

In *Webster* v. *Reid*, 11 How. 437, it was held that the "writ of error may be directed to any court which has the custody of the record, and can certify it, though not the court which rendered the judgment, provided no difficulty exists respecting the execution of a mandate from this court."

The doctrine stated in *Atherton* v. *Fowler*, 1 Otto, 143, is the following: "As the appellate jurisdiction of this court over the State courts is confined to a re-examination of the final judgment or decree in any suit in the highest court of a State in which the decision in the suit could be had, the writ of error sued out here should be sent only to such court, unless the latter, after pronouncing judgment, sends its record and judgment, in accordance with the laws and practice of the State, to the inferior court, where they thereafter remain. In such a case the writ may be sent either directly to the latter court, or to the highest court, in order that through its instrumentality the record may be obtained from the inferior court having it in custody or under control."

The statute clearly designates the State court whose judgment or decree may be reviewed by the Supreme Court; but it does not designate the tribunal to which the writ of error shall be directed. The design of this writ is to secure the record of a given case; and hence, under the ruling and practice of the Supreme Court, it may

be sent to any State court in which the record is to be found, even though it be not the court that rendered the judgment or decree.

5. Final Judgment or Decree.—The judgment or decree, to be reviewed, must be "final." The Supreme Court has had frequent occasion to expound this term, and determine what judgments and decrees are final in their character. Chief Justice Marshall, in *Weston* v. *The City Council of Charleston*, 2 Pet. 449, said: "The word 'final' must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause." It was held, in this case, that the judgment of the highest court of the State, reversing the order in a writ of prohibition granted by an inferior court, is final, and might be re-examined by the Supreme Court.

Chief Justice Waite, in *Bostwick* v. *Brinkerhoff*, 16 Otto, 3, said: "The rule is well settled and of long standing, that a judgment or decree, to be final within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." (*Whiting* v. *The Bank of the United States*, 13 Pet. 6; *Forgay* v. *Conrad*, 6 How. 201; *Craighead* v. *Wilson*, 18 How. 199; *Bebee* v. *Russell*, 19 How. 283; *Bronson* v. *The Railroad Company*, 2 Black, 524; *Thomson* v. *Dean*, 7 Wall. 342; *St. Clair County* v. *Lovingston*, 18 Wall. 628; *Parcels* v. *Johnson*, 20 Wall. 653; *The Railroad Company* v. *Swasey*, 23 Wall. 405; *Crosby* v. *Buchanan*, 23 Wall. 420; and *The Commissioners* v. *Lucas*, 3 Otto, 108.)

"If the judgment is not one which disposes of the whole case on its merits," the Chief Justice continued to say, "it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error." (*Brown* v. *The Union Bank*, 4 How. 465; *Pepper* v. *Dunlap*, 5 How. 51; *Tracy* v. *Holcombe*, 24 How. 426; *Moore* v. *Robbins*, 18 Wall. 588; *McComb* v. *Knox County*, 1 Otto, 1; *Baker* v. *White*, 2 Otto, 176; and *Davis* v. *Crouch*, 4 Otto, 514.)

In *Grant* v. *The Phœnix Insurance Company*, 16 Otto, 429, Chief Justice Waite said: "It has also been many times decided

that a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal. (*Ray* v. *Law*, 3 Cranch, 179; *Whiting* v. *The Bank of the United States*, 13 Pet. 6; *Bronson* v. *The Railroad Company*, 2 Black, 524; and *Green* v. *Fisk*, 13 Otto, 518.)

In *Kanouse* v. *Martin*, 14 How. 23, the judgment of the highest appellate State court affirming the refusal of a lower court to allow the removal of a cause from that court to a Circuit Court of the United States, under the act of Congress providing therefor, was regarded as a final judgment.

In *O'Dowd* v. *Russell*, 14 Wall. 402, it was held that "a judgment in a court of last resort that a judgment against A. (who had been sued for not faithfully discharging the duties of a vendue-master of a city and been held discharged under the Bankrupt Act) be reversed, is a final judgment within the meaning of the Judiciary Act, as is also a judgment in a court of last resort that a judgment in an inferior court, holding B. and C. (the sureties of A. on his bond as vendue-master) liable, be reversed."

It was held, in *Atherton* v. *Fowler*, 1 Otto, 143, that the judgment of the Supreme Court of California, reversing the judgment of an inferior court, and directing a modification thereof as to the amount of damages, without permitting further proceedings in the court below, if the defendants consented to such modification, is final within the meaning of the act of Congress, if the record shows that such consent was given, and that the writ of error was properly directed to the Supreme Court of the State. The writ of error was, in this case, directed to the Supreme Court of California, and that court furnished a transcript of the record of the court below, which was held to be sufficient.

In *The Commissioners* v. *Lucas*, 3 Otto, 108, it was held that if, by any direction of a Supreme Court of a State, an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation, and is subject in a proper case to review by the Supreme Court of the United States. The judgment was also held to be final where, upon appeal from an interlocutory order made by a Circuit Court of Indiana, granting a temporary injunction, the Supreme Court of the State reversed

the order and remanded the cause to the lower court, with direction to dismiss the complaint.

On the other hand, the judgment of the appellate tribunal reversing that of the court below and remanding the case with directions to award a *venire facias de novo*, or reversing the judgment and remanding the case for such proceedings by the inferior court as law and justice shall require, or merely affirming an interlocutory order and remanding the case, or dismissing a petition for a removal of a case into a Federal court and remanding the case to the inferior court for further proceedings according to law, is not a final judgment, since it does not in any of these cases finally dispose of and determine the particular cause, but leaves it open for further proceedings. (*Houston* v. *Moore*, 3 Wheat. 433; *Winn* v. *Jackson*, 12 Wheat. 135; *Pepper* v. *Dunlap*, 5 How. 51; *Tracy* v. *Holcombe*, 24 How. 426; *McComb* v. *The Commissioners*, 1 Otto, 1; *Moore* v. *Robbins*, 18 Wall. 588; *Davis* v. *Crouch*, 4 Otto, 514; *Reddall* v. *Bryan*, 24 How. 421; and *Kimball* v. *Evans*, 3 Otto, 320.)

In *Rankin* v. *The State*, 11 Wall. 380, it was held that "where, on an indictment for a capital offense, the Supreme Court reverses a judgment of a court below, under such circumstances as that the case must go back for trial on its merits, the judgment is not a final judgment," and cannot be reviewed by the Supreme Court of the United States.

These examples illustrate the principle, stated by Chief Justice Marshall, that a judgment or decree which determines the particular cause is final, and that no other judgment or decree is to be deemed such.

The final character of the judgment or decree is of course relative to State courts. It is final in the sense that neither of the parties can find in the court rendering it, or in any other court of the State, any further judicial remedy in that suit. This makes the judgment or decree final. It is not certain, until this point has been reached, that the judicial power of the State will not correct any errors that may have been committed, and thus supersede the necessity of a resort to the Supreme Court of the United States.

It was evidently the intention of Congress that the Supreme Court of the United States should not exercise a revisory power over the judgments and decrees of State courts until the judicial

power of the State in each particular case has been entirely exhausted. Hence the judgment or decree must be final, and must also be rendered by the highest court of the State that can take cognizance of the subject. The case, with the other necessary conditions present, is then a proper one for review by the Supreme Court of the United States.

SECTION XII.

FEDERAL QUESTIONS.

The judgment or decree, to be re-examined, must, as to its subject-matter, embrace and determine, in the manner specified, at least one of the Federal questions named in the statute. The statute designates three classes of such questions; and a case belonging to some one or more of these classes must be shown by the record, in order to give jurisdiction to the Supreme Court. These classes are as follows:

1. Federal Treaties and Laws.—The first class embraces all cases in which "is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity." This language specifies two jurisdictional facts; and, in order that the Supreme Court may exercise jurisdiction, both must be shown to exist.

(1.) *The Matter drawn in Question.*—The first fact is that "the validity of a treaty or statute of, or an authority exercised under, the United States" was "drawn in question" in the State court, and by that court made the subject of a judicial determination. This supposes that such a question may arise in a State court, and that the court, in the exercise of its judicial power, may decide it.

The Constitution declares that "the laws of the United States which shall be made in pursuance" thereof, and all treaties made or which shall be made under the authority of the United States," shall be a part of "the supreme law of the land," and that the judges of State courts shall be bound by this law, "anything in the constitution or laws of any State to the contrary notwithstanding." These judges are required to take an oath to this effect.

The test of "the validity" of a treaty or law of the United States is, of course, the Constitution itself; and the particular

clause of the statute under consideration supposes that a State court, in deciding a case before it, may subject either to this test, and may decide for or against "the validity" of either, as the case may be. The test of "an authority exercised under the United States" is the Constitution, or a law, or a treaty of the United States, each being a part of "the supreme law of the land." Any "authority," in whatever form, that rests upon this basis, has attached to it the supremacy of the basis itself.

The phrase "drawn in question," as here used, evidently means that "the validity of a treaty or statute of, or an authority exercised under, the United States," did arise in the State court in the progress of a case, and was by that court determined, not as an abstract question, but in reference to some right claimed or denied by a party to the suit. The matter was brought to the attention of the court under the claim or denial of an alleged right; and this called for a decision, and a decision was made. Such being the state of the facts as shown by the record, then one of the statutory conditions of appellate review by the Supreme Court is supplied.

(2.) *The Decision of the State Court.*—The other condition, which must be equally shown by the record, is that the decision of the State court was *against* the validity of the treaty or the statute of, or the authority exercised under, the United States, which was drawn in question. If the record shows this fact, then what is called a "Federal question" was determined in the manner named in the statute; and to the judgment or decree rendered in the case the statute extends the revisory jurisdiction of the Supreme Court. Either party to the suit may then, by complying with the provisions of law therefor, cause the suit to be removed to the Supreme Court for final determination.

If, however, the decision of the State court sustained the validity of the Federal treaty, or statute, or authority, drawn in question, or if there was no decision upon the point, then the Supreme Court, by the express terms of the statute, has no jurisdiction in the case. The mere fact that the specified validity was drawn in question, or that a decision was made in regard to it, is not enough. A decision must not only be made, but it must be against this validity, or the appellate jurisdiction of the Supreme Court cannot be exercised in the case.

Congress doubtless might have provided that the decision of

the State Court, whether for or against the validity named, might be reviewed in the Supreme Court. It, however, has not so provided. Even if the decision of the State court was erroneous in sustaining the validity of the Federal treaty, or statute, or authority, that was drawn in question, this will not give any jurisdiction to the Supreme Court. The latter court has nothing to do with such a decision, and no authority to inquire whether it was right or wrong. The jurisdiction is purely statutory; and the character of the decision made by the State court is just as indispensable to it as the presence of the Federal question decided.

2. State Laws. — The second class embraces those cases in which "is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity."

(1.) *Meaning of the term "State."*—The term "State," as occurring in this clause of the statute, means a member of the Union, owing obedience and conformity to the Constitution and laws of the United States. Mr. Justice Woodbury, in *Scott* v. *Jones*, 5 How. 343, said: "The statute must be by a State, a member of the Union and a public body, owing obedience and comformity to its Constitution and laws. This seems to have been settled by this court as to the meaning of the word 'State,' where empowering one to bring an action. It must be a member of the Union. (*The Cherokee Nation* v. *Georgia*, 5 Pet. 18.) And it is not enough for it to be an organized political body within the limits of the Union."

In *The Miners' Bank* v. *The State of Iowa*, 12 How. 1, it was held that the Supreme Court cannot re-examine the decision of a State court that a law of a Territory was not repugnant to the Constitution of the United States, and that the power of review given to the court does not extend to laws passed by a territorial legislature. Mr. Justice Daniel said in this case: "The alleged wrong which the court are called on to redress, is not an act of State power at all; it is an act of the territorial government of Iowa, by which was repealed an act of the preceding territorial government of Wisconsin; consequently, the decision of the court below asserted no State act or power in opposition to the Constitution, treaties, or laws, or to a commission or authority of or

under the United States, and presents therefore no ground of jurisdiction here, either as derived from the language of the statute, or from any construction heretofore given of it." The doctrine stated in *Scott* v. *Jones*, *supra*, was approvingly referred to in this case.

The provision confines the jurisdiction of the Supreme Court exclusively to State statutes and authority, considered as being drawn in question on the ground specified, and has no reference to the laws of a Territory, or to those of any political body existing within the limits of the Union, but which is not a State, and not a member of the Union. It is assumed that the Supreme Court, though not admitting States into the Union, and though having no power to review and change the action of Congress in such admissions, will take judicial notice of the States which, by the proper authority, compose the Union.

(2.) *The Statute or Authority of a State.*—As to what constitutes a statute or an authority of a State, within the meaning of the provision under consideration, it was held, in *Williams* v. *Bruffy*, 6 Otto, 176, that "any enactment, from whatever source originating, to which the State gives the force of law, is a State statute, within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the State courts." Mr. Justice Field, in stating the opinion of the court, took the ground that "acts authorized by the constitution of a State, or by the convention that framed it," if treated and applied as laws, come within the meaning of the statute giving jurisdiction to the Supreme Court. He said in this case that if a State recognizes and gives effect to an act of the Confederate States, such act becomes the act of the State for the purpose of jurisdiction by the Supreme Court.

The doctrine of this case was re-affirmed in *Ford* v. *Surget*, 7 Otto, 594, the court holding that "an enactment of the Confederate States, enforced as a law of one of the States composing that Confederation, is a statute of such State, within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the State courts."

The imposition of a tax on the bonds of the United States in the hands of individual citizens of the State, though made by a municipal corporation of that State, was, in *Weston* v. *The City*

Council of Charleston, 2 Pet. 249, treated as an exercise of authority under the State, and hence as coming within the statute that gives to the Supreme Court appellate jurisdiction over the judgments and decrees of State courts.

In *The Railroad Company* v. *McClure*, 10 Wall. 511, it was held that the constitution of a State, as well as a statute thereof, comes within the meaning of that clause of the Federal Constitution which ordains that no State shall pass any law impairing the obligation of contracts. A provision made in a State constitution, repugnant to this or any other provision of the Federal Constitution, or to any treaty or law of the United States, would be "a statute" or law of the State in the sense of section 709 of the Revised Statutes; and, the constitutionality of the provision being drawn in question in the proper State court, the Supreme Court would have jurisdiction over the case, if the decision of the State court be the one specified.

The general principle is that whatever a State regards and treats as law, and, as such, is applied by its courts, is "a statute" thereof for the purpose of the jurisdiction in question. The authority of the State is annexed to it; and this makes it law, even though it may not have been directly enacted by the legislature.

In *Bethell* v. *Demaret*, 10 Wall. 537, it was held that "the authority conferred by a State on its Supreme Court to hear and determine cases, is not the kind of authority referred to in the twenty-fifth section of the Judiciary Act, which gives this court a right to review the decisions of the highest State court, 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, &c., * * * and the decision is in favor of such validity." The phrase "authority under any State" does not refer to the authority of State courts to make decisions. If it did, the result, as remarked by Mr. Justice Nelson in this case, would be that "every judgment of the Supreme Court of a State would be re-examinable under the section."

(3.) *The Question of Repugnancy.*—The question assumed to have arisen in, and to have been decided by, the State court, relates to the validity of a statute of or an authority exercised under a State, considered with reference to the repugnancy thereof to the Constitution, treaties, or laws of the United States.

It is the province of State courts to construe and apply State laws and State constitutions; and when they simply decide that the former are or are not repugnant to the latter, without deciding any question of repugnancy as between such laws and constitutions and the Constitution, treaties, or laws of the United States, the Supreme Court has no power to review their decisions. The statute gives no such power. (*Jackson* v. *Lamphire*, 3 Pet. 280; *McBride* v. *Hoey*, 11 Pet. 167; *Robertson* v. *Coulter*, 16 *How.* 106; *Withers* v. *Buckley*, 20 *How.* 84; *Adams* v. *Preston*, 22 *How.* 473; *Medbery* v. *The State of Ohio*, 24 *How.* 413; *Congdon* v. *Goodman*, 2 *Black*, 574; and *The Insurance Company* v. *The Treasurer*, 11 Wall. 204.)

In *Austin* v. *The Aldermen*, 7 Wall. 694, it was held that "if a State statute, passed in professed exercise of an authority given by Congress to the States to pass such a statute, does not deprive, contrary to the act of Congress, *the party to the suit* of any right, nor work as to him any effect which the act of Congress forbids, this court cannot, on the case being brought here by such party, on the ground that the State statute violated the act of Congress, declare the State statute void." If the law of the State does not deprive the plaintiff in error of any right, contrary to the law of Congress, the decision of the State court will not be reviewed by the Supreme Court, whatever may be the effect of the law upon the rights of others, who are not parties to the suit.

Chief Justice Taney, in *The Commonwealth Bank* v. *Griffith*, 14 Pet. 56, referring to this clause of the statute, said that the three following things must concur to give the Supreme Court jurisdiction: "1. The validity of a statute of or an authority exercised under a State must be drawn in question. 2. It must be drawn in question upon the ground that it is repugnant to the Constitution, treaties, or laws of the United States. 3. The decision of the State court must be in favor of their validity." If the specified validity was not drawn in question upon the ground named in the statute, then the jurisdiction of the Supreme Court will not attach to the case. (*Walker* v. *Taylor*, 5 *How.* 64; and *Sevier* v. *Haskell*, 14 *Wall.* 12.)

The doctrine laid down in *The Railroad Company* v. *Rock*, 4 *Wall.* 177, is the following: 1. That "in a case brought here from a State court, under the twenty-fifth section of the Judiciary Act, the record must show that some one of the matters men-

tioned in that section was necessarily decided by the court, notwithstanding there may be a certificate from the presiding judge that such matters were drawn in question." 2. That "if it appears from the record that the State court might have decided the case on some other ground, this court has no jurisdiction." 3. That "this court cannot review the decision of a State court upon the general ground, that that court has declared a contract void which this court thinks to be valid." 4. That "it must be the constitution or some statute of the State which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution or laws of the United States, and the decision of the State court must sustain the law of the State in the matter in which this conflict is supposed to exist, or the case for this court does not arise."

In *Rector* v. *Ashley*, 6 Wall. 142, it was held: 1. That "when a case is brought here by a writ of error to a State court under the twenty-fifth section of the Judiciary Act, this court can only review the decision of the State court on the questions mentioned in that section." 2. That, "if in addition to the decision of the State court on such question or questions, that court has rested its judgment on some point in the case not within the purview of that section, and that point is broad enough to sustain the judgment, then, although the ruling of the State court might be reversed on the point which is of Federal cognizance, this court will not entertain jurisdiction of the case."

Mr. Justice Bradley, in stating the opinion of the court (*Klinger* v. *The State of Missouri*, 13 Wall. 257), said:

"The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court

based its judgment on the law raising the Federal question, and this court will then take jurisdiction."

The following cases were referred to in support of this statement: *Magwire* v. *Tyler*, 8 Wall. 650; *Neilson* v. *Lagow*, 12 How. 110; *The Railroad Company* v. *Rock*, 4 Wall. 177; *The Railroad Company* v. *McClure*, 10 Wall. 511; *The Insurance Company* v. *The Treasurer*, 11 Wall. 204; *Crowell* v. *Randell*, 10 Pet. 368; *Suydam* v. *Williamson*, 20 How. 427; and *Williams* v. *Oliver*, 12 How. 123.

(4.) *The Decision of the State Court.*—The decision of the State court, in order to make a case for the appellate review of the Supreme Court, must be in favor of the validity of the statute of or an authority exercised under a State, drawn in question on the ground of an alleged repugnancy to the Constitution, or a treaty or law of the United States. This supposes that the State court actually decided that the State statute or authority, drawn in question as specified, is not repugnant to the Constitution, or any law or treaty of the United States, and hence that, so far as this ground of objection is concerned, it is to be taken and applied as a rule governing the rights of the parties to the suit pending before the court.

Such being the decision made by the State court, and the case being determined on the basis of the State statute or authority in respect to which the Federal question was raised, then, by the express terms of the Federal statute, the judgment or decree rendered may be reviewed in the Supreme Court. The conditions of its appellate jurisdiction are present; and if the case be properly brought before it, the court will exercise jurisdiction, and determine the Federal question that was raised and decided in the court below.

If, however, the decision of the State court was against the validity of the State statute or authority, drawn in question on the ground of repugnancy to the Constitution, or a law or treaty of the United States, then, although a Federal question was raised and decided, it was not so decided as to give the Supreme Court jurisdiction. This state of facts being shown by the record, the court will dismiss the case for the want of jurisdiction.

It was held in *Walker* v. *Taylor*, 5 How. 64, that the Supreme Court has no jurisdiction, under the twenty-fifth section of the

Judiciary Act of 1789, if the decision of the State court be against the validity of the State law, drawn in question as repugnant to the Constitution of the United States. This case illustrates the uniform ruling of the court in all similar cases. The decision of the State court must be the one specified, or the Supreme Court will have no power to review the case.

3. Federal Titles, Rights, Privileges, and Immunities.— The third class embraces those cases in which "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."

The corresponding clause in the twenty-fifth section of the Judiciary Act of 1789 reads as follows: "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." This, in the second section of the Act of February 5th, 1867 (14 U. S. Stat. at Large, 385), was so changed as to read as follows: "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." In this form the clause is reproduced *totidem verbis* in section 709 of the Revised Statutes.

The evident design of Congress in the original language, as well as in the revised form, was to embrace every case arising in a State court, and decided as specified, in which the decision denied any title, right, privilege, or immunity claimed, by either party to the suit, on the ground of being a title, right, privilege, or immunity secured to such party by the Constitution, or a treaty, or law of the United States, or by any commission held or authority exercised under the Government of the United States. The intention was that such party, whether plaintiff or defendant in the

State court, should have the means of redress in the appellate jurisdiction of the Supreme Court. The later form of the enactment, though not differing essentially from the earlier form, is perhaps a more comprehensive and accurate expression of this purpose. Nearly all the cases, if not absolutely all, included in the first class of cases, are also included in the more comprehensive provision relating to the third class.

Two jurisdictional conditions must be shown by the record of the State court, in order to bring a case within the limits of this provision.

(1.) *The Matter Claimed.*—This must be some "title, right, privilege, or immunity," claimed by the party on at least one of the grounds named in the statute, which must be "the Constitution, or a treaty or statute of, or a commission held or an authority exercised under, the United States." A claim in any one of these forms, on any one of these grounds, will supply the first condition of jurisdiction.

It is evident, upon the very face of the provision, that titles, rights, privileges, and immunities that do not depend upon, or are not protected by, the Constitution, or laws, or treaties of the United States, or any commission held or authority exercised under the United States, but which, so far as they exist at all, are entirely dependent upon State constitutions or laws, do not come within the provision at all. Such rights present questions which, so far as the jurisdiction of the Supreme Court is concerned, it is the exclusive province of State courts to consider and determine; and over their judgments or decrees relating thereto the Supreme Court has no jurisdiction. (*Udell* v. *Davidson*, 7 How. 769; and *Walworth* v. *Kneeland*, 15 How. 348.)

It is essential that the claim, on any one of the grounds specified, should have been presented to the State court, and its attention called to the subject. Chief Justice Taney, referring to this point in *The Grand Gulf R. R. & B. Co.* v. *Marshall*, 12 How. 165, said:

"The party is authorized to bring his case before this court, because a State court has refused him a right to which he is entitled under the Constitution or laws of the United States. But if he omits to claim it in the State court, there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for anything that appears in the record, the judgment

of the State court might have been in his favor if its attention had been drawn to the question. The rule upon this subject is distinctly stated in the case of *Armstrong and others* v. *The Treasurer of Athens County*, 16 Pet. 285."

The case of *Calcote* v. *Stanton*, 18 How. 243, was dismissed on the ground that the record did not show that any Federal question, involving any right of the plaintiff in error, did arise in the State court, or "could have been decided" by it. In *The Victory*, 6 Wall. 382, it was held that the Federal question "must have received the consideration or attention of the court," and that "it is not sufficient that this court can see that it *ought* to have been raised, and that it might have been decided."

In *The Hamilton Company* v. *Massachusetts*, 6 Wall. 632, it was held that "questions not decided in the State court, because not raised and presented by the complaining party, will not be re-examined in this court on a writ of error under the twenty-fifth section of the Judiciary Act." So, also, in *Caperton* v. *Bowyer*, 14 Wall. 216, it was held that "a Federal question cannot be assumed to have been raised and passed on in a State court, so as to give jurisdiction to this court, when nothing appears in the record to show on what grounds the decision of the matter in which the Federal question alleged to be involved was made."

The following doctrine was laid down in *Millingar* v. *Hartupee*, 6 Wall. 258: 1. That the twenty-fifth section of the Judiciary Act does not give jurisdiction to this court in cases of decisions by the courts of a State against mere *assertions* of an exercise of authority under the United States. 2. That where a party claims authority under an order of a court of the United States, which, when rightly viewed, does not purport to confer any authority upon him, the writ will be dismissed. 3. That the writ will be dismissed on motion, and apart from the consideration of the merits, when the single question is, not the validity of the authority, but its existence, and the court is fully satisfied that there was and could have been no decision by the State court against any authority under the United States existing in fact.

Chief Justice Chase, in this case, said that "something more than a bare assertion of such authority seems essential to the jurisdiction of this court," and that "the authority intended by the act is one having a real existence, derived from competent governmental power." He added: "In respect to the question we are

now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and, on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decision of a State court that the right claimed did not exist."

Chief Justice Marshall, in *Hickie* v. *Starke*, 1 Pet. 94, said: "This court has never required that the treaty or act of Congress under which the party claims, who brings the final judgment of a State court into review before this court, should have been spread upon the record. It has always deemed it essential to the exercise of jurisdiction, in such a case, that the record should show a complete title under the treaty or act of Congress, and that the judgment of the court is in violation of that treaty or act."

Mr. Justice Trimble, in *Montgomery* v. *Hernandez*, 12 Wheat. 129, said: "It is not every misconstruction of an act of Congress by a State court, that will give this court appellate jurisdiction. It is where the party claims some title, right, privilege, or exemption, under an act of Congress, and the decision is against such right, title, privilege, or exemption."

The conclusions derivable from these cases are the following: 1. That the party who seeks a review and reversal, by the Supreme Court, of the final judgment or decree of a State court, must have presented to the latter court "the title, right, privilege, or immunity" which he asks the former court to secure to him, together with the Federal ground on which he makes the claim. 2. That this Federal ground, whether it be the Constitution, or a law, or treaty of the United States, or a commission held or an authority exercised under the United States, must be a reality, and must also support the claim. 3. That the State court must have actually made a decision with regard to the Federal question brought to its notice. 4. That the decision must be the one specified in the statute.

The Supreme Court, unless the record shows these facts, has no power to review and reverse the decision of the State court. The statute, in the class of cases now under consideration, expressly confines the appellate power of the court to the case of some "title, right, privilege, or immunity specially set up or claimed by either party" in the State court, and set up or claimed on any one or more of the Federal grounds specified, and alleged to be denied

by the judgment or decree of the State court. These are jurisdictional facts, and they must exist, and the record must show that they do exist, or the case will be dismissed for the want of jurisdiction.

(2.) *Decision of the State Court.*—The statute gives jurisdiction to the Supreme Court, even where all the other necessary conditions are present, only when the decision of the State court is *against* "the title, right, privilege, or immunity specially set up or claimed by either party," on any one of the grounds named. If the decision was in favor of the claim, then no case is presented for appellate review, even though the decision be deemed erroneous. It was held, in *Gordon* v. *Caldcleugh*, 3 Cranch, 268, that "if a State court decree in favor of a right claimed under the act of Congress, this court has no jurisdiction under the twenty-fifth section of the Judiciary Act."

Mr. Justice Grier, in *Strader* v. *Baldwin*, 9 How. 261, said: "The plaintiffs in this case have set up no act of Congress in their pleadings, under which they support their claim or title to recover. It is the defendant who has pleaded a privilege or exemption under a statute of the United States, and relies upon it as his only defense. If the decision of the State court had been against him, his right to have the case re-examined by this court could not be doubted. But the decision has been in favor of the right set up under the statute, the validity of which was denied by the plaintiffs. We have no jurisdiction to entertain a writ of error to the Supreme Court of Ohio at their suggestion. This case must, therefore, be dismissed for want of jurisdiction."

The case of *Linton* v. *Stanton*, 12 How. 423, is to the same effect. The plaintiffs in error brought a suit in a State court of New Orleans against the defendant on two promissory notes, and the latter pleaded his discharge under the bankrupt law of the United States. The former objected to the regularity of the bankruptcy proceedings, but the court overruled the objection and gave judgment for the defendant. From this judgment the plaintiffs took an appeal to the Supreme Court of the State; and here the judgment of the court below was affirmed. The plaintiffs then carried the case to the Supreme Court of the United States by writ of error. Chief Justice Taney, referring to the twenty-fifth section of the Judiciary Act of 1789, said:

"We have no jurisdiction over the judgment of a State court upon a writ of error, except in the cases specified in that section. And the jurisdiction of this court is there limited with great care and in plain terms. It gives a writ of error to this court where a party claims a right or exemption under a law of Congress, and the decision is against the right claimed. Undoubtedly, the defendant, in pleading his discharge under the bankrupt law, claimed a right or exemption under a law of Congress. But, in order to give jurisdiction, something more is necessary. The judgment of the State court must be *against* the right claimed. In the case before us the decision was in favor of it; and, consequently, no writ of error will lie to this court under the provisions of the Act of 1789."

In *Roosevelt* v. *Meyer*, 1 Wall. 512, it was held, where a certificate, coming up with the record from the highest court of law or equity of a State, certifies only that on the "*hearing*" of the case a party "*relied upon*" such and such provisions of the Constitution of the United States, "*insisting*" that the effect was to render an act of Congress void, as unconstitutional, which said claim the record went on to say, "was overruled and disallowed by this court," and the record itself shows nothing except that the statute which, it was argued, contravened these provisions, was drawn in question, and that the decision was in favor of the statute, and of the rights set up by the party relying on it, that no writ of error would, under the twenty-fifth section of the Judiciary Act of 1789, lie from the Supreme Court to the State court.

So, also, in *Ryan* v. *Thomas*, 4 Wall. 603, it was held that where a decision of the highest court of law or equity of a State is in favor of the validity of a statute of or an authority exercised under the United States, drawn in question in such court, the Supreme Court, under the twenty-fifth section of the Judiciary Act, by which alone it has jurisdiction of the judgments of State courts, has no revisory power.

Mr. Justice Catron, in stating the opinion of the court in *Hale* v. *Gaines*, 22 How. 144, said: "To give jurisdiction to this court, the party must claim for himself, and not for a third person in whose title he has no interest. (*Henderson* v. *Tennessee*, 10 How. 323.) The plaintiff in error must claim (for himself) some title, right, privilege, or exemption, under an act of Congress, &c., and the decision must be *against* his claim, to give this court jurisdiction. Setting up a title in the United States, by way of defense, is not claiming a personal interest affecting the matter in litigation.

This is the established construction of the twenty-fifth section of the Judiciary Act. (*Montgomery* v. *Hernandez*, 12 Wheat. 132.)"

It was held, in *Miller* v. *The Lancaster Bank*, 16 Otto, 542, that, "where a party sues out a writ of error to a State court, this court has no jurisdiction to re-examine the judgment or the decree, although it be adverse to the Federal right, if he set up and claimed the right, not for himself, but for a party in whose title he had no interest." Chief Justice Waite, in this case, after stating the facts, remarked: "Clearly, therefore, the plaintiffs in error occupy no other position than that of parties setting up title in the Danville Bank by way of defense, and that is not claiming for themselves any title, right, privilege, or immunity given by law." (*Long* v. *Converse*, 1 Otto, 105.)

It appears then, from these cases taken together, that, in order to give the Supreme Court jurisdiction over the final judgment or decree of a State court, not only must the decision of the latter court be against the title, right, privilege, or immunity specially set up or claimed by the party on any of the Federal grounds mentioned in the statute, but that the party setting up such claim must do so *for himself*, and not for another in whose title he has no interest. The writ of error, in the absence of either of these conditions, will be dismissed for the want of jurisdiction.

Congress has, with great accuracy and precision of language, specified the three classes of cases which, first arising in State courts and being determined, in the manner stated, by the highest State courts in which decisions in the same could be had, may, by writ of error, be reviewed in the Supreme Court. The jurisdiction, while resting on the Constitution as an ultimate basis, is purely statutory as to the cases in which it may be exercised, and cannot exceed the limits fixed by statute.

The statute, in its recital of cases, begins with that class in which "the validity of a treaty or statute of, or an authority exercised under, the United States," is drawn in question in the highest court of a State, and the decision of the State court is "*against* their validity." A case of this character may be re-examined in the Supreme Court.

The statute then proceeds to specify the class of cases in which "the validity of a statute of or an authority exercised under any State," is drawn in question, on the alleged ground of "being re-

pugnant to the Constitution, treaties, or laws of the United States," and the decision of the State court is in favor of the State statute or authority. Such a case may be carried to the Supreme Court by writ of error.

The statute then specifies the more comprehensive class in which "any title, right, privilege, or immunity is," in the State court, "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." A case, coming within this description, may also be re-examined in the Supreme Court.

It is worthy of observation, that when a Federal treaty, statute, or authority is drawn in question in a State court, or when a Federal title, right, privilege, or immunity, claimed on any of the grounds stated, is the subject of judicial determination in a State court, the decision must be *against* the validity of the treaty, statute, or authority, or the Federal title or right, &c., in order to give jurisdiction to the Supreme Court. But when a State statute or authority is drawn in question, on the ground of being repugnant to the Constitution, laws, or treaties of the United States, then, in order to give jurisdiction to the Supreme Court, the decision of the State court must be in *favor* of the validity of such statute or authority.

This difference, as to the character of the decisions made by State courts, was designed to limit the jurisdiction of the Supreme Court to those cases in which rights claimed on the Federal basis are rejected by these courts. If such rights are not rejected, but affirmed, then there is no occasion for a review by the Supreme Court. All that this court could give to a party making such claim has been given by the decision already rendered; and Congress did not think it necessary or practically expedient to vest in the Supreme Court any power to review such a decision.

The three classes of cases specified in the statute, when taken together, cover the whole field of Federal questions. Congress cannot increase the dimensions of this field, without exceeding the limits assigned to the judicial power of the United States, and invading that province of jurisprudence which, by the Constitution, belongs exclusively to the States. If no State statute or author-

ity is drawn in question in a State court, on the ground of being repugnant to the Constitution, or a law, or treaty of the United States, and if no question arises in such court to which "the supreme law of the land" has any relation, then the case is purely one of local State jurisprudence; and any attempt to remove the case therefrom, or to review the exercise of that jurisprudence, would be without warrant in the Constitution. The States have exclusive and absolute rights, under the Constitution, legislative, executive, and judicial; and, in the sphere of these rights, no agency of the General Government has any duty to perform, or any power to exercise.

So, also, the United States have rights within the limits fixed by the Constitution; and all rights, within these limits, are paramount, and may be carried into effect by the appropriate agency of the General Government. The jurisprudence of this Government, subject in its exercise to the regulations of law, reaches to all cases, no matter where they first arise, that come within the terms of the Constitution. The cases being Federal in their character, or, by reason of the parties thereto, the fact that they first arise in State courts, does not in the slightest degree qualify or limit this jurisprudence. They may, at the pleasure of Congress, expressed by law, be transferred to a Federal court, either before trial and judgment or decree, or afterward, as Congress shall direct.

SECTION XIII.

THE RECORD AND SCOPE OF THE JURISDICTION.

The Supreme Court, in expounding its own jurisdiction under the statute, has had frequent occasion to refer to what the record of the State court must show, and also to the scope or extent of the jurisdiction when it has legally attached to a case. The question as to the sufficiency of the record has often been before the court, and also the further question whether, when jurisdiction has attached to a case, it extends to all the matters involved in that case as they stood in the State court, or is limited to such matters as come within one or the other of the enumerated classes of questions specified in the statute. The following cases, in ad-

dition to those already cited, will serve to throw light on both of these points.

Mr. Justice Story, in stating the opinion of the court in *Crowell* v. *Randell*, 10 Pet. 368, briefly referred to all the cases in which the construction of the twenty-fifth section of the Judiciary Act of 1789 had been made a matter of controversy. His conclusion was that, in order to bring a case within this section, it must appear on the face of the record:

"1. That some one of the questions stated in that section did arise in the State court. 2. That the question was decided by the State court, as required in the same section. 3. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised and must have been decided in order to have induced the judgment. 4. That it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the State court to the case."

This deliverance was made in 1836, and, in 1842, the Supreme Court, in *Armstrong* v. *The Treasurer of Athens County*, 16 Pet. 281, through Mr. Justice Catron, laid down the following doctrine, as being the established law of the court:

"To give this court jurisdiction under the twenty-fifth section of the Judiciary Act (1 Stats. at Large, 85), it must appear on the record itself to be one of the cases enumerated in that section; and nothing out of the record certified to this court can be considered. This may be shown: 1. By express averment in, or necessary intendment from, the pleadings. 2. By a ruling stated in a bill of exceptions. 3. In Louisiana, by a statement of facts, and the decision thereon. 4. By an entry on the record of proceedings of the appellate court, in a case in which such a question may have arisen and been decided, that it was in fact raised and decided; and this entry must appear to have been made by order of the court, and must be certified by the clerk as part of the record. A certificate to that effect, made by the presiding judge, and certified by the clerk as part of the record, will be presumed to have been made by authority of the court. 5. In equity, it may be stated in the final decree. 6. It may appear that the State court could not have given the judgment or decree, without deciding such a question."

Mr. Justice Strong, in stating the opinion of the court, in *Murray* v. *Charleston*, 6 Otto, 432, said: "The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation, this court is authorized to interfere. The form and mode in which the Federal question is raised in the State court are of minor importance, if, in fact, it was raised and decided. * * * The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right." Mr. Justice Strong, in confirmation of these views, referred to *Crowell* v. *Randell*, 10 Pet. 368; *Armstrong* v. *The Treasurer of Athens County*, 16 Pet. 281; *The Bridge Proprietors* v. *The Hoboken Company*, 1 Wall. 116; and *Furman* v. *Nichol*, 8 Wall. 44.

The Supreme Court, in *Montgomery* v. *Hernandez*, 12 Wheat. 129, having referred to the provisions of the twenty-fifth section of the Judiciary Act of 1789, said: "Under these provisions we have no authority to re-examine the whole case. We can re-examine so much and such parts of it only as come within some one or other of the classes of questions enumerated in the act of Congress, and so much of the case as must necessarily be decided to arrive at such question." In *Mills* v. *Brown*, 16 Pet. 525, it was held that, since the record did not show "that a question under the Constitution of the United States was raised in the State court, and as that court might have decided the case without passing on such a question, this court has not jurisdiction under the twenty-fifth section of the Judiciary Act."

In *Doe* v. *The City of Mobile*, 9 How. 451, it was held that, under the twenty-fifth section of the Judiciary Act, the court "cannot re-examine the decision of a State court upon a question of boundary between coterminous proprietors of lands, depending on the local laws." In *Gill* v. *Oliver's Executors*, 11 How. 529, it was said by Mr. Justice Grier, in stating the opinion of the court, that "it is a conclusive test of the question of jurisdiction of this court in the present case that, if we assume jurisdiction and proceed to consider the merits of the case, we find it to involve no

question either of validity or construction of treaties or statutes of the United States."

Mr. Justice Story, referring, in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 358, to the twenty-fifth section of the Judiciary Act of 1789, said: "It was foreseen that the parties might claim under various titles, and might assert various defenses, altogether independent of each other. The court might admit or reject evidence applicable to one particular title, and not to all, and in such cases it was the intention of Congress to limit, what would otherwise have unquestionably attached to the court, the right of revising all the points involved in the cause. It therefore restrains this right to such errors as respect the questions specified in the section."

Mr. Justice Catron, in considering the question, in *Lytle* v. *The State of Arkansas*, 22 How. 193, 203, how far the Supreme Court can "re-examine the proceedings of State courts," said: "In their answers, the respondents rely on the act of limitations of the State of Arkansas for protection. As this is a defense having no connection with the title of Cloyes, this court cannot revise the decree below in this respect, under the twenty-fifth section of the Judiciary Act." A decree of a State court protecting parties as innocent purchasers, under a State statute of limitations, whether rightfully made or not, was in this case held not to be within the revisory jurisdiction of the Supreme Court.

All these cases, with the exception of *Murray* v. *Charleston*, 6 Otto, 432, were decided under the provisions of the twenty-fifth section of the Judiciary Act of 1789. (1 U. S. Stat. at Large, 73.) One of the provisions of this act was as follows: "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 record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute." This, in express terms, limited the jurisdiction of the Supreme Court, as to its power of reversal, to errors set forth on the record, and to such errors as immediately related to the questions specified in the statute; and the court has accordingly been careful to observe this limitation.

Congress, however, when, in the second section of the Act of February 5th, 1867 (14 U. S. Stat. at Large, 385), re-enacting the substance of the twenty-fifth section of the Judiciary Act of 1789, somewhat changed its phraseology, omitting some words and add-

ing others, and wholly omitting the restraining clause of the original section, as above quoted. The omission of this clause raised the question whether the Supreme Court, having acquired jurisdiction of a case by reason of the presence of one or more of the Federal questions specified in the second section of the Act of 1867, which subsequently became section 709 of the Revised Statutes of the United States, has the power to re-examine not only the Federal question or questions presented in the case, but also all the other questions of law, controverted facts, and conflicting evidence that may be shown by the record. Was it the design of Congress, in modifying the twenty-fifth section of the Judiciary Act of 1789, thus to extend the jurisdiction of the Supreme Court to a determination of matters not expressly within the enumeration of the statute?

Mr. Justice Miller, in delivering the opinion of the court in *Murdock* v. *The City of Memphis*, 20 Wall. 590, took the ground that the second section of the Act of February 5th, 1867, was in effect a repeal of the twenty-fifth section of the Judiciary Act of 1789; that this section as now found in section 709 of the Revised Statutes is the sole law on the subject; that it was not the intention of Congress affirmatively to enact that the Supreme Court should consider all the other questions involved in the case that might be necessary to a final judgment or decree in the court below; and that, under the law as it now stands, the court is not to decide any other than the Federal questions when a case is brought before it for revision. The conclusions to which Mr. Justice Miller finally comes are the following:

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; 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; and 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."

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 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."

5. "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."

This is the most complete statement ever made by the Supreme Court with reference to the general principles that govern the exercise of its jurisdiction over the judgments and decrees of State courts.

Chief Justice Waite, in *Moore* v. *Mississippi*, 21 Wall. 636, referred to this statement, and then added: "It is sufficient for all the purposes of this case to hold, as we do, that if the record shows upon its face that a Federal question was not necessarily involved, and does not show that one was raised, we will not go outside of it, to the opinion or elsewhere, to ascertain whether one was in fact decided." The record of the State court, with its pleadings, bills of exceptions, judgments, and evidence, must present the case to which the court will apply the principles regulating its jurisdiction; and if no proper case is thus presented, then the court will not assume the jurisdiction.

In *Bolling* v. *Lersner*, 1 Otto, 594, Chief Justice Waite said: "We cannot re-examine the judgment or decree of a State court simply because a Federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered."

So, also, in *The Citizens' Bank* v. *The Board of Liquidation*, 8 Otto, 140, Chief Justice Waite said: "To give us jurisdiction under sect. 709, Rev. Stat., it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause. (*Williams* v. *Oliver*, 12 How. 125; *Klinger* v. *State of*

Missouri, 13 Wall. 257.) As the State court has decided as a question of State law that, even if the guaranties of the bonds are valid obligations of the State, they are not fundable under the act, it matters not in this suit whether the decision against their validity was erroneous or not."

The Supreme Court has, for nearly a century, been expounding its appellate jurisdiction, as conferred by law, over the judgments and decrees of State courts. Several hundred cases, involving the question of such jurisdiction, have come before the court. The cases mentioned in this chapter furnish an outline of the law, as explained and applied by the court.

The general fact that such jurisdiction exists in the cases specified by law, and also the general principles which regulate and control its exercise, are settled beyond controversy. The court has clearly indicated what the record must show, in order to make a proper case for its appellate review, and as clearly established the principle that the jurisdiction, when acquired, is limited to the Federal questions named in the statute, and does not extend to other questions of law and fact that may be involved in the case. Congress, within the limits prescribed by the Constitution, may change the law; yet, the law remaining substantially what it now is, it is not likely that the Supreme Court will see any occasion for changing its construction.

PART V.

RELATIONS OF FEDERAL AND STATE JURISPRUDENCE.

CHAPTER I.

EXCLUSIVE AND CONCURRENT JURISDICTION.

1. State and Federal Courts.—The judicial system of this country is embodied in two classes of courts, with their respective powers to take cognizance of and decide causes, and enforce their judgments and decrees.

One of these classes embraces the courts that exist and act under the constitutions and laws of the several States. These courts are known as State courts. They existed before the Constitution of the United States was adopted, and they still continue to exist. They derive their judicial powers from State authority.

The other class embraces those courts that exist and act under the authority of the Constitution, laws, and treaties of the United States. These courts are spoken of as Federal courts, or courts of the United States. They have no dependence whatever upon State authority. They derive their jurisdiction from the Constitution and laws of the United States, and are limited in the exercise thereof to the cases and controversies specified in the Constitution as coming within the judicial power of the United States.

Both classes of courts operate within the same territory and among the same people. In all the States there are State courts to hear and decide causes; and in all the States there are Federal courts to hear and decide causes.

Here then arises the important question of relationship, if any, between these two classes of courts. Is the jurisdiction of the Federal courts exclusive in the cases and controversies confided to them, so that in these cases and controversies the State

courts have no jurisdiction whatever? Is it exclusive in some cases, and concurrent with State courts in others? Is it concurrent with State courts in all the cases and controversies enumerated in the Constitution?

The Constitution does not, in express words, answer these questions. It says, for example, that the judicial power of the United States shall extend to controversies "between citizens of different States," but does not expressly say that such controversies shall not be cognizable also in State courts. It nowhere, in express terms, excludes the cognizance of State courts in any of the cases and controversies confided to Federal courts, and nowhere, in express terms, gives to State courts a concurrent cognizance.

What then is the fact? How far, if at all, is the jurisdiction of the Federal courts exclusive, considered with reference to State courts, and how far, if at all, do the latter courts possess a concurrent jurisdiction with the former, so that the same suit may be brought in either class of courts? This is the question to be considered in this chapter.

2. Opinions of Commentators.—Alexander Hamilton, than whom no one had a larger share in framing the Constitution, or contributed a stronger influence in securing its adoption, took the ground that the delegation of legislative power to the United States, by this instrument, is exclusive, in respect to the States, only in the following cases:

"1. Where the Constitution in express terms granted an exclusive authority to the Union. 2. Where it granted in one instance an authority to the Union, and in another instance prohibited the States from exercising the like authority. 3. Where it granted an authority to the Union, to which a similar authority would be absolutely and totally contradictory and repugnant." (The Federalist, No. 32.)

Mr. Hamilton held that the legislative power of the United States, as defined in the Constitution, is, and must be, in these cases, exclusive of any similar power in the States. Referring to these principles in a subsequent number of the Federalist, he further said:

"Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former

as well as the latter. And, under this impression, I shall lay it down as a rule that the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes. * * * I hold that State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they are not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which these acts will give birth." (The Federalist, No. 82.)

It was the opinion of Mr. Hamilton "that the State courts would have a concurrent jurisdiction, in all cases arising under the laws of the Union, where it was not expressly prohibited."

Mr. St. George Tucker regarded the judicial power of the United States as being exclusively vested in the tribunals of the Federal Government in the following cases: 1. "All cases affecting ambassadors, other public ministers, and consuls." 2. "All cases of admiralty and maritime jurisdiction." 3. "Controversies between two or more States." 4. "Controversies between a State and any foreign state." 5. "Controversies to which the United States are a party." 6. "Trials for offenses against the Constitution or laws of the Federal Government." He thought "that the judicial power of the State must be presumed to possess concurrent, though perhaps subordinate, powers with the courts of the United States in the following cases:" 1. "Controversies between the State and the citizens of another State, or foreign citizens or subjects." 2. Controversies "between citizens of different States, if the defendant reside within the State claiming jurisdiction." 3. Controversies "between citizens of the same State claiming lands, within the State, under grants from different States." (1 Tuck. Black. Part I, App. 181–183.)

Mr. Rawle remarks: "A jurisdiction exclusive of the State courts is not expressly given by the Constitution to any of the courts of the United States, but it is in several instances clearly implied." He cites cases of admiralty and maritime jurisdiction, cases affecting ambassadors, other public ministers, and consuls, and controversies between two or more States, as examples of such clear implication.

As to cases in law and equity arising under the Constitution, laws, or treaties of the United States, controversies to which the United States are a party, and controversies between a State and

citizens of another State, or between citizens of different States, or between citizens of the same State claiming lands under grants of different States, or between a State or the citizens thereof and foreign states, citizens, or subjects, Mr. Rawle says that "in some of these cases it may be doubted whether it was intended, and whether it would be beneficial to the United States, that the jurisdiction should be exclusive" in the Federal courts. He adds that "in all these cases a concurrent jurisdiction exists" in State courts "so far as relates to the language of the Constitution itself," and expresses the opinion that these courts are not "precluded from holding cognizance of a right claimed under a treaty or statute of the United States, or an authority exercised under the United States, or a suit in which is drawn in question the construction of any clause of the Constitution." "The correct general position seems to be," he says, "that in civil cases in some instances the judicial power is unavoidably exclusive of State authority, and in many others it may be rendered so at the election of Congress." (Rawle's Const. pp. 191–195.)

Chancellor Kent, after considering the question somewhat at length, comes to the following conclusion: "The conclusion, then, is, that in judicial matters the concurrent jurisdiction of the State tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts; and that, without an express provision to the contrary, the State courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter." (Kent's Comm. Lect. 18.)

Mr. Justice Story, having remarked that it would be difficult "to lay down any general rules in relation to the cases in which the judicial power of the courts of the United States is exclusive of the State courts, or in which it may be made so by Congress," proceeds to say:

"That there are some cases in which that power is exclusive cannot well be doubted; that there are others, in which it may be made so by Congress, admits of as little doubt; and that in other cases it is concurrent in State courts, at least until Congress shall have passed some act excluding the concurrent jurisdiction, will scarcely be denied. It seems to be admitted that the jurisdiction of the courts of the United States is, or at least may be made, ex-

clusive in all cases arising under the Constitution, laws, and treaties of the United States; in all cases affecting ambassadors, other public ministers, and consuls; in all cases (in their character exclusive) of admiralty and maritime jurisdiction; in controversies to which the United States shall be a party; in controversies between two or more States; in controversies between a State and citizens of another State; and in controversies between a State and foreign states, citizens, or subjects. And it is only in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction." (Story's Const. sec. 1754.)

Mr. Curtis expresses the opinion "that, in regard to the several classes of cases, to *all* of which the Constitution imperatively declares that the judicial power shall extend, if any original jurisdiction is established by the Constitution itself, or by Congress in the exercise of the discretion left to it by the Constitution, that jurisdiction may be regarded as exclusive of State courts." In regard to other classes of cases, such as "controversies to which the United States shall be a party, those between citizens of different States, or between citizens of a State and aliens or foreign states," he thinks it to be the "purpose of the Constitution to provide a tribunal to which resort might be had, which would be more likely to be impartial than the State courts might always be, under the same circumstances, but to leave the resort to that tribunal entirely optional," without any intention of making its jurisdiction exclusive in such cases. (Curtis's Comm. Book I, chap. 7.)

Mr. Abbott lays down the following general principles in reference to this question:

1. "The Constitution leaves it to the discretion of Congress to confer upon the courts of the United States an *original* jurisdiction in all cases to which the judicial power of the United States extends." 2. "Where the language of the Constitution extends the judicial power to *all* cases of any class, it is in the power of Congress to make the jurisdiction of the courts of the United States *exclusive* in reference to such cases." 3. "Whether, in a given case, Congress has *conferred* exclusive jurisdiction, depends upon the statute conferring it, in the interpretation of which some weight is due to the consideration that in respect to many classes of cases the State courts had jurisdiction prior to the adoption of the Constitution, and that the presumption in such cases is against

an alienation or surrender of State power by implication." (Abb. U. S. Practice, vol. 1, p. 63.)

Mr. Pomeroy, in regard to "controversies between a State and citizens of another State," or "between citizens of different States," or "between citizens of the same State claiming lands under grants of different States," or "between a State or the citizens thereof and foreign states, citizens, or subjects," raises the question whether the jurisdiction relating to these controversies is "exclusively in the national courts, or held by them concurrently with the State tribunals." His answer is the following: "Plainly, the latter is the true interpretation of the Constitution. In all these cases the judiciary of the United States is not wielding a power which belongs to it of right, of necessity, but one which the State judges may also wield — a power relating entirely to State laws, to rights and duties flowing from State legislation." (Pomeroy's Const. Law, sec. 759.)

Here is some diversity of opinion, in the matter of detail, among these text-writers and commentators; yet they all agree that, in some of the enumerated cases and controversies, the jurisdiction of the Federal courts is exclusive, and that, in respect to other cases, State courts may exercise concurrent jurisdiction, unless expressly excluded therefrom by the legislation of Congress.

3. Judicial Opinions. — The Supreme Court of the United States has, on several occasions, expressed its opinion in regard to this subject. The following cases are examples to this effect:

(1.) *Martin* v. *Hunter*, 1 *Wheat.* 304, 337. — The court, in answer to the question relating to the cases, if any, in which the judicial power of the United States is "exclusive, or exclusive at the election of Congress," proceeded to say:

"It is manifest that the judicial power of the United States is unavoidably in some cases exclusive of all State authority, and in all others may be made so at the election of Congress. No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to State tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the Judicial Act,

and particularly in the ninth, eleventh, and thirteenth sections, has legislated upon the supposition that, in all the cases to which the judicial power of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts."

This deliverance limits the concurrent jurisdiction of State courts to those cases in which, previously to the adoption of the Constitution, they had jurisdiction, as, for example, a controversy between citizens of different States, and leaves it at the option of Congress to exclude such jurisdiction, even in these cases.

(2.) *Houston* v. *Moore*, 5 *Wheat.* 1, 26.—Mr. Justice Washington, in stating the opinion of the court, referred to the view of Alexander Hamilton, which he stated to be "that, in every case in which the State tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth." In regard to this view he said: "I can discover, I confess, nothing unreasonable in this doctrine; nor can I perceive any inconvenience which can grow out of it, so long as the power of Congress to withdraw the whole, or any part of those cases from the jurisdiction of the State courts, is, as I think it must be, admitted."

Having spoken of the provisions of the Judiciary Act of 1789, as assuming the power of Congress to exclude the concurrent jurisdiction of State courts in cases cognizable by the Federal courts, Mr. Justice Washington further said: "I hold it to be perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the State courts may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts."

As to crimes and offenses against the United States, Mr. Justice Washington still further said: "The law of Congress had vested the cognizance of them exclusively in the Federal courts. The State courts, therefore, could exercise no jurisdiction whatever over such offenses, unless where, in particular cases, other laws of the United States had otherwise provided; and wherever such provision was made, the claim of exclusive jurisdiction to the particular cases was withdrawn by the United States, and the concurrent jurisdiction of the State courts was *eo instanti* restored, not by way of grant from the national Government, but by the removal of a disability before imposed upon the State tribunals."

The particular point considered and disposed of in this case was whether a law of Pennsylvania could "confer authority upon a State court-martial to enforce the laws of the United States against delinquent militia-men who had disobeyed the call of the President to enter into the service of the United States." The Supreme Court held that this law was "not repugnant to the Constitution and laws of the United States," and hence that a State court-martial might act under it and carry it into effect.

(3.) *Teal* v. *Felton*, 12 *How.* 284, 292.—This was an action of trover originally brought in a State court to recover from a postmaster the value of a newspaper which he refused to deliver to the party to whom it was addressed, claiming the authority of the postal laws of the United States for the refusal. The case, having been decided by the highest court of the State, was by writ of error transferred to the Supreme Court of the United States. The question arose in the latter court whether the State court had jurisdiction of the case.

Mr. Justice Wayne, in stating the opinion of the court on this point, said: "Now, the courts in New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the Constitution of the United States. That such is not the case, we cannot express our view better than Mr. Justice Wright has done in his opinion in this case in the Court of Appeals." He then proceeded to quote this opinion with reference to the second section of the third article of the Constitution, as follows: "This is a mere grant of jurisdiction to the Federal courts, and limits the extent of their power, without words of exclusion or any attempt to oust the State courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the State courts, but to define the limits of those granted to the Federal judiciary."

Adopting this language as his own, Mr. Justice Wayne further said: "We will add that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find in the twenty-fifth section of the Judiciary Act of 1789, under which this case is before us,

that such a concurrent jurisdiction in the courts of the States and of the United States was contemplated, for its first provision is for a review of cases adjudicated in the former, 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 against their validity."

The concurrent jurisdiction of the State court was in this case asserted by the Supreme Court; and inasmuch as there was no error in the decision made by the Court of Appeals, its judgment was affirmed. The opinion of Mr. Justice Wright, as to the second section of the third article of the Constitution, was also adopted as the opinion of the Supreme Court.

(4.) *The Moses Taylor*, 4 *Wall.* 411.—The question, considered and decided in this case, was whether a State court, proceeding under the authority of a State statute, could take cognizance of a suit which was properly one of admiralty and maritime jurisdiction. This question was answered in the negative, and hence the case was remanded to the State court, with directions to dismiss the action for want of jurisdiction. This was equivalent to declaring the jurisdiction of the Federal courts exclusive in such cases.

Mr. Justice Field, in stating the opinion of the court, referred to the opinion in *Martin* v. *Hunter*, *supra*, to the effect "that the judicial power of the United States is in some cases unavoidably exclusive of all State authority, and that in all others it may be made so at the election of Congress," and then proceeded to say:

"We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. It declares that in some cases, from the commencement, such jurisdiction shall be exclusive. In other cases it determines at what stage of the procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from the commencement, exclusively under the cognizance of the Federal courts."

"On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a Federal or a State court, at the option of the plaintiff; and, if brought in the State court, may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the Federal courts."

"Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authorities of the United States, are only drawn within the control of the Federal courts upon appeal or writ of error, after final judgment."

"By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases which by the Judiciary Act could only come under the cognizance of the Federal courts after final judgment in the State courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant."

"The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both State and Federal courts."

The conclusions to be drawn from these authorities are the following: 1. That, in respect to the cases and controversies enumerated in the Constitution, over whose subject-matter State courts had jurisdiction prior to the adoption of the Constitution, these courts, if so authorized by their respective States, retain such jurisdiction, unless excluded therefrom by Congress. 2. That, in respect to other cases named in the Constitution, the jurisdiction is, by reason of the parties or the subject-matter, exclusive in the courts of the United States. 3. That, in all cases and controversies to which the Constitution extends the judicial power of the United States, the jurisdiction of the Federal courts may be made exclusive by Congress, and is exclusive so far as Congress has thus legislated.

It should be added, in this connection, that Congress cannot, in the distribution of the judicial power of the United States, affirmatively bestow any portion of it upon State courts, and hence cannot in this way make their jurisdiction concurrent with that of Federal courts. Mr. Justice Story, in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, said that "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." So, also, Mr. Justice Washington, in *Houston* v. *Moore*, 5 Wheat. 1, said: "I hold it to be perfectly clear

that Congress cannot confer jurisdiction upon any courts, but such as exist under the Constitution and laws of the United States."

This excludes State courts from being the recipients of the judicial power of the United States by the authority of Congress. They are not established by Congress, and their judges are not appointed under the Constitution and laws of the United States. If they exercise cognizance in cases within the judicial power of the United States, they do so by State authority, and not that of Congress. The omission of Congress to exclude this cognizance in any of these cases does not affirmatively confer it, but simply leaves these courts to exercise whatever power State authority may bestow upon them.

Chancellor Kent justly remarks: "The doctrine seems to be admitted that Congress cannot compel a State court to entertain jurisdiction in any case. It only permits State courts, which are competent for the purpose, and have an inherent jurisdiction adequate to the case, to entertain suits in given cases; and they do not become inferior courts in the sense of the Constitution, because they are not ordained by Congress." (Comm. Lect. 18.)

Congress, by the Act of March 2d, 1815 (3 U. S. Stat. at Large, 244), provided that "State or county courts within or next adjoining a collection district" established by Congress "for the collection of any direct tax or internal duties of the United States," should have power "to take cognizance of all complaints, suits, and prosecutions for taxes, fines, penalties, and forfeitures arising and payable under any of the acts passed or to be passed as aforesaid, or where bonds are given under the said acts;" and also that these courts, or the principal or presiding judges thereof, should have authority "to exercise all and every power in cases cognizable before them, by virtue of this act, for the purpose of obtaining a mitigation or remission of any fine, penalty, or forfeiture, which may be exercised by judges of the District courts of the United States in cases brought before them by virtue of the law of the United States." The law here referred to is the Act of March 3d, 1797. (1 U. S. Stat. at Large, 506.)

The Act of March 3d, 1815, was, upon its face, an attempt by Congress to vest a portion of the judicial power of the United States in State courts. The cases in respect to which such power purported to be given arose under the laws of the United States. This legislation, according to the doctrine stated in *Martin* v.

Hunter's Lessee, and *Houston* v. *Moore*, *supra*, exceeded the power of Congress, and was, therefore, unconstitutional.

By some State courts the power was for a time exercised, and by others declined. The Supreme Court of New York, in *The United States* v. *Lathrop*, 17 John. 4, decided that a State court could not take jurisdiction of an action brought by the United States to recover a penalty or forfeiture for a breach of the laws of the United States, and that Congress has no power to confer such jurisdiction upon State courts. The pecuniary penalty or forfeiture was held to be a punishment for a violation of the law of Congress; and hence the matter was regarded as cognizable only in the courts of the United States. A similar doctrine was stated in several other cases. (*The United States* v. *Campbell*, 6 Hall's Law. Jour. 113; *The Commonwealth* v. *Freely*, 1 Va. Cases, 321; and *Jackson* v. *Rose*, 2 Va. Cases, 34.)

The courts of the United States, on the other hand, are, except as established by the Constitution itself, purely the creatures of Congress, and may be vested with the judicial power granted by the Constitution, in any form and to any extent not inconsistent with the constitutional grants of power to the Supreme Court. Congress may make the jurisdiction of these courts exclusive of State courts, even in those cases in which the latter courts would otherwise possess concurrent jurisdiction. What then is the legislation of Congress on this subject?

4. The Judiciary Act of 1789.—The first answer to this question is found in the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), providing for the organization of the courts of the United States, and vesting judicial power in them. The provisions of the act, relating to this subject, are the following:

(1.) *District Courts.*—The ninth section of the act provided as follows in respect to the exclusive jurisdiction of District Courts: 1. That they should have, exclusively of the courts of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted. 2. That they

should have jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid. 3. That they should have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons' burthen, within their respective districts as well as upon the high seas; saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. 4. That they should have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made under the laws of the United States. 5. That they should have such cognizance of all suits for penalties and forfeitures incurred under these laws.

The same section also provided as follows in respect to the concurrent jurisdiction of these courts: 1. That they should have cognizance, concurrent with the courts of the several States, or the Circuit Courts, as the case might be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. 2. That they should have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars.

Here, then, are seven classes of cases, in five of which the jurisdiction of District Courts is made exclusive of that of the courts of the several States, and in two of which a concurrent jurisdiction by State courts is not excluded.

(2.) *Circuit Courts.*—The eleventh section of the act provided as follows in respect to the Circuit Courts: 1. That they should have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State. 2. That they should have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States

shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable therein.

This permitted a concurrent jurisdiction by State courts in the civil cases mentioned, and excluded it in all criminal cases cognizable under the authority of the United States.

(3.) *The Supreme Court.*—The thirteenth section of the act provided as follows in respect to the original jurisdiction of the Supreme Court: 1. That this court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. 2. That this court shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations, and original but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul may be a party.

A controversy of a civil nature between a State and its citizens is here excepted from the original jurisdiction of the Supreme Court; and hence it has no such jurisdiction over such a case, concurrently with a State court. In controversies between a State and citizens of other States, or aliens, the jurisdiction was declared to be original but not exclusive. The denial of exclusive original jurisdiction to the Supreme Court in these cases has generally been regarded as implying a concurrent jurisdiction by other Federal courts. If, however, these cases could be determined by a State court, then so far the original jurisdiction of the Supreme Court would be concurrent with that of State courts.

In cases of a civil nature brought against ambassadors, &c., the jurisdiction of the Supreme Court was made original and exclusive. And in cases brought by ambassadors, &c., or in which a consul or vice-consul was a party, the jurisdiction was declared to be original but not exclusive. If State courts in the latter cases could exercise jurisdiction, then their jurisdiction would be concurrent with that of the Supreme Court. Such jurisdiction on their part is not excluded by the thirteenth section of the Judiciary Act of 1789. There is nothing in this section to prevent an ambassador or a consul from bringing a suit in a State court.

The twenty-fifth section of the Judiciary Act extended the appellate jurisdiction of the Supreme Court to cases arising in and determined by State courts, in which certain Federal questions were involved and decided as specified. This recognizes the fact that State courts might render decisions upon the questions named, and provides that the Supreme Court may review these decisions, and pass judgment upon the same questions. The jurisdiction of State courts for the purpose of making decisions in the first instance, and that of the Supreme Court for the purpose of reviewing these decisions, are, according to the provisions of this section, concurrent in respect to the Federal questions decided in State courts and re-examined and decided by the Supreme Court. The appellate jurisdiction of the latter court covers these questions when decided in a certain way by the highest State courts. There is here a species of concurrent jurisdiction, not in the sense that the suits might be originally brought in State courts, or in the Supreme Court, but that both have jurisdiction in respect to the same subject-matter, so far as the twenty-fifth section of the Judiciary Act extends the appellate jurisdiction of the Supreme Court.

5. Revised Statutes of the United States.—Section 711 of these Statutes provides that the jurisdiction of the courts of the United States shall, in the following cases and proceedings, be exclusive of the courts of the several States:

(1.) All crimes and offenses cognizable under the authority of the United States.

(2.) All suits for penalties and forfeitures incurred under the laws of the United States.

(3.) All civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it.

(4.) All seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.

(5.) All cases arising under the patent or copyright laws of the United States.

(6.) All matters and proceedings in bankruptcy.

(7.) All controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

The effect of these provisions is to exclude any concurrent jurisdiction by State courts in the cases specified, with the qualifica-

tions contained in the third and seventh of the above paragraphs. The right to a common-law remedy is saved to suitors in admiralty cases where the common law is competent to give such a remedy; and, in such cases, they may, at their own option, seek their relief in a State court. So, also, where a State is a party in a civil controversy, the jurisdiction is exclusive of any concurrent jurisdiction by State courts, except between a State and its citizens, or between a State and citizens of other States or aliens.

6. The Civil Rights Act.—The Act of March 1st, 1875 (18 U. S. Stat. at Large, 335), entitled "An Act to protect all citizens in their civil and legal rights," provides as follows, in its first section:

"That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

The second section of this act provides that any person who shall violate any of the above provisions, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs, and shall also be deemed guilty of a misdemeanor, punishable, on conviction, by a fine of not less than five hundred nor more than one thousand dollars, or by imprisonment not less than thirty days nor more than one year. The provisoes annexed to this section are these:

"*Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and State statutes; and having so elected to proceed in one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State.

"*And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

The third section of the act provides that "the District and Circuit Courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses

against, and violations of, the provisions of this act." The fourth section forbids the exclusion of any citizen, otherwise qualified, from serving as a juror, on account of race, color, or previous condition of servitude.

The criminal jurisdiction provided for in this act is exclusively vested in the District and Circuit Courts of the United States. The party aggrieved by a violation of any of the provisions of the first section of the act, and seeking by an action of debt to recover the forfeiture specified in the second section, may sue therefor in a Federal court, or may proceed under his rights at common law and by State statutes, in the latter case bringing his action in a State court, and seeking his remedy under State authority. He is not confined to a Federal court or to the provisions of this act for a remedy, but may seek whatever remedy State authority may afford to him, with the provision that if he elects to do so, he cannot proceed in a Federal court.

7. The Act of March 3d, 1875.—Congress, by the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), provides as follows, in the first section thereof:

(1.) That the Circuit Courts of the United States shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable therein.

(2.) That these courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution, or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects.

This act designates the cases in which the original jurisdiction of the Circuit Courts of the United States shall be exclusive of State courts, and those in which it shall not be thus exclusive. A concurrent jurisdiction on the part of State courts is permitted in

all the civil suits specified in the first section of the act. This permission does not directly bestow such jurisdiction upon State courts, but simply omits to exclude it, and hence leaves the question, whether they can exercise it in all of the cases mentioned, to be determined by the courts themselves proceeding under State authority.

Congress, commencing with the Judiciary Act of 1789, has thus assumed the power to prescribe the cases in which State courts shall be permitted to exercise jurisdiction within the field assigned by the Constitution to the judicial power of the United States. And, in the exercise of this power, it has never wholly excluded State courts from this field, and never opened the entire field to their jurisdiction.

Such has been the policy of Congress in legislatively disposing of the question of jurisdiction, as between the Federal and State courts, in the cases and controversies specified in the third article of the Constitution. Where it permits a concurrent jurisdiction it provides for a transfer, before trial and judgment, of suits from State courts to the Circuit Courts of the United States, or for a review of the final judgments or decrees of the highest State courts, on writ of error, by the Supreme Court of the United States. And thus the judicial power of the United States is made effective and operative in all the cases specified, either by providing for bringing them in the Federal courts in the first instance, or, if permitting them to be first brought in State courts, by providing for their transference to Federal courts.

CHAPTER II.

FEDERAL AND STATE HABEAS CORPUS.

1. The Writ of Habeas Corpus.—This writ, as defined by Bouvier, is "a writ directed to the person detaining another, and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf." (Law Diction.)

The power to issue such a writ, and pass upon the question involved and raised by its issue, is judicial; and it hence belongs to courts of justice or the judges thereof, or to those who, if not judges in the technical sense, are, nevertheless, invested by law with the power of performing this judicial function. The power, being derived from law, is in all cases subject to the regulations and qualifications that may be imposed by law. It is the province of law to fix the limits within which this power must be exercised.

The purpose of the writ is to afford summary relief to those who are illegally restrained of their liberty, with the exception of the case in which the prisoner is by the writ brought into court for the purpose of being used as a witness. The party holding another under restraint is commanded to bring him into court or before the judge issuing the writ, with a statement of the reason for the detention, that an inquiry may be promptly made as to the lawfulness of such detention, and that, if not lawful, the person may at once be discharged therefrom.

The writ of *habeas corpus*, though not a writ of error, or a writ of *certiorari*, is collaterally the exercise of appellate power, so far at least as to inquire and determine whether a person in custody under color of authority is lawfully deprived of his liberty. The applicant for the writ affirms the custody to be unlawful, setting forth the facts of the case, and on this ground asks to be discharged. If, by his own statement, the custody appears to be lawful, then the writ will not be issued at all. If, however,

the facts as stated fairly raise the question, then an inquiry will be made by the issue of the writ.

The proper range of inquiry, on the hearing of the case upon the issue made by the applicant for the writ and the return thereto, relates to the existence and legal validity of the process by which the party is detained; and beyond this the inquiry cannot extend without exceeding its just limits. Testimony, within these limits, may be introduced to settle any question of fact. If the party is shown to be held by a legal process issued by competent authority, then the writ is dismissed and the party remanded to the custody from which he sought to be released. It is not the province of the court or judge, upon merely *habeas corpus* proceedings, to review the judgment of another court, and correct errors which can be corrected only by an appeal or a writ of error. If, however, the detention rests on no legal process, or if the process itself does not rest upon lawful authority, then the party is entitled to a summary discharge.

Such are the general principles of law in relation to the purpose and the exercise of judicial power in proceedings upon *habeas corpus*.

2. Federal and State Governments.—We have in this country two distinct and separate systems of government, operating in the same territory, and among and upon the same people. One of these systems is the local government of the respective States, which are independent and sovereign political communities, except as their powers are limited by the Constitution of the United States. The other is the Government of the United States, extending over the territory of all the States, acting directly upon the people composing these States, and supreme in the sphere of action assigned to it by the Constitution.

These systems of government are conducted by distinct and separate agencies, legislative, executive, and judicial; and the theory of the Constitution is that neither shall interfere with the legitimate operations of the other. The writ of *habeas corpus* is, in both of these systems, a recognized and established legal process, resting upon and regulated by constitutional or statutory provisions, or both. There is a Federal writ of *habeas corpus*, and a State writ of *habeas corpus*, the one issued under the authority of the United States, and the other issued under State authority.

Both writs are essentially the same in their purpose and general characteristics.

How far then, if at all, does the Federal writ extend to persons restrained of their liberty under State authority, or under color thereof? How far, if at all, does the State writ extend to persons restrained of their liberty under the authority of the United States, or under color thereof? These are the questions to be considered in this chapter.

3. Federal Habeas Corpus.—The Revised Statutes of the United States contain the following provisions in relation to the Federal writ of *habeas corpus:*

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus.*" (Sec. 751.)

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." (Sec. 752.)

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify." (Sec. 753.)

The first and second of the above sections give the power to the Federal courts, and to the several justices and judges of these courts, to issue writs of *habeas corpus.* This power extends to every species of the writ; and, as to the meaning of the writ of *habeas corpus*, reference may be had to the common law, but not for the authority to issue the writ, since this depends upon statute. (*Ex parte Bollman*, 4 Cranch, 75.)

The other section specifies five classes of cases, in any one of which the writ may be issued. The section also declares that the writ shall not extend to a prisoner in jail, unless his case comes within one of these classes.

(1.) The first class embraces the cases in which the prisoner "is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof." This has nothing to do with custody under State authority.

(2.) The second class embraces the cases in which the prisoner "is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof." The terms here used show that the party contemplated is not one who is in custody on the charge of any crime against the United States. The custody is for an act done or omitted in pursuance of United States law, or of the order of a Federal court or judge. It must, of course, be based on some State law; and hence the case presented is that of a person imprisoned under State law for his obedience to the laws of the United States, or to the order of some court or judge thereof.

The occasion which originally led Congress to extend the writ of *habeas corpus* to this class of cases, grew out of the rebellious attitude of South Carolina in 1833 in respect to the tariff laws of the United States. The special design was to give the *habeas corpus* relief to any officers of the General Government, or persons acting under their authority, who, under the laws of that State, might be arrested and imprisoned for acts done or omitted in pursuance of the laws of the United States, or of the orders or processes of any court or judge thereof. For this purpose Congress, in the seventh section of the Act of March 2d, 1833 (4 U. S. Stat. at Large, 632), provided as follows:

"That either of the justices of the Supreme Court, or a judge of any District Court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or under any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof, any thing in any act of Congress to the contrary notwithstanding. And if any person or persons to whom such writ of *habeas corpus* may be directed, shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment

not exceeding six months, or by either, according to the nature and aggravation of the crime."

This section in the Act of March 2d, 1833, furnished the basis of the provision in the Revised Statutes under consideration. The law as thus established, and still continued, is applicable to any case in which a person, for the reason stated, is held in custody under State authority, or under color thereof. The Federal courts, proceeding under the supreme authority of the United States, may give the relief of *habeas corpus.* The General Government surely has the right to protect its own officers and citizens against imprisonment by State authority for obedience to its laws.

(3.) The third class embraces any case in which the prisoner "is in custody in violation of the Constitution or of a law or treaty of the United States," whether under color of State or Federal authority. The custody, in such a case, is not only unlawful, but is so as a violation of "the supreme law of the land." This provision, originally made by the Act of February 5th, 1867 (14 U. S. Stat. at Large, 385), grew out of circumstances that were connected with the war of the Rebellion. The special design of Congress was to afford the *habeas corpus* relief to any person who, under State authority or under color thereof, might be imprisoned in violation of the Constitution, or a law or treaty of the United States. The original act expressly declared that such State authority "shall be deemed null and void."

This provision is applicable to any case that comes within its terms. If, for example, the Government of the United States should, under the stipulations of a treaty, demand and receive a fugitive criminal from a foreign state, on the charge that he had violated a law of one of the States, and should then deliver the accused to the authorities of that State, and if these authorities, having obtained the custody, were to maintain and continue it in violation of the treaty under which the delivery was made by the foreign state, then, upon a proper application setting forth the facts, a Federal court would be authorized to grant a writ of *habeas corpus*, and if, upon the hearing of the case, it appeared that the custody was in violation of the treaty, to discharge the prisoner therefrom.

The provision clearly covers such a case should it be found to exist; and it is equally clear that there should be some way in which the General Government, having obtained from a foreign

government the custody of fugitive criminals against State authority, and having delivered them to such authority for trial and punishment, may secure to them all the rights guaranteed to them by treaty, whether expressly or by implication. It is the duty of the General Government to see to it that the treaty is in no respect violated.

(4.) The fourth class embraces any case in which the prisoner, "being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations." This provision was suggested by the McLeod case which arose in the State of New York, and at one time threatened to involve the United States in serious complications with Great Britain.

McLeod, who was arrested, indicted, and tried for murder in the State of New York, claimed, in reference to the matter charged against him as an offense, to have acted under the authority of the British government, and his claim was indorsed by that government. The State of New York, through its Supreme Court, insisted upon its right to try the prisoner for the offense charged; and there was at the time no law of the United States giving any Federal court the power to exercise any jurisdiction in the premises. Fortunately, the jury acquitted McLeod, and he was at once discharged.

Congress, seeing the peril in this case, provided by the Act of August 29th, 1842 (5 U. S. Stat. at Large, 539), that the Federal writ of *habeas corpus* should be applicable to all such cases. The question involved in such a case depends upon the law of nations; and it is the province of the Federal courts, rather than State courts, to pass upon such a question. The original act authorized any justice of the Supreme Court, or judge of a District Court of the United States, to bring the prisoner before him by *habeas corpus*, and if, upon the hearing of the case, it appeared that the prisoner was entitled to be discharged on the ground alleged, then at once to discharge him from custody. It suspended proceeding against the prisoner while the case was being heard by *habeas corpus*, and, after his discharge in this way, it made any further proceeding against him unlawful.

(5.) The fifth and last class embraces the cases in which "it is necessary to bring the prisoner into court to testify." This provision was made in the fourteenth section of the Judiciary Act of 1789. (1 U. S. Stat. at Large, 73.) No question in such a case is raised as to the lawfulness of the custody. The only object of the writ is simply to obtain the testimony of the prisoner in a case pending before the court.

Such, then, are the cases of custody to which the Federal writ of *habeas corpus* is applicable, and to which it is expressly limited by law. It is undoubtedly true, as a general principle, that the Federal courts have no jurisdiction to inquire by writ of *habeas corpus* into the imprisonment of persons held in custody under State authority, or under color thereof. It is the special province of State courts to inquire by *habeas corpus* into the lawfulness of the custody in such cases. Mr. Hurd says: "None of the courts of the United States have authority to grant the writ for the purpose of inquiring into the cause of commitment, where the prisoner is imprisoned under process issued from the State courts." (Hurd's Habeas Corpus, 2d ed. p. 143.)

This states the general rule, without the necessary qualifications. A truer statement is that the Federal courts have no such authority, except in the cases specified in section 753 of the Revised Statutes of the United States, and in which Congress has extended the Federal writ to prisoners in jail, even though the custody may be under State authority. These exceptions relate to cases in which rights under the Constitution, or a law or treaty of the United States, or under the law of nations, may be involved. Congress has provided that, in such cases, the Federal writ of *habeas corpus* shall be available to persons held in custody under State authority.

One of the points laid down by the court in *Ex parte Waddy Thompson*, 24 A. L. Reg. 522, was that "the power given to the Federal courts to arrest the arm of State authorities, and to discharge a person held by them, is one of great delicacy, and should only be exercised where it clearly appears that justice demands it." So, also, in *In re Jesse H. Bull*, 4 Dill. 323, it was held that, "before a party will be released on a writ of *habeas corpus*, it must be made to appear with reasonable certainty that the imprisonment under State authority is for an act done in pursuance of Federal authority and warranted by it." The case must come within one

of the classes of cases specified by Congress, as cases in which the Federal writ may be issued.

Mr. Bump, in his "Federal Procedure," pp. 460–462, cites, at considerable length, the cases which come, and those which do not come, within the provisions made by Congress on this subject, giving the authorities therefor. We present, as follows, several of these cases:

If a Federal officer is imprisoned under process issued by a State court for an act done in pursuance of a law of the United States; or if a person be indicted for murder under a State law committed while executing a writ issued by a Federal court; or if a person has been arrested under a State law for an act done while engaged in the execution of a process issued by a Federal officer; or if an agent appointed by the governor of a State, to make a demand upon the governor of another State for a fugitive from justice, is arrested for an act done by him as such agent; or if a person is convicted in a State court for an act done by him while in the service of the United States in a rebellious territory; or if a Federal supervisor of elections is arrested by a State officer for acts done in the discharge of his duty; or if a person has been convicted in a State court for perjury before an officer of the United States; or if, under a State law void because in conflict with the Constitution or a law or treaty of the United States, a person has been convicted in a State court; or if a person is imprisoned by a State court for a crime committed in a place under the exclusive jurisdiction of the United States,—then, in each of these cases, the Federal writ of *habeas corpus* is an appropriate and lawful remedy for the relief of the prisoner. (*Ex parte H. H. Robinson*, 6 McLean, 335; *The United States* v. *Jailer*, 2 Abb. C. C. 265; *The United States* v. *Morris*, 2 A. L. Reg. 348; *Ex parte H. B. Titus*, 8 Ben. 411; *Coleman* v. *Tennessee*, 7 Otto, 509; *Ex parte Geissler*, 13 C. L. N. 59; *In re Wong Young Quy*, 2 Fed. Rep. 624; and *Ex parte John W. Tatem*, 1 Hughes, 558.)

It was held by Judge Blatchford, in *In re Thomas H. Neill*, 8 Blatch. 156, that no State court, judge, or officer, has jurisdiction to release a soldier, on *habeas corpus*, when it appears, *prima facie*, that he is held to service in the army by an officer acting under the authority of the United States and claiming to hold him as an enlisted soldier; that, in the return to a writ of *habeas corpus* issued by a State court or judge in such a case, the officer is not

bound to produce the body of the soldier; and that where such officer has, by a State court, been imprisoned for contempt, because he did not produce the body of the soldier, and did not make a sworn return to the writ, he may, by a Circuit Court of the United States, on a writ of *habeas corpus*, be discharged from such imprisonment.

In *Ex parte McCready*, 1 Hughes, 598, it was held that the law of Virginia which prohibits persons other than citizens of that State from taking or planting oysters in the waters of that State, and subjecting offenders to forfeiture and indictment, is unconstitutional; that a person indicted and imprisoned under this law, is deprived of his liberty in violation of the Constitution of the United States; and that, consequently, he may, on *habeas corpus*, be released from such imprisonment by a court or judge of the United States.

In *The Electoral College of South Carolina*, 1 Hughes, 571, it was held that a Federal court may issue a writ of *habeas corpus*, in favor of petitioners imprisoned for contempt by a State court, where the acts constituting the alleged contempt were done in performance of duties created by the Constitution and laws of the United States, and the petitioners acted under the protection of these laws and of the courts of the United States, and where the record clearly shows that the State court exceeded its powers in committing the petitioners to prison for the alleged contempt.

In *Ex parte Reynolds*, 3 Hughes, 559, a *habeas corpus* was issued by the Circuit Court of the United States, requiring the sheriff of a county to bring the bodies of two colored persons into court, with a statement of the cause of their detention, on the ground that, according to the allegations in the petition of the prisoners, they had been tried capitally before a State court by a jury exclusively white, which, as they claimed, was in contravention of the Constitution and laws of the United States.

In *Ex parte Turner*, 3 Woods, 603, it was held that if a district attorney and marshal of the United States are imprisoned by a State court for contempt, because not obeying a *subpœna duces tecum* commanding them to produce papers which had been presented to the grand jury of a Circuit Court of the United States, and which were held to be used as evidence on the trial of the indictment found by the grand jury, a Circuit Court may discharge them by writ of *habeas corpus*. It was held in this case that the

papers required by the State court were proper evidence in a pending prosecution before the Circuit Court; that the court had a right to retain them until they had been thus used; that no other court of concurrent jurisdiction could, without its permission, take them from its custody; that its officers could not be required to produce such papers before the grand jury of a State court; and that officers of a court of the United States, if arrested by a State court for contempt, in refusing to obey such a requirement, may and should be discharged by a Federal writ of *habeas corpus*. The theory of this ruling is that the officers in such circumstances are acting under the authority and protection of Federal law. They cannot commit a contempt against a State court, or an offense against State authority, while simply doing what they are by Federal law required to do.

Such are some of the cases which contain the construction placed by courts upon section 753 of the Revised Statutes of the United States, and the antecedent legislation of Congress which formed the basis of this section.

It would manifestly involve a serious conflict of jurisdictions, if, in ordinary cases of imprisonment under State authority, the Federal writ of *habeas corpus* were deemed concurrent with the State writ, so that a party imprisoned might apply for relief to either a Federal or a State court. Such a use of the writ would be an interference with State rights, wholly unwarranted by the Constitution.

Congress, in bestowing the power on the Federal courts for the relief of persons in jail, has, hence, limited it to persons in custody under the authority of the United States, or, if in custody under State authority, to cases in which the imprisonment is for some act done or omitted in pursuance of a law of the United States, or in which the Constitution, or a law or treaty of the United States, is violated thereby, or in which the law of nations and the rights of a foreign state are involved in such imprisonment, or in which it is necessary to use the prisoner as a witness. All other cases of imprisonment under State authority are beyond the jurisdiction of the Federal courts. The power of these courts on this subject is purely statutory, and is, therefore, confined to the limits fixed by statute.

4. The State Habeas Corpus.—The question whether State courts have jurisdiction, concurrent with the Federal courts, to

inquire by writ of *habeas corpus* into the lawfulness of the imprisonment or detention of persons held or detained under the authority of the United States, or under color thereof, and to pass judgment upon the validity of their commitment or detention, and, if deciding against the validity thereof, to discharge them from such custody or detention, was, for a long series of years, the subject of conflicting decisions, not only in the State courts, but to some extent in the inferior Federal courts. The courts of some of the States, as in Massachusetts, Pennsylvania, and New Jersey, claimed and exercised the power. In other States the courts disclaimed the jurisdiction, and declined to exercise it.

It would require a volume to give the full history of the judicial discussion of this subject. Mr. Hurd, in his "Habeas Corpus," 2d ed. pp. 154–198, states the leading cases on both sides.

(1.) *The Case of Booth.*—The first consideration of this question by the Supreme Court of the United States was in 1858, in the cases of *Ableman* v. *Booth*, and *The United States* v. *Booth*, 21 How. 506. Both of these cases were considered and determined at the same time, since both involved essentially the same matter. The facts in these cases are the following:

Booth was charged before a United States Commissioner with aiding in the escape of a fugitive slave from the deputy marshal who had him in custody under the Act of September 18th, 1850. (9 U. S. Stat. at Large, 462.) The law made the act a crime against the United States, and provided for its punishment. The Commissioner, upon the preliminary inquiry, being satisfied that the offense charged had been committed, held Booth to answer before the District Court of the United States for the district of Wisconsin, and finally committed him to the custody of the marshal of the district, to be delivered to the keeper of the jail, and there held until he should be discharged in due course of law.

Booth, the next day after his commitment to prison, applied to one of the judges of the Supreme Court of Wisconsin for a writ of *habeas corpus*. The writ was issued, and the marshal made due return thereto, stating under what authority he held the prisoner. The judge, after hearing the case, decided that the custody was illegal, and ordered the prisoner's discharge, which was accordingly done. The marshal, after this decision, carried the case by a proper proceeding to the Supreme Court of the State; and this court af-

firmed the order of one of its judges discharging Booth. The marshal, whose name was Ableman, then sued out a writ of error, returnable to the Supreme Court of the United States, thus bringing the case before this court for a review of the judgment rendered by the Supreme Court of Wisconsin. Chief Justice Taney, in stating the opinion of the court, said with reference to these facts:

"A judge of the Supreme Court of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a Commissioner of the United States, and to discharge a prisoner who had been committed by the Commissioner for an offense against the laws of this Government, and this exercise of power was afterwards sanctioned and affirmed by the Supreme Court of the State."

Booth, after his discharge by the State judge, was indicted by the grand jury of the District Court of the United States for the offense with which he was charged before the Commissioner, and for which he had been committed to prison. Being tried on this indictment, he was convicted, and by the court sentenced to imprisonment for one month and to pay a fine of one thousand dollars. He then applied to the Supreme Court of Wisconsin for a writ of *habeas corpus;* and the court having granted the writ and heard the case, decided that his imprisonment was illegal and ordered him to be discharged. The Attorney-General of the United States then took the proper steps to bring this action before the Supreme Court of the United States for review; and in regard to this action Chief Justice Taney said:

"The State court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the District Court."

Both of these cases involved essentially the same question, and that question was whether a State court or a State judge could, by writ of *habeas corpus*, discharge a prisoner held in custody under the authority of the United States, as exercised by an officer thereof. If this question were answered in the affirmative, then, as remarked by Chief Justice Taney, "no offense against the laws

of the United States can be punished in their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned." The power, as claimed and exercised by the Supreme Court of Wisconsin, if it exists at all, applies, as justly said by the Chief Justice, to all offenses against the United States, from the highest to the lowest; and, moreover, if such a power belongs to the courts and judges of that State, it would equally belong to the courts and judges of every other State. The result would be that the Government of the United States could not, through its own courts, execute its penal laws against offenders in any case in which a State court should see fit to interfere with the execution by writ of *habeas corpus*.

Having stated the character of these cases, and also the question which they involved, Chief Justice Taney presented a carefully prepared argument, founded upon the Constitution of the United States, in which he showed that although the powers of the General Government and those of the State governments are exercised within the same territorial limits, they are, nevertheless, separate and distinct, and that the sphere of action assigned by the Constitution to the United States "is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line was traced by landmarks and monuments visible to the eye." The doctrine of the court, as stated by its Chief Justice, with reference to these cases, is the following:

"We do not question the authority of a State court or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within the sphere of action prescribed by the Constitution of the United

States, independent of the other. But after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him relief."

The Chief Justice added, that while it is the duty of the marshal to make the proper return, it is also "his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government," and, if necessary, "to call to his aid any force that might be necessary to maintain the authority of law against illegal interference." The order of a State court or judge directing the discharge of the prisoner in such circumstances would be without any legal authority; and it would be the duty of the marshal to disobey it. Any attempt to enforce the order would be "nothing less than lawless violence."

The decision of the Supreme Court in these cases, and the language of Chief Justice Taney in stating the views of the court, led to some conflict of opinion in State courts as to the construction to be given to the decision and the language. It was maintained by some State courts that the ruling of the Supreme Court applied only to those cases in which a prisoner is held in custody under undisputed lawful authority of the United States, and, consequently, that where the lawfulness of the authority was in dispute, a State court might still issue the writ of *habeas corpus*, and pass upon the question whether the prisoner was in custody under the laws of the United States, and in conformity therewith, especially when the custody is not the result of a judicial proceeding. It was held by other State courts that the ruling applied to any case in which the prisoner was in the custody of a Federal officer under claim and color of the authority of the United States, and, hence, that when this fact appeared, it was conclusive as against any jurisdiction by State courts. Conflicting decisions in State courts resulted from this diversity of construction.

(2.) *Tarble's Case.*—The same general question was, in 1871, considered by the Supreme Court of the United States in *Tarble's Case*, 13 Wall. 397. Tarble, being in the custody of a recruiting officer of the United States as an enlisted soldier, was, on writ of *habeas corpus*, discharged by a court commissioner of Wisconsin, who under the laws of that State had the authority to issue writs of *habeas corpus*. The Supreme Court of the State subsequently affirmed the order of the commissioner. (*In re Tarble*, 25 Wis. 390.) This judgment of affirmation was by writ of error carried to the Supreme Court of the United States for review.

Mr. Justice Field, in delivering the opinion of the court, said that the question to be determined is "whether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that Government." Referring to the cases of *Ableman* v. *Booth*, and *The United States* v. *Booth*, *supra*, he further said that "the decision of this court in the two cases which grew out of the arrest of Booth, * * * disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal."

In respect to the theory, adopted by some State courts, that the decision referred to was applicable only "to cases where a prisoner is held under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority," Mr. Justice Field said "that the decision does not admit of any such limitation." Referring to the language used by Chief Justice Taney in the cases which grew out of the arrest of Booth, he further said: "All that is meant by the language used is, that the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States, that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release."

The doctrine established by this case, as given in the syllabus thereof, is the following:

"A State judge has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that Government. If, upon the application for the writ, it appear that the party, alleged to be illegally restrained of his liberty, is held under the authority, or claim and color of the authority, of the United States, by an officer of that Government, the writ should be refused. If this fact do not thus appear, the State judge has the right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. But after he is fully apprised by the return that the party is held by an officer of the United States, under the authority, or claim and color of the authority, of the United States, he can proceed no further."

These decisions of the Supreme Court of the United States settle the question that the jurisdiction of State courts, by writ of *habeas corpus*, does not extend to the discharge of persons held in custody under the authority, or claim and color of the authority, of the United States. The Federal courts are the proper courts to take cognizance of such cases, and afford the necessary relief, and with them State courts have no concurrent jurisdiction. Any interference with such custody by a State court or a State judge is itself an unlawful act, since it is without jurisdiction. State laws cannot make it lawful. The Constitution of the United States, as expounded by the supreme judicial authority of the land, excludes and forbids the interference.

The government of the respective States and that of the United States, though existing and acting within the same territorial limits, and upon the same people, are distinct and separate in their spheres of action. "Neither," as remarked by Mr. Justice Field in *Tarble's Case*, "can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority."

The only cases in which the Federal writ of *habeas corpus* extends into the domain of State authority, are those in which the Constitution, or a law or treaty of the United States, or the law of

nations may be involved in the custody enforced by such authority, or in which it is necessary to bring prisoners into court to testify. In all other cases the State writ of *habeas corpus* is exclusive in this domain. The latter writ in no case extends into the domain of the authority of the United States. Here the Federal writ is exclusive; and, hence, here all relief to persons, alleged to be illegally restrained of their liberty, must be furnished by Federal courts, under such regulations as Congress may see fit to prescribe.

CHAPTER III.

FEDERAL JURISPRUDENCE AND STATE LAWS.

SECTION I.

INTRODUCTORY STATEMENT.

1. Constitutional Provisions.—The Constitution extends the judicial power of the United States to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens or subjects.

The Eleventh Amendment to the Constitution modifies two of these provisions, by declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."

The jurisdiction conferred by these provisions of the original Constitution, subject to the qualification imposed by the Eleventh Amendment, rests upon the character of the parties to the controversies mentioned, and not upon the subject-matter involved therein, with the single exception that, when the controversy is between citizens of the same State, it must relate to lands claimed under grants of different States. The general principle of these provisions is that jurisdiction depends on the parties to the suit, without regard to the nature of the matter in dispute.

2. Legislative Provisions.—Section 629 of the Revised Statutes of the United States gives to the Circuit Courts original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds

the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of a State where it is brought and a citizen of another State.

Section 687 of these Statutes gives to the Supreme Court exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original but not exclusive jurisdiction.

Section 691 of the same Statutes gives, to the Supreme Court of the United States, appellate jurisdiction of all final judgments of any Circuit Court, or of any District Court acting as a Circuit Court, in civil actions brought there by original process, or removed there from courts of the several States, and of all final judgments of any Circuit Court in civil actions removed there from any District Court by appeal or writ of error, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars. Section Third of the Act of February 16th, 1875 (18 U. S. Stat. at Large, 315), so modified this legislation as to provide that the jurisdictional sum should exceed five thousand dollars, exclusive of costs.

Congress, by the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), provided that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens or subjects.

These provisions of law are founded upon, and designed to carry into effect, corresponding provisions in the Constitution itself.

3. The Subject-matter.—Many of the controversies thus provided for, if not all of them, depend, as to the subject-matter involved, not on the Constitution, laws, or treaties of the United States, but on State constitutions or laws. The jurisdiction over the parties depends on the Federal Constitution, or the laws or treaties of the United States, while the subject-matter in dispute

has its legal basis in State authority, and might be determined by State courts.

What then, in such cases, shall be the rule of decision when the trial is had in a Federal court? If, for example, a citizen of a State brings a suit in the proper Circuit Court against a citizen of another State, in which the subject-matter of the controversy depends upon State laws, what is the rule by which the courts shall be governed in deciding the question at issue?

The obvious answer to this question is that the law upon which the matter depends should be the rule. Such would be the fact if the suit, as might have been, had been brought in a State court. Shall a different rule be adopted when a suit is brought in a Federal court, having jurisdiction over it by reason of the parties, but in which the matter in controversy depends on a State law? This would lead to endless confusion, and often, if not always, to a grave perversion of justice. It is manifest on the very face of the case that, if a Circuit Court of the United States decides a controversy between citizens of different States, in which the legal basis of the controversy is solely in State laws, then the court ought to apply and administer these laws. This must have been anticipated and intended by the framers of the Constitution, and by the people in adopting it.

4. Authority of State Laws.—It is well to remember that the constitutions and laws of the several States, not inconsistent with the Constitution, laws, or treaties of the United States, are not superseded or made inoperative by the Federal system. They still exist in all their force, concurrently with that system, as the foundation and rule of rights, as regulations of contracts, as laws for the disposition of property, whether real or personal; and it is the province of State courts to interpret and apply these laws, as fully as it would be if the Federal system did not exist at all. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." These reserved powers, both legislative and judicial, relate to a large body of rights and interests, which may be matters of controversy in State courts, and upon which such courts have full authority to pass judgment. The autonomy of the States is not destroyed by the Constitution.

And, if the Federal courts have jurisdiction over the parties

in cases where the matter in controversy depends on State laws, and where, by reason of the parties, they also have jurisdiction over the subject-matter, then they must have authority to apply and administer the State laws upon which the controversy depends, and in such cases must be bound by these laws. This is an obvious requirement of simple justice. The question cannot be one for the discretion of Federal courts. They stand in the place of State courts, and in the cases contemplated must find their rules of decision in State laws.

SECTION II.

LEGISLATIVE ADOPTION OF STATE LAWS.

The Thirty-fourth Section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), as reproduced in Section 721 of the Revised Statutes of the United States, establishes the following provision on the subject under consideration:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

This, within the limits and subject to the qualifications specified, is an imperative rule for the guidance of Federal courts. It virtually re-enacts State laws as "rules of decision," in these courts, in the cases named. Their jurisdiction does not depend upon these laws, and cannot be defeated by them; yet they are to be governed thereby, so far as the laws are applicable, and not inconsistent with the Constitution, laws, or treaties of the United States.

Mr. Justice Story, in stating the opinion of the court, in *The Steamboat Orleans* v. *Phœbus*, 11 Pet. 175, 184, said: "The local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of the parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States."

The rule, thus provided, originally applied to the laws of the several States that were members of the Union when the rule was

first established; and so far as the common law had been adopted by these States as a part of their local law in civil cases that were not cases of equity or admiralty and maritime jurisdiction, it doubtless applied to the common law as thus adopted, and by the adoption made a part of their local law. The rule is general in its terms, and permanent in its reasons, and includes State laws existing at the time of its original enactment and any such laws that might thereafter be passed by any State of the Union. It is just as applicable to the laws of the several States existing to-day, as it was to those of the several States existing in 1789.

The courts of the United States have had repeated occasions to construe this statute; and from their construction, as well as from the language itself, we gather the following results as to its meaning and application:

1. Trials at Common Law.—The statute declares that the laws referred to shall be rules of decision "in trials at common law." It has no application to any other trials than those embraced in this description. What then are "trials at common law?"

Chief Justice Marshall, referring, in *The United States* v. *Aaron Burr*, 2 Robertson, 481, to the words "trials at common law," said: "It would seem to me too that the technical term 'trials at common law,' used in the section, is not correctly applicable to prosecutions for crimes. I have always conceived them to be, in this section, applied to civil suits as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty." This limits the phrase to trials of a civil nature in which simply legal rights form the issue to be determined.

In *The United States* v. *Reid*, 12 How. 361, it was held that the thirty-fourth section of the Judiciary Act "applies only to the trial of civil actions at common law." Chief Justice Taney said in this case:

"The language of this section cannot, upon any fair construction, be extended beyond civil causes at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that Congress had the power

to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the States. But it could not be supposed, without very plain words to show it, that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another."

Judge Ingersoll, in *Segee* v. *Thomas*, 3 Blatch. 11, 18, said: "This section was intended to furnish a rule to guide the courts of the United States in the formation of their judgments, in trials or litigations in court, in cases at common law. To enable them to form a judgment in such cases, the laws of the several States are to be regarded as rules of decision, or rules of evidence. But the section does not apply to cases in equity, or to criminal cases."

By the phrase "trials at common law," as intended in the statute, we must then understand civil suits or trials in distinction from criminal trials, and also from equity and admiralty suits or trials. The reference is exclusively to this class of trials; and the statute, consequently, furnishes no rule in respect to trials of the other classes of cases. (*Blanchard* v. *Sprague*, 1 Cliff. 288; and *The United States* v. *Mundell*, 1 Hughes, 415.)

2. Limitations in the Statute.—The statute contains limitations or exceptions to its application, even in "trials at common law." If, in respect to these trials, "the Constitution, treaties, or statutes of the United States otherwise require or provide," then, so far as this is the fact, State laws cease to be rules of decision in the Federal courts. To such cases the statute does not apply.

If the constitution or law of a State be inconsistent with the Constitution, or a law or treaty of the United States, it can furnish no rule for the guidance of a Federal court; and whether such inconsistency exists or not in a given case would be a question for that court to determine. The Constitution of the United States provides that no State shall pass any law "impairing the obligation of contracts;" and hence a State law exposed to this objection, being for this reason inoperative and void, could have no force or effect in a Federal court. It would be the duty of the court to disregard it altogether. (*Bronson* v. *Kinzie*, 1 How. 311; *The Bank* v. *Dudley*, 2 Pet. 492; *McCracken* v. *Hayward*, 2 How.

608; *Delmas* v. *The Insurance Company*, 14 Wall. 661; and *White* v. *Hart*, 13 Wall. 646.)

So, also, State laws are, in the statute, declared to be rules of decisions only "in cases where they apply." The evident meaning of this language is that the matter in litigation must arise under, and be dependent upon, the laws of a State or States. If this be not a fact, then State laws do not apply to the matter, and cannot be resorted to for the purpose of settling the rights of the parties. No other State laws than those which thus apply are, by the Federal courts, to be regarded as "rules of decision." The test of applicability is the dependence of the matter in controversy upon a State law.

Moreover, the court, having jurisdiction to try the issue, is the tribunal to determine whether, in the case pending before it, a State law applies. This is a question of fact in part as to the nature of the issue, and a question of construction in part as to the import of a law. If the point in litigation relates to a title to land, then the State law must relate to the same subject, in order to be a rule of decision; and of this question the court must judge in each case, applying such laws, and such only, as relate to the matter in hand.

The limitation of the statute does not confine the court exclusively to the laws of the State in which it may be sitting. The statute says that "the laws of the several States" are to be regarded as rules of decision "in cases where they apply." This embraces the laws of *any* State, upon which the rights of the parties, either in whole or in part, may be dependent, whether it is or not the State in which the court happens to sit. It is the province of the court to consider all State laws that apply to the case, and affect the rights of the parties in litigation. If, as may be the fact, the controversy, as to its subject-matter, depends upon the laws of more than one State, then these laws, so far as they are pertinent to the issue, are to be regarded as "rules of decision." There is nothing in the statute that limits its operation to the particular State in which the court may be holding its session.

On this point Mr. Abbott says: "And the Circuit and District Courts are thus called upon to administer, not only the laws of the State in which they may be respectively sitting, but the laws of other States of the Union wherein rights litigated before them depend upon such laws." (Abb. U. S. Pr. vol. 1, p. 75.)

This statute has no application to the laws of the Territories of the United States, since these Territories are not States, and Territorial courts are not courts of the United States in the sense of the statute. (*American Ins. Co.* v. *Canter*, 1 Pet. 607; *Benner* v. *Porter*, 9 How. 235; and *Clinton* v. *Englebrecht*, 13 Wall. 434.)

3. Judicial Notice of State Laws.—The State laws, referred to in the statute, do not, like foreign laws, need to be proved in the Federal courts, as matters of fact. The acts of the legislature of any State are sufficiently authenticated by having the seal of the State annexed thereto. (Rev. Stat. sec. 905.) These acts, though not conferring jurisdiction upon the Federal courts, nevertheless, in many cases, furnish the means of ascertaining and determining the rights of litigant parties; and hence the statute refers to them, as proper subjects for judicial notice, just as other statutes refer to the laws of the United States.

Mr. Justice Story, in *Owings* v. *Hull*, 9 Pet. 607, 625, said:

"The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial power conferred on the General Government, by the Constitution, extends to many cases arising under the laws of the different States. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States by the ordinary methods of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts."

In *Pennington* v. *Gibson*, 16 How. 65, it was held that "the courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and, with respect to them, no averment need be made in pleading, which would not be necessary within the respective States." Chief Justice Taney, in *The Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227, 232, said that "wherever a law of a State is held to be a public one, to be judicially taken notice of by the State courts, it must be regarded in like manner by a court of the United States, when it is required to administer the laws of the State."

4. Rules of Decision.—The laws of a State or States that are applicable to the case before the court, and not excluded by the exception stated in the statute, are declared to be "rules of decision" in the class of trials mentioned.

Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 24, referring to this statute, said: "But it has, we believe, been generally considered by gentlemen of the profession, as furnishing a rule to guide the court in the formation of its judgment, not one for carrying that judgment into execution. It is a rule of decision, and the proceedings after judgment are merely ministerial. It is, too, a rule of decision in trials at common law—a phrase which presents clearly to the mind the idea of litigation in court, and could never occur to a person intending to describe an execution, or proceedings after judgment, or the effect of those proceedings."

The same view was taken in *The Bank of the United States* v. *Halstead*, 10 Wheat. 51, 54. This particular statute, according to this construction, does not make State laws a rule in respect to the practice, process or modes of proceeding in the Federal courts. It relates simply to the judgment or decision to be rendered. In *Beers* v. *Haughton*, 9 Pet. 329, it was held that State laws cannot, *proprio vigore*, affect the process or proceedings of the courts of the United States. To the same effect is the ruling in *Keary* v. *The Farmers' & Mechanics' Bank*, 16 Pet. 89.

The laws of the several States that are to operate as authoritative rules in the Federal courts, relate to a variety of subjects; and among these the following may be mentioned:

(1.) *The Laws of Property.*—The rights of property are largely regulated by local State laws; and it is the province of the Federal courts, having acquired jurisdiction, to administer these laws, so far as they apply, in the cases that come before them.

This is especially true in respect to the possession and conveyance of land titles. Referring to such a question arising under a statute of North Carolina, the court, in *Olcott* v. *Bynum*, 17 Wall. 44, 58, said: "It is one to be determined by the *lex loci rei sitæ*. It is to be considered solely in the light of the statutes and adjudications in North Carolina. This court must hold and administer the law upon the subject as if it were sitting as a local court of that State." Referring to a similar question in *Slaughter* v. *Glenn*, 8 Otto, 242, 244, the court said: "The controversy between the parties is to be decided according to the jurisprudence

of Texas. We must administer the law of the case in all respects as if we were a court sitting there, and reviewing the decree of an inferior court in that locality."

In *Ward* v. *Chamberlain*, 2 Black, 430, it was held that "whenever, by the laws of the State, the judgments or decrees of the State courts are liens on real estate, the judgments and decrees of the courts of the United States sitting in that State are liens under similar circumstances." Such judgments or decrees are a rule of property by the laws of the State, and the rule is to be applied by the Federal courts. (*Clements* v. *Berry*, 11 How. 398, 411; *The United States* v. *Morrison*, 4 Pet. 124; and *Lombard* v. *Bayard*, 1 Wall. Jr. 96.)

Mr. Justice Grier, in *Lombard* v. *Bayard*, *supra*, held that the lien of judgments in the courts of the United States does not result from any direct legislation of Congress on that subject; and that, under the Judiciary Act which ordains that the laws of the several States shall be rules of decision at common law, the courts of the United States have uniformly adopted the principles of State policy and jurisprudence on the subject of the lien of judgments, so far as the same were applicable, treating them as rules affecting real property and its transmission, whether by descent or purchase.

In *Miles* v. *Caldwell*, 2 Wall. 35, it was held that "a State statute, enacting that a judgment in ejectment, provided the action be brought in a form which gives precision to the parties and the land claimed, shall be a bar to any other action between the same parties on the same subject-matter, is a rule of property as well as of practice, and, being conclusive on title in the courts of the State, is conclusive also in those of the Union." The same doctrine was stated in *Blanchard* v. *Brown*, 3 Wall. 245.

In *Brine* v. *The Insurance Company*, 6 Otto, 627, it was held that "the laws of the State in which land is situated control exclusively its descent, alienation, and transfer, and the effect and construction of instruments intended to convey it," and that "all such laws in existence when a contract in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract."

In *Orvis* v. *Powell*, 8 Otto, 176, it was held that "where lands have been mortgaged, and parcels thereof subsequently sold at different times to different purchasers, the order in which such

parcels shall be subjected to the satisfaction of the mortgage is, where the rule is established by a statute or by the decisions of the courts of the State where the lands lie, a rule of property binding on the courts of the United States sitting in that State."

Mr. Justice Thompson, in stating the opinion of the court in *Jackson* v. *Chew*, 12 Wheat. 153, 162, said: "The inquiry is very much narrowed, by applying the rule which has uniformly governed this court, that, where any principle of law establishing a rule of real property has been settled by the State courts, the same rule will be applied by this court that would be applied by the State tribunals." He added: "This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of."

These and numerous other cases proceed upon the general principle that when a rule of property exists and has been acted upon under State authority, especially in respect to real property, that rule will be followed and applied by the Federal courts when sitting in the State. Chief Justice Marshall, referring, in *The Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet. 492, 525, to the thirty-fourth section of the Judiciary Act of 1789, said that "the laws of the States and the occupant law, like others," would be regarded, as a rule of decision in the courts of the United States, independently "of that special enactment."

(2.) *Laws of Evidence.*—In *M'Niel* v. *Holbrook*, 12 Pet. 84, it was held that, "under the thirty-fourth section of the Judiciary Act, the statutes of the several States which prescribe rules of evidence in civil cases, are included." Chief Justice Taney said in this case: "The object of the law of Congress was to make the rules of decisions in the courts of the United States the same with those of the States, taking care to preserve the rights of the United States by the exceptions contained in the same section. Justice to the citizens of the several States required this to be done, and the natural import of the words used in the act of Congress includes the laws in relation to evidence, as well as the laws in relation to property. We think they are both embraced in it."

In *Vance* v. *Campbell*, 1 Black, 427, it was held that "the Federal courts follow the State courts as to rules of evidence, including competency of witnesses, when there is no act of Congress to the contrary, and in Ohio, when plaintiff was offered and was by the law of the State competent as a witness, his rejection

is error, for which the judgment must be reversed." Alluding to the thirty-fourth section of the Judiciary Act, Mr. Justice Nelson said: "This section has been construed to include the rules of evidence prescribed by the laws of the State in all civil cases at common law, not within the exceptions therein mentioned."

Mr. Bump, in his "Federal Procedure," p. 414, cites several cases in illustration of this principle. If, under the laws of a State, a party to a suit is a competent witness in his own behalf; or if State laws provide that a wife shall not testify for or against her husband, nor the husband for or against his wife; or if the laws of a State make the certificate of a register of a land office competent evidence; or if a notary's certificate of protest and notice thereof be competent evidence by State law; or if by State law an indorsement be *prima facie* evidence of the transfer of a promissory note without proof of the handwriting; or if the courts of a State treat a public record of land grants as primary evidence, then, in each of these cases, a Federal court sitting in the same State will follow the same rule as to evidence. (*Ryan* v. *Bindley*, 1 Wall. 66; *Lucas* v. *Brooks*, 18 Wall. 436; *Best* v *Polk*, 18 Wall. 112; *Sims* v. *Hundley*, 6 How. 1; *M'Niel* v. *Holbrook*, 12 Pet. 84; and *Palmer* v. *Low*, 8 Otto, 1.)

This rule, however, is subject to whatever qualification may be imposed by section 858 of the Revised Statutes of the United States, which provides as follows:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

(3.) *Statutes of Limitation.*—The laws of the several States that operate as statutes of limitation, as well as those that directly relate to rights of property, come within the meaning of the statute of Congress. "It is not to be questioned," said the

Supreme Court in *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 466, "that the laws limiting the time of bringing suit constitute a part of the *lex fori* of every country; they are laws for administering justice, one of the most sacred and important of sovereign rights and duties." "It is as little to be questioned," said this court in *Amy* v. *Dubuque*, 8 Otto, 470, "that the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitation of the several States, and give them the same construction and effect which are given by the local tribunals." These statutes, in *Leffingwell* v. *Warren*, 2 Black, 599, 603, were declared to be "a rule of decision under the thirty-fourth section of the Judiciary Act of 1789." (*Green* v. *Neal's Lessee*, 6 Pet. 291; *Harpending* v. *The Dutch Church*, 16 Pet. 455; and *Davie* v. *Briggs*, 7 Otto, 628.)

In *Ross* v. *Duval*, 13 Pet. 45, it was held that "the act of Virginia, passed in 1792, to regulate proceedings on judgments, is substantially an act of limitation, and is one of the laws of the State, to be applied in the courts of the United States, according to the thirty-fourth section of the Judiciary Act, although one of its provisions regulates the issue of executions." In *McElmoyle* v. *Cohen*, 13 Pet. 312, it was held that "the statute of limitations of Georgia may be pleaded in bar of an action in the Circuit Court of the United States for the district of Georgia, on a judgment recovered in South Carolina."

In *Rich* v. *Ricketts*, 7 Blatch. 230, it was held that "a plea setting up the statute of limitations of the State of New York is a good plea in bar to an action for the infringement of letters patent, brought in this court."

(4). *New Trials.*—Section 254 of the Code of Civil Procedure of Colorado provides as follows:

"Whenever judgment shall be rendered against either party under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and, upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case; but neither party shall have but one new trial in any case, as of right, without showing cause. And after such judgment is vacated, the cause shall stand for trial the same as though it had never been tried."

The question came before the Supreme Court, in *The Equator Company* v. *Hall*, 16 Otto, 86, whether a Circuit Court of the United States, sitting in Colorado, is, upon a motion for a new trial, to be governed by this statute of that State. The answer was in the affirmative. Mr. Justice Miller, in stating the opinion of the court, said: "We are of opinion that when an action of ejectment is tried in a Circuit Court of the United States according to the statutory mode of proceeding, that court is governed by the provisions concerning new trials as it is by the other provisions of the State statute. There is no reason why the Federal court should disregard one of the rules by which the State legislature has guarded the transfer of the possession and title to real estate within its jurisdiction."

Reference in this case was made to *Miles* v. *Caldwell*, 2 Wall. 35, in which the court cited a law of Missouri in regard to an action of ejectment, to the following effect: "A judgment, except on nonsuit, in an action authorized by this act, shall be a bar to any other action between the same parties, or those claiming under them, as to the same subject-matter." The court then said: "We hold this enactment to be binding on the Federal courts as well as those of the State. It is a rule of property. It concerns the stability of the titles to land, and it would be highly improper to adopt in the Federal courts a rule tending to increase litigation and unsettle those titles, which is in conflict with the one prescribed by the law-making power of the State."

State laws, then, furnishing the local rule as to rights of property, relating to evidence, or being statutes of limitation, or in the cases specified referring to new trials, are, by the Federal courts, to be regarded as rules of decision in trials at common law, in cases where they apply. These courts administer such laws as if they were sitting as local courts of the State. (*Alcott* v. *Bynum*, 17 Wall. 44; and *Slaughter* v. *Glenn*, 8 Otto, 242.)

5. Construction of State Laws.—The general principle, as to the construction of State constitutions and laws, adopted by the Federal courts, is to accept the construction given to them in the highest State courts, without inquiring into its correctness, provided that such construction does not make them inconsistent with the Constitution, or laws, or treaties of the United States. This principle is founded upon the theory that the judicial depart-

ment of every government is the appropriate agency for construing the constitution and laws of that government. The constitution and laws of a State, for the purpose of affecting the rights of parties, are what the judicial authority of that State declares them to be; and this declaration the Federal courts, as a general rule, accept as conclusive in respect to their meaning.

Mr. Justice Field, in stating the opinion of the court in *Walker* v. *The State Harbor Commissioners*, 17 Wall. 648, said:

"It is not for us to express any opinion as to what would be our construction of the act had the Supreme Court [of the State] never spoken on the subject. In the construction of the statutes of a State, and especially those affecting titles to real property, where no Federal question arises, this court follows the adjudications of the highest court of a State. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness. It becomes a part of the statute, as much so as if incorporated into the body of it; and, in following the statute as thus interpreted, we only apply to a local question the law of the place. As has been often remarked, infinite mischiefs would result if, in construing State statutes affecting titles to real property where no Federal question is involved, a different rule were adopted by the Federal tribunals from that of the State courts."

The rule here stated is sustained by repeated decisions of the Supreme Court of the United States, and is the settled rule on the subject. (*Shelby* v. *Guy*, 11 Wheat. 361, 368; *Jackson* v. *Chew*, 12 Wheat. 153; *Green* v. *Neal's Lessee*, 6 Pet. 291; *M'Keen* v. *Delancy's Lessee*, 5 Cranch, 22 *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Webster* v. *Cooper*, 14 How. 488; and *The City of Richmond* v. *Smith*, 15 Wall. 429.)

It has not infrequently happened, however, that State courts of the last resort have reconsidered and reversed their own construction of State constitutions and laws, and thus given to them an import different from that previously established. The Federal courts in such cases, as a general rule, follow the latest construction of these courts. (*Green* v. *Neal's Lessee*, 6 Pet. 291; *Suydam* v. *Williamson*, 24 How. 427; *Leffingwell* v. *Warren*, 2 Black, 599; and *The United States* v. *Morrison*, 4 Pet. 124.)

The Federal courts, however, will not follow the latest decisions of State courts to the damage of rights acquired under a previously settled construction of State constitutions or laws.

This construction, for the purpose of determining these rights, will be adopted and applied by the courts of the United States, because it was the recognized and accepted law applicable to the case when the rights were acquired.

Chief Justice Taney, in *The Ohio Life Insurance & Trust Co.* v. *Debolt*, 16 How. 416, 431, said:

"And when the constitution of a State, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive, and judicial, I think it must be regarded as the true one. It is true that this court always follows the decision of the State courts in the construction of their own constitutions and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give the instrument a fixed and definite meaning. Contracts with the State authorities were made under it. And upon the question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the State authorities at the time the contract was made."

A similar view was taken in *Rowan* v. *Runnels*, 5 How. 134. The court said in this case that, while it would regard the decisions of State courts upon their own constitutions and laws as conclusive, it would not "give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of the court were lawfully made."

In *Gelpcke* v. *The City of Dubuque*, 1 Wall. 175, it was held that, although it is the practice of the court to follow the latest settled adjudications of the State courts giving construction to the laws and constitutions of their own States, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement, and that it will not follow any adjudication to such an extent as to make a sacrifice of truth, justice, and law. It was also held that the fact that the Supreme Court of Iowa *now* decides that previous decisions of the same court were erroneous, and ought not to have been made, and that the legislature of the State has no such power as former decisions declared that it had, can have no effect upon transactions in the past, however it may affect those in the future.

"The sound and true rule," said Mr. Justice Swayne in this case, quoting the language of Chief Justice Taney, "is that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law."

In *Havemeyer* v. *Iowa County*, 3 Wall. 294, the case of *Gelpcke* v. *The City of Dubuque*, *supra*, was re-affirmed, and the doctrine re-asserted that if a contract, when made, was valid by the constitution and laws of a State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action of the legislature or judiciary can impair its obligation.

Mr. Justice Strong, in stating the opinion of the court in *Olcott* v. *The Supervisors*, 16 Wall. 678, 690, said: "This court has always ruled that if a contract, when made, was valid by the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice."

The doctrine laid down in *Douglas* v. *The County of Pike*, 11 Otto, 677, is the following: 1. That where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the State as they were then construed by her highest court, and that in a case involving these rights the Supreme Court will not be governed by any subsequent decision in conflict with that under which they accrued. 2. That the settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself, and that a change of decision is the same in its effect on pre-existing contracts as a repeal or an amendment by legislative enactment.

Chief Justice Waite in this case said: "The true rule is to give a change in judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

Mr. Justice Bradley, in stating the opinion of the court in *Burgess* v. *Seligman*, 2 Supreme Court Rep. 10, 21, gave an extended

exposition of the views of the court in regard to the decisions of State courts, as furnishing the rule to be followed by the Federal courts. The following is his language upon this point:

"We do not consider ourselves bound to follow the decisions of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court."

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is."

"But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

"But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and

sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

"As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the margin, but it is not deemed necessary to discuss them in detail."

The cases here alluded to are the following: *McKeen* v. *Delancy's Lessee*, 5 Cranch, 12; *Polk's Lessee* v. *Wendell*, 9 Cranch, 98; *Thatcher* v. *Powell*, 6 Wheat. 127; *Preston's Heirs* v. *Bowman*, Id. 581; *Daly* v. *James*, 8 Wheat. 495; *Elmendorf* v. *Taylor*, 10 Wheat. 159–165; *Shelby* v. *Guy*, 11 Wheat. 367; *Jackson* v. *Chew*, 12 Wheat. 167, 168; *Fullerton* v. *The Bank of the United States*, 1 Pet. 614; *Gardner* v. *Collins*, 2 Pet. 85; *The United States* v. *Morrison*, 4 Pet. 136; *Green* v. *Neal's Lessee*, 6 Pet. 295, 300: *Groves* v. *Slaughter*, 15 Pet. 497; *Swift* v. *Tyson*, 16 Pet. 18–20; *Carpenter* v. *The Insurance Co.* Id. 511; *Carroll* v. *Safford*, 3 How. 460; *Lane* v. *Vick*, Id. 476; *Rowan* v. *Runnels*, 5 How. 139; *Smith* v. *Kernochan*, 7 How. 219; *Nesmith* v. *Sheldon*, Id. 818; *Williamson* v. *Berry*, 8 How. 558, 559; *Van Rensselaer* v. *Kearny*, 11 How. 318; *Webster* v. *Cooper*, 14 How. 504; *Ohio Life & Trust Co.* v. *Debolt*, 16 How. 431, 432; *Beauregard* v. *New Orleans*, 18 How. 500–503; *Watson* v. *Tarpley*, Id. 519; *Pease* v. *Peck*, Id. 598, 599; *Morgan* v. *Curtenius*, 20 How. 1; *League* v. *Egery*, 24 How. 266; *Suydam* v. *Williamson*, Id. 433; s. c. 6 Wall. 736; *Leffingwell* v. *Warren*, 2 Black, 603; *Mercer Co.* v. *Hacket*, 1 Wall. 95, 96; *Gelpcke* v. *The City of Dubuque*, Id. 175; *Seybert* v. *Pittsburgh*, Id. 273, 274; *Havemeyer* v. *Iowa City*, 3 Wall. 294, 303; *Thomson* v. *Lee*, Id. 330; *Christy* v. *Pridgeon*, 4 Wall. 203; *Mitchell* v. *Burlington*, Id. 274, 275; *Lee Co.* v. *Rogers*, 7 Wall. 183, 187; *Butz* v. *Muscatine*, 8 Wall. 583; *The City* v. *Lamson*, 9 Wall. 485; *Olcott* v. *The Supervisors*, 16 Wall. 678; *Supervisors* v. *The United States*, 18 Wall. 81, 82; *Boyce* v. *Tabb*, Id. 548; *Township of Pine Grove* v. *Talcott*, 19 Wall. 677; *Elmwood* v. *Marcy*, 92 U. S. 294; *State Railroad Tax Cases*, Id. 617; *Ober* v. *Gallagher*, 93 U. S. 207; *Ottawa* v. *Perkins*, 94 U. S. 260, 267, 268; *Davie* v. *Briggs*, 97 U. S. 637, 638; *Fairfield* v. *The Gallatin Co.* 100 U. S. 47, 55; *Oates* v. *The Bank of Montgomery*, Id. 245; *Douglas* v. *Pike Co.* 101 U. S.

686, 687; *Barret* v. *Holmes*, 102 U. S. 655; *The Town of Thompson* v. *Perrine*, 103 U. S. 816; *the Same Case*, Oct. Term, 1882, 1 Supreme Ct. Rep. 564, 568.

The doctrine of the Supreme Court, as to the construction of State laws, may, in the light of these cases, be summed up in these propositions: 1. That, in respect to the local constitutions and laws of the several States, the Federal courts are to accept the construction given by the highest courts of the respective States. 2. That, where the decisions of State courts are conflicting, the latest decisions, as a general rule, are to be followed. 3. That contracts and transactions between parties creating rights and imposing obligations, under an accepted and settled construction of the constitution or laws of a State by its highest judicial authority, are not invalidated by any subsequent changes of this construction, but are to be carried into effect by the Federal courts according to the construction as it was at the time of such contracts and transactions.

6. General Jurisprudence.—The question has repeatedly come before the Supreme Court, and by that court has been decided, whether the Federal courts are bound to follow the decisions of State courts in construing the law when the subject-matter at issue is not local in its nature, but belongs to the domain of general jurisprudence and commercial law. The doctrine of the court, in answer to this question, will appear in the following cases:

The question before the court in *Swift* v. *Tyson*, 16 Pet. 1, was whether a *bona fide* holder of a bill of exchange who has taken it before its maturity, in payment of a pre-existing debt, without notice of any equities existing between the drawer and acceptor, is affected by such equities. The court decided this question in the negative on the general principles of commercial law in regard to negotiable instruments. Mr. Justice Story, referring to this law, said: "'There is no doubt that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity." He laid this

down as a settled principle of commercial law, and further said that "a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments."

In answer to the argument of the defendant that the contract in this case was to be considered as a New York contract, and, therefore, under the thirty-fourth section of the Judiciary Act of 1789, to be governed by the laws of New York, as expounded by its courts, Mr. Justice Story further said:

"In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the thirty-fourth section limited its application to State laws strictly *local*, that is to say, to the positive statutes of the State, and the construction thereof adopted by local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by commercial law to govern the case. * * * Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed."

The question in this case being one of general commercial law, in application to negotiable instruments, the Supreme Court decided for itself what was the established doctrine of that law in application to such a case, without regard to the doctrine that may have been held by the courts of the State of New York. Their construction was not regarded as necessarily its rule.

In *Carpenter* v. *The Providence Washington Insurance Co.*, 16 Pet. 495, it was held that questions of general commercial law, concerning the construction and legal effect of a contract of insurance, are not local in their character, and that the Supreme Court is not bound by the decisions of the State courts thereon. Mr. Justice Story, in this case, said: "The questions under our

consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. * * * We are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned State courts, we may regret it, but it cannot be permitted to alter our judgment."

In *Watson* v. *Tarpley*, 18 How. 517, it was held that, by the general commercial law, a right of action on a bill of exchange accrues against the indorser on protest and notice of non-acceptance, though payable at a time long subsequent, and that this right cannot be defeated as against the citizen of another State who sues in a court of the United States, by a statute of the State where the indorser resides and is sued. Mr. Justice Daniel, in stating the opinion of the court, said:

"The general commercial law being circumscribed within no limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several States and upon aliens the power or privilege of litigation and enforcing their rights, acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must necessarily follow by regular consequence that any State law or regulation, the effect of which would be to impair the rights thus secured, or to devest the Federal courts of cognizance thereof, in their fullest acceptation under commercial law, must be nugatory and unavailing. The statute of Mississippi, so far as it may be understood to deny, or in any degree to impair the right of a non-resident holder of a bill of exchange, immediately after presentment to and refusal to accept by the drawee, and after protest and notice, to resort forthwith to the courts of the United States by suit upon such bill, must be regarded as wholly without authority and inoperative."

Such a law, according to the doctrine stated in this case, would be no rule of decision in a Federal court; and it would be the duty of the court to disregard it altogether. It would not come within the provision of the thirty-fourth section of the Judiciary Act of 1789.

In *Goodman* v. *Simonds*, 20 How. 343, the general principles in regard to bills of exchange as negotiable instruments, governed

as to accruing rights and liabilities by commercial law, rather than local State statutes, as laid down in *Swift* v. *Tyson*, *supra*, were re-affirmed as the rule to be observed by the Federal courts in suits brought therein.

The same principles were re-stated and applied in *Murray* v. *Gardner*, 2 Wall. 110. In this case it was held that coupon bonds of the ordinary kind, payable to bearer, pass by delivery, and that a purchaser of them in good faith is unaffected by want of title in the vendor, and that the burden of proof, on a question of such faith, lies on the party who assails such possession. This is the doctrine of commercial law, and the Federal courts apply it without reference to State laws or the decisions of State courts.

In *Olcott* v. *The Supervisors*, 16 Wall. 678, 689, Mr. Justice Strong said: "It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the States respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State, which the Federal courts adopt as rules for their own judgments." The case before the court was deemed to be "one of general law," and hence not coming within the meaning of the thirty-fourth section of the Judiciary Act.

It was held, in *The Township of Pine Grove* v. *Talcott*, 19 Wall. 666, that questions relating to bonds issued in a negotiable form, under a legislative act authorizing such issue, involve questions relating to commercial securities, and that whether under the constitution of a State such securities are valid or void belongs to the domain of general jurisprudence. "In this class of cases," said Mr. Justice Swayne, "this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself."

In *Cromwell* v. *The County of Sac*, 6 Otto, 51, the general principles of commercial law were applied to municipal bonds, and such bonds were declared to be subject to the same rules as other negotiable paper. One of these rules is that a *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for the want of power in the maker to issue it, or its circulation is

by law prohibited by reason of the illegality of the consideration. The doctrine of this case is that municipal bonds, payable to bearer, and hence transferable by delivery, are negotiable paper, and, as such, subject, in the hands of innocent holders, to the same general rules of commercial law that apply to other forms of negotiable paper.

Mr. Justice Harlan, in *Oates* v. *The National Bank*, 10 Otto, 239, 246, said: "While the Federal courts must regard the laws of the several States and their construction by the State courts, except when the Constitution, treaties, or statutes of the United States otherwise provide, as rules of decisions in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court. * * * How far the rights of parties here are affected by the rules and doctrines of that law is for the Federal courts to determine upon their own judgment as to what these rules and doctrines are."

These cases, though different in the specific questions that were at issue, settle the general question that the term "laws," as occurring in the statute of Congress, and made binding upon the Federal courts as rules of decision in the cases specified, were not intended to embrace general commercial law, that is alike operative in all the States, and hence not peculiar or limited to any particular State. This law is not by the statute superseded as a guide to the courts of the United States. These courts will consider and apply it upon their own judgment, without regard to the laws of the State in which they may be sitting, or the decisions of the courts thereof. In respect to this law they are not subordinate to, but co-ordinate with, State courts, and, having jurisdiction, exercise their own judgment as to the meaning and requirements of this law.

SECTION III.

SPECIAL SUPPLEMENTARY PROVISIONS.

1. Occupying Claimants of Lands.—Congress, by the Act of June 1st, 1874 (18 U. S. Stat. at Large, 50), entitled "An Act for the benefit of occupying claimants," and designed in certain

cases to give remedies to dispossessed occupants of land, provided as follows:

"That where an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the State or Territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made.".

This provision is evidently supplementary to that contained in the thirty-fourth section of the Judiciary Act of 1789, or section 721 of the Revised Statutes of the United States. It was designed to meet the ends of justice in the class of cases specified.

This class embraces those cases in which occupants, in good faith and under color of title, have made valuable improvements upon lands, but in which the lands, thus occupied and improved, have been granted by the United States to other parties, who by "the proper action" seek to oust these occupants from their possession. Such occupants in this state of facts, though not the rightful owners of the land, are, nevertheless, entitled to all the rights and remedies, whatever they may be, and, upon instituting the proper proceedings, to all such relief, in the Federal courts, as may be given or secured to them by the statutes of the States or Territories in which the lands lie. The fact that the title of the plaintiff, in the action brought for their dispossession, may have been granted by the United States after the improvements were made, does not impair their rights or remedies in the premises.

The design of the provision is to enable such dispossessed occupants to recover a reasonable compensation for the improvements made by them on the lands of which they are thus dispossessed. And, for this purpose, Congress provides that they shall, in the Federal courts, have the rights and remedies afforded to them by the laws of the State or Territory where the lands lie. This in practical effect, for the purpose in question, makes these laws rules of decision, and authorizes the Federal courts to administer them. If such laws provide that dispossessed occupants of lands, for the want of rightful ownership, who have, nevertheless, under color of title and in good faith, made valuable im-

provements thereon, shall be compensated for the same, then the Federal courts, upon the institution of the proper proceedings, must give effect to this provision, just as they would if the laws had been directly enacted by Congress.

2. Common Law of the States.—Section 722 of the Revised Statutes of the United States also contains a special provision which, in the cases specified, directs the District and Circuit Courts to refer to the common law of the States as the rule of decision. The section reads as follows:

"The jurisdiction in civil and criminal matters conferred on the District and Circuit Courts by the provisions of this Title, and of the Title 'CIVIL RIGHTS,' and of the Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

This section applies alike to civil and criminal proceedings, and, in the cases specified and subject to the limitations and qualifications annexed, adopts the common law of the State, in which the District or Circuit Court may be held, as a rule to govern the court "in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." It makes this law a rule of decision, and makes it the duty of the court to administer it.

3. Penal Code of the States.—So, also, section 5391 of the Revised Statutes, relating to offenses committed in forts, dockyards, navy-yards, arsenals, armories, magazines, or other places ceded to the United States, yet within the territorial limits and jurisdiction of a State, provides that, where the offense is not prohibited, or the punishment thereof is not specifically provided for by any law of the United States, the punishment to be in-

flicted is that prescribed by the penal code of the State in which the place is situated, for a like offense committed within the jurisdiction of the State, with the provision that no repeal of the State law shall affect any prosecution for such offense in any court of the United States.

The State law in force, when the Revised Statutes were adopted by Congress, is, in the case specified, to be administered by the Federal courts. That case is one in which the offense is not prohibited, or the punishment thereof not specifically provided for, by any law of the United States. In such a case the law of the State in which the place is situated becomes the law for the court.

SECTION IV.

ADOPTION OF THE PROCEDURE IN STATE COURTS.

The Revised Statutes contain a series of provisions which refer to the procedure and practice of State courts, and adopt such procedure and practice as a general rule for the guidance of the District and Circuit Courts of the United States. The following examples show this fact:

1. Rule of Procedure.—Section 914 provides as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

This section is founded upon the fifth section of the Act of June 1st, 1872 (17 U. S. Stat. at Large, 196), and is almost identical with it in language. A somewhat similar provision was made in section second of the Act of September 29th, 1789 (1 U. S. Stat. at Large, 93).

Courts must necessarily have some method of proceeding, established by themselves, or prescribed by statute, in conformity

with which causes may be brought before them, and their trial conducted in an orderly way. This method being established, whether written or unwritten, the courts apply it, and require counsel and suitors to conform their practice and pleadings to it. It is the law of the court, not as to the question of its jurisdiction, or as to the rights of the parties, but as to the method of exercising jurisdiction in the trial of causes and the determination of the rights involved.

The general intention of Congress, in the fifth section of the Act of June 1st, 1872, reproduced as section 914 of the Revised Statutes, is evident upon the very face of the language. Referring to the first of these sections, Mr. Justice Swayne, in *Nudd* v. *Burrows*, 1 Otto, 426, 441, said:

"The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code-enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete."

In *The Indianapolis, &c., R. R. Co.* v. *Horst*, 3 Otto, 291, 301, Mr. Justice Swayne, referring to the same section, said: "While the act of Congress is to a large extent mandatory, it is also to some extent only directory and advisory." The words "as near as may be," were intended to qualify the mandatory character of the provision, and leave to the Federal courts some degree of discretion in carrying out the general intention of Congress. These words imply that in some cases it would not be practicable, without injustice or great inconvenience, to conform exactly to the entire practice of the courts of a State in which the Federal courts might be sitting. The Federal courts are hence left with discretionary power to determine this question.

"The personal conduct and administration of the judge in the

discharge of his separate functions," said Mr. Justice Swayne in *Nudd* v. *Burrows*, 1 Otto, 426, 442, "is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context."

The causes arising in the Circuit and District Courts of the United States, to which this section applies, are designated as "civil causes, other than equity and admiralty causes." The latter causes, though civil in their nature, are, in express terms, excluded from the application of the act. (*Blease* v. *Garlington*, 2 Otto, 1.)

The section has no reference to criminal causes in the Federal courts, since, by its own terms, it is confined to "civil causes," not including therein such as are of equity and of admiralty and maritime jurisdiction.

2. Attachments.—Section 915 provides as follows:

"In common-law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such Circuit or District Courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held, in relation to attachments and other process: *Provided*, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

The first clause of this section gives the right specified in absolute terms on the basis of State laws existing when the section was adopted. The second clause authorizes the Circuit and District Courts to adopt any State laws relating to the subject that may be subsequently enacted. The proviso qualifies both clauses by the conditions stated.

The causes to which the section is applicable are designated as "common-law causes." This means causes in which legal rights are litigated, in distinction from those that are simply equitable. The whole structure of the section shows that it has no application to criminal causes at common law.

The provision here made applies only where jurisdiction over the defendant has been acquired by a proper service of process

upon him if a resident within the district in which the court is held, or if found there. An attachment cannot be issued for the purpose of acquiring jurisdiction over a person who is a non-resident of the district or who is not found there, and consequently, upon whom no process *in personam* has been served. (*Chittenden* v. *Darden*, 2 Woods, 437; *Nazro* v. *Cragin*, 3 Dill. 474; *Toland* v. *Sprague*, 12 Pet. 300; and *Piquet* v. *Swan*, 5 Mason, 35.)

The jurisdiction of the Federal courts is not enlarged by this provision. Their processes do not operate beyond the territorial limits fixed by law; and hence they have no right to issue attachments against the property of persons who, by reason of non-residence, or by not being found within these limits, have not been served with process *in personam*. They cannot use an attachment as the means of obtaining jurisdiction over a party.

3. Dissolution of Attachments.—Section 933 provides as follows:

"An attachment of property, upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the State where said court is held, such attachment would be dissolved upon like process instituted in the courts of said State: *Provided*, That nothing herein contained shall interfere with any priority of the United States in the payment of debts."

This, subject to the exceptions made and the qualification of the proviso, provides for the dissolution of attachments in conformity with State laws, in similar cases, and upon the happening of like contingencies.

4. Executions.—Section 916 provides as follows:

"The party recovering a judgment in any common-law cause, in a Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment-debtor, as are now provided in like causes by the laws of the State in which the court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be

in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

This provision is founded on the sixth section of the Act of June 1st, 1872 (17 U. S. Stat. at Large, 196), and upon the third section of the Act of May 19th, 1828 (4 U. S. Stat. at Large, 278). It applies to judgments in common-law causes, and gives to the judgment-creditor the same remedies, by execution or otherwise, as are provided in like causes by the laws of the State in which the court is held, and at the same time authorizes the court, from time to time, by general rules, to adopt any future State legislation as to such remedies.

State regulations as to judgment liens, "as to bail, exemptions from arrest, stays, and exemptions of property from executions," were, under the earlier law which was substantially identical with this provision, held to come within its meaning, and hence were to be followed by the Federal courts. (*Beers* v. *Haughton*, 9 Pet. 329; and *Massingill* v. *Downs*, 7 How. 760.)

In *The United States* v. *The Council of Keokuk*, 16 Wall. 514, it was held that, a "*mandamus* being in the Supreme Court of the State the remedy to compel a municipal corporation to levy a tax to pay a judgment of which the creditor has no means of obtaining payment, a party, having a judgment in a Circuit Court, is entitled to the same remedy in that court."

In *New Orleans* v. *Morris*, 3 Woods, 115, it was held that "a judgment-creditor may have the same remedy against a municipal corporation as the State law allows upon similar judgments against private individuals, although the State law does not allow that remedy against municipal corporations."

Mr. Justice Grier, in *Williams* v. *Benedict*, 8 How. 107, 111, said: "The process, both mesne and final, in the District and Circuit Courts of the United States, being conformed to those of the different States in which they have jurisdiction, the lien of judgments on property within the limits of that jurisdiction depends also upon the State law where Congress has not legislated on the subject." If the State law makes the judgment of a State court a lien, then a judgment in a Circuit or District Court becomes a lien upon property within its jurisdictional limits. (*Massingill* v. *Downs*, 7 How. 760.)

The general intention of Congress is to give the same remedy,

whether by execution or otherwise, to a party who has obtained a judgment in a Circuit or District Court, that the laws of the State in which the court is held afford in a like case where the judgment is rendered by a State court, and, in this sense, and for this purpose, to adopt those laws not as rules of judgment, but in order to carry the judgment into effect. And, that the purpose might not fail by a change in State laws, the Circuit and District Courts are authorized, from time to time, by general rules, to adopt any State laws that may be enacted on the subject.

5. Judgments and Decrees—When not Liens.—Section 967 provides as follows:

"Judgments and decrees rendered in a Circuit or District Court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease by law to be liens thereon."

In *Massingill* v. *Downs*, 7 How. 760, it was held that "whether the lien of the judgment is created by the issuing of process or by express statute, the same proceeding which will create a lien in the county where the judgment is entered will create a lien in the Circuit Court to the extent of its jurisdiction." Mr. Justice McLean said in this case that "where the right has attached in the courts of the United States, a State has no power, by legislation or otherwise, to modify it."

Judge Johnson, in *Myers* v. *Tyson*, 13 Blatch. 242, held that, under this section, "the courts of the United States, in the State of New York, are not vested with the discretionary power which the State courts of New York have, under section 282 of the Code of Procedure of New York, to order real property bound by the lien of a jndgment to be exempted from such lien, in certain cases, during the pendency of an appeal from such judgment."

The lien, as provided in the New York Code, is merely suspended, in the discretion of the court, during the appeal, but does not cease. The cessation of the lien, as provided for in section 967 of the Revised Statutes, refers "to a fixed rule in respect to time and manner, and not to a discretionary power vested by statute in a State court."

6. The Judgment Debtor.—Section 988 provides as follows:

"In any State where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."

7. Goods Taken on a Fieri Facias.—Section 993 provides as follows:

"When it is required by the laws of any State that goods taken in execution on a writ of *fieri facias* shall be appraised, before the sale thereof, the appraisers appointed under the authority of the State may appraise the goods taken in execution on a *fieri facias* issued out of any court of the United States, in the same manner as if such writ had issued out of a court of such State. And the marshal, in whose custody such goods may be, shall summon the appraisers, in the same manner as the sheriff is, by the laws of such State, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement. When such appraisers attend they shall be entitled to the like fees as in cases of appraisement under the laws of the State."

This section is a reproduction of the eighth section of the Act of March 2d, 1793. (1 U. S. Stat. at Large, 333.) In regard to the original section, Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 35, said: "The section under consideration does not profess to adopt the appraisement laws of the several States, but proceeds on the idea that they were already adopted, and authorizes the officer to avail himself of the agency of those persons who had been selected by the local tribunals to appraise property in execution."

8. Imprisonment for Debt.—Section 990 provides as follows:

"No person shall be imprisoned for debt in any State, on process issued from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any State, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceed-

ings shall be adopted therein as may be adopted in the courts of such State."

This does not absolutely forbid imprisonment for debt in all cases by process from a Federal court, but requires the court on this subject to follow the laws of the State in which it may be sitting, when they prohibit such imprisonment, and also in all the modifications, conditions, and restrictions which they impose upon imprisonment for debt. In *Low* v. *Durfee*, 5 Fed. Rep. 256, it was held that "the intent of sections 990 and 991 of the Revised Statutes, relating to imprisonment for debt, is that in civil actions for debt the defendant shall be subject to imprisonment and be released therefrom, precisely as he would be under the law of the State."

9. Discharge from Arrest.—Section 991 provides as follows:

"When any person is arrested or imprisoned in any State, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such State. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such State, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the Circuit Court for the district where the defendant is so held."

This section is a compilation of several acts of Congress on this subject, beginning with the second section of the Act of January 6th, 1800. (2 U. S. Stat. at Large, 4.)

In *King* v. *Riddle*, 7 Cranch, 168, it was held that, "under the Act of January 6th, 1800, for the relief of insolvent debtors, the debt is not discharged." The discharge is only of the person, and does not affect the judgment.

10. Privileges of Jail Limits.—Section 992 provides as follows:

"Persons imprisoned on any process issuing from any court of the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like causes on process from the courts of the re-

spective States are entitled to, and under the like regulations and restrictions."

The purpose of Congress in the legislation contained in the above sections, is, in the classes of cases specified, to assimilate the practice of the Federal courts to that established for the courts of the respective States in which the former courts are held. Such assimilation, both classes of courts being held in the same territory and among the same people, is undoubtedly a convenience alike to judges, lawyers, and the people themselves.

PART VI.

FEDERAL JURISPRUDENCE AND THE COMMON LAW.

CHAPTER I.

THE COMMON LAW IN CRIMINAL CASES.

SECTION I.

PRELIMINARY STATEMENT.

1. Criminal Jurisdiction.—The Judiciary Act of 1789 divided the territory of the United States, embraced within the several States, into judicial districts and circuits, and established in each district a District Court, and in each circuit a Circuit Court. To each of these courts the act gave jurisdiction, with certain qualifications specified, "of all crimes and offenses cognizable under the authority of the United States." This jurisdiction, under the same general phraseology, is continued in sections 563 and 629 of the Revised Statutes of the United States.

The Judiciary Act, however, did not, by title or description, specifically designate the crimes and offenses to which the jurisdiction should apply. It simply characterized them as "crimes and offenses cognizable under the authority of the United States."

2. Penal Laws.—Congress, by the Act of April 30th, 1790 (1 U. S. Stat. at Large, 112), entitled "An Act for the punishment of certain crimes against the United States," and by other acts enacted from time to time, has, by express statute, declared that certain crimes and offenses, committed against the United States, shall be cognizable under their authority. These crimes are designated by their titles, or by description, or both, and made punishable as the law provides.

The several parts of this legislation, in force on the 1st of December, 1873, are chiefly found in the nine chapters which compose Title LXX of the Revised Statutes of the United States. These chapters are in fact a penal code, specifying offenses against the United States, and prescribing their punishment.

3. The Question Stated.—The question arose, at a very early period in the history of the Government, whether the criminal jurisdiction of the District and Circuit Courts of the United States, as conferred by the Judiciary Act of 1789, extended to any crimes that were such merely at common law, or was limited to crimes and offenses, in express terms, designated and made punishable by acts of Congress. Can these courts, in the absence of such legislation by Congress, refer to the common law as the means of determining what offenses are cognizable under the authority of the United States, and what punishments shall be inflicted therefor?

This question involved the general question, whether the United States, as such, organized and existing under the powers granted in the Constitution, and limited to the exercise of those powers, had a common law, to be the source or rule of criminal jurisdiction, which, independently of penal legislation by Congress, it was the province of the Federal courts to apply and enforce in the punishment of crime.

4. The Common Law.—The phrase, "common law," was understood to mean the common law of England, including the statutes of Parliament, as it existed at the time of the Revolution, which, after the close of the war, or during that struggle, had been adopted by most if not all of the States, so far as it was applicable to their circumstances.

This "common law" was distinguished from equity jurisprudence, and also from admiralty and maritime jurisdiction. It was in England administered by common-law courts, and had, prior to the Revolution, been administered by similar courts in this country. It was a well understood body of laws, embracing alike civil and criminal matters, made up of long-established legal and judicial usages and parliamentary statutes, which in English history had been the growth of ages, and which the several States, so far

as it was adapted to their situation, had adopted as a part of their local law.

Now, did this law extend to the United States, after the adoption of the Constitution and the organization of the Federal Government under it, so that crimes against the United States, not specifically designated and made punishable by Congress, but such only at common law, were to be regarded as "cognizable under the authority of the United States," and on this basis tried and punished by the Federal courts; or were these courts limited to the express statutes of Congress in the exercise of their criminal jurisdiction? This is the question now to be examined.

SECTION II.

CRIMINAL JURISDICTION IN THE STATES.

Federal criminal jurisdiction within the boundaries of States is exercised by the District and Circuit Courts, and operates in the same territory in which the criminal jurisdiction of State courts also operates, and among the same people. Many of the crimes there committed are simply offenses against State authority; and these crimes are not "cognizable under the authority of the United States." The Federal courts have nothing to do with their trial or punishment. A law of Congress, making them "cognizable under the authority of the United States," would be unconstitutional; and it would be the duty of the courts so to declare.

Are, then, the District and Circuit Courts of the United States, exercising, as they do, their criminal jurisdiction within the boundaries of States, limited to and by the express statutes of Congress in ascertaining *what* crimes come within the scope of this jurisdiction, and what punishments shall be inflicted, assuming the statutes themselves to be constitutional; or may they, in the absence of such penal statutes, refer to the common law in determining whether an alleged offense is a crime against the United States, and, if so, what penalty shall be inflicted?

1. Opinions of Text-Writers. — Mr. St. George Tucker, in 1803, made this question the subject of an elaborate essay, ending with the following conclusion: "That neither the Articles of Confederation and Perpetual Union, nor the present Constitution

of the United States, ever did or do authorize the Federal Government, or any department thereof, to declare the common law or statutes of England or of any other nation to be the law of the land in the United States, generally, as one nation, nor to legislate upon, or exercise jurisdiction in, any case of municipal law, not delegated to the United States by the Constitution." (1 Tuck. Black. vol. 1, Part 1, App. 432.)

This denies alike the existence and possibility of any common law, other than the Constitution and laws of the United States, as a source or rule of criminal jurisdiction by the Federal courts.

Mr. Peter S. Du Ponceau, in his "Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States," published in 1824, rejected the conclusion of Mr. Tucker, and maintained that criminal jurisdiction, being conferred by the Constitution and laws of the United States upon the courts thereof, might be exercised in the trial and punishment of offenses against the United States that were such simply at common law, without any express statute of Congress defining these offenses and fixing their punishment, and that for this purpose the common law, though not a *source* of jurisdiction, might be referred to as the means of exercising it and ascertaining its extent.

The result of his argument on this point Mr. Du Ponceau states in the following propositions: "1. That the common law is the law of the United States in their national capacity, and is recognized as such in many instances by the Constitution of the United States and the statutes made in pursuance of it. 2. That when the Federal courts are sitting in and for the States, they can, it is true, derive no jurisdiction from the common law, because the people of the United States, in framing their Constitution, have thought proper to restrict them within certain limits; but that whenever by the Constitution or the laws made in pursuance of it, jurisdiction is given either over the person or the subject-matter, they are bound to take the common law as their rule of decision whenever other laws, national or local, are not applicable." (P. 101.)

To the question which he proposed in the outset of the discussion, "whether an offense merely at common law is indictable in the courts of the United States," Mr. Du Ponceau's answer was in the affirmative, which was exactly the opposite of the ground taken by Mr. Tucker some twenty years previously. These writers

may be regarded as the representatives of two different and conflicting classes of opinions.

The opinion expressed by Chancellor Kent, at a later period, is the following: "The safe course undoubtedly is to confine the jurisdiction in criminal cases to *statute* offenses duly defined, and to cases within the express jurisdiction given by the Constitution." (Kent's Comm. Lect. xvi.)

2. The case of Gideon Henfield.—The first case in which the question arose for judicial decision, was that of Gideon Henfield, who, being a citizen of the United States, was, in 1793, indicted in the Circuit Court of the United States for the district of Pennsylvania, on the charge of illegally enlisting in a French privateer, and thereby making war upon nations with which the United States had treaties of amity and peace. (Wharton's State Trials, pp. 49–89).

No law of Congress had made the act of Henfield a crime against the United States. Mr. Justice Wilson of the Supreme Court, however, in charging the jury, said to them that the court were unanimously of the opinion that "the acts of hostility committed by Gideon Henfield are an offense against this country, and punishable by its laws." As to the laws under which Henfield was punishable, he referred to the law of nations as a part of the common law, and also to the treaties of the United States, deducing therefrom the criminal character of the acts charged in the indictment, and the right of the Circuit Court to try and punish him therefor, when there was no statutory enactment of Congress making these acts punishable.

The jury finally returned a verdict of "not guilty," and this ended the case.

3. The case of Ravara.—The case of Joseph Ravara, who was a consul from Genoa, came, in 1793, before the Circuit Court of the United States for the district of Pennsylvania, upon an indictment charging him with sending anonymous and threatening letters to Mr. Hammond, the British Minister, to Mr. Holland, a citizen of Philadelphia, and to several other persons, with a view to extort money. (*The United States* v. *Ravara*, 2 Dall. 297, and Wharton's State Trials, pp. 90–92).

A motion was made to quash the indictment, on the ground

that the Supreme Court had original and exclusive jurisdiction in "all cases affecting ambassadors, other public ministers, and consuls." Mr. Justice Wilson, of the Supreme Court, and Judge Peters, of the District Court, were of the opinion that jurisdiction in this case was not exclusive in the Supreme Court, and that it might be concurrently exercised by the Circuit Court, and that since Congress had expressly declared that the Circuit Courts shall have "exclusive cognizance of all crimes and offenses, cognizable under the authority of the United States," the "indictment ought to be sustained." Ravara, being tried, was convicted, and then pardoned, with certain conditions annexed to the pardon.

There was at the time no law of Congress declaring the act of Ravara to be a crime against the United States, and designating its punishment; and hence it was only by resorting to the common law, and assuming the power of the court to administer it, that the indictment could be sustained. This case, therefore, like that of Henfield, goes to sustain the view so ably argued by Mr. Du Ponceau.

4. The case of Williams.—The case of Isaac Williams came, in 1799, before the Circuit Court of the United States for the District of Connecticut, on an indictment charging him with accepting a commission in a French armed vessel, and under the same committing acts of hostility against Great Britian. (Wharton's State Trials, pp. 652–658.)

Williams admitted the acts charged in the indictment, but claimed to have expatriated himself from the United States, and to have become a citizen of the French Republic.

Chief Justice Ellsworth, of the Supreme Court of the United States, denied the right of expatriation as claimed by Williams, and regarded the facts which he offered to prove in his defense as "totally irrelevant." The jury found him guilty, and the court sentenced him to pay a fine of one thousand dollars, and to be imprisoned for four months. This conviction and sentence were had under the common law, in regard to which the Chief Justice said: "The common law of this country remains the same as it was before the Revolution."

This remark was understood to mean, as it doubtless was intended to mean, that the United States had a common law to

which resort, in the absence of statutory provisions, might be had for the punishment of offenses against the United States.

5. The United States v. Worrall.—This case came, in 1798, before the Circuit Court of the United States for the district of Pennsylvania. (2 Dall. 384, and Wharton's State Trials, pp. 189–199.)

Worrall was, in the indictment, charged with an attempt to bribe the United States Commissioner of the Revenue, and was found guilty on both counts. Mr. Dallas, who had declined to speak on the facts before the jury, then made a motion in arrest of judgment, on the ground that the Circuit Court had no legal cognizance of the crime charged in the indictment. The reason assigned was that neither the Constitution nor any law of Congress made an attempt to bribe the Commissioner of the Revenue an offense against the United States. As to the ground that bribery "is an offense at common law, and that the common law is the law of the United States," he remarked: "The nature of our Federal compact will not, however, tolerate this doctrine."

Mr. Rawle, the District Attorney, admitted that the indictment was "solely at common law," and hence rested on no express statute of Congress, making the acts charged a crime.

Mr. Justice Chase, of the Supreme Court of the United States, said, in view of this admission, that the question is "whether the courts of the United States can punish a man for any act, before it is declared by a law of the United States to be criminal." In answer to this question he further said:

"Now, it appears to my mind to be as essential that Congress should define the offenses to be tried, and apportion the punishments to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction. It is attempted, however, to supply the silence of the Constitution and statutes of the Union, by resorting to the common law for a definition and punishment of the offense which has been committed. But, in my opinion, the United States, as a Federal Government, have no common law; and, consequently, no indictment can be maintained in their courts for offenses merely at common law. If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and yet it is impossible to trace when or how the system was adopted or introduced."

"The United States must possess the common law themselves

before they can communicate it to their judicial agents. Now, the United States did not bring it with them from England; the Constitution does not create it; and no act of Congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the States; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?"

"Upon the whole, it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common law authority, relating to crimes and punishments, has not been conferred upon the Government of the United States, which is a government in other respects also of limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say whether the offense is at this time cognizable in a State court; but, certainly, Congress might have provided, by law, for the present case, as they have provided for other cases of a similar nature; and yet if Congress had ever declared and defined the offense, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject."

This opinion was in direct antagonism to the view which seems to have been adopted in the cases above referred to. Judge Peters, the district judge, however, dissented from the opinion of Mr. Justice Chase, and took substantially the ground afterward maintained by Mr. Du Ponceau. The case was not certified to the Supreme Court, and hence it did not settle the law on the subject.

6. The United States v. Burr.—Chief Justice Marshall, in *The United States* v. *Aaron Burr*, 2 Robertson, 481—a case which in 1807 came before the Circuit Court of the United States for the district of Virginia—said: "Now, in criminal cases, the laws of the United States constitute the *sole* rule of decision; and no man can be condemned or prosecuted in the Federal courts on a State law. The laws of the several States, therefore, cannot be regarded as rules of decision in trials for offenses against the United States." The phrase "trials at common law," as occurring in the thirty-fourth section of the Judiciary Act of 1789, he did not regard as including prosecutions for crime; and hence this section furnished no rule for the guidance of a Federal court in a criminal case.

The position taken by Chief Justice Marshall in this case was

understood to be in harmony with that previously taken by Mr. Justice Chase in the case of *The United States* v. *Worrall.* If "the laws of the United States," which mean the laws enacted by Congress, "constitute the *sole* rule of decision" in criminal cases, then very plainly the common law, except as it may have been thus enacted, can be no part of that rule.

7. The United States v. Hudson & Goodwin.—This case came before the Supreme Court of the United States in 1812, on a certified division of opinion between the judges of the Circuit Court for the district of Connecticut. (7 Cranch, 32.)

Mr. Justice Johnson, in stating the opinion of the court, said: "The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly, because a decision in a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute."

As to this question the court held that, although the courts of the United States had certain implied powers, as the power to fine and imprison for contempt and to enforce the observance of order, &c., still the exercise of criminal jurisdiction in common law cases is not within their implied powers, and that, before they could exercise criminal jurisdiction, "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." This limits the criminal jurisdiction of Federal courts to statutory offenses, and, of course, excludes therefrom offenses that are simply such at common law, without any act of Congress declaring them to be crimes against the United States, and providing for their punishment.

8. The United States v. Coolidge.—This case came, in 1813, before the Circuit Court of the United States for the district of Massachusetts. (1 Gallison, 488.)

Mr. Justice Story, of the Supreme Court of the United States, said in regard to it: "The simple question is, whether the Circuit Court of the United States has jurisdiction to punish offenses against the United States which have not been previously defined, and specific punishment affixed, by some statute of the United States."

This question Mr. Justice Story answered in the affirmative, and delivered a carefully prepared argument to show the truth of the answer. He admitted that the Federal courts are courts of limited jurisdiction, and that they could exercise no authority, except that "confided to them by the Constitution and laws made in pursuance thereof;" and yet he claimed that "when once an authority is lawfully given, the nature and extent of that authority, and the mode in which it shall be exercised, must be regulated by the rules of the common law." Proceeding from the fact that Congress had given to the Circuit Courts "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States," he insisted that, in the absence of express statutes defining these crimes and providing for their punishment, reference might and should be made to the common law, for the purpose of ascertaining what offenses are thus cognizable, and what punishment shall be inflicted. This is the key-note of his whole argument.

The following is the form in which the conclusion is finally stated: "The result of my opinion is: 1. That the Circuit Court has cognizance of all offenses against the United States. 2. That what those offenses are, depends upon the common law applied to the sovereignty and authorities confided to the United States. 3. That the Circuit Court, having cognizance of all offenses against the United States, may punish them by fine and imprisonment, where no punishment is specially provided by statute."

This case was certified to the Supreme Court of the United States, upon a division of opinion between the judges of the court below. (*The United States* v. *Coolidge*, 1 Wheat. 415.) Mr. Justice Johnson, in stating the opinion of the court, said:

"Upon the question now before the court, a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the Attorney-General has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances, the court would not choose to review their decision in the case of *The United States* v. *Hudson & Goodwin*, 7 Cranch, 32, or draw it in doubt. They will, therefore, certify an opinion to the Circuit Court in conformity with that decision."

The certificate was in favor of the defendant; and this was

equivalent to a rejection and reversal of the position taken by Mr. Justice Story in the court below.

9. The United States v. Bevans.—This case was considered by the Supreme Court of the United States in 1818, upon a certified division of opinion between the judges of the Circuit Court for the district of Massachusetts. (3 Wheat. 336.)

Bevans, who was a marine enlisted in the service of the United States, had, on board of a United States ship of war lying in the harbor of Boston, killed the cook's mate, and was indicted and tried for murder under the eighth section of the Act of April 30th, 1790. (1 U. S. Stat. at Large, 112.)

This section provided that if any person shall commit murder "upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State," he shall, upon conviction, be punished with death. The crime, according to this statutory description, is that of murder, and it is cognizable under the authority of the United States, if committed in any one of the places named, and "out of the jurisdiction of any particular State."

Bevans was charged with the crime of murder, and, hence, so far the indictment corresponded with the statute. The murder, however, was committed in the harbor of Boston, within the jurisdiction of the State of Massachusetts; and hence, as to the *place* of the offense, it did not correspond with the statute. It was not in this respect the offense described; and on this ground the Supreme Court decided that it was not cognizable in the Circuit Court for the district of Massachusetts.

This decision makes no formal reference to the common law as a ground or guide of jurisdiction; yet it clearly implies the theory that the criminal jurisdiction of the Federal courts is limited to statutory offenses, defined and made punishable by acts of Congress. The case of Bevans did not come within the terms of the criminal statute, and hence the Circuit Court had no jurisdiction over it.

It was urged in the argument before the court, that "the murder committed by the prisoner is a case of admiralty and maritime jurisdiction." Chief Justice Marshall said in reply: "Let this be admitted. It proves the power of Congress to legislate in the case, not that it has legislated." The obvious implication of this answer is that cognizance of offenses by the Federal

courts must be exercised with reference to such as have been designated and made punishable by acts of Congress; and this plainly excludes cognizance of offenses simply at common law, in the absence of such statutory designation.

10. The United States v. Wiltberger. — This case was certified to the Supreme Court of the United States from the Circuit Court of the United States for the district of Pennsylvania. (5 Wheat. 76.)

Wiltberger was charged with the crime of manslaughter, committed on board of an American ship in the river Tigris in China, lying at the time near Wampoa, which was thirty-five miles above the mouth of the river. The indictment was based on the twelfth section of the Act of April 30th, 1790 (1 U. S. Stat. at Large, 112), which provided that "if any seaman or other person shall commit manslaughter upon the high seas," he shall, upon conviction, "be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

Chief Justice Marshall, having in this case referred to the words of the statute, said: "Manslaughter is not punishable in the courts of the United States, according to the words which have been cited, unless it be committed on the high seas." He then asked the question whether the place where this manslaughter was committed is to be regarded as a part of the "high seas;" and answering this question in the negative, he expressed the unanimous opinion of the court "that the offense charged in this indictment is not cognizable in the courts of the United States." He also said: "We can conceive of no reason why other crimes, which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this court cannot enlarge the statute." "The power of punishment," he observes, "is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define the crime and ordain its punishment."

It necessarily follows from the view taken in this case, that, where Congress has not specified or defined a crime and ordained its punishment, the common law cannot supply the omission, and thus bring acts, not declared to be criminal by the laws of Congress, into the category of "crimes and offenses cognizable under the authority of the United States." The Federal courts cannot

extend their criminal jurisdiction beyond the statutory provisions of Congress. They must follow the written law and stop where that stops.

11. Pennsylvania v. The Wheeling Bridge Co.—In this case, reported in 13 How. 518, Mr. Justice McLean, in stating the opinion of the court, said: "The Federal courts have no jurisdiction of common law offenses, and there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction." He further said: "An indictment at common law could not be sustained in the Federal courts by the United States, against the bridge as a nuisance, as no such procedure has been authorized by Congress."

These statements clearly involve the doctrine that a crime, not defined and made punishable by Congress, cannot be the subject of indictment and trial in a Federal court.

12. Wheaton v. Peters.—In this case, found in 8 Pet. 591, Mr. Justice McLean, in stating the opinion of the court, said: "It is clear, there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption."

This is a broad and unequivocal denial that the Government of the United States has any common law, other than the Constitution itself and the laws enacted in pursuance thereof, to be the basis or guide in the exercise of criminal jurisdiction. The denial has never been changed by any subsequent declaration of the Supreme Court. If Congress has adopted any provision of the common law, the authority of such provision rests upon the fact of such adoption.

13. Other Cases.—In *The United States* v. *Lancaster*, 2 McLean, 431, the court said: "The Federal Government has no jurisdiction of offenses at common law. Even in civil cases the Federal Government follows the rule of the common law adopted by the States respectively. It can exercise no criminal jurisdiction

which is not given by statute, nor punish any act criminally, except as the statute provides."

In *The United States* v. *Barney*, 5 Blatch. 294, Judge Shipman said: "It is now settled law, universally acted on by those courts [the Federal courts], that they cannot resort to the common law as a source of criminal jurisdiction. However that body of jurisprudence may furnish the Federal courts with rules of procedure, definition and construction, those tribunals have no power to try any offenses, except such as are in some form prohibited by the Constitution or by an act of Congress."

To the same effect was the language of Judge Hughes in *The United States* v. *Taylor*, 1 Hughes, 514. He said in this case: "The offense must be expressly created by law, and must be distinctly charged in the indictment."

These cases, scattered through different periods in the history of the Government, show that, although criminal jurisdiction was, in the outset, claimed for the Federal courts over offenses against the United States that were such merely at common law, it is now well settled that these courts, when exercising their jurisdiction within the boundaries of States, must look to the legislation of Congress, not only for their power to exercise criminal jurisdiction, but also to ascertain what acts, considered as crimes, come within its scope, and also what punishments are to be inflicted, and that these courts are absolutely bound and limited by this legislation.

14. The Thirty-fourth Section of the Judiciary Act.— Congress in this section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), which is continued as section 721 of the Revised Statutes of the United States, and which has been fully considered in a previous chapter, provided that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Mr. Du Ponceau, in his "Dissertation" previously referred to, says in regard to this section: "This statute goes the whole length of my argument, and I cannot consider it otherwise than as declaratory of what the law was before it was enacted." (P. 37.) The mistake of the learned author consists in assuming that the

phrase "trials at common law," as occurring in the statute, includes criminal prosecutions. In *The United States* v. *Aaron Burr*, 2 Robertson, 481, it was held, by Chief Justice Marshall, that this phrase is limited to civil suits at common law; and the same view was taken by Chief Justice Taney in *The United States* v. *Reid*, 12 How. 361. The statute, therefore, has nothing to do with criminal cases, and in these cases does not make the common law or State laws a rule of decision in the Federal courts.

15. Adoption of the Common Law.—Section 722 of the Revised Statutes of the United States, relating to proceedings, whether civil or criminal, for the protection and vindication of civil rights, provides as follows:

"The jurisdiction in civil and criminal matters conferred on the District and Circuit Courts by the provisions of this Title, and of the Title 'CIVIL RIGHTS," and of the Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

The following things should be observed in regard to the import of this statute: 1. All the provisions contained in it, or referred to by it, relate exclusively to the protection and vindication of civil rights. 2. The jurisdiction, whether civil or criminal, conferred on the District and Circuit Courts for this purpose, is to be exercised in conformity with the laws of the United States, so far as these laws are suited to carry this purpose into effect. 3. If, however, such laws, in any case that may arise, are not thus adapted to the purpose, or are found deficient in the remedies which they furnish, whether civil or criminal, then, but not otherwise, the common law, subject to the qualifications named, is to become the rule in the trial and disposition of the cause, and, if it be of a criminal nature, in the infliction of punishment. 4. This

resort to the common law, in the case stated, is by the express authority of Congress, and not because the common law, without this authority, would be the rule in any case. 5. The common law, in criminal cases, is not used to define or ascertain the crimes over which the Federal courts may exercise jurisdiction, since these are defined in the Title "CRIMES;" but it is to be used in the trial and punishment of crime, and that, too, only when the laws of the United States shall not have made adequate provision for this purpose.

This section of the Revised Statutes gives no support to the theory that the Federal courts may in any case resort to the common law for the purpose of ascertaining what crimes are "cognizable under the authority of the United States." It neither embodies nor implies any such theory. It still remains true that the criminal jurisdiction of these courts is limited to such acts as Congress by law has made criminal.

16. Penal State Laws.—Section 5391 of the Revised Statutes of the United States provides as follows:

"If any offense be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."

The chapter of which this section is a part, specifies certain offenses committed "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States." The Constitution gives to Congress the power of "exclusive legislation in all cases whatever" over all places purchased by the Government in any of the States, with the consent of the legislature thereof, "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

Now, in respect to the places thus purchased and thus situated, the above section provides that, if an offense be committed therein, which is not forbidden or made punishable by any law of the

United States, the laws of the State in which the place is situated, now in force, shall be adopted by the Federal court as the rule for its trial and punishment. Congress, having the power of "exclusive legislation" in the case, makes State laws for the purpose in question the laws of the United States, and authorizes the Federal courts to apply them, as if they had been originally enacted by Congress. There is no doubt as to the power of Congress to give this authority; and when the Federal courts act under it, they do so solely by the authority of Congress, and not by that of the common law or of State law.

17. Common Law Terms and Phrases.—There are certain passages in the Constitution, and in the amendments thereto, in which occur several terms and phrases that were unquestionably borrowed from the common law, and were incorporated into this instrument in the general sense in which they were used in that law. Cases in law as distinguished from those in equity, trial of crimes by jury, suits at common law, the rules of the common law, impeachments, presentment or indictment of a grand jury, the writ of *habeas corpus*, &c., are examples of the use of such terms and phrases in the particular connections in which they occur.

It was convenient for the framers of the Constitution to use these terms and phrases, and they did so in their well-known sense; and the people, in adopting the Constitution and its amendments, adopted the terms and phrases, and adopted the sense in each case of such use, without defining that sense. It is hence not only proper, but necessary, to refer to the common law in ascertaining the meaning of these terms and phrases wherever they occur. This law in such cases serves the purposes of a dictionary. By it we ascertain what the framers of the Constitution meant when they employed certain terms and phrases that were in common use in that law, and what the people meant when they ratified the Constitution.

But it does not by any means follow, from this use of a certain class of common law terms and phrases for the purpose of framing the Constitution, that the whole body of this law has been imported in a single lump into the Government of the United States, or that the Federal courts may, in the absence of legislation by Congress, refer to this law in determining what acts are criminal

and "cognizable under the authority of the United States." Had it been the intention to adopt this law as a rule for the guidance of courts, except when the Constitution or laws of Congress otherwise provide, such intention would have been definitely and clearly expressed. It is hardly conceivable that it would have been left to rest on so slender a basis as the use of a few common law terms and phrases.

It is true that some of the principles of the common law, as the writ of *habeas corpus* and trial by jury, are in express terms made constituent parts of the Constitution; but it is not true that the common law, as such, as a body of laws, is in the Constitution made a part of the *law of the land.* So far as the Constitution has adopted a principle or maxim of the common law, that principle or maxim has authority by reason of the adoption, and not because it is a part of the common law, any more than if it were a part of the civil law or of the law of Russia.

Congress, in its legislative action, has also used common law terms and phrases. It has provided for the punishment of murder, manslaughter, rape, and other common law crimes, when committed in certain places, and under certain defined circumstances, designating the offenses by their well-known titles, without a formal statement of their nature, and, by the designation, making them statutory offenses against the United States, and cognizable under the authority thereof. The Federal courts, in the exercise of their criminal jurisdiction, undoubtedly have the right to interpret these undefined titles of crime according to their common law import. Congress, in using the titles without definition or description, adopts this import.

This, however, simply refers to the common law as the means of understanding the words of the statute, and hence the nature of the crime or crimes which it was the intention of Congress to forbid and punish. It bases no jurisdiction on this law, and does not imply that the common law may ever be used to determine what offenses are cognizable under the authority of the United States. The statutes of Congress are the only test as to jurisdiction and as to cognizable crimes.

And this is not the less true because criminal jurisdiction may, in general terms, be given to the Federal courts by one act of Congress, and the crimes to which this jurisdiction is applicable, may be specified in other and different acts. The law which con-

fers the jurisdiction has its limitation in the law or laws which designate the crimes. What crimes are cognizable under the authority conferred, is to be ascertained by those specified in the penal legislation of Congress. Were the Federal courts to depart from this principle in determining the extent of their own jurisdiction, they would at once swing out into a jurisdiction of indefinite and uncertain boundaries.

SECTION III.

THE DISTRICT OF COLUMBIA.

The next field of this inquiry relates to the criminal jurisdiction exercised under the authority of the United States in the District of Columbia.

1. Constitutional Provision.—The Constitution, in article 1, sec. 8, provides that Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular States, become the seat of the Government of the United States."

The Supreme Court of the United States, in *Kendall* v. *The United States*, 12 Pet. 524, 619, said that, in the District of Columbia, which had been ceded to and accepted by the United States, there "is no division of powers between the General and State governments," and that "Congress has the entire control of the District for every purpose of government." This is evident upon the very face of the constitutional provision. All law in that District rests and must rest solely upon the legislative authority of Congress. This authority is here alike supreme and exclusive.

2. Cession and Acceptance.—The legislatures of Maryland and Virginia, soon after the adoption of the Constitution, offered to cede a territory to the United States, then divided between their respective jurisdictions, for the seat of Government.

Congress, by the Act of July 16th, 1790 (1 U. S. Stat. at Large, 130), accepted the offer, and provided that the seat of the Government of the United States shall be transferred to the District designated on the first Monday in December, 18 0, and "that

the operation of the laws of the State within such District shall not be affected by this acceptance, until the time fixed for the removal of the Government thereto, and until Congress shall otherwise by law provide." This, for the time being, continued the operation of these State laws within the District.

The seat of the Government being removed as provided, Congress, by the Act of February 27th, 1801 (2 U. S. Stat. at Large, 103), provided "that the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said State to the United States, and by them accepted for the permanent seat of government, and that the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted as aforesaid."

This act established a Circuit Court in the District of Columbia, and vested in the court and the judges thereof all the powers vested by law in the Circuit Courts and judges of the Circuit Courts of the United States. It provided, among other things, that it should have cognizance of all crimes and offenses committed within the District. It divided the District into two counties—one to be called the County of Washington, and the other the County of Alexandria, the Potomac river being made the boundary line between them. It authorized the appointment of justices of the peace in each of these counties, and gave them power to perform all the duties required of justices of the peace, as individual magistrates, by the laws continued in force in those parts of the District for which they were respectively appointed. The act, in a word, provided for the organization of a local government in the District of Columbia.

3. Retrocession.—Congress, by the Act of July 9th, 1846 (9 U. S. Stat. at Large, 35), ceded back to Virginia that part of the District of Columbia which by that State had been ceded to the United States, upon the condition that the people of the same should give their assent thereto. Such assent was given; and hence only that portion which was ceded by Maryland was left, as forming the District of Columbia.

4. The Revised Statutes.—Congress has, from time to time, legislated for the District of Columbia; and the laws thus estab-

lished, and in force on the 1st of December, 1873, are compiled in "the Revised Statutes of the United States relating to the District of Columbia."

Chapter XXIII of these Statutes establishes a Supreme Court, consisting of a Chief Justice and four associate justices, and provides that this court shall possess the same powers and exercise the same jurisdiction as the Circuit Courts of the United States, and that any one of the justices may hold a criminal court for the trial of all crimes and offenses arising within the District.

Chapter XXXIII establishes a police court, and provides that it shall have original and exclusive jurisdiction of all offenses against the United States committed in the District, not deemed capital or otherwise infamous crimes.

Chapter XXXVI enumerates the crimes and offenses for which, being committed in the District, the parties found guilty may be punished as provided by law. Section 1146 of this chapter declares that "every other felony, misdemeanor, or offense, not provided for by this title, shall be punished as provided by laws in force in the District."

5. The Common Law.—This recital shows that the common law, as a rule of criminal jurisdiction in the District of Columbia, as it was in force in Virginia and Maryland when the territory was ceded to the United States, depends, so far as it has ever been such a rule, upon the legislative action of Congress. Congress adopted and continued in force the laws of these States, including the common law existing therein, until provision should otherwise be made. This adopting act, after the retrocession of the County of Alexandria, applied only to the laws of Maryland, since this county then came under the jurisdiction of Virginia. The common law as adopted in Maryland, both civil and criminal, as it was at the time of the cession, is, therefore, by the express authority of Congress, and not by any inherent authority in the law itself, in force in the District of Columbia, except so far as Congress may have modified or superseded it by specific statutes. It exists there, so far as it exists at all, by the express legislation of Congress, and not because it is a law of the General Government.

Chief Justice Marshall, in 1831, in *Cathcart* v. *Robinson*, 5 Pet. 264, 280, said that the statute of 27 "Elizabeth is in force in this District." Mr. Justice Thompson, in *Kendall* v. *The United*

States, 12 Pet. 524, 614, said that "the common law, as it was in force in Maryland when the cession was made, remained in force in this District."

The courts of the District of Columbia, therefore, possess a common law jurisdiction in respect to crimes and offenses committed therein, not specifically designated and made punishable by express statutes. It seems to have been the intention of Congress to confer this jurisdiction in the declaration, previously quoted, that "every *other* felony, misdemeanor, or offense, not provided for by this title, shall be punished as provided by laws in force in the District."

SECTION IV.

TERRITORIES OF THE UNITED STATES.

The next and last branch of this inquiry relates to the Territories of the United States.

1. Constitutional Provision.—The Constitution, in article 4, sec. 3, provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States." Congress has understood this provision to be a grant of legislative power over the Territories of the United States, no matter when acquired, and has accordingly, at various times, legislated upon this theory. The provision is a grant of power to make "all needful rules and regulations;" and the only way in which Congress can exercise such a power is by the enactment of laws. "Rules and regulations" made by Congress possess the nature and have the effect of laws.

Chief Justice Marshall, in *The Amer. Ins. Co.* v. *Canter*, 1 Pet. 511, 546, said: "In legislating for them [Territories], Congress exercises the combined powers of the General and of a State government."

Chief Justice Waite, in *The National Bank* v. *The County of Yankton*, 11 Otto, 129, 133, said: "All territory within the jurisdiction of the United States, not included in any State, must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying do-

minion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government."

Mr. Justice Bradley in *Snow* v. *The United States*, 18 Wall. 317, said: "The government of the Territories of the United States belongs, primarily, to Congress, and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government. * * * Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States."

Such being the political status of the Territories of the United States, the question then arises whether Congress, in the fundamental law of their organization, has given jurisdiction to their courts over offenses that are such merely at common law, without any legislative designation of these offenses, or of the punishment to be inflicted.

2. The Legislative Power.—The Revised Statutes of the United States provide that "the legislative power in each Territory shall be vested in the governor and a legislative assembly," and that this power "shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." (Secs. 1846, 1851.)

Here is adequate authority for the exercise of local legislative power in respect to the ordinary subjects of legislation. This power undoubtedly extends to the prohibition and punishment of offenses against the peace and good order of society. The phrase "all rightful subjects of legislation," is sufficiently broad to allow and authorize territorial legislatures to enact penal statutes, defining crimes and offenses and providing for their punishment.

To suppose, however, that Congress intended to authorize Territorial legislatures to establish the common law as a rule of criminal jurisprudence, so that courts, in the absence of penal statutes,

might resort to this law in determining what acts are criminal, and what punishment should be inflicted, is to extend the phrase far beyond its natural and obvious meaning. If such had been the intention, the presumption is that the idea would have been expressed in definite language, or rather that Congress itself would have directly made the common law a part of the organic law of every Territory.

3. The Extension of Federal Laws.—The Revised Statutes provide that "the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere in the United States. (Sec. 1891.)

This extends the penal code of the United States to every organized Territory, except where the laws are locally inapplicable. The crimes specified in Title LXX of the Revised Statutes, if committed within a Territory, are, with this exception, to be treated by the courts of the Territory, as offenses against the United States, and punished as prescribed by statute. So also the crimes defined by the Territorial legislature are to be tried and punished according to the law violated by them, if not inconsistent with the Constitution and laws of the United States.

The result is that the criminal law in each Territory is in part that of the United States, directly enacted by Congress, and in part that of the Territory itself, enacted by its legislature under the authority of Congress. This law exists in the form of statutory enactments, defining crime and prescribing penalty. Congress has not only not established any other criminal law for Territories, but has not given any authority to their legislatures to do so.

4. Judicial Power.—The Revised Statutes further provide that the Supreme Court of every Territory shall consist of a Chief Justice and two associate justices; that every Territory shall be divided into three judicial districts, in each of which a District Court shall be held by one of the justices of the Supreme Court; and that "the Supreme Court and the District Courts, respectively, of every Territory shall possess chancery as well as common-law jurisdiction." (Secs. 1864–1868.)

The well-understood meaning of the words "chancery as well as common-law jurisdiction," is that they embrace suits in equity, and also all civil suits and criminal prosecutions at law, in distinction from equity; and this jurisdiction is conferred by Congress upon the Supreme Court and the District Courts of every Territory. It does not, however, follow that the common law is made a source of jurisdiction by these courts in criminal cases, or a rule to regulate its exercise, or that they can take cognizance of crimes that are such simply at common law. The Federal courts, as has been previously shown, have no such cognizance from the common law, although they possess chancery and common-law jurisdiction; and there is no reason for giving to this phraseology a broader import when applied to Territorial courts. The latter courts, like the former, are not courts of general jurisdiction, and hence they are limited in the scope of their powers by the express provisions of law.

The Revised Statutes still further provide that "the judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, Montana, and Wyoming shall be vested in a Supreme Court, District Courts, Probate Courts, and in justices of the peace;" that "the judicial power in Arizona shall be vested in a Supreme Court and such inferior courts as the legislative council may by law prescribe;" that "the jurisdiction of the courts," thus clothed with judicial power, both original and appellate, "shall be limited by law;" and that "each of the District Courts in the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States." (Secs. 1907, 1908, 1866, and 1910.)

Colorado, since the enactment of these provisions, has been admitted into the Union as a State; and hence the provisions now have no application to it.

The original and appellate jurisdiction of Territorial courts, as thus provided for, is to be "limited by law." That is to say, it is to be defined and regulated by express statute, and to be exercised within the limits thus fixed. Such regulation and limitation may be established by the laws of Congress, or by the laws of Territorial legislatures not inconsistent with the Constitution and laws of the United States. If the jurisdiction be criminal, then it must

be such as the law prescribes; and hence the law must first define the crime and provide for its punishment, in order that the jurisdiction may become operative. The courts cannot exceed the law, or deal with crime that is such merely at common law, without any statutory designation of the offense and its punishment. Law furnishes alike the basis and the rule of its action.

This is the settled rule of law in the Circuit and District Courts of the United States; and, in all cases arising under the Constitution and laws of the United States, the District Courts of Territories possess the same jurisdiction as the Circuit and District Courts of the United States in like cases. If the cases be criminal, the jurisdiction of the latter courts furnishes the test and the rule of that of the former.

The conclusion derivable from this examination of the question which has been considered in the several sections of this chapter, may be stated as follows:

1. That crimes and offenses, merely such at common law, are not cognizable in the Circuit and District Courts of the United States, sitting in the several States and there exercising their powers, and that, in order to make any act cognizable by these courts as a crime against the United States, it must by a law of Congress be expressly declared to be a crime, and its punishment designated, with the qualifications provided in sections 722 and 5391 of the Revised Statutes of the United States.

2. That the common law, as it existed in the State of Maryland when the District of Columbia was ceded to the United States, having by the express authority of Congress been continued therein, is a rule of criminal jurisdiction to the courts of that District, except as it may have been modified or superseded by the laws of Congress.

3. That the common law has not been established by Congress in the Territories of the United States, and hence that the courts of these Territories have no jurisdiction to try and punish crimes merely on the basis of the common law, but must in all cases look to the laws of Congress, or to laws enacted by Territorial legislatures, for the crimes which are cognizable under their authority, and for the punishment thereof.

The *lex scripta*, and not the *lex non scripta*, is the established rule of criminal jurisdiction under the authority of the United States. The United States, as such, have no common law for the

ascertainment and punishment of crime. The only exceptions to this remark are furnished by the continuance of the common law of Maryland in the District of Columbia, where it has not been superseded by acts of Congress, and a resort to the common law of the States in the cases provided for in section 722 of the Revised Statutes of the United States. The common law may be referred to as a means of construing the terms used in penal statutes, but not as a source or rule of criminal jurisdiction, with the exceptions above stated.

CHAPTER II.

THE COMMON LAW IN CIVIL CASES.

It was shown in the immediately preceding chapter that the Federal courts have no jurisdiction over offenses, except as the offenses are expressly specified and their punishment provided for by positive law. As a body of laws, the common law in criminal cases has no authority, *proprio vigore*, in these courts. This is now a settled doctrine.

Does the same doctrine hold true in respect to the *civil* jurisprudence of the Federal courts? Is there any common law established in the Government of the United States, as such, either to give jurisdiction to its courts in civil cases, or to operate as an authoritative regulation in the exercise of that jurisdiction?

By the phrase "common law," as used in this question, is meant that body or system of laws known as *the common law of England*, which was brought to this country by our English ancestors, and which the several colonies, when they became independent States, adopted and continued as a part of their local law, so far as it was applicable to their situation. There is no doubt of an unwritten common law in most of the States that compose the Union. Have the United States, considered as a political unit or nation, an unwritten common law that operates as an authoritative rule in the judicial disposal of civil cases? This is the question now to be examined in the following order:

1. Statement of a General Principle.—It is a general principle that no law or system of laws, whether written or unwritten, can be the law of any particular country independently of its own authority in adopting it and making it a law or system of laws. Such adoption is essential to its binding force as a law. If one country gives effect to the law of another country, it does so in virtue of what is known as the comity of nations, and not because the law of the latter country is *ipso facto* binding in and upon the former.

This principle applies to the several States which, in the aggre-

gate, compose the United States. These States are separate sovereignties, having defined territorial boundaries with their respective local governments; and each, except as limited by the Constitution of the United States, which operates alike upon them all, is governed exclusively by its *own* laws, and not by those of another State. Nothing is law in a State, except what the Constitution of the United States make such, or the State itself makes a law. The comity between the States of the Union rests on the same ground as the comity between nations, increased in its force by reason of their territorial contiguity as parts of one and the same nation.

The same principle holds equally true of the United States, considered as a separate and independent nation. There is no law of binding force in and for the United States as a political whole, except what the United States have in some way adopted. The Constitution of the United States, the statutes of Congress enacted in pursuance thereof, and treaties made by the President with the advice and consent of the Senate, are laws by reason of their adoption.

Mr. Justice Bradley, referring, in *The Lottawanna*, 21 Wall. 558, 572, to this general principle, said:

"But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the civil law, which forms the basis of most European laws, but which has the force of law in each State only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union presents an analogous case. It is the basis of all the State laws, but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by the commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have."

The principle here laid down, as one of obvious truth, applies to all systems of law. The common law is a part of the law of those States that have adopted it, and so far as they have adopted it, and because they have adopted it, and for no other reason. If

it be also a part of the law of the United States in reference to civil cases, then it must be such because the United States have adopted it, and can be such no further than it has been thus adopted. The United States certainly did not receive it by inheritance, and must have received it by adoption if at all.

2. The Federal Constitution.—The first question then is whether the Constitution of the United States has established the common law, either in whole or in part. No one claims that this Constitution contains any provision which, in general terms, adopts the common law as a system or body of laws. If there be any adoption of this law, it is in particular clauses of the instrument, and with reference to particular parts of the common law. How far is this a fact, if it be a fact at all? Let us briefly examine the clauses which may be supposed to have a bearing upon this question.

(1.) *Cases in Law and Equity.*—The Constitution extends the judicial power of the United States 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." The common law must be referred to in order to ascertain the meaning of the words "cases in law and equity," as well as the distinction between the two classes of cases. It is well settled that "cases in law" mean such as involve purely legal rights and are triable in common-law courts, and that cases "in equity" mean such as involve equitable rights, and are to be determined according to the principles and usages that belong to equity courts. This distinction existed in England and in this country when the Constitution was adopted; and the Constitution, by the use of these words in their well-known sense, simply adopts and perpetuates the distinction in the system of Federal jurisprudence. (*Parsons* v. *Bedford*, 3 Pet. 433, 447.)

It does not, however, follow that the Constitution has adopted the common law, except for the purpose of this distinction. The cases "in law" to which it refers do not arise under the common law, but under the Constitution, or a law or treaty of the United States. They include criminal cases, as well as those that are civil in their nature; and in respect to the former it is well settled that the common law is neither a source nor a rule of jurisdiction in the Federal courts. And, as to civil cases "in law," the mere

words used do not establish the common law, except for the purposes of interpretation and distinction between these cases and those "in equity."

(2.) *Ambassadorial and Consular Cases.*—Cases affecting ambassadors, other public ministers and consuls are, by the Constitution, placed within the judicial power of the United States. To understand this class of cases there must be a reference to the law of nations as to the rights and immunities of ambassadors and consuls, and not to the common law of England, except as the law of nations may be a part of that law. The law of nations is, by this clause of the Constitution, undoubtedly adopted as a guide to the Federal courts in dealing with such cases, subject to any regulations which Congress may see fit to establish. This, however, is not a general adoption of the common law of England, any more than it is of the civil law prevailing among the nations of Europe.

(3.) *Admiralty Cases.*—So also the judicial power of the United States is, by the Constitution, extended to "all cases of admiralty and maritime jurisdiction." These cases do not arise under the common law at all, and are not governed by the principles of that law. They are not identical with the cases "in law and equity" referred to in the Constitution. They fall under the category of maritime law, and are to be determined according to the principles of that law, whether established in England or elsewhere. (*The American Ins. Co.* v. *Canter*, 1 Pet. 511, 545, 546.)

Prize causes, which are usually considered as falling within the sphere of admiralty jurisdiction, hold, in addition to their maritime character, special relations to the recognized principles of the laws of war, and are to be disposed of by courts in accordance with these principles, subject to any statutory regulations that may be established by Congress.

(4.) *The Writ of Habeas Corpus.*—The Constitution provides that "the privilege of the writ of *habeas corpus* shall not be superseded, unless where in cases of rebellion or invasion the public safety may require it." The writ of *habeas corpus* is a well-known writ of the common law, and existed in this country, as also in England, when the Constitution was adopted. The principles relating to the writ and the purpose of its issue are prin-

ciples of the common law. It is not possible to understand the language of the Constitution without referring to these principles.

This language does not directly and affirmatively establish the writ, but rather assumes its existence, and directly declares that "the privilege" thereof "shall not be superseded," except at the time and for the reason stated, necessarily implying that "the privilege" shall exist at all other times, and that it shall not be withdrawn for any other reason than the one specified. The proper regulations for the exercise of the power intended by the writ of *habeas corpus*, as also the courts that are to exercise the power, are left to the legislative discretion of Congress; yet this great principle of the common law is not only recognized, but in effect re-enacted in the Constitution. Congress has no power to banish it from the jurisprudence of the United States, and no power to change the essential nature of the writ, and no power to suspend "the privilege" thereof or authorize the suspension, except in the "cases" specified and for the reason named.

(5.) *Due Process of Law.*—The Fifth Amendment to the Constitution declares that no person shall "be deprived of life, liberty, or property, without due process of law." The phrase "due process of law," was not invented by the Congress that proposed this amendment. It was already in existence, and in legal use, and had a recognized meaning as a phrase of the common law. It is the province of courts to define the phrase, and thus determine what is and what is not "due process of law;" but the meaning, whatever it is, was made a part of the Constitution of the United States when the Fifth Amendment was ratified. The Fourteenth Amendment establishes the same provision, and with the same meaning, in respect to the State governments. This is unquestionably an adoption of so much of the common law as is involved in "due process of law."

(6.) *Private Property taken for Public Use.*—The Fifth Amendment also provides that "private property" shall not "be taken for public use, without just compensation." The principle, here incorporated into the Constitution, was a well-known principle of the common law of England, and the common law of the American States; and what the amendment does is to adopt it, and make it a part of the fundamental law of the United States, and, as such, an imperative rule for the guidance of Federal courts.

What it forbids, as well as what it permits, is a matter for judicial construction, and is to be determined by a reference to the established meaning attached to the language at the time of the adoption.

(7.) *Trial by Jury.*—The Seventh Amendment to the Constitution provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," and that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The jury here referred to is unquestionably the petit jury of the common law; and, in regard to this jury, the amendment establishes two principles as a part of the jurisprudence of the United States.

One of these principles is that, in civil "suits at common law," brought in any court of the United States, in which "the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Either party may demand such a trial; and, unless both parties waive the right, the trial must be by jury.

The other principle is, that "no fact tried by a jury" in a suit at common law, "shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This assumes that in the common law there are rules for the re-examination of facts tried and determined by a jury; and these rules, whatever they may be, are adopted by the amendment as authoritative regulations for the re-examination of facts that have been tried by a jury, and so far the common law is adopted as a part of the Constitution.

The amendments to the Constitution contain other principles of the common law, relating to freedom of speech and of the press, the right of security against unreasonable searches and seizures, the indictment and trial of criminals, excessive bail and fines, and cruel and unusual punishments. And, in all the cases, whether civil or criminal, in which the Constitution adopts the well-known principles of the common law, that law is, in these respects and by this adoption, to be regarded as a part of "the supreme law of the land." While it is not true that there is in the Constitution any general adoption of the common law, as a whole or a system of laws, it certainly is true that some of the principles of that law are adopted by it; and hence so far, and so far only, by the direct authority of this instrument, is the com-

mon law a part of the law of the United States. It is made such to this extent by the direct and express authority of the Constitution, and not by any authority inhering in itself.

3. Legislation of Congress.—Congress has never by any general provision adopted the common law, even if it be conceded that it has the authority to do so, as a rule of decision in the Federal courts, or as the means of enabling them to exercise their powers. There is much in the legislation of Congress that is analogous to various principles of this law not only, but also to the laws of all civilized countries. This is founded upon the obvious fact that what is expedient and right in one country is, in like circumstances, expedient and right in another. Civilization and general enlightenment thus assimilate the laws of different countries.

It is on this principle that many of the statutory enactments of Congress are substantially re-enactments of corresponding provisions of the common law, not that this law is the authority or reason therefor, but that the enactments themselves, independently of this law altogether, are in accordance with right reason. The laws of the several States which compose this Union are largely similar, not because the laws of one State are of binding authority in another State, but because the wants and habits of the people are essentially the same. Most of the States have for this reason adopted the common law as a part of their local law; yet this law is not a law in any State, except as it may have been adopted by such State. The general presumption, in the absence of evidence to the contrary, that it is part of the law of the several States, is founded on the general presumption of such adoption, and not on any inherent and universal operation of the law.

Congress has had occasion to use the language of the common law in many of its statutes; and in such cases this law must be referred to as the means of construing the language, and thus understanding the statutes. Power is given to the courts of the United States to issue writs of *habeas corpus*, *scire facias*, *ne exeat*, &c., and all other writs not specifically provided for by statute, but which are necessary to the exercise of their jurisdiction and agreeable to the principles and usages of law. The statute giving this power is not self-interpreting, and cannot be understood without a reference to the common law and the uses of such

writs according to the principles of that law. The courts cannot exercise the power given, without constant reference to this law, not for their authority, but as a guide in exercising the power bestowed.

The Supreme Court of the United States is by Congress vested with such original jurisdiction in proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations. (Rev. Stat. sec. 687.) The court must, of course, refer to the law of nations in order to ascertain what privileges and immunities this law accords to the persons named, and thus determine its own jurisdiction in the cases specified.

Congress has authorized the Court of Claims to "punish for contempt in the manner prescribed by the common law," and also, in cases in which judgment is rendered against claimants, to grant new trials "for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial." (Rev. Stat. secs. 1070, 1087.) Both of these provisions, in respect to the matter referred to, make the common law a rule for the Court of Claims, and so far establish that law.

The Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), provides that no Circuit or District Court shall "have cognizance of any suit, founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." Here is a statutory reference to the *lex mercatoria* or the law merchant, which is a part of the common law, and which is indirectly enacted as a rule to test the negotiability of a promissory note. The Federal courts must, in cases that call for it, determine what this law requires, and follow it as a rule for their own guidance.

Mr. Justice Blatchford, in *Coe* v. *The Cayuga Lake Railroad Co.* 19 Blatch. 522, 528, said:

"It cannot be supposed that Congress, in 1875, with the large experience which had been had at that time, in the United States, in bonds, obligations, certificates of indebtedness and promissory notes, under seal and not under seal, of municipal corporations and private corporations, did not understand and recognize, in

making such exception, the distinction between a promissory note negotiable by the law merchant, as an instrument well known to law and to commerce, and other instruments which, though they had come, by statute or general usage or judicial decisions, to be regarded as in a certain sense negotiable, were not promissory notes negotiable by the law merchant."

So also Congress, as we have seen in a previous chapter, makes the laws of the several States, except when the Constitution, or a law or treaty of the United States otherwise provides or requires, rules of decision in trials at common law, in the Federal courts, in cases where they apply. If the case pending before the Federal court arises in a State that has adopted the common law, and if that law as thus adopted is applicable to the case, and is not excluded from it by the Constitution, or a law or treaty of the United States, it will then be the duty of the court to regard that law as a rule of decision and apply it to the case. The statute, in effect, for the purpose in question, and subject to the qualifications made, adopts the common law which the State adopts, and directs the courts of the United States in the cases specified to apply it.

These examples are sufficient to show that while Congress has never adopted the common law as a body of principles or laws, it has, nevertheless, so used its terms and so referred to it that this law must in some cases be consulted in order to understand the statute, and that in other cases it must be applied as a rule of decision in order to carry the statute into effect. This is especially true of the common law as adopted in the several States.

4. Judicial Deliverances.—We come now to a series of cases in which courts, with one exception, of the United States, have expressed opinions bearing on the point under consideration.

(1.) *The United States* v. *Worrall*, 2 *Dall.* 384.—This case, in 1798, came before the Circuit Court of the United States for the District of Pennsylvania. Mr. Justice Chase, of the Supreme Court, took the broad ground that "the United States, as a Federal Government, have no common law." He said:

"The United States must possess the common law themselves before they can communicate it to their judicial agents. Now, the United States did not bring it with them from England; the Constitution does not create it; and no act of Congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or

modified, as it exists in some of the States; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?"

It is true that the case before the court was a criminal one; yet the sweeping language of Mr. Justice Chase goes upon the supposition that the United States, as such, have no common law for any class of cases, whether civil or criminal.

(2.) *Lorman* v. *Clarke*, 2 *McLean*, 568, 572.—This case, in 1841, came before the Circuit Court of the United States for the district of Michigan. The court said:

"But the Federal court has jurisdiction between citizens of different States, as well as in cases arising under the laws of the United States. And when controversies are brought before it which do not arise under the laws of the Union, by what law are they to be determined? The law of the contract is the law of the place where it was made and was to be executed. *There is no unwritten or common law of the Union.* This rule of action is found in the different States, as it may have been adopted and modified by legislation and a course of judicial decisions. The rule of decision then must be found in the local law, written or unwritten. No foreign principle attaches to the Federal court when exercising its powers within a State. It gives effect to the *local* law under which the contract was made, or by virtue of which the right was asserted, and this independently of any act of Congress adopting the modes of proceeding, at common law, of the State courts."

The point to be noted in this case is the declaration of the court that "there is no unwritten or common law of the Union," and that "this rule of action," namely, the common law considered as a rule for the Federal courts, so far as it is such at all, is to be "found in the different States, as it may have been adopted and modified by legislation and a course of judicial decisions." The theory of the court is, that the common law is a rule as found in the local law of the State, whether written or unwritten, and not such in itself independently of being a part of the local State law. The courts of the United States administer it as a State common law, and not as a Federal common law.

(3.) *The United States* v. *The New Bedford Bridge*, 1 *Woodb. & M.* 401, 438.—Mr. Justice Woodbury, in this case, which in 1846 came before the Circuit Court of the United States for the First Circuit, spoke as follows:

"The United States has no unwritten code to give it jurisdiction, though the common law, as before remarked, may be resorted to for analogies and definitions where jurisdiction is conferred."

The common law seems to be here spoken of generally, and not as the local law of any particular State; and, as such, it may be resorted to for the purpose of ascertaining the meaning of common law terms when they occur in the Constitution or in statutes. It may also be referred to for instructive analogies with reference to the case pending before the court, where the jurisdiction is already conferred. But it is not a source of jurisdiction; and hence, for this purpose, the United States have no unwritten code or common law.

(4.) *The United States* v. *Garlinghouse*, 4 *Ben.* 194, 205.—This case, which arose in 1870 before the District Court of the United States for the Northern district of New York, was a suit on a bond in the penal sum of $20,000, executed by Mrs. Garlinghouse as principal and others as sureties, to the United States, stipulating on her part compliance with the provisions and requirements of the warehousing and internal revenue laws of the United States. The suit was brought for alleged violations of the conditions of the bond; and Mrs. Garlinghouse set up in defense her coverture as a married woman, and her consequent incapacity to execute the bond, insisting that the bond was void under the rules of the common law relating to married women.

Judge Hall, in reply to this objection, referred to the fact that the bond was executed in the State of New York, and that by the laws of that State, Mrs. Garlinghouse, though a married woman, was competent to engage in the business of a distiller upon her own account, and for her own benefit, and was also competent to enter into the contract contained in the bond. The bond, as he held, was valid under the *lex loci contractus*. And with reference to the common law, he said:

"It may be proper to remark that the courts of the United States are governed by the rules of the common law, because the common law is in force in the State or Territory where the cause of action arose or is to be enforced, and not because the common law has been adopted by the United States, or has under the laws of the United States any binding force, except as being the law of some State, Territory, or district."

This places the authority of the common law, as a rule of binding force upon the courts of the United States, upon the fact of its previous adoption, not by the United States but by the State in which the cause of action arose, or in which it is to be enforced. The law itself, *proprio vigore*, is not such a rule independently of such adoption, and is, of course, subject to whatever modifications the adopting State may have made. The common law of the State of New York did not disqualify Mrs. Garlinghouse, though a married woman, to execute the bond on which she was sued.

(5.) *The People* v. *Folsom*, 5 *Cal.* 375.—The facts of this case were the following: Twelve days before the ratification of the treaty of Guadalupe Hidalgo, a Mr. Leisdesdorff, a naturalized citizen of Mexico, died seized of certain lands in San Francisco, and Anna M. Sparks, his mother and heir, through whom the defendant Folsom claimed title to the lands, was not at the time of his death a citizen of the United States or of Mexico, but was a subject of Denmark, and never resided in Mexico or the United States.

The questions before the Supreme Court of California were these: 1. Was Anna M. Sparks competent, under the laws as they then existed, to take the property of Leisdesdorff by inheritance? 2. If she was not, has the State of California such an interest as can be maintained? The first of these questions was answered in the affirmative, and this disposed of the second question.

Chief Justice Murray, in stating the opinion of the court, referred to the common law, and in regard to it spoke as follows:

"Now, there is no common law of the United States, as contradistinguished from the individual States; and the courts of the United States, instead of administering the common law or any particular system, conform to the law of the States where they are situated. So that the acquisition of California did not extend over it the common law, which recognizes and sustains the doctrine of escheats, for in that case there would have been a continuance of the same political law. But, in the absence of any law on the subject, the principles of the natural law would prevail, as well as the familiar principle of jurisprudence, that any one may inherit who is not expressly prohibited."

The doctrine here stated is, that the United States, as such, have no common law, and that the common law, so far as it exists

at all in this country, so exists as the common law of the individual States that have adopted it. It is hence an authoritative rule for the Federal courts only as it so exists, when they are called upon to administer State laws of which the common law is a part. The acquisition of California by the United States from Mexico did not establish the common law in that territory, for the simple reason that the United States had no common law to establish.

(6.) *Wheaton* v. *Peters*, 8 *Pet.* 591, 658.—This was a copyright suit, arising in the State of Pennsylvania, and coming before the Supreme Court of the United States in 1834, in which the complainants claimed their right on two distinct grounds, one of which was the common law. In reference to this ground, Mr. Justice McLean, in stating the opinion of the court, said:

"But, if the common law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country? It is clear, there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the State in which the controversy originated. And, in the case under consideration, as the copyright was entered in the clerk's office of the District Court of Pennsylvania, for the first volume of the book in controversy, and it was published in that State, we may inquire whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania."

In answer to the position "that our ancestors, when they emigrated to this country, brought with them the English common law, as a part of their heritage," Mr. Justice McLean further said:

"That this was the case, to a limited extent, is admitted. No one will contend that the common law, as it existed in England, has ever been in force, in all its provisions, in any State in this Union. It was adopted, so far only as its principles were suited to the condition of the colonies; and from this circumstance we see what is common law in one State is not so considered in another. The judicial decisions, the usages and customs of the respective States must determine how far the common law has been introduced and sanctioned in each."

The propositions contained in this deliverance are these: 1. That the United States, as such, have no common law, other than that of the Constitution and laws of the United States. 2. That when a right, on the ground of the common law, is asserted in a Federal court, reference must be had to the common law of the State, if any there exists, in which the controversy originated. 3. That whether there is any common law in such State, and to what extent, affecting the right in question, must be determined by a reference to the judicial decisions, the usages and customs thereof.

(7.) *Pennsylvania v. The Wheeling Bridge Co.*, 13 *How.* 518, 563.—This case was an application to the Supreme Court of the United States by the State of Pennsylvania for an injunction against the Wheeling Bridge Company, chartered by the legislature of Virginia, and authorized by its charter to construct a bridge across the Ohio river. Pennsylvania complained of the bridge as injurious to her public works, and sought relief by injunction.

It was objected, "if not as a matter going to the jurisdiction, as fatal to any further action in the case, that there are no statutory provisions to guide the court, either by the State of Virginia, or by Congress;" that "there is no common law of the Union on which the procedure can be founded; that the common law of Virginia is subject to its legislative action, and that the bridge having been constructed under its authority, it can in no sense be considered a nuisance;" and "that whatever shall be done within the limits of a State, is subject to its laws, written or unwritten, unless it be a violation of the Constitution, or of some act of Congress." Mr. Justice McLean, having thus stated the objection, proceeded to say:

"It is admitted that the Federal courts have no jurisdiction of common law offenses, and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction. And it is admitted that the case, under consideration, is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the district of Virginia."

The jurisdiction of the Supreme Court in this case was asserted, not on the ground of the common law, but on the ground of the chancery powers conferred on the court by the Constitution and

laws of the United States, and on the further ground that there was no plain, adequate and complete remedy to be had at law. The parties were properly before the court, and the case was one for the exercise of chancery jurisdiction, according to the rules of the High Court of Chancery in England, which had been adopted by the courts of the United States.

Referring to *Wheaton* v. *Peters*, *supra*, and quoting the language there used in regard to the common law, Mr. Justice McLean said: "The inquiry in that case, was whether a copyright existed by common law in the State of Pennsylvania." He also referred to *Robinson* v. *Campbell*, 3 Wheat. 212, 222, in which the court said: "The court, therefore, think that, to effectuate the purposes of the legislature, the *remedies* in the courts of the United States are to be, at law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." "The court," as Mr. Justice McLean remarks, in this deliverance, "spoke of the remedy" simply; and the utterance does not controvert the doctrine laid down in *Wheaton* v. *Peters*, *supra*, in which the court was considering an alleged copyright on the basis of the common law.

It is important to observe the distinction between these two cases as here referred to. What the court held in *Robinson* v. *Campbell*, 3 Wheat. 212, was that, in order "to determine whether there is a plain, adequate, and complete remedy at law, so as to prevent a resort to the equitable powers of the courts of the United States, reference must be had to the principles of the common law of England, and not to the laws of the State where the court sits." Mr. Justice Todd, in stating the opinion of the court in this case, said: "In some States in the Union, no court of chancery exists to administer equitable relief. In some of those States, courts of law recognize and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce; in others all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the State practice in all its extent, would at once extinguish, in such States, the exercise of equitable jurisdiction. The acts of Congress have distinguished

between remedies at common law and in equity, yet this construction would confound them."

Now, it was in view of this legislation of Congress and the diversity of practice in the State courts, that the Supreme Court, in *Robinson* v. *Campbell*, *supra*, held that the remedy in the United States courts must be by a suit at common law in which legal rights are considered and legal remedies are administered, or by a suit in equity in which equitable rights are considered and equitable remedies are administered, "according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of those principles," no matter what may be the practice in State courts as to these two classes of remedies, and no matter whether they administer both remedies or only one in the same proceeding. The distinction between the remedy at law and that in equity must, in the Federal courts, be maintained, whether it exists or not in State courts.

This principle as to the remedy in the Federal courts is not, as remarked by Mr. Justice McLean, inconsistent with the doctrine stated in *Wheaton* v. *Peters*, 8 Pet. 658. It does not establish the common law of England in the United States, but simply refers to English common law and English equity, as the means of understanding the distinction between the two remedies—the one at law and the other in equity, and thus giving effect to the acts of Congress on the subject.

(8.) *Kendall* v. *The United States*, 12 Pet. 524.—The question before the Supreme Court in this case was whether the Circuit Court of the District of Columbia, sitting for the county of Washington, which was that part of the District that had been ceded by the State of Maryland to the United States, had jurisdiction to issue a writ of *mandamus* to compel Mr. Kendall, the Postmaster-General of the United States, to perform a ministerial act which the relator, under the law of Congress, had a right to have done. This question was answered in the affirmative.

The ground on which the answer was placed is the following: 1. That the case presented was a proper case for a *mandamus*, according to the principles of the common law. 2. That the common law, as it was in force in the State of Maryland when the District of Columbia was ceded to the United States, was by

an act of Congress continued in force in that part of the District ceded by Maryland, and hence that the writ of *mandamus* as there issued was to be understood according to the common law. 3. That the Circuit Court of the District of Columbia, sitting in the county of Washington which was that part of the District ceded by Maryland, had jurisdiction, under the common law continued in the District and the act of Congress defining the powers of the court, to issue a writ of *mandamus*.

The whole reasoning of the court in this case goes upon the supposition that the common law, by a special act of Congress, was a part of the law of the District of Columbia, as it was not a part of the laws of the United States generally. It became such by being a part of the laws of the States that ceded this District, and by the act of Congress declaring that these laws should continue in force in the territory thus ceded. Mr. Justice Thompson, in stating the opinion of the court, expressly said: "The common law has not been adopted by the United States as a system in the States generally, as has been done in respect to this District." This clearly distinguishes between the District where the United States had adopted the common law, and other parts of the country where there had been no such adoption by the United States.

The inference from this case is that the common law does not operate as a part of the law of the United States generally, as it does in the District of Columbia by reason of a special act of Congress, or as it does as a part of the local law of the States that have adopted it.

(9.) *Cox* v. *The United States*, 6 Pet. 172,—This case arose in the District Court of the United States for the Eastern district of Louisiana. It was a suit on the bond of a navy agent of the United States, of which Nathaniel Cox was one of the sureties.

One of the questions, considered by the Supreme Court, was whether the contract of this bond made by the navy agent and his sureties, and the liability of the parties thereon, were "to be governed by the rules of the civil law which prevails in Louisiana, or by the common law which prevails" in the District of Columbia, where the Government has its seat and locality. The United States claimed that this liability was to be governed by the rules of the common law prevailing in the District of Columbia, because the liability of the navy agent for the non-performance of his duties was at the seat of Government; and this claim the court

sustained, saying: "The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington, and the liability of the parties must be governed by the rules of the common law." The same view was taken in *Duncan* v. *The United States*, 7 Pet. 435.

The reason, in both of these cases, why the common law was held to be a rule to govern the liability of the parties was the fact that this law existed in the District of Columbia where the Government was located, and the contract was to be enforced. This, as a special reason, would lose all its force if the common law were a part of the law of the United States generally, since, upon this supposition, it would be as operative in Louisiana as in the District of Columbia. Louisiana is a part of the United States; and all the laws of the United States, including the common law if it be a part of these laws, that are general in their operation, are as operative there as anywhere else. Indeed, upon this supposition, the acquisition of Louisiana and her admission into the Union established the common law in that State for all Federal purposes.

These nine cases, differing from each other in the particular issue involved in each, all agree in sustaining the general doctrine that the common law, considered as a system or body of laws, is not to be regarded as a part of the laws of the United States, certainly not in the sense in which the Constitution, statutes, and treaties of the United States are regarded as laws. In this sense the United States have no common law. Such is the obvious conclusion from the cases above cited.

This conclusion is, however, modified by another class of cases in which the Federal courts refer to the common law as containing the true rule of rights and liabilities between parties, apply its principles, and in this sense adopt it, in determining questions pending before them, not as the source of jurisdiction, but as an aid and a guide in its exercise. The common law, in many respects, has been thus adopted and followed in the decisions of Federal courts, not in opposition to the written laws of Congress, but in respect to matters in regard to which these laws furnish no rule. It becomes in this way a sort of *judge*-made law, which the Federal courts recognize and apply. The following examples will suffice to illustrate this remark:

(1.) *Gregory* v. *Morris*, 6 *Otto*, 619, 623.—Chief Justice Waite, in stating the opinion of the court in this case, said:

"The lien at common law of the vendor of personal property to secure the payment of purchase-money is lost by the voluntary and unconditional delivery of the property to the purchaser; but this does not prevent the parties from contracting for a lien which, as between themselves, will be good after delivery. So, ordinarily, when the possession of a pledge is relinquished, the rights of the pledgee are gone. In this case, however, Morris was not willing to rely upon the lien which the law gave him as vendor, or upon a mere pledge of the property, but required a special contract on the part of Gregory, securing his rights. This contract created a charge upon the property, not in the nature of a pledge, but of a mortgage. The lien, as between the parties, was not made to depend upon possession, but upon a contract which defined the rights of both Morris and Gregory, and the power of Morris for the enforcement of his security."

Chief Justice Waite, in this case, states a common law principle respecting a vendor's lien on personal property, and assumes that this principle would have been applicable to the case if there had not been a written contract which, as between the parties, superseded it. Morris, who sold a large number of cattle to Gregory, was not willing to rely upon a common law lien, but required a special contract to secure his rights. The rights, as between the parties, depended, not upon possession, but upon a written contract which defined the rights of both parties, and formed the rule of determining the case. The vendor's lien which exists at common law only where there is an actual or constructive possession, "does not prevent the parties from contracting for a lien which, as between themselves, will be good after delivery." This recognizes the vendor's lien as a principle of the common law that in a proper case may be applied by the courts of the United States.

(2.) *Munn* v. *Illinois*, 4 *Otto*, 113.—The question to be determined, in this case, was whether the legislature of Illinois could, under the limitations imposed by the Constitution of the United States, fix by law the maximum charges for the storage of grain in warehouses at Chicago and other places in the State. It was contended, among other things, that such a law was inconsistent with that part of the Fourteenth Amendment to the Constitution which declares that no State shall "deprive any person of life,

liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Now, as to the question whether "statutes regulating the use, or even the price of the use, of private property, necessarily deprived an owner of his property without due process of law," and were therefore forbidden by the Fourteenth Amendment, Chief Justice Waite, in delivering the opinion of the court, referred to "the principles upon which this power of regulation rests," in order to "determine what is within and what without its operative effect." And here he remarks: "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is affected with a public interest it ceases to be *juris privati* only." And to establish this doctrine he refers to several eminent English authorities on the common law, and then proceeds to say: "We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining."

The principle laid down by Lord Chief Justice Hale was that when "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." Private property, under such circumstances, becomes "affected with a public interest and ceases to be *juris privati* only." This was a principle of the common law of England.

Chief Justice Waite, in this case, referred to this principle of English common law, and to the language of its eminent English expounders, for the purpose of showing that the Illinois statutes in question did not deprive any person of property without due process of law, within the meaning of the word "deprive" as used in the Fourteenth Amendment. He used the common law as a means of interpreting the amendment. Moreover, the Supreme Court, in sustaining the regulating statutes of Illinois as to warehouses, adopted, for the purpose of its own decision, the doctrine of the common law relating to "private property clothed with a public right," and, by its own authority, gave effect to that doctrine as a rule of Federal jurisprudence. The deliverance and decision in this case stamped the doctrine with the judicial authority of the Supreme Court.

(3.) *Murray* v. *Lardner*, 2 *Wall.* 110, 118.—The doctrine laid down by the court in this case is the following: 1. That coupon bonds, of the ordinary kind, payable to bearer, pass by delivery. 2. That a purchaser of them, in good faith, is unaffected by want of title in the vendor. 3. That the burden of proof, on a question of such faith, lies on the party who assails the possession.

The court did not absolutely invent these principles *de novo*, as novelties in commercial jurisprudence. Mr. Justice Swayne, in delivering its opinion, starts out with the statement that "the general rule of the common law is that, except by a sale in market overt, no one can give a better title to personal property than he has himself." He immediately follows this statement with another, saying: "The exception from this principle of securities, transferable by delivery, was established at an early period. It is founded upon principles of commercial policy, and is now as firmly fixed as the rule to which it is an exception."

And, for the purpose of establishing the exception to "the general rule of the common law," Mr. Justice Swayne proceeded to quote a series of English authorities which showed that the exception itself was a rule of the common law. The doctrine contained in the exception was adopted and applied to the case before the court, and by Mr. Justice Swayne declared to be the settled law of the court. Neither the Constitution nor Congress had established this doctrine; yet the Supreme Court made it a rule for its own government in cases to which it is applicable, and, as a precedent, for the government of the inferior courts of the United States in similar cases. The doctrine was thus assumed, asserted, and applied as the law of the court, not because it was a doctrine of the common law by which the court was necessarily bound, but because the doctrine itself was right and just. It rested upon sound "principles of commercial policy."

(4.) *Goodman* v. *Simonds*, 20 *How.* 343.—In this case it was held: 1. That the surrender of collateral security and an extension of time on an existing indebtedness is a good consideration for the delivery of new collaterals not overdue. 2. That if a party, intending to accommodate another, signs his name to a blank paper, he authorizes the other to fill up the blank, and is bound by his act in so doing. 3. That a party who acquires such paper for value, in the usual course of business, is not affected by any

equities between the original parties, if taken before its maturity, and without knowledge of these equities.

Mr. Justice Clifford, in delivering the opinion of the court in this case, referred to a series of decisions by which the courts of England had settled certain rules of the common law in application to negotiable paper. The doctrine sustained by these authorities, as well as by American authorities, is that, in respect to bills of exchange and promissory notes, which pass by delivery, "the title and possession are considered as one and inseparable, and, in the absence of any explanation, the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title." This is simply a statement of the common law doctrine with reference to negotiable paper, as adopted and applied by both English and American courts. The courts have, in effect, judicially enacted the doctrine, and made it a rule for the disposal of cases to which it is applicable.

(5.) *Foxcroft* v. *Mallett*, 4 *How.* 353, 379.—In this case it was held that the decision of the highest court of a State, construing a deed by the rules of the common law, is not binding on the Supreme Court. Mr. Justice Woodbury said that, while such a decision would be entitled to high respect, "it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute." This is equivalent to saying that the common law may be resorted to as a guide in the construction of a deed, and that the Supreme Court has the right to construe the law for itself according to its own judgment, independently of the decisions of State courts. Such decisions are not conclusive in matters belonging to the common law.

(6.) *The City of Chicago* v. *Robbins*, 2 Black, 418, 428.—It was held in this case that a municipal corporation is liable for injuries received by an individual by reason of the unsafe condition of the streets of which it has control; that it has a remedy also against the individual whose fault it was that the street was left in that condition; that the owner of the lot on which the injury occurred cannot relieve himself from liability for its dangerous condition by an agreement with the contractor who puts up a building for him; that his obligation to keep his property in a safe condition

for the use of the streets cannot be thus evaded; and that, notwithstanding the adoption of a different rule by the State courts where the trial took place, as it is a question to be determined by the common law, in a matter which has not become a rule of property, the Supreme Court is not bound by the decisions of the State court.

Mr. Justice Davis, in stating the opinion of the court, said: "Where rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the State courts. But where private rights are to be determined by the application of common law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions." That is to say, the court, in such a case, will determine for itself what are the rules of common law, and will apply them to the rights involved according to its own judgment, without regard to the judgment of State courts.

The fact shown by these six cases is that the Federal courts resort to the principles and doctrines of the common law as furnishing a rule to guide their action in civil cases, and that in this sense, and for this purpose, they adopt these principles and judicially apply them, so far as may be necessary. Other examples might be cited to the same effect; yet these are sufficient to establish the fact.

5. The General Result.—The general result of this inquiry may be stated as follows:

(1.) *The Common Law as a System.*—Taking the phrase "common law" in the comprehensive sense, as meaning a body or system of laws existing in the jurisprudence of England, and also in that of the American States, when the Constitution was adopted, it is true that the United States have not, either in the Constitution itself, or by the legislation of Congress, adopted this law as a source or rule of jurisdiction in the judicial disposal of civil cases. There is no clause of the Constitution that contains such an adoption, and equally no statute of Congress to this effect. The United States, in this broad and comprehensive sense, have never adopted the common law.

(2.) *Particular Provisions.*—It is just as true, however, that some of the provisions or principles of the common law have been adopted, either by the Constitution or by the statutes of Congress,

and that so far as such is the fact, this law is, by being thus adopted, a rule of binding authority upon the Federal courts. The writ of *habeas corpus* and other writs provided for by Congress, and also trial by jury, stand upon this basis. They come from the common law, and are enacted either by the Constitution or by acts of Congress, and are parts of the supreme law of the land. The same is true of the principle that no one shall be deprived of life, liberty, or property without due process of law, and the principle that private property shall not be taken for public use without just compensation, and also that *ex post facto* laws shall neither be passed nor executed. Where a principle of the common law is thus stamped with the authority of the Constitution, or that of an act of Congress, as is the fact in some cases, then, of course, the authority is absolute, and must be respected and obeyed by the Federal courts. They have no more discretion in respect to such cases than they have in respect to the Constitution itself or an act of Congress. The common law principle is a part of the written law.

So, also, the Federal courts must regard the common law as of binding authority when, under an express statute of Congress, they are called to administer it as a part of the local law of a State, so far as it has been adopted by that State. The construction of the common law by State courts is another question. The Federal courts are not bound to follow their construction, but have a right to construe the law according to their judgment as to its meaning and application.

(3.) *Judicial Adoption.*—The courts of the United States have never adopted the common law, as a whole, by any general rule of court, and have no power to do so. And yet, in the disposal of civil cases relating to legal rights and their remedies, these courts have, from the commencement of the Government, looked to the common law as a repository of doctrines and principles to which they might refer for the purpose of understanding the meaning of statutes and constitutional provisions, and which, in the absence of statutes directing them or otherwise requiring, they might adopt and apply as containing pertinent and proper rules for their guidance in the exercise of the powers conferred on them by express law, and in determining questions relating to the rights of the parties in the cases pending before them.

Such, as a matter of fact, has been the practice of these courts.

They could not, without it, interpret all parts of the Constitution, which is not an instrument of definitions, but simply of enumeration; and, without it, they could not interpret all the statutes of Congress. Indeed, if the Federal courts were absolutely confined to the provisions of the Constitution and the express laws of Congress, and were not permitted to look anywhere else for any light to guide them, it would be hardly possible for them to conduct an ordinary trial affecting rights of property, and involving the settlement of sundry questions in respect to which purely statutory law is entirely silent.

The very necessities of the case compel these courts to refer to the common law, and judicially adopt its principles, so far as it may be necessary to the proper exercise of their powers. This law is to them in no sense a source of jurisdiction; yet it furnishes them important rules and principles in the conduct of trials and the settlement of rights. And when such rules and principles are not repugnant to the Constitution and laws of the United States, the Federal courts may in their discretion adopt and apply them, and thus give them the effect of law by stamping them with their own authority. This is precisely what they have done.

Take, for example, what is called the law of evidence as applied by these courts. What is this law? Nine-tenths of it is simply *judge*-made law, largely borrowed from the common law. The express statutes of Congress supply but the merest fragment of it. The rest of it is established by courts, and becomes law for them by reason of its general adoption. The various rules of evidence, except as they are matters of express statute, are, therefore, the product of judicial action by both Federal and State courts; and it has been held by the Supreme Court of the United States that, under the thirty-fourth section of the Judiciary Act of 1789, the law of evidence in civil cases at common law, as established in the State in which the Federal courts may be sitting, and applied by its courts, is to be followed and applied by the Federal courts in similar cases, except where the Constitution, laws, or treaties of the United States otherwise provide or require. (*McNiel* v. *Holbrook*, 12 Pet. 84; and *Vance* v. *Campbell*, 1 Black, 427.)

Congress doubtless might legislatively construct a full and detailed treatise upon the law of evidence, which would be binding upon the Federal courts; but it has not done so, and it is not

likely that it ever will do so. And, in the absence of such legislation, this law rests and must rest mainly on judicial action rather than statutory enactment; and this action is largely the adoption and application of the principles of the common law in relation to evidence. The books of text-writers upon the law of evidence are for the most part simply compilations of the doctrines laid down and applied in judicial decisions.

The law of contracts furnishes another illustration to the same effect. But a small part of this law, as applied by courts, exists in the statutory form. The most of it exist in the form of judicial precedents. What is a contract? What is the obligation of a contract? What are the principles relating to and embraced in the *lex loci contractus*, the *lex domicilii*, the *lex loci solutionis*, the *lex fori*, and the *lex loci rei sitæ?* What authority defines these laws, distinguishes between them, and fixes the limits of their application? We look in vain to the statutes of Congress for an answer to these questions, and must look to the decisions of courts, borrowing many of the principles which they adopt from the common law, and making these principles the law of the courts in determining cases to which they apply. A large part of the law of contracts exists in this way and by this agency.

The same is true in relation to promissory notes, bills of exchange, and the various forms of negotiable paper. The statutes of Congress certainly do not contain all the principles of law in regard to negotiable instruments which have been adopted and applied by the courts of the United States, and to which, in the construction of these instruments, and for the purpose of settling rights as growing out of them, these courts have given the effect of law, thus establishing by a series of judicial precedents rules which they continue to apply in parallel cases. These principles are older than the statutes of Congress, and the most of them are older than the Constitution of the United States. They are largely the principles of the common law, and, because in application to the subject-matter they have their foundation in right reason, they are general in their operation, and hence not confined to any specific locality. They commend themselves to the judicial conscience as necessary, just and right, and for this reason they are adopted by that conscience whenever the occasion calls for it.

And thus it comes to pass that courts—the courts of the United

States as well as State courts—judicially establish a large body of laws which are not statutory in their origin, but which rest upon the authority of courts, and might very properly be designated as "American common law," much of which has been borrowed from the common law of England, and made American by its adoption in this country. This American common law is a mass of legal principles which the Federal courts adopt and apply, and by which, in part at least, they determine the rights and liabilities of parties. Its authority is that of judicial precedents. It is, except as sanctioned by the Constitution itself, subject to any change which Congress may see fit to establish, and may be modified or amended by a course of judicial decisions, especially those of the Supreme Court of the United States.

It is true that there is an important sense in which these principles are not laws of the United States, like the provisions of the Constitution, or the express enactments of Congress, and never a source of jurisdiction to the Federal courts. Even a decision of the Supreme Court of the United States is not absolute law except in the particular case which it determines. It is to be remembered, however, that the Federal courts are not in the habit of determining a case one day by the application of a legal principle and the next day reversing that principle and determining a substantially parallel case differently. Such a course would unsettle all law. Principles, settled by a series of judicial decisions, stand as practically the law of courts, and are applied in the determination of new cases as they arise and call for the application, until they are overruled by other and different decisions.

Judge-made law, though not absolutely inflexible or absolutely binding, is, nevertheless, practically law, and as such has a high degree of stability. It is the law of precedents which courts understand and respect, and ordinarily follow. It is the law of legal principles contained in and based upon these precedents and quoted from time to time, and relied upon, as authority for the principles which they involve. Even the Supreme Court of the United States is in the constant habit of quoting its own precedents, and not only so, but those of subordinate courts, including those of State courts. Such precedents are never set up against the written law, whether it be constitutional or statutory; but, in the silence of the written law, or as the means of construing that

law, they are referred to as authority to guide the action of courts.

Mr. St. George Tucker, in an elaborate note published in his edition of Blackstone's Commentaries, examines the question which has been the subject of this chapter. The conclusion to which he comes is stated as follows:

"We may fairly infer from all that has been said, that the common law of England stands precisely upon the same footing in the Federal Government and courts of the United States, *as such*, as the civil and ecclesiastical laws stand upon in England. That is to say, its maxims and rules of proceeding are to be adhered to, whenever the written law is silent, in cases of a similar or analogous nature, the cognizance whereof is by the Constitution vested in the Federal courts. It may govern and direct the course of proceeding in such cases, but cannot give jurisdiction in any case, where jurisdiction is not expressly given by the Constitution."

"The same may be said of the *civil* law, the rules of proceeding in which, whenever the written law is silent, are to be observed in cases of equity and of admiralty and maritime jurisdiction. In short, as the matters, cognizable in the Federal courts, belong, as we have before shown in reviewing the powers of the judiciary department, partly to the law of nations, partly to the common law of England, partly to the civil law, partly to the maritime law, comprehending the laws of Oleron and Rhodes, and partly to the general law and custom of merchants, and partly to the municipal laws of any foreign nation, or of any State in the Union, where the cause of action may happen to arise, or where the suit may be instituted, so the law of nations, the common law of England, the civil law, the law maritime, the law merchant, or the *lex loci*, or law of the foreign nation or State, in which the cause of action may arise, or shall be decided, must in their turn be resorted to as the rule of decision, according to the nature and circumstances of each case, respectively. So that each of these laws may be regarded, so far as they apply to such cases, respectively, as the law of the land."

"But to infer from hence that the common law of England is the general law of the United States, is to the full as absurd as to suppose that the laws of Russia or Germany are the general law of the land, because, in a controversy respecting a contract made in either of those empires, it might be necessary to refer to the laws of either of them, to decide the question between the litigant parties. Nor can I find any more reason for admitting the penal code of England to be in force in the United States, except so far as the States, respectively, may have adopted it within their several jurisdictions, than for admitting that of the Roman empire,

or of Russia, or Spain, or any other nation whatever." (Tuck. Blackstone, vol. I, Part 1, App. 429, 430.)

The doctrine set forth in the above statement is that the courts of the United States have no jurisdiction, civil or criminal, except as they derive it from the Constitution and laws of the United States. Being, however, from this source, clothed with jurisdiction, they may refer to the common law, the civil law, maritime law, or the law of nations, and, for judicial purposes, adopt and give effect to any one of these laws, when this is necessary in order justly to determine the rights of the parties litigating before them. Whether they shall do so or not depends upon the nature and circumstances of each particular case. If the case be one of contract, then the law regulating the contract will be adopted and applied in disposing of it.

Judge Cooley, in his "Constitutional Limitations," 4th ed. p. 35, says in a note: "In some of the States formed out of the territory acquired by the United States from foreign countries, traces will be found of the laws existing before the change of government. Louisiana has a code peculiar to itself, based on the civil law. Much of Mexican law, and especially as regards lands and land titles, is retained in the systems of Texas and California. * * * In the mining States and Territories a peculiar species of common law, relating to mining rights and titles, has sprung up, having its origin among the miners, but recognized and enforced by the courts."

The civil law in Louisiana, Mexican law in Texas and California, and mining law originating among the miners in mining districts, if a rule under which rights were acquired or liabilities incurred, would, like the common law in other parts of the United States, furnish a rule to guide the action of the Federal courts in cases to which the rule is applicable, and to which it must be applied in order to do justice between parties. If the common law is more frequently referred to and used for this purpose than any other law that is not one of express enactment, the reason must be found in the fact of its wide diffusion throughout the United States, and not in any superior authority inhering in the law itself. The principles of the civil law, if having a like prevalence in this country, and a like adaptedness to our institutions, would doubtless be referred to and used in the same way.

PART VII.

FEDERAL EQUITY JURISPRUDENCE.

CHAPTER I.

EQUITY IN GENERAL.

1. The Nature of Equity.—The term "equity," if taken in its most comprehensive sense, is simply a synonyme of natural justice. In this sense, it embraces all the principles and maxims of natural right by which human beings should be governed in their intercourse with each other.

The same term, when used in the limited and technical sense given to it by English and American courts, in application to a system of jurisprudence, refers to that form of remedial justice established in England, in distinction from the common law, which was administered by the High Court of English Chancery, and which, at an early period, was transferred to this country by English colonists. These colonists brought it with them, as they also brought the common law, and here established both systems of remedial justice, so far as applicable to their situation.

The two systems are, in Story's Equity Jurisprudence, 12th ed., sec. 25, stated as follows:

"The remedies for the redress of wrongs, and for the enforcement of rights, are distinguished into two classes: first, those which are administered in courts of common law; and, secondly, those which are administered in courts of equity. Rights which are recognized and protected, and wrongs which are redressed by the former courts, are called legal rights and legal injuries. Rights which are recognized and protected, and wrongs which are redressed by the latter courts only, are called equitable rights and equitable injuries. The former are said to be rights and wrongs at common law, and the remedies, therefore, are remedies at common law. The latter are said to be rights and wrongs in equity, and the remedies, therefore, are remedies in equity. Equity jurisprudence may, therefore, properly be said to be that portion of remedial justice which is exclusively administered by

a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law."

This definition of equity refers to the two classes of courts, with their established methods and rules of procedure, and also the subjects to which they apply their respective jurisdictions, for the purpose of determining what is the remedial sphere of equity in distinction from that of the common law. That belongs to equity which equity courts so treat; and that belongs to common law which is so treated by courts of common law. The distinction between the two classes of cases—one of equity and the other of common law—is fixed by established practice.

It is a well-known fact of history that equity courts, as existing in England, were originally adopted as a sort of supplement to the system of remedial justice as administered by common law courts, and were designed to furnish remedies and reliefs which the latter courts either could not furnish at all, or could not do so as effectually as a court of equity. The English equity court, beginning with the functions of the Lord Chancellor as the special adviser of the King's conscience, gradually came into existence, and finally became an established system of remedial justice in the jurisprudence of England, not for the purpose of superseding the common law, or dispensing with common law courts, but for the purpose of doing what *ought* to be done for the protection of rights, either admitted or legally adjudged to exist, that would otherwise be unprotected altogether, or at best be but inadequately protected. The court of equity was added to the common law court as a distinct and separate institution. The term "equity" is a very appropriate term with which to designate the fundamental idea and purpose of such a court.

And, accordingly, we find that, at a very early period, it became a settled principle of equity that where, in respect to rights recognized and protected by the municipal jurisprudence, a plain, adequate, and complete remedy could be had in the courts of common law, a court of equity had no jurisdiction. In such a case the common law remedy was deemed amply sufficient for the purposes of justice; and hence there was no necessity for the interference of a court of equity. Parties, under these circumstances, were left to seek their remedy according to the methods of the common law. The existence of a plain, adequate, and

complete remedy at law was made a test of equity jurisdiction, and such it remains to this day.

The remedy, however, at common law must be "plain," which was understood to mean that it must be obvious and not doubtful, or uncertain, or difficult of apprehension. If it was not plain in this sense, then a court of equity might take jurisdiction of the case. (*Rathbone* v. *Warren*, 17 Johns. 587; and *King* v. *Baldwin*, 17 Johns. 384.)

So, also, the remedy at common law must be "adequate," which meant that, in addition to being "plain," it must be sufficient to secure the rights or afford the protection to which the party was entitled. If it came short of this mark, the remedy was not "adequate," and in such a case a court of equity might take jurisdiction, on the theory of furnishing an "adequate" remedy.

And, still further, the remedy at common law must be "complete," by which was meant that it must be completely adequate, so as fully to secure the ends of justice, and to do so with as much promptitude, directness, and efficiency as would be practiced by a court of equity. If the remedy at common law did not come up to this point, then the case was deemed a proper one for equity jurisdiction. (*Clouster* v. *Sherer*, 99 Mass. 209; and *Webb* v. *Ridgely*, 3 Md. 364.)

The general theory of equity jurisprudence, as laid down and applied by the courts, both English and American, is that it acts only where the courts of common law either do not afford any remedy at all in cases in which there ought to be a remedy, or, if they do afford one, they do not afford a plain, adequate, and complete remedy, in the established sense assigned to these words. This fact, in either form, is sufficient to sustain equity jurisdiction where rights exist to be secured or protected. The absence of this fact excludes the jurisdiction, and leaves the case to be adjudicated by a common law court. (*Oelrichs* v. *Spain*, 15 Wall. 211; *Grand Chute* v. *Winegar*, 15 Wall. 373; *The Insurance Co.* v. *Bailey*, 13 Wall. 616; *Parker* v. *The Winnipiseogee, &c. Co.* 2 Black, 545; *Baker* v. *Biddle*, Baldw. 304; *Woodman* v. *Freeman*, 25 Me. 531; *The Piscataqua Ins. Co.* v. *The Hill Co.* 60 Me. 178; *Milkman* v. *Ordway*, 106 Mass. 232; and *Angel* v. *Stone*, 110 Mass. 54.)

This general principle, applied to a specific case, determines whether it comes within the sphere of equity jurisdiction or not. The jurisdiction depends not so much upon the case in itself considered, as it does upon the question whether the party, having a right, has also a plain, adequate, and complete remedy at law, for the assertion and enforcement of that right. If he has, then he must resort to that remedy, since there is no occasion for the interference of a court of equity. The contrast between equity and law is not that the one is a system of justice and that the other is not. Both are systems of remedial justice, and in some cases a court of equity is better adapted to this end than a court of common law, and, hence, the former is supplementary to the latter.

A complete and exhaustive definition of equity, as a system of jurisprudence, cannot be given in general terms. It can be given only by a detailed statement of the principles, rules, precedents, modes of proceeding, and the classes of cases, that belong to courts of equity. Such a definition would be far beyond the scope of this chapter, and is properly the work of a treatise devoted specially to this one subject. It will be found, on examining such a treatise, that equity courts are governed by rules, and that they follow these rules. There are settled principles, fixed either by statute or by long-established usage, which they apply, not only in determining whether the cases come within the sphere of equity, but also in administering the remedy. Though more flexible in the administration of the remedy than common law courts, they are, nevertheless, regulated by authority. They are not mere courts of arbitration, seeking to do justice as between parties, without any fixed rules to guide their action. Their jurisdiction is as really regulated by established rules as that of a court of law.

2. Cases in Equity.—The system of equity jurisprudence has existed sufficiently long to acquire a definite and fixed character as to the classes of cases which belong to it, with the remedy appropriate to each class. Bouvier, in his Law Dictionary, gives the following enumeration of these cases:

(1.) Cases in which justice requires that the defendant, in order to the discovery of truth, should be compelled to answer allegations made or questions put to him by the complainant, relating to

matters set forth in the complaint of the latter, and assumed to be within his knowledge. The direct object in these cases is the discovery of truth by an appeal to the defendant's conscience, that it may be used by a court of equity in determining the rights of the parties.

(2.) Cases in which courts of law do not recognize any right, and hence can give no remedy, but in which courts of equity recognize equitable rights and give equitable reliefs, as trusts, charities, forfeited and imperfect mortgages, penalties and forfeitures, and imperfect consideration.

(3.) Cases in which courts of law, recognizing a right, give a remedy according to their principles, modes, and forms, but in which the remedy is by courts of equity deemed to be inadequate to the requirements of justice, as cases of fraud, mistake, accident, administration, legacies, and contribution, and cases in which justice requires the cancellation or reformation of instruments, or the rescission or the specific performance of contracts.

(4.) Cases in which the relations of the parties are such that there are impediments to the legal remedy, as partnership, joint-tenancy, and the marshalling of assets.

(5.) Cases in which the forms of proceeding in the courts of law are not deemed adequate to the due investigation of the particulars and details of the case, as accounts, partition, dower, and the ascertainment of boundaries.

(6.) Cases in which, from a relation of trust and confidence, or from consanguinity, the parties do not stand on equal ground in their dealings with each other, as the relations of parent and child, guardian and ward, attorney and client, principal and agent, executor and administrator, legatees and distributees, and *cestui que trust*, &c.

(7.) Cases in which courts of equity grant relief from considerations of public policy, because of the mischief that would result if they did not interfere, as marriage-brokage agreements, contracts in restraint of trade, buying and selling public offices, agreements founded on corrupt considerations, usury, gaming, and contracts with expectant heirs.

(8.) Cases in which a party is without capacity to take care of his rights, as those of infants, idiots, and lunatics.

(9.) Cases in which a court of equity recognizes an obligation on the part of a husband to make provision for the support of his

wife, or to make a settlement upon her, out of the property which comes to her by inheritance or otherwise.

(10.) Cases in which the equitable relief, appropriate to the circumstances of the case, consists in restraining the commission or continuance of some act of the defendant, administered by means of a writ of injunction.

(11.) Cases in which a court of equity affords its aid in the procuration or preservation of evidence of the rights of a party, to be used, if necessary, in some subsequent proceeding, the court administering no final relief.

Mr. Bispham, in his "Principles of Equity" (2d ed. p. 29), adopts the classification of Mr. Spence in his work on the "Jurisdiction of the Court of Chancery," and arranges all the subjects of this jurisdiction into three classes.

The first class, designated as "Equitable Titles," embraces those cases in which common-law courts do not recognize a title, but in which equity both recognizes and enforces a title. In this class are placed assignments of *choses in action*, trusts of various kinds, and mortgages.

As a general principle, an assignment of a *chose in action* conveys no title at common law. Equity, however, when the assignment is for a valuable consideration, and not contrary to public policy, regards the assignment as virtually a contract by the assignor to permit the assignee to use his name in an action at law for recovery, and, upon the filing of the proper bill of complaint, will, in case of non-performance, give the necessary relief.

Trusts belong to the same class. The legal title in a trust is vested in the trustee; but the beneficial title or ownership of the property which equity recognizes and enforces, and which is hence called the equitable title, is vested in the party for whose benefit the trust was established. Trusts form a common and very important class of cases to which the principles of equity are applicable.

A mortgage is, in form, the legal conveyance of property by the mortgagor to the mortgagee, which becomes null and void by the performance, on the day specified, of the condition named in the mortgage, but at law is absolute on the non-performance of this condition; and hence, in the event of such non-performance, the title at common law would vest exclusively in the mortgagee. Equity, however, recognizes an equitable title as still subsisting in

the mortgagor, after the extinction of his legal title, and secures to him the privilege of complying with the condition at a subsequent period by the payment of the money for the security of which the mortgage was executed, and thus re-invests him with a legal title to the property which would otherwise be lost entirely. He has, under the rules of equity, the right of "equity redemption," which was unknown to the rules of common law.

The second class, designated as "Equitable Rights," embraces those cases in which courts of equity establish and enforce "equitable rights in regard to existing legal titles." In this class are placed accidents, mistakes, frauds, notice, estoppel, election, conversion and reconversion, set-offs, contribution, exoneration, subrogation, marshalling, and liens. Equity in these cases recognizes and enforces rights that relate to legal titles.

The third class, designated as "Equitable Remedies," embraces the cases in which "common-law courts cannot enforce a right, or cannot enforce it so as to do complete and exact justice." In this class are placed specific performance, injunctions, the re-execution, reformation, rescission, and cancellation of contracts, accounts, partition, dower, boundaries, rent, partnership bills, creditors' bills, administration suits, the cases of infants, idiots, and lunatics, discovery, bills *quia timet*, receivers, writs of *ne exeat*, and writs of *supplicavit*.

Such is the classification which Mr. Bispham gives of the cases that come under the jurisdiction of courts of equity, and in which these courts recognize and enforce an equitable title or right, not recognized by the common law, and supply equitable remedies in cases where the common law either furnishes no remedy at all, or one not adequate to do complete and exact justice.

Mr. Adams, in his "Doctrine of Equity," arranges the subjects of this jurisprudence into three Books; the first treating "of the jurisdiction of courts of equity as regards the power of enforcing discovery;" the second treating "of the jurisdiction of courts of equity in cases in which the courts of ordinary jurisdiction cannot enforce a right;" and the third treating "of the jurisdiction of courts of equity in cases in which the courts of ordinary jurisdiction cannot administer a right." This differs somewhat from the arrangement of Spence and Bispham; yet the same general field is traversed, and the same subjects of equity jurisprudence presented and explained.

Mr. Justice Story, in his Equity Jurisprudence, follows the division made by Mr. Fonblanque and Mr. Jeremy, and arranges cases in equity into three classes. The first embraces the cases in which the jurisdiction is concurrent with that of common-law courts, which he subdivides into two branches: first, that in which the subject-matter constitutes the principal (for it rarely constitutes the sole) ground of the jurisdiction; and, secondly, that in which the peculiar remedies afforded by courts of equity constitutes the principal (although not always the sole) ground of the jurisdiction. The second class embraces the cases in which the jurisdiction is exclusive; and the third class, those in which it is auxiliary or supplementary. (12th ed. secs. 75, 77.)

This exhibit shows that equity jurisprudence embraces a wide and varied field relating to the affairs and interests of human society, and that, as originally established in England, it was a very important supplement to the common law in the administration of justice. The things which it undertakes to do ought to be done in some way. A legal system not containing its general principles, either in itself or as an appendix thereto, would be defective as a system of justice. Such was the fact with the common law; and, to supply a remedy, the system of equity gradually came into existence.

3. The Maxims of Equity.—Certain principles or general truths have, by the practice of equity courts, acquired the familiarity of adages, or universally recognized rules in the administration of equity. They are hence called Maxims of Equity, and are guides to practice. They disclose the spirit and purpose of the equity system. The following statement presents examples of such maxims, without their qualifications in actual practice:

(1.) That, where there is a right, there shall be a remedy. This means that where a right exists, not otherwise provided for or not adequately provided for, a court of equity, having acquired jurisdiction of the case, will supply a remedy and make that remedy adequate to the requirements of justice. It will not suffer a wrong which comes within the scope and cognizance of law, to exist without redressing it. This is one of the fundamental principles of equity jurisprudence.

(2.) That, as a general rule, equity follows the law. In regard to the meaning of this rule, Mr. Bispham remarks: "The mean-

ing of the maxim is that equity applies to equitable titles and interests those rules of law by which legal titles and interests are regulated, provided this can be done in a manner not inconsistent with the equitable titles and interests themselves." A particular case in which the rules of law would operate to sanction fraud and injustice, would furnish an exception to the maxim that equity follows the law. The object of the equitable relief in such a case is to correct the fraud or injustice that would otherwise be uncorrected.

(3.) That equality is equity. This maxim is applied to cases of contribution, and to cases of apportionment of moneys among those who are equally liable for or equally benefited by the payment thereof. Equality, in respect to the subject-matter, exists as a fact, and hence it becomes a rule of equity. Among beneficiaries equally entitled to the benefits of a trust, equity will see to it that they share equally in those benefits, and that no one of them is deprived of his rights.

(4.) That, as between equal equities, the law must prevail. The theory of this rule is that if both parties are equally entitled to an equitable right, and one of them has a legal title in respect to the matter in controversy, there is no question as between them for a court of equity to determine. The law, as administered by a court of law, must prevail in such a case. There is no question of equity between them which calls for the action of a court of equity.

(5.) That he who seeks equity must himself do equity. The plain intent of this rule is that the party who asks relief from a court of equity, shall himself, in respect to the other party, do that which equity requires. A borrower of money who wishes to have a contract set aside on the ground of usurious interest, will be required to pay back the money borrowed with lawful interest, and in this sense to do equity while he seeks equity. The court, while releasing him from an unjust obligation, will not release him from this equitable duty.

(6.) That equity considers that as done which ought to be done. This rule applies in favor of a party who would have had a benefit from something contracted to be done, and who has an equitable right to have the case considered as if it had been done. Where a contract for a sale of land has been made, and the vendor dies before the contract is actually performed, equity deals with the case as if the sale had been completed, and regards the

land as money or a part of the personal estate of the deceased vendor. So if a testator commands land to be sold and converted into money, the conversion, for the purposes of equity, occurs at the death of the testator. The profits which a trustee makes by the use of trust property are not his, but are regarded by equity as made for the *cestui que trust.* In this sense equity treats that as done which ought to be done.

(7.) That where equities are equal, and one of them has priority in time, the equity having such priority is the one that must prevail. The fact of such priority gives it the precedence in the order of time. It cannot be ousted or impaired by a subsequent but conflicting equity.

(8.) That *vigilantibus non dormientibus aequitas subvenit,* which means that, in certain cases, equity interposes for the vigilant who give proper and reasonable attention to their rights, and not for those who have been guilty of negligence in asserting their claims.

(9.) That he who seeks the remedy of equity must do so with clean hands, or, in other words, that if he himself is in the wrong touching the matter involved, as in a gambling transaction or by participation in fraud, equity will afford him no relief. This is a general principle of equity.

(10.) That equity acts *in personam,* or upon the person of the defendant, if within its jurisdiction, and, if necessary, compels him to obey its order.

(11.) That equity acts specifically, and not simply by way of compensation, as when it enforces the specific performance of a contract, instead of awarding damages for its non-performance, or commands or forbids a party to do a specific thing.

These general maxims, whose statement, explanation, and qualifications may be found in treatises on equity jurisprudence, have acquired the authority of law as rules of practice in equity courts. They regulate the discretion of these courts in disposing of equity cases. Like the system of equity itself as to the cases of which it takes jurisdiction, they are founded upon right reason, and apply that reason in effecting the purposes of equity. In an eminent sense they are rules of conscience in the sphere of things to which equity is applicable, while at the same time they rest upon a sound and well-ascertained expediency.

4. Equity in the American States.—No one, acquainted with the history of this country, need be told that the two systems known in England as the common law and equity jurisprudence, were established in the practice of the people long before the adoption of the Constitution of the United States. This was the natural result of the fact that the country was largely settled by English colonists, who brought with them the laws and usages of the mother country, and here used and applied them so far as they were suited to their circumstances. Both equity and the common law, considered relatively to this country, are of English origin.

When the American colonies, by successful revolution, dissevered their connection with and dependence upon the British Crown, and became independent and self-directing States, they did not abolish these inherited systems, but rather retained and continued them, with such modifications as they saw fit to make. In the outset many of the States followed the example of England, and organized Courts of Chancery, as distinct and separate from courts of common law, and adopted substantially the procedure of the High Court of English Chancery. Other States did not provide for a Court of Chancery, but conferred certain equity powers upon common-law courts. They all continued the general system of equity in some form.

Mr. Bispham, in his "Principles of Equity," to which reference has already been made, divides the States of the Union, considered with reference to the question of equity jurisprudence, into three groups or classes.

The first class embraces those States in which distinct equity courts are established for the administration of the system, and includes New Jersey, Maryland, Kentucky, Delaware, Tennessee, Mississippi, and Alabama.

The second and much larger class embraces those States in which equity courts, as such, are abolished, and equity powers are conferred upon common-law courts, to be exercised according to the usual method of procedure in courts of equity. In this class are included Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Virginia, West Virginia, North Carolina, Georgia, Illinois, Texas, Florida, Michigan, Iowa, Arkansas, and Oregon.

In the third class, including all the States not embraced in the two preceding classes, the distinction between actions at law and

those in equity, is abolished; and yet, in these States, many of the remedies of equity are still "administered under the statutory form of the civil action." The forms of equity procedure in these States are laid aside, while the substance of the system in many respects is retained and appears in the "civil action."

There is no doubt of a general tendency among the States of the Union to dispense with Chancery Courts as distinct and separate organizations, and give to the judges of common-law courts chancery powers, thus uniting the two systems, for the purpose of administration, in the same judicial organization. Moreover, statute law in these States has provided, under the ordinary form of the "civil action," reliefs and remedies which were unknown to the common law of England, and which, in order to secure the ends of justice, were administered by the High Court of English Chancery. The sphere of common-law courts has been so widened and enlarged as to increase their power to furnish equitable relief, at least in many of the cases that were formerly regarded as belonging to courts of chancery. The effect has been to diminish, if not altogether remove, the necessity for two sets of courts—the one to administer law according to the methods of common-law courts, and the other to administer equity according to the principles, usages, and methods which belong to courts of equity.

The common law, in some of the States, as in Louisiana, has never existed at all; and here equity jurisprudence, as contradistinguished from that of the common law, or as a supplement thereto, of course, has no existence. In such States there are no equity courts possessing general equity powers. So far as the ordinary courts of law administer equitable reliefs, they do so under specific heads of equity jurisdiction which may be assigned to them by statute.

5. The English Judicature Act.—The Judicature Act, passed by the English Parliament, on the 5th of August, 1873 (Stat. 36 & 37 Vict. ch. 66), made a radical change in the manner of administering equity in England. This Act consolidated the Courts of Chancery, Queen's Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce, Matrimonial Causes, and the London Court of Bankruptcy, into one court having two divisions, one being entitled Her Majesty's High Court of Justice, and the other Her Majesty's High Court of Appeal.

Courts of equity, as distinct and separate organizations, disappear under the provisions of this Act; yet the equity system, formerly administered by them, does not disappear. This still remains by the express terms of the Act. It is expressly provided, mainly in the fourth section of the Act, that all the equitable titles, rights, and remedies, hitherto known and recognized in English jurisprudence, shall continue to exist; and hence the parties, whether plaintiffs or defendants, may seek their reliefs or make their defense, according to the principles, rules, and usages of equity, just as they could in the Courts of Chancery before the passage of the Act. England has not, therefore, abolished her system of equity jurisprudence, but simply changed the agency of its administration.

This outline of equity, necessarily drawn in the most general terms, is designed as a preliminary to the consideration of equity as incorporated into the judicial system of the United States. The Constitution makes equity a part of this system; and it seemed fitting, before proceeding to consider it in this relation, to give a general statement of its nature, of the cases which come within its scope, of the maxims adopted and applied by equity courts, and of equity as existing in the States which, by their union under the Constitution, form the United States. Such has been the purpose of this chapter.

CHAPTER II.

FEDERAL EQUITY.

1. The Constitutional Provision.—The Constitution of the United States, in article 3, sec. 2, expressly declares that the judicial power of the United States "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."

Two classes of cases are here referred to as arising under the Constitution, laws, or treaties of the United States. The one class embraces the cases of "law," and the other embraces those of "equity."

The framers of the Constitution understood the then well-known distinction between these classes of cases; and by cases in "equity," as distinguished from those in "law," they meant in general those cases or "suits in which relief is sought according to the principles and practice of equity jurisdiction as established in English jurisprudence." They were familiar with this system of remedial justice, and intended to provide for the establishment of a similar system in the jurisprudence of the United States. This purpose was carried into effect by the people when they ratified the Constitution. The details of its administration were left to the legislation of Congress.

Mr. Justice Story, referring to the language of the Constitution, says: "It is observable that the language is, that 'the judicial power shall extend to all cases in *law and equity*,' arising under the Constitution, laws, and treaties of the United States. What is to be understood by 'cases in law and equity' in this clause? Plainly cases at the common law, as contradistinguished from cases in equity, according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American States were familiarly acquainted." (Story's Const. sec. 1645.)

To the same effect Mr. George Ticknor Curtis remarks: "The Constitution of the United States, as we have seen, extends the judicial power to cases both 'in law and equity.' The distinction adopted by this expression is the same as that established in the jurisprudence of England, and under it the equity jurisprudence of the courts of the United States embraces generally the same matters of jurisdiction and modes of remedy which belong to the courts of equity in England, as distinguished from the cases and remedies appropriate to the courts of common law." (Curtis's Comm. sec. 20.)

The Supreme Court of the United States, in *Robinson* v. *Campbell*, 3 Wheat. 212, 223, referred to "the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." The reference here was to the common law and equity jurisprudence of England, as existing antecedently to the adoption of the Constitution.

Mr. Justice Story, in stating the opinion of the court in *Parsons* v. *Bedford*, 3 Pet. 433, 447, referred to the "cases in law and equity" mentioned in the body of the Constitution, and also the phrase "common law" as found in the Seventh Amendment, and then proceeded to say: "By common law they meant what the Constitution denominated in the third article law, not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." In the latter class of cases the rules and modes of equity jurisprudence apply, and not those of the common law by which legal rights simply are determined.

The Constitution extends the judicial power of the United States to several classes of controversies, among which are included those to which "the United States shall be a party." And, in *The United States* v. *Howland*, 4 Wheat. 108, it was held that a Circuit Court of the United States has jurisdiction on a bill in equity filed by the United States for the assertion and maintenance of its priority of claim under the law of 1799. Equity jurisdiction was regarded as applicable to such a case.

So also the Constitution extends the judicial power of the United States to other controversies, as those between two or

more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens or subjects. And it is the well settled doctrine of the Federal courts that, in these controversies, equity jurisdiction is applicable when the controversy in its character comes within the scope of equity. The courts of the United States may dispose of the controversies, either as courts of law or courts of equity, according to their character.

The result is that the Constitution, with the exception of admiralty and maritime cases for which special provision is made, and the further exception of criminal cases to which equity has no application, has authorized and established the system of equity jurisprudence in the cases and controversies specified therein, to be administered by the Federal courts whenever their jurisdiction attaches, and the nature of the case or controversy calls for this mode of remedial justice.

2. Statutory bestowal of the Jurisdiction on Courts.—The Constitution, while intending that the equity jurisdiction which it grants shall be exercised by the courts of the United States, authorizes Congress to provide by law for the organization of the Supreme Court, and for the creation of such inferior courts as it may see fit to ordain and establish. Whether, with the exception of the Supreme Court, there should be two sets of Federal courts—the one to administer law, and the other to administer equity—was in the outset a question for Congress to determine.

The Judiciary Act of 1789 provided for the organization of the Supreme Court and for the establishment of District and Circuit Courts. This act and all subsequent acts of Congress relating to the subject proceed upon the theory of authorizing these courts to administer law or equity, according to the character of each particular case, thus combining the two systems of jurisprudence in the same courts, rather than establishing two classes of courts. This does not confound law and equity, or abrogate the distinction between them; but it does give to these courts the power to administer both systems, and make them alike courts of law and courts of equity. The following statement presents a summary of their jurisdiction as courts of equity:

(1.) *Jurisdiction of District Courts.*—Section 563 of the Revised Statutes of the United States specifies eighteen different subjects to which it extends the jurisdiction of District Courts; and, in this list, equity jurisdiction is expressly given in the following cases: 1. All suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest. 2. All suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States, to persons within the jurisdiction thereof.

Equity jurisdiction, in some of the other cases specified, though not expressly given, is perhaps implied. The jurisdiction in these cases is given in general terms, without any limitation to suits at law, in distinction from those in equity.

So also section 569 of the Revised Statutes provides, that when any Territory is admitted as a State, and a District Court is established therein, this court shall take cognizance of all cases which were pending and undetermined in the superior court of such Territory, from the judgments or decrees to be rendered, in which writs of error could have been sued out or appeals taken to the Supreme Court, and shall proceed to hear and determine the same. If any of these cases were equity cases, then the District Court is authorized to exercise equity jurisdiction in hearing and determining the same.

(2.) *Jurisdiction of Circuit Courts.*—The equity jurisdiction bestowed on the Circuit Courts is both original and appellate.

(*a.*) *Original Jurisdiction.*—Section 629 of the Revised Statutes specifies twenty distinct subjects embraced in the original jurisdiction of the Circuit Courts; and of these equity jurisdiction is expressly given in the following cases: 1. All suits of a civil nature in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the State in which it is brought and a citizen of another State. 2. All suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum

or value of five hundred dollars, and the United States are petitioners. 3. Suits in equity arising under import, internal revenue, and postal laws. 4. Suits in equity arising under the patent or copyright laws of the United States.

Equity jurisdiction is expressly given in these cases to the Circuit Courts; and in many of the other cases it is given by obvious implication, as in suits by or against national banks, and suits by such banks to enjoin the comptroller of the currency.

Section 637 of the Revised Statutes provides that, if a cause of whatever nature shall be transferred from a District to a Circuit Court, as elsewhere provided for, the latter court shall have all the powers of the former to consider and determine it. This gives to the Circuit Court equity powers, if the suit in the District Court was one of equity.

These Statutes also provide that equity suits, being commenced in State courts, and being removable and actually removed to the Circuit Courts of the United States, may be tried and determined by the latter courts in the exercise of their original jurisdiction. The terms in which such removable suits are described, clearly include equity suits first arising in State courts. (Secs. 639–647.)

These Statutes still further provide that the Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing and pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein, and that any judge of a Circuit Court may, upon reasonable notice to the parties, make, and direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court. (Sec. 638.)

Congress, by the Act of March 3d, 1875 (18 U. S. Stat. at Large, 470), passed since the adoption of the Revised Statutes, provided that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, arising under the Constitution, laws, or treaties of the United

States, or in which the United States shall be petitioners, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between the citizens of a State and foreign states, citizens, or subjects. This enlarges the original jurisdiction of the Circuit Courts in equity cases.

The same act also provided that when any of these suits are first commenced in State courts, and are removed therefrom to the proper Circuit Courts, the latter courts shall have the same cognizance to proceed with their trial and determination as if they had been originally brought therein.

(*b.*) *Appellate Jurisdiction.* — Provision is made, in section 631 of the Revised Statutes, that, from all final decrees of a District Court in causes of equity, where the matter in dispute exceeds the sum or value of fifty dollars, an appeal shall be allowed to the Circuit Court next to be held in such district; and it is made the duty of such Circuit Court to receive, hear, and determine such appeal. The next section provides that, in such an appeal, copies of the proofs, and of such entries and papers on file as may be necessary on hearing of the appeal, may be certified up to the appellate court.

Section 635 of these Statutes provides that the appeal must be taken within one year after the entry of the decree or order complained of, with the provision that where a party entitled to take an appeal is an infant, or *non compos mentis*, or imprisoned, the appeal may be taken within one year after such entry, exclusive of the term of such disability.

Section 636 of the same Statutes authorizes the Circuit Court, upon such appeal, to affirm, modify, or reverse the decree or order of the District Court, and empowers it to direct such decree or order to be rendered, or such further proceedings to be had by the District Court, as the justice of the case may require. The whole case in respect to questions of both law and fact, as appearing on the record of the District Court, comes before the Circuit Court for re-examination and disposal.

The law gives the right of appeal subject to the conditions specified; and if the District Court refuses to allow an appeal, the party aggrieved thereby may apply to the Circuit Court, and it is

then the duty of the latter court to direct the clerk to enter an appeal, upon proper conditions being supplied. (Abbott's U. S. Pr. 3d ed. vol. 2, p. 244.)

(3.) *The Supreme Court.*—Section 687 of the Revised Statutes extends the original jurisdiction of the Supreme Court to all controversies of a civil nature where a State is a party, to all suits and proceedings against ambassadors, other public ministers, or their domestics or domestic servants, and to all suits by ambassadors or other public ministers, or in which a consul or vice-consul is a party. This provision obviously includes equity suits.

These Statutes also extend the equity appellate jurisdiction of the Supreme Court to the following cases:

(*a.*) All final decrees of any Circuit Court, or any District Court acting as a Circuit Court, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars. (Sec. 692, and 18 U. S. Stat. at Large, 315.)

(*b.*) All final decrees in which the judges holding the Circuit Court shall certify to the Supreme Court that their opinions were opposed upon some question or questions arising upon the hearing of the case. (Sec. 693.)

(*c.*) All final decrees in equity of any Circuit Court, or of any District Court acting as a Circuit Court, or of the Supreme Court of the District of Columbia or of any Territory, in cases touching patent rights and copyrights, or of any Circuit Court, or District Court acting as a Circuit Court, in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States, without regard in any of these cases, to the sum or value in dispute. (Sec. 699.)

(*d.*) All final decrees in equity of the Supreme Courts of the several Territories, provided the matter in dispute, exclusive of costs, exceeds the sum or value specified. (Secs. 702, 703.)

(*e.*) All final decrees of any District Court in equity cases transferred to it from the Supreme Court of any Territory, upon such Territory becoming a State. (Sec. 704.)

(*f.*) All final decrees of the Supreme Court of the District of Columbia in equity cases, where the matter in dispute, exclusive of costs, exceeds the sum or value of twenty-five hundred dollars, and all decrees in such cases, although the matter in dispute is less

than the sum specified, but more than one hundred dollars, upon the petition of either party submitted to any justice of the Supreme Court, if such justice shall be of opinion that the case involves questions of law of such extensive operation as to render a decision of them by the Supreme Court desirable, and shall by a written order direct the clerk of the Supreme Court of the District to allow the appeal. (Secs. 705, 706, and 20 U. S. Stat. at Large, 320.)

(*g.*) All final decrees in equity in suits in the highest court of a State in which a decision in the suits could be rendered, wherein any of the Federal questions specified in the statute is drawn in question, and the decision touching the same is the one named. (Sec. 709.)

All these cases are to be heard in the Supreme Court on appeal, with the exception of the final decrees of State courts.

Appeals to the Supreme Court from the Circuit Courts, or from District Courts acting as Circuit Courts, are subject to the same rules, regulations, and restrictions as are prescribed in cases of writs of error; and every such appeal must be taken within two years after the entry of the decree or order appealed from, with the provision that where a party entitled to take an appeal is an infant, insane person, or imprisoned, the appeal may be taken within two years after the decree or order, exclusive of the term of such disability. (Secs. 1012, 1008.)

Appeals from the final decrees of the Supreme Court of any Territory, or the Supreme Court of the District of Columbia, are to be considered, and the decrees reviewed and reversed or affirmed in the same manner, and under the same regulations, as the final decrees of Circuit Courts. (Secs. 702, 705.)

The Supreme Court has power to affirm, modify, or reverse the final decree or order of a Circuit Court, or a District Court acting as a Circuit Court, in any equity case lawfully brought before it for review, and may direct such decree or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. It cannot, however, issue execution in such cases, but is directed to send a special mandate to the inferior court to award execution thereupon. (Sec. 701.)

In cases coming from the highest court of a State, the Supreme Court may reverse, modify, or affirm the decree or order of

such court, and may, in its discretion, award execution, or remand the same with instructions to the State court. (Sec. 709.)

The above exhibit contains the provisions of law relating to the equity jurisdiction of the Federal courts, original and appellate, as established by Congress in pursuance of the Constitution. The reader is referred to chapters second and third of Part III, treating of the Circuit Courts and the Supreme Court of the United States, and to chapter third of Part IV, treating of the revisory jurisdiction of the Supreme Court over the final judgments and decrees of the highest court of a State, for a detailed explanation of the subject.

3. Constitutional and Legal Limitation of the Jurisdiction. —The courts of the United States, whether proceeding as common-law courts or courts of equity, are not courts of general jurisdiction. The Constitution, in specifying the cases and controversies to which the judicial power of the United States shall extend, obviously implies that it shall be limited to these cases and controversies. The jurisdiction, as thus defined and limited, depends either upon the subject-matter of the suit, without regard to the parties, as when the case arises under the Constitution, laws, or treaties of the United States, or upon the character of the parties, without regard to the subject-matter of the suit, as when the controversy is between two or more States, or between citizens of different States. An equity suit in a Federal court must come within the limits thus constitutionally established. If it does not, the court has no jurisdiction.

Moreover, with the exception of the original jurisdiction of the Supreme Court, which the Constitution defines and limits in express terms, such a suit must come within the limits established by the laws of Congress in pursuance of the Constitution. The Supreme Court exercises its appellate jurisdiction, subject to such exceptions and regulations as Congress shall make. All the other courts of the United States, being exclusively the creatures of Congress, have no powers except such as may be conferred upon them by the laws of Congress or by treaties of the United States.

It necessarily results that the Federal courts, in the exercise of equity powers, are limited by the Constitution and by law, and that they must keep within the limitation thus imposed. The mere fact that a case comes under one of the recognized heads of

equity jurisprudence, or that an English court of chancery could take cognizance of such a case, will not of itself, standing alone, give any jurisdiction over it to a Federal court. It is essential to the jurisdiction, not only that the case should be one proper for equity, but also that, by reason of the parties or the subject-matter involved, it should lie within the limits of the judicial power of the United States granted in the Constitution, and, by law, conferred upon the court to which the case is presented. The jurisdiction must be exercised within these limits, and in the cases specified by law. (*Baker* v. *Biddle*, Bald. 394; and *Pierpont* v. *Fowle*, 2 W. & M. 23.)

The adoption of the equity jurisprudence of England applies only to the remedy, and not to the right to be secured or protected thereby. It is not sufficient that the right was given by the laws of England when the Constitution was adopted, since these laws as to rights have no operation in this country, and hence are not a rule in Federal courts. (*Meade* v. *Beale*, Taney, 339.)

4. State Laws.—The equity jurisdiction of the Federal courts, and the remedies to be employed by these courts when proceeding as courts of equity, being founded upon the Constitution and laws of the United States, exist independently of State laws, and cannot be limited or restrained by such laws. This doctrine was laid down in *Payne* v. *Hook*, 7 Wall. 425.

And yet if a right exists within a State under the laws thereof, and is a proper subject for equitable relief, a Federal court, having jurisdiction of the case under the Constitution and laws of the United States, may give the necessary relief for the protection of that right. It is enough that the court has jurisdiction, and that a State law gives the right. (*Lorman* v. *Clarke*, 2 McLean, 568; and *Goshorn* v. *Alexander*, 2 Bond, 158.)

In *Clark* v. *Smith*, 13 Pet. 195, it was held that "a State law, authorizing one having both title and possession to bring a suit in equity against one claiming or pretending to title, may be administered by a Circuit Court," and that "though the laws of the States cannot affect the jurisdiction or modes of proceeding in equity, of the courts of the United States, they may afford rules as to what shall be deemed a cloud upon title to lands, and the Circuit Courts, as courts of equity, may remove such clouds."

Mr. Justice Catron, in stating the opinion of the court in this

case, said: "The State legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the State courts. On the contrary, propriety and convenience suggest that the practice should not materially differ where titles to lands are the subjects of investigation. And such is the constant course of the Federal courts."

In *Fitch* v. *Creighton*, 24 How. 159, it was held that "where a statute of a State gives a lien for work on the streets against the adjoining lot-owner, though it may give a specific mode of enforcing that lien, a court of the United States will enforce such lien in a court of equity, as the one appropriate to its jurisdict[redacted] The lien in this case was created by State law; and the d[redacted]ne of the Supreme Court was that the Circuit Court in which the suit was brought, having equitable jurisdiction over the parties, might enforce that lien by a decree in equity.

In *Smith* v. *The Railroad Company*, 9 Otto, 398, it was held that "the jurisdiction of the Federal courts cannot be affected by State legislation, and they will enforce equitable rights created by such legislation if they have jurisdiction of the subject-matter and the parties."

In *Ex parte McNiel*, 13 Wall. 236, 243, Mr. Justice Swayne, in stating the opinion of the court, said: "A State law cannot give jurisdiction to any Federal court; but that is not the question. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, of admiralty, or of common law."

The doctrine of these cases is that State laws, though never the source of the equity jurisdiction of the Federal courts, may, nevertheless, give equitable rights which these courts, having jurisdiction over the parties and the subject-matter, will enforce in proper suits for this purpose. The fact that the equitable right has its basis in a State law does not exclude their power to afford the necessary remedy.

5. Cases of Equity.—Neither the Constitution nor any law of Congress defines equity jurisprudence, considered with reference to the cases to which it is applicable, as distinguished from cases at common law. Hence, whether a given case presented to a Federal court be a proper case for the exercise of equity powers or simply one at common law, or whether it is in part one, and in part the other, is a question for that court to determine. If it be simply a case at common law, then manifestly the court cannot decide it in the exercise of its equity jurisdiction, without ignoring the distinction which the Constitution and laws of Congress make between the two classes of cases.

In *The La Mothe Manufacturing Co.* v. *The National Tube Works Co.* 15 Blatch. 432, which was a case originally brought in a State court and removed into a Circuit Court, it was held by Judge Blatchford, that where a complaint, as made in a State [redacted] before the removal of the cause, prays for relief purely equitable and also for relief purely legal, the plaintiff must replead in the Federal court. The Judge said the "complaint must be recast into two cases, one in law and one in equity," since purely legal and purely equitable claims could not, in a Federal court, be blended in the same suit. (*Fisk* v. *The Union Pacific R. R. Co.* 8 Blatch. 299; and *Montejo* v. *Owen*, 14 Blatch. 324.)

In *Bennett* v. *Butterworth*, 11 How. 669, 675, Chief Justice Taney, in stating the opinion of the court, said: "The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim is an equitable one, he must proceed according to the rules which this court has prescribed (under the authority of the act of August 23d, 1842), regulating proceedings in equity in the courts of the United States."

How then shall the Federal court determine whether the case, as presented, is one for the exercise of its equity jurisdiction? No judge surely will depend on his own individual and unaided opinion in deciding such a point, or invent a new rule for each case. Every judge is presumed to understand the principles of equity jurisprudence, and, in this sense, to know what the system is, as a branch of remedial justice; and his business is to apply

these principles rather than create principles *de novo*. The system is more elastic and flexible than that of the common law, but not so elastic as to have no limits in the cases to which it is applicable, or to be confounded with the common law.

The rule on this subject as stated by Mr. Justice Davis, in giving the opinion of the court in *Thompson* v. *The Railroad Companies*, 6 Wall. 134, is as follows: "The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the State courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit."

So, also, in *Neves* v. *Scott*, 13 How. 268, 272, it was said by the court: "Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable thereto."

In *Van Norden* v. *Morton*, 9 Otto, 378, the court said: "We think the rule is settled in this court, that whenever a new right is granted by statute, or a new remedy for a violation of an old right, or whenever such rights and remedies are dependent on State statutes or acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the Federal courts, must be determined by the *essential character* of the case, and unless it comes within some of the *recognized* heads of equitable jurisdiction it must be held to belong to the other." (*Robinson* v. *Campbell*, 3 Wheat. 212; *Bennett* v. *Butterworth*, 11 How. 669; *Jones et al.* v. *McMasters*, 20 How. 8; and *Basey* v. *Gallagher*, 20 Wall. 670.)

The "recognized heads of equitable jurisdiction," here referred to, are such as existed in England when the Constitution was

adopted, and by these equity cases were distinguished from cases at common law, not only in their "essential character," but also in the remedy applicable thereto. The Federal courts, and, in the final resort, the Supreme Court, ever since the organization of the Government, have been expounding the principles of equity, alike in reference to cases of equity and to the appropriate remedy, considered as applicable to Federal courts; and it is by this accumulation of expository precedents that a Federal court determines whether a particular case is one in equity or one at common law, and hence determines what the remedy should be. The "recognized heads" of equity are matters of judicial precedent on the basis of the equity system adopted by the Constitution, and especially such precedents as are furnished by the decisions of the Supreme Court. And if a case does not come within the circle of these precedents, then Federal equity jurisdiction does not attach to it.

Equity precedents derived from State courts are not the rule in Federal courts. In some of the States there are no such precedents, because equity does not exist there as a distinct system; and in none of the States are such precedents an authoritative guide to the Federal courts, either as to what are proper cases for equity jurisdiction, or as to the remedy to be administered. The principles of equity established by the Constitution, as expounded by the Federal courts, especially the Supreme Court, form the guide on this subject.

6. The Statutory Test of Equity.—Congress, while making no attempt to define equity cases, as distinguished from those at common law, nevertheless provided, in the sixteenth section of the Judiciary Act of 1789, "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." (1 U. S. Stat. at Large, 73.) This section is reproduced as section 723 of the Revised Statutes of the United States.

The principle, here established by positive law, was by no means a new principle in equity. It was at the time a well-settled doctrine in English equity jurisprudence; and hence, as remarked by the court in *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215, the statute was simply declaratory, "making no alteration whatever in the rules of equity on the subject of the legal remedy." Congress

thought the rule sufficiently important to enact it in a statutory form.

The statute is virtually one of limitation by excluding, from the equity jurisdiction of the Federal courts, all cases in which the party bringing the suit has "a plain, adequate, and complete remedy at law." This being the fact, there is no necessity for equitable relief. It is not the design of the equity system to interfere in such cases, since there is no occasion for the interference to secure the ends of justice.

Moreover, where the plaintiff has "a plain, adequate, and complete remedy at law," and may, therefore, enforce his claims by proceedings at law, the defendant has the right of trial by jury; and hence the plaintiff must seek his remedy at law, and not by a proceeding in equity. If it were otherwise, he might, at his option, deprive the defendant of this constitutional right. (*Dade* v. *Irwin*, 2 How. 383; *Wright* v. *Ellison*, 1 Wall. 16; *Grand Chute* v. *Winegar*, 15 Wall. 373; and *Ewing* v. *St. Louis*, 5 Wall. 413.)

The objection that the plaintiff has a "plain, adequate, and complete remedy at law" is jurisdictional; and although it is not usual for the court to make this objection on its own motion where it has not been made by the defendant in the pleadings, still the court may do so and on this ground dismiss the case for the want of jurisdiction. (*Amis* v. *Myers*, 16 How. 492; *Oelrichs* v. *Spain*, 15 Wall. 211; and *Wright* v. *Ellison*, 1 Wall. 16.)

It is not sufficient that the plaintiff has a remedy at law, unless that remedy is "plain, adequate, and complete;" and, as to what is meant by this language, the court, in *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215, said that the remedy at law must be "as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." If it be less than this, if a court at law, having jurisdiction, could afford a remedy, but not one as adequate and complete, as practical and efficient, as that afforded by a court of equity, then equity jurisdiction is not by this rule excluded from taking cognizance of the case.

Mr. Justice Davis, in stating the opinion of the court in *Watson* v. *Sutherland*, 5 Wall. 74, said: "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed

in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued."

The ground upon which the issue of an injunction to arrest the execution of a levy and the sale of goods belonging to Sutherland was sustained by the Supreme Court, in this case, was the fact that, in the circumstances of the case as presented by the pleadings and the evidence, an action at law would have afforded him no adequate remedy. There was in the case "the absence of a plain and adequate remedy at law" for Sutherland, and hence, as the Supreme Court held, the remedy in equity by injunction to prevent what would otherwise work irreparable mischief and injustice to him became applicable. It was necessary to secure this end, and for this reason the equity jurisdiction of the Circuit Court attached to the case.

Mr. Justice Swayne, in stating the opinion of the court in *Morgan* v. *Beloit*, 7 Wall. 613, 618, said: "But these inquiries are only material as bearing upon the question whether there is an adequate remedy at law. If so, a suit in equity cannot be maintained. To have this effect, the remedy at law must be as plain, adequate, and complete, and as practical and efficient to the ends of justice, and to its prompt administration, as the remedy in equity. When the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial by jury. The objection is regarded as jurisdictional, and may be enforced by the courts *sua sponte*, though not raised by the pleadings, nor suggested by the counsel." (*Boyce's Executors* v. *Grundy*, 3 Pet. 210; *Hipp* v. *Babin*, 19 How. 271; *Fowle* v. *Lawrason*, 5 Pet. 495; and *Dade* v. *Irwin*, 2 How. 383.)

These cases supply a general explanation of the statute as a rule to guide the action of Federal courts in the exercise of their equity powers. The question whether a particular case is, under this rule, within or beyond the scope of these powers, is to be determined by the character of that case, considered with reference to the remedy which may be had by an action at law. If there is such a remedy, and that remedy is as plain, adequate, and complete as the one in equity, that ends the question. Mr. Bump, in his "Federal Procedure," cites an extended series of cases in illustration of the construction placed upon this rule by the courts.

7. Forms and Modes of Equity.—Section 913 of the Revised Statutes of the United States provides that "the forms of mesne process and the forms and modes of proceeding in suits of equity * * * in the Circuit and District Courts, shall be according to the principles, rules, and usages which belong to courts of equity * * * except when it is otherwise provided by statute, or by rules of court made in pursuance thereof," and that "the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed from time to time to any Circuit or District Court, not inconsistent with the laws of the United States."

Section 917 of these Statutes provides that "the Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used in suits in equity * * * by the Circuit and District Courts."

These sections, embodying the legislation of Congress on the subject in force on the 1st of December, 1873, have nothing to do with the jurisdiction of the Federal courts in equity cases, or with the question that relates to the cases that shall be deemed proper for the exercise of their equity powers. They refer simply to the procedure in such cases. Section 913 lays down the rule that, except when otherwise provided by statute, or by rules of court made in pursuance thereof, the procedure in the Circuit and District Courts "shall be according to the principles, rules, and usages which belong to courts of equity." This is a reproduction and continuance of a part of the second section of the Act of May 8th, 1792. (1 U. S. Stat. at Large, 275.) This act declared that the procedure in equity cases "shall be according to the principles, rules, and usages which belong to courts of equity, * * * as contradistinguished from courts of common law," except as might be otherwise provided.

The Supreme Court of the United States has construed this to mean that, with the exceptions stated, the procedure in equity cases must follow that of the court of chancery in England.

Chief Justice Marshall, referring, in *Vattier* v. *Hinde*, 7 Pet. 252, 274, to the language used in the second section of the Act of 1792, said: "This act has been generally understood to adopt the principles, rules, and usages of the court of chancery of England." The same construction has been repeatedly affirmed by the Supreme Court in other cases.

Mr. Justice Davis, in *Payne* v. *Hook*, 7 Wall. 425, said: "If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred in the Federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union." (*Green* v. *Creighton*, 23 How. 90; *Robinson* v. *Campbell*, 3 Wheat. 212; *The United States* v. *Howland*, 4 Wheat. 108; and *Pratt et al.* v. *Northam et al.* 5 Mason, 95.)

The procedure, then, of the chancery court of England, as it was when adopted by Congress in 1792, except as otherwise provided, furnishes the basis and guide of equity procedure in the Circuit and District Courts of the United States. Both of these courts are authorized to alter this procedure, or make additions thereto, and the Supreme Court may, from time to time, prescribe rules for these courts, not inconsistent with the laws of the United States. In the absence of such changes, or of changes made by Congress, the English chancery practice, in respect to process, forms, and modes of proceeding, supplies a guide to the Circuit and District Courts in the exercise of their equity powers.

The result is that these courts, in all equity cases coming within their jurisdiction, exercise their powers uniformly in all the States of the Union, without any limitation or restraint by State legislation, and without any reference to the rules or usages of State courts, except as such rules or usages may have been adopted by them, or by the Supreme Court. They are not in this respect regulated or controlled by the local and municipal jurisprudence of the State in which they may be sitting. Whether the States have equity courts or not, whether they distinguish or not between cases at common law and those in equity, or whether they combine both in a single judicial proceeding called a "civil action," is a matter of no consequence in relation to the equity jurisdiction and procedure of the Federal courts. The jurisdiction and pro-

cedure of these courts operate independently of State regulations and usages on the subject of equity jurisprudence. (*Noonan* v. *Lee*, 2 Black, 500; *Neves* v. *Scott*, 13 How. 268; *Boyle* v. *Zacharie & Turner*, 6 Pet. 648; *Robinson* v. *Campbell*, 3 Wheat. 212; *Thompson* v. *The Railroad Companies*, 6 Wall. 134; and *Payne* v. *Hook*, 7 Wall. 425.)

The distinction between law and equity, as to the remedy and the procedure to be adopted in administering that remedy, though not originated by the Constitution, is established by it; and State laws can neither obliterate the distinction, nor form an authoritative rule to guide the action of Federal courts when proceeding as courts of equity.

CHAPTER III.

ENGLISH CHANCERY PRACTICE.

The rules prescribed by the Supreme Court for the regulation of the practice of the Circuit Courts of the United States in equity cases, are, to a very considerable extent, founded upon the practice of the High Court of Chancery in England. The course of an equity suit, under these rules, is, in its general outlines, similar to that under the English practice. The ninetieth rule refers to this practice, not as being absolutely authoritative, but "as furnishing just analogies to regulate the practice" of the Circuit Courts, "so far as the same may reasonably be applied," in cases where the rules made by the Supreme Court do not apply.

Congress, when providing, by the second section of the Act of May 8th, 1792 (1 U. S. Stat. at Large, 275), that the procedure in equity cases "shall be according to the principles, rules, and usages which belong to courts of equity," except as otherwise provided by statute, or by rules of court in pursuance thereof, evidently had in view the English chancery practice. The Supreme Court of the United States has thus construed the provision.

It becomes important, then, before stating the rules made by the Supreme Court for the regulation of Circuit Courts in equity cases, to give at least a general view of the forms, modes, and proceedings adopted in the chancery practice of England. The following exhibit will suffice for this purpose:

1. The Bill of Complaint. — The party seeking relief in equity, commenced his suit by filing in the court a petition, which was known as a bill of complaint, and which, upon being filed, made him the complainant or plaintiff in the suit. The general object of this bill was to set before the court the facts of his case as regarded by the complainant, and also to specify the relief which he desired to obtain. This bill was known as the original bill in the case, and consisted of the five following parts:

(1.) *The Statement.*—The statement was a narrative of the facts which constituted the plaintiff's case. It was required that this narrative should be drawn in precise and definite terms, with as much brevity as possible, and without the introduction of any scandalous or impertinent matter. All the facts upon which the plaintiff relied for the relief sought were required to be put in the statement; and it was necessary that the statement of facts should, upon its face, make a case, which, if the facts as stated were admitted by the other party, would entitle the plaintiff to a decree in his favor.

(2.) *The Charges.*—The charging part of the bill was used for collateral purposes, and consisted in special denials or averments by the plaintiff, made in view of what he suspected would be alleged or pretended by the defendant in his answer, and made for the purpose of meeting beforehand the defendant's supposed case, and also for the purpose of drawing the attention of the defendant to the special matter thus set forth, and making it necessary for him to answer thereto. The charges related to matters which the plaintiff did not profess absolutely to know, but which he suspected, and in respect to which he desired to obtain an answer from the defendant.

(3.) *Interrogatories.*—This part of the bill consisted of a question or a series of questions, directly and specifically put to the defendant, by him to be answered on oath, with a view to the discovery of truth assumed to be within his knowledge, and for the purpose of compelling him to make full answer to all the matters contained in the bill, without omission or evasion. These questions were in effect an examination of the defendant with reference to the statement and charges of the bill.

(4.) *Prayer for Relief.*—This prayer consisted in a distinct statement of the relief which the plaintiff was seeking, and specified, in general, any relief to which he might be entitled, as shown by the hearing of the case. The specific relief sought was required to be stated distinctly, with clearness, and without multifariousness.

(5.) *The Prayer for Process.*—This part of the bill asked for the issue of a process of subpœna, directed to the party or parties named as defendant or defendants in the bill, and commanding the defendant or defendants to appear and make answer to the

bill in writing. If any other writ was desired, as an injunction or a writ *ne exeat*, it was asked for in the prayer for process.

Such were the several parts of the original bill of complaint by which a suit in equity was commenced. It was not absolutely necessary in all cases that all these parts should be present in every bill. It was sufficient if the complainant made a statement of his case, and added a prayer for relief and for process against the adverse party, without placing in the bill any charges or interrogatories.

The signing of the bill by the complainant or his attorney, or by both, and the filing of the same with the proper officer of the court, completed the first step in an equity suit.

2. The Process.—The process of subpœna was the next step in the case. This was issued by the clerk of the court, under its seal, and hence carried with it the authority of the court.

The party against whom the complaint was made, and on whom the process of subpœna was properly served, with due return of such service, thereby became the defendant in the suit, and was legally bound to appear and make answer to the complaint and await the order of the court in the premises. His omission or refusal to obey the order of the court subjected him not only to punishment for contempt, but also to the liability of having the complaint taken *pro confesso*, and the case proceeded with and determined *ex parte*. He could not, by such omission or refusal, evade the suit, or disobey the subpœna without peril to himself. The court had ample power to supply a remedy in the event of his contumacy.

3. The Parties.—The general principle of equity practice was that all persons, not joined as plaintiffs in making the complaint, who had any interest in the suit to be affected by the decree sought to be obtained, should be made defendants, and accordingly be served with a process of subpœna. There were exceptions to this principle, yet such was the general rule.

The theory of the rule was to settle by one suit all the matters in dispute between all the persons who had any interest or rights involved therein, upon which the decree of the court would operate, and who for this reason ought to be made parties thereto. The rule was founded in justice, and, moreover, had the good

effect of preventing a multiplicity of suits relating to essentially the same matter, which was one of the objects of equity.

4. The Defense. — The person on whom the subpœna was served, appearing in obedience thereto, was entitled to make a defense in accordance with the established method of pleading in equity. This defense might be made in any one of four forms, or in two or more of these forms, if the different forms of defense related to different parts of the complaint, and this difference of relation was distinctly specified. These forms of defense were the following:

(1.) *The Disclaimer.* — The defendant, by this defense, affirmed that he had no interest in the subject-matter presented in the complaint, and was not, therefore, properly a party to the suit, and on this ground he asked to be dismissed from the case altogether. This fact appearing was the end of the suit, so far as he was concerned, but not the end of it in respect to other defendants, if there were such.

(2.) *The Demurrer.*—The defendant, by this mode of defense, while making no direct answer to the statements in the complaint, claimed that these statements, even if admitted, did not make out a case that calls for the interference of a court of equity. The theory of a demurrer is that the plaintiff is not, upon his own showing, entitled to any relief. It asks that the bill of complaint may be dismissed on the ground of insufficiency. This was a question for the court to decide upon argument; and if the demurrer was sustained and applied to the whole complaint, that was the end of the suit, unless the plaintiff obtained the permission of the court to amend his complaint. If, on the other hand, the demurrer was not sustained, then the defendant was required to answer the complaint, or he might, with the permission of the court, put in what was known as a plea.

(3.) *The Plea.*—The plea was a partial answer inasmuch as it was not responsive to the whole complaint, and consisted in the averment of some special matters not appearing in the complaint, or in the denial of some of the allegations thereof, and in resting the defense solely upon the issue as thus made. Mr. Adams, in his Introduction to "The Doctrine of Equity," 7th Amer. ed., p. 61, remarks in regard to the plea: "If the plea is overruled on ar-

gument, the defendant must answer; if allowed, its validity is established, but the plaintiff may still file a replication, and go to a hearing on the question of its truth. If on the hearing it is sustained by the evidence, there will be a decree for the defendant; if disproved, he can set up no further defense, but a decree will be made against him."

(4.) *The Answer.*—The answer to the complaint, which was the usual mode of defense, was the method by which the defendant presented to the court his whole case, in response to the statements, charges, and interrogatories of the complaint, stating facts according to his best knowledge and belief, and admitting or denying the allegations of the complaint, or admitting them in part and denying them in part, and doing so in positive and explicit terms, without scandal or impertinence, and without unnecessary prolixity. The theory of the answer was to bring out a full and complete exhibit of the defendant's side of the case, and put the same on record, so that the whole case, as between the parties, made by the complaint and the answer, not only as to their agreement in respect to matters of fact, but also as to their disagreement, and hence as to the particular issues that should become the subject of proof, might be brought before the court. Each party, in the outset, had the opportunity to tell his whole story—the one in making the complaint, and the other in making the answer.

(5.) *Two or more Forms of Defense.*—If the defendant desired to combine two or more of these modes of defense, he might make a disclaimer as to one part of the bill, demur as to another part, plead as to another, and answer as to another part. But these different modes of defense could not be combined, either as to the whole bill, or as to any of the same parts. If the defendant demurred to the whole bill, he could not at the same time answer as to the whole; and so if he demurred to a part of the bill, he could not answer as to that part to which he had demurred. He could not, by an answer, claim what he had declared, by a disclaimer, that he had no right to. These different modes of defense were not deemed compatible with each other when jointly applied to the whole complaint, or to the same part or parts of it. (Mitford's & Tyler's Pleadings, p. 411.)

5. Amendment of the Pleadings.—Provision was made in the chancery practice of England that the plaintiff might amend

his complaint, adding new matter or changing the original bill, according to the exigency of the case as appearing from the answer of the defendant. The defendant might also, in special circumstances, with the permission of the court, amend his answer, and was required to amend his answer, or answer further, when the answer was not deemed sufficient.

6. Cross-Bills.—A cross-bill might in an equity suit be filed by one or more of the defendants against the plaintiff, and against such other of the defendants as would be affected by the cross-relief. This bill was resorted to when the facts were such that a decree on the plaintiff's bill simply, "either from cross-relief or discovery being required by the defendants, or from the existence of litigation between co-defendants," would not determine the whole litigation. The object of the cross-bill was to enable the court to give full relief to all parties interested in the suit, and bring before it a point or points in litigation that would not be reached and determined by a decree upon the original bill. If such a bill had not been filed, and the difficulty of making a final decree that would terminate the litigation appeared at the hearing of the case, the court might postpone the decree until this difficulty was remedied.

7. The Supplemental Bill.—A supplemental bill, or a bill in the nature of a supplement, was allowed to be filed by the plaintiff when the frame of the original bill was defective, and the time for amending it had elapsed. This defect, with the permission of the court, might be rectified in this way. As to the character of the defect to be thus cured, Mr. Adams, in his "Doctrine of Equity," remarks: "Defects in a suit subsequent to its institution may be caused, either in respect of parties, by the transfer of a former interest or the rise of a new one, or, in respect of issues between the existing parties, by the occurrence of additional facts. And they are cured by a bill of supplement, or in the nature of a supplement." (P. 408.)

It was to remedy such defects in the original bill that the supplemental bill was allowed to be added thereto, not as the commencement of a new suit, but as the continuation of the original suit, in order that the court might render a proper decree in the premises.

8. Bills of Revivor.—A bill of revivor, or in the nature of a revivor, was provided for when an equity suit was interrupted in its progress by what was known as an abatement, as when a party died during the pendency of the proceeding, having an interest or liability that did not determine at his death, and did not survive in any of the other litigants to the suit. The object of the bill was to prevent the absolute abatement or interruption of the suit; and this end was attained by putting in place of the deceased person another party in whom the interest or liability did survive, and by or against whom the suit might be continued to its termination in a final decree. The bill was allowable, at any stage of the proceeding, upon the occurrence of an event which made it necessary; and, being properly prepared and filed, the suit was then revived by an order of the court.

9. The Replication.—The original bill, or the bill as amended, being filed, and the original answer, or the answer as amended, being also filed, then the pleadings had reached that point at which the plaintiff, if not designing to admit the truth of the answer made by the defendant, filed a general replication. This replication was in effect the plaintiff's general answer to the pleadings of the defendant, in which he re-affirmed the truth of the matters set forth in the complaint, declared his readiness and ability to prove the same, denied the truth of the plea or answer of the defendant and the sufficiency of the matter contained therein, and, in short, joined issue with the defendant as to the questions in dispute between them.

The effect of the replication was to close the pleadings on both sides, and put the questions of fact, as arising therefrom, in issue before the court. The whole case of the complainant and the whole case of the defendant, as presented by these respective parties, were on the record of the court by the pleadings; and since there was a conflict between them as to facts and their respective rights and liabilities, it became necessary for the court to institute an inquiry into the truth of their allegations.

10. The Evidence.—The parties had the right to establish, if they could, their respective cases as set forth in the pleadings. For this purpose evidence was introduced in proof of allegations not admitted by both parties. This evidence was taken in writing,

either by the oral examination of witnesses, or by interrogatories previously prepared, and taken by an officer of the court, and not disclosed or published until the whole evidence was completed. And after the evidence had thus been taken, and the depositions published and read, no further evidence was admissible, without the special permission of the court, except for the purpose of impeaching witnesses.

Public documents, and documents not impeached and requiring only the proof of handwriting, might be given as evidence by affidavit at the hearing of the case.

The general rules of evidence were the same as those in use by common-law courts. The difference between the two classes of courts was in the manner of taking the evidence.

The evidence formed a part of the record of the court in the case, and was used by the court in determining the equities between the parties, and, if an appeal was taken from the decree, it was also used by the appellate tribunal for the same purpose.

11. The Hearing.—The evidence being all taken and made a part of the record, together with the pleadings on both sides, the case was ready for a hearing before the court, with a view to a final decree. The parties then presented and argued their respective cases upon the pleadings and the evidence, in the light of which the court rendered a final decision.

If, at this hearing, questions arose in the case not satisfactorily settled by the evidence, it was the practice of the court to defer making a final decree, and provide for the proper settlement of such questions by a preliminary decree, ordering a case for a court at law, or an issue of fact for a jury to settle, or referring the matter or matters involved to a master in chancery, who was charged with the duty of taking testimony in regard to the same and making a report thereof to the court.

The report of the master being made in a case which had been referred to him, then, if any of the parties interested in the suit were dissatisfied with the report, and had filed written exceptions thereto, these exceptions were heard and determined by the court before proceeding to a final decree.

If the report itself raised new inquiries of sufficient importance to demand further investigation, another reference to a master in chancery was made, and even another under like circum-

stances, until all material questions of fact were settled by the evidence.

12. The Final Decree.—The final decree, when made and enrolled, disposed of the case, so far as the court making it was concerned. And this decree, unless appealed from and reversed, the court had the power to enforce upon all the parties affected thereby.

Prior to the enrollment, the decree might be changed on a rehearing of the case, either before the court that made the decree, or before the Lord Chancellor who was regarded as the head of the court. But, after the enrollment, it could be altered only on appeal, either to the King or by petition to the House of Lords.

This is an abridged outline of the procedure in an English chancery suit, mainly compiled from the fuller statement given by Mr. Adams in his Introduction to the "Doctrine of Equity." Congress and the Supreme Court of the United States alike refer to this procedure—the one, in declaring that it shall be adopted by the Circuit and District Courts of the United States, except when otherwise provided by law, or by rules of court in pursuance thereof, and the other, in prescribing rules for the guidance of Circuit Courts. This procedure undoubtedly formed the basis and largely the source of these rules.

The system of English equity, as existing when the Constitution was adopted, was the gradual growth of centuries. It had then assumed a definite and organized form, and become a well-known and fixed part of the jurisprudence of England. The fundamental idea of the system was to give the parties a full opportunity to make a complete exhibit of their respective cases, unhampered and unrestrained by the rigid technicalities and requirements of the common law. Its aim was to supplement this law by adding remedies, in certain cases, not afforded by it.

It was but natural that this system should, at an early period, have been introduced into this country, and just as natural that, when the Constitution of the United States was framed and adopted, it should have a recognition and sanction in that instrument, and that it should have thus become an integral part of the Federal jurisprudence authorized by it, with such modifications and additions as the circumstances of this country might

render expedient. The system is in the Constitution, and there it will permanently abide, unless removed therefrom by amendment, and that, too, whatever may be the policy or practice of the several States in regard to equity jurisprudence. Equitable rights and legal rights cannot, under the General Government, be litigated and determined in the same suit. They may be litigated in the same courts, but not in the same suits. Both the Constitution and the law separate them as to the method of adjudication.

Judge Blatchford, in *The La Mothe Manufacturing Co.* v. *The National Tube Works Co.* 15 Blatch. 432, 435—a case which had been removed from a State court to the Circuit Court—said: "It is clear that the complaint prays for purely equitable relief, in praying for an injunction and for the cancellation of the agreement, and that it prays for purely legal relief, in praying for the award of $100,000 damages, for breaches of the provisions of the agreement." Referring to the fact that, under the New York Code of Procedure, a plaintiff may in the same action seek relief in both forms, he added: "But this cannot be done in the Federal courts, either in causes originally commenced there, or in causes removed there. The present complaint must be recast into two cases, one at law and the other in equity." (*Montejo* v. *Owen*, 14 Blatch. 324.)

CHAPTER IV.

FEDERAL EQUITY RULES.

Congress, by the second section of the Act of May 8th, 1792 (1 U. S. Stat. at Large, 275), gave to the Supreme Court authority to prescribe, from time to time, regulations for equity practice in the Circuit and District Courts of the United States. Proceeding under this authority, the Supreme Court has prescribed the following rules to regulate the equity procedure in Circuit Courts:

Preliminary Regulations.

1. Courts always Open.—The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits. (Rule 1.)

2. Clerk's Office Open—when.—The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed. (Rule 2.)

3. Orders in Vacation.—Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing. (Rule 3.)

4. Motions, Rules, and Orders to be Entered.—All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule days at the clerk's office, whether special or of

course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit in equity and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion. (Rule 4.)

5. Motions Grantable of course.—All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings, for making amendments to bills and answers, for taking bills *pro confesso*, for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown. (Rule 5.)

6. Motions not Grantable of course.—All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order-book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party or his solicitor shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion. (Rule 6.)

Process.

1. Kinds of Process.—The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the

exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court. (Rule 7.)

2. Process of Execution.—Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree. (Rule 8.)

3. Writs of Assistance.—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court. (Rule 9.)

4. Persons who are not Parties.—Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause. (Rule 10.)

Service of Process.

1. Issue of Process.—No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office. (Rule 11.)

2. Return of Process.—Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there is more than one defendant a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants. (Rule 12.)

3. Manner of Service.—The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family. (Rule 13.)

4. Another Subpœna.—Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, *toties quoties*, against such defendant, if he shall require it, until due service is made. (Rule 14.)

5. The Officer to Serve.—The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof. (Rule 15.)

6. Docketing the Cause.—Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry. (Rule 16.)

Appearance.

The appearance day of the defendant shall be the rule day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable. The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk. (Rule 17.)

Bills Taken Pro Confesso.

1. Default of the Defendant.—It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order as of course, in the order-book, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill within a period to be fixed by the court or judge, and undertaking to speed the cause. (Rule 18.)

2. Decree in Case of Default.—When the bill is taken *pro confesso*, the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause. (Rule 19.)

The Frame of Bills.

1. The Introduction.—Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the Circuit Court of the United States for the district of : A. B., of and a citizen of the State of , brings this his bill against C. D., of and a citizen of the State of , and E. F., of and a citizen of the State

of . And thereupon your orator complains and says that," &c. (Rule 20.)

2. Recitals and Contents of the Bill.—The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for. (Rule 21.)

3. Parties not within Jurisdiction.—If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction. (Rule 22.)

4. Application for Subpœna.—The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process. (Rule 23.)

5. Counsel Must Sign the Bill.—Every bill shall contain the signature of counsel annexed to it, which shall be considered as

an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed. (Rule 24.)

6. Taxable Costs.—In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer. (Rule 25.)

Scandal and Impertinence in Bills.

1. Such Matter Excluded.—Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments in *haec verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference. (Rule 26.)

2. Exceptions Therefor. — No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination. (Rule 27.)

Amendment of Bills.

1. Amendments of Course.—The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his

bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterward, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do, of course) after a copy has been so taken, before any answer, or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby. (Rule 28.)

2. Amendments by Permission.—After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause. (Rule 29.)

3. Waiver of the Right to Amend.—If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made. (Rule 30.)

Demurrers and Pleas.

1. Conditions of Allowance.—No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay, and, if a plea, that it is true in point of fact. (Rule 31.)

2. Allowance by the Court.—The defendant may at any time before the bill is taken for confessed, or afterward, with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded. (Rule 32.)

3. Argument or Issue. — The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him. (Rule 33.)

4. Overruling.—If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly. (Rule 34.)

5. Allowance of Demurrer or Plea.—If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable. (Rule 35.)

6. Sufficiency of Demurrer or Plea.—No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to. (Rule 36.) No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea. (Rule 37.)

7. Omission to Reply.—If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule

day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose. (Rule 38.)

ANSWERS.

1. Sufficiency. — The rule that, if a defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in uch answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea. (Rule 39.)

2. Answering Interrogatories.—A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent. (Rule 40.) *Ordered*, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be, and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery. (December Term, 1850.)

3. Manner of Interrogation.—The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively, 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered

respectively 1, 2, 3, &c.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill. (Rule 41.)

Rule 41 was, at the December term, 1871, amended as follows: If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the Act of Congress of July 2d, 1864.

4. Interrogatories in the Foot-Note.—The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as a part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill. (Rule 42.)

5. Form, Preceding the Interrogatories of the Bill.—Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall thereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say:—

"1. Whether, &c.

"2. Whether, &c." (Rule 43.)

6. Declinature to Answer.—A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer. (Rule 44.)

7. Special Replication.—No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct. (Rule 45.)

8. Time of New Answer.—In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer. (Rule 46.)

Parties to Bills.

1. When Dispensed with.—In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties. (Rule 47.)

2. Numerous Parties.—Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties. (Rule 48.)

3. Trustees as Parties.—In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the

matter on the hearing, if it shall so think fit, order such persons to be made parties. (Rule 49.)

4. Heirs at Law.—In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him. (Rule 50.)

5. Joint and Several Demand.—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable. (Rule 51.)

6. Defect of Parties.—Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following; that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill. (Rule 52.)

7. Objections at the Hearing.—If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties. (Rule 53.)

Nominal Parties to Bills.

1. Their Appearance.—Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear

and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct. (Rule 54.)

2. Injunctions.—Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte* if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court. (Rule 55.)

Bills of Revivor and Supplemental Bills.

1. Bills of Revivor.—Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived as of course. (Rule 56.)

2. Supplemental Bills.—Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court. (Rule 57.)

3. Repetition of Original Statements.—It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it. (Rule 58.)

Answers.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory. (Rule 59.)

Amendment to Answers.

After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom. (Rule 60.)

Exceptions to Answers.

1. The Time of Filing.—After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient. (Rule 61.)

2. Separate Answers by same Solicitor.—When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other

proceedings were necessary or proper, and ought not to have been joined together. (Rule 62.)

3. Exceptions for Insufficiency.—Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient: *Provided*, however, that the court or any judge thereof may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable. (Rule 63.)

4. Answer after Exceptions are Allowed.—If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct. (Rule 64.)

5. Costs on Exceptions.—If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudicated insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court or the judge thereof, at the hearing upon the exceptions. (Rule 65.)

Replication and Issue.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order as

of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge thereof shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed. (Rule 66.)

TESTIMONY—HOW TAKEN.

1. Commissions sued out.—After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases, the commissioner or commissioners shall be named by the court or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories. (Rule 67.)

2. December Term, 1854.—*Ordered*, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

3. December Term, 1861.—*Ordered*, That the last paragraph in the sixty-seventh rule in equity be repealed, and the rule be amended as follows: Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and, when completed, shall be read over to the witness and signed by him in presence of the parties or counsel, or such of them as may attend;

provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given, by the respective counsel or solicitors, to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the thirtieth section of Act of Congress, September 24th, 1789.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

4. December Term, 1869.—Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained on motion, for cause shown.

5. Depositions after the Cause is at Issue.—Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress,

if a court or a judge thereof shall, under all the circumstances, deem it reasonable. (Rule 68.)

6. Time for Taking Testimony. — Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony. (Rule 69.)

Testimony De Bene Esse.

After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony. (Rule 70.)

Form of the Last Interrogatory.

The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer." (Rule 71.)

Cross-Bill.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff

shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used. (Rule 72.)

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

1. The Personal Estate of Decedent.—Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct. (Rule 73.)

2. Hearing of a Reference by Masters.—Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference. (Rule 74.)

3. Duty of the Master.—Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay. (Rule 75.)

4. Form of Report.—In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge,

affidavit, deposition, examination or answer were so brought in or used. (Rule 76.)

5. Powers of the Master.—The master shall regulate all the proceedings in every hearing before him upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties. (Rule 77.)

6. Procuring Witnesses.—Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable. (Rule 78.)

7. Form of Accounting.—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct. (Rule 79.)

8. Evidence before the Master.—All affidavits, depositions, and documents which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master. (Rule 80.)

9. Examination of Claimants.—The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary. (Rule 81.)

10. Appointment of Masters, &c.—The Circuit Courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court. (Rule 82.)

[Congress, by the Act of March 3d, 1879 (20 U. S. Stat. at Large, 415), provided that no clerk of the District or Circuit Courts of the United States, or their deputies, shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.]

Exceptions to Report of Master.

1. Time of Filing.—The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise. (Rule 83.)

2. Costs on Exceptions.—And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the Circuit Court. (Rule 84.)

Decrees.

1. Correcting Decrees.—Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing. (Rule 85.)

2. Formal Parts of Decrees.—In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" [Here insert the decree or order.] (Rule 86.)

Guardians and Prochein Amis.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami;* subject, however, to such orders as the court may direct for the protection of infants and other persons. (Rule 87.)

Rehearing.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court. (Rule 88.)

Rules by Circuit Courts.

The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, pro-

ceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same. (Rule 89.)

English Practice Applicable.

In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice. (Rule 90.)

Affirmations in Lieu of Oaths.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him. (Rule 91.)

Foreclosure Suits in Equity.

December term, 1863. *Ordered*, That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money. (Rule 92.)

Injunctions.

October term, 1878. When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party. (Rule 93.)

Provisions by Congress.

The following provisions relating to equity practice may be found in the Act of June 1st, 1872 (17 U. S. Stat. at Large, 196):

Sec. 7. That, whenever notice is given of a motion for an injunction out of a Circuit or District Court of the United States,

the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

Sec. 13. That when in any suit in equity, commenced in any court of the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found, or where such personal service is not practicable, such order shall be published in such a manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district, but said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

Bills by Stockholders.

Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action. (Rule 94, promulgated January 23d, 1882.)

These rules, being prescribed by the Supreme Court under the authority of Congress, have the force and effect of positive statutes. They are obligatory upon the Circuit Courts of the United States, except where, as is often the case, they remit matters to the discretion of these courts, and being applicable to all the Circuit Courts, they establish in these courts a general and uniform system of equity procedure throughout the United States. (*Ex parte Poultney*, 13 Pet. 472; and *Ex parte Myra Clarke Whitney*, 13 Pet. 404.)

This, however, does not exclude the power of the Circuit Courts, in their discretion, to make other and further regulations, provided that such regulations are not inconsistent with those established by the Supreme Court, or their power, from time to time, to alter and amend the same, as circumstances may require. The eighty-ninth rule, prescribed by the Supreme Court, expressly declares that the Circuit Courts, both judges concurring, shall have this power. The same power is also given in section 913 of the Revised Statutes of the United States.

The ninetieth rule, made by the Supreme Court, provides that, "in all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." This refers to the English chancery practice as it was when the rule was adopted.

All these rules are regulations of practice in the Circuit Courts when exercising their original jurisdiction in equity cases. They do not relate to the appellate jurisdiction of these courts, or to that of the Supreme Court, except as it may become necessary for the latter court to enforce them when reviewing, upon appeal, the final decrees of Circuit Courts. Nor do they prescribe any regulations for District Courts when sitting as courts of equity, unless they are so sitting and acting as Circuit Courts, and, consequently, exercising the powers of such courts in equity cases, in which event the rules would be equally applicable to them.

The general result, as to equity practice in the courts of the United States, may be thus stated: Where Congress or the Su-

preme Court has prescribed rules for the guidance of the Circuit or District Courts in equity cases, these rules must be followed in all cases to which they are applicable. But where neither Congress nor the Supreme Court has prescribed such rules, the principles, rules, and usages which belong to courts of equity, as established in the English chancery practice when the Constitution was adopted, are to furnish the guide, except as these courts, in pursuance of the authority given to them by Congress, may see fit to establish rules for their own practice, altering them or adding thereto, from time to time, as occasion may require.

All that has been attempted in the four chapters composing Part VII, is to give a general idea of that branch of Federal jurisprudence which relates to the administration of remedial justice according to the principles, rules, and usages of equity, in distinction from those of law. The equity system is a part of this jurisprudence by the authority of the Constitution. The fact, established by the legislation of Congress, that law and equity are administered by the same Federal courts, and not by separate courts, does not confound the two systems of jurisprudence, or combine them in the same proceeding, or make them any the less distinct in their procedure, or in the cases to which they are respectively applicable.

The Federal courts, in distinct proceedings, simply exercise both classes of powers, and administer both classes of remedies, according to the character of each particular case coming within their jurisdiction. And when sitting as courts of equity, they administer precisely the same system in all the States, without regard to the methods of procedure that may be practiced in those States. Their equity jurisdiction and procedure are wholly independent of State laws and State usages.

ADDITIONS AND CORRECTIONS.

1. Limitation of Time.—As to the question whether, under section 1008 of the Revised Statutes of the United States, considered on pp. 566 and 567 of this treatise, a writ of error from the Supreme Court to a State court must be brought within two years after the entry of the judgment or decree complained of, the cases of *Cummings* v. *Jones*, 14 Otto, 419, and of *Scarborough* v. *Pargoud*, 2 Supreme Ct. Rep. 877, may be consulted. Both of these cases affirm this doctrine.

2. Record of the State Court.—The doctrine as to the record of a State court on a writ of error from the Supreme Court to such court, stated on pp. 547 and 548, was, in *Gross* v. *The United States Mortgage Co.*, 2 Supreme Ct. Rep. 940, so far modified as to hold it proper for the Supreme Court to examine the opinions of the judges of the State court, in connection with the record, for the purpose of ascertaining whether the judgment or decree complained of necessarily involves a Federal question within the reviewing power of the Supreme Court, especially when, as in this case, the laws of the State require the judges of the State court, in all cases submitted to them, to file and spread at large upon the record of the court their written opinions. (*Murdock* v. *The City of Memphis*, 20 Wall. 633.) Such opinions delivered by the Supreme Court of Louisiana are examined by the Supreme Court for this purpose. (*The Grand Gulf R. R. Co.* v. *Marshall*, 12 How. 165; and *Cousin* v. *Labatut*, 19 How. 202.)

3. Time of Citizen Status.—The Supreme Court, in *Gibson* v. *Bruce*, 2 Supreme Ct. Rep. 873, passed upon the question considered on pp. 500–503, which had been the subject of conflicting decisions in the Circuit Courts, whether, in removing a cause from a State court to the proper Circuit Court, under the Removal Act of March 3d, 1875, it is necessary that the parties to the suit should be citizens of different States, not only at the time of filing the petition for such removal, but also at the commencement of the suit in the State court. The decision of the court was that, such citizenship being the ground of the right of removal, it must, under this act, exist at both periods.

4. Cases under Federal Laws.—Judge Wallace, in *Cruikshank* v. *The Fourth National Bank*, 16 Fed. Rep. 888, held, that any suit by or against a corporation created by an act of Congress is a suit arising under the laws of the United States, within the meaning of section 2 of the Removal Act of 1875, and may be removed from the State court. (*Osborn* v. *The Bank of*

the United States, 9 Wheat. 738; and *The Union Pacific R. R. Co.* v. *McComb*, 1 Fed. Rep. 799.)

This differs from the ruling of Judge McCrary, in *Myers* v. *The Union Pacific R. R. Co.*, 16 Fed. Rep. 292, referred to on p. 492 of this treatise, who, in this case, held that a suit by or against a corporation created by an act of Congress, is not necessarily a case which arises under a law of the United States within the meaning of the second section of the Act of March 3d, 1875, providing for the removal of causes from the State to the Federal courts, and that Congress has not provided for the removal of every case brought by or against a Federal corporation, upon the sole ground that it is a corporation organized under the laws of the United States. It is necessary, in order to the removal of the suit, as Judge McCrary held, that the cause of action or the defense should arise upon the construction of some provision of the Constitution, or of a law or treaty of the United States. (*The State of Illinois* v. *The Illinois Central R. R. Co.* 16 Fed. Rep. 881; and *Holand et al.* v. *Ryan et al.* 17 Fed. Rep. 1.)

5. The Court of Claims.—The Supreme Court, at the October term, 1882, ordered that Rule 1, in reference to appeals from the Court of Claims, be, and the same is hereby, made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by the Act of June 16th, 1880, c. 243, "to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes." (Promulgated May 7th, 1883.) The act here referred to is found in 21 U. S. Stat. at Large, 284.

Congress, March 3d, 1883, c. 116, passed an act entitled "An Act to afford assistance and relief to Congress and the Executive Departments, in the investigation of claims and demands against the Government," which, for the purposes specified in the act, and subject to the limitations therein stated, increases the jurisdiction of the Court of Claims beyond the limits previously fixed. (22 U. S. Stat. at Large, 485.)

6. Errata.—The following corrections of errors should be made: "administering" for "administerting," 12th line from the top, p. 22; "interstate" for "international," 18th line from the top, p. 56; "sixteenth" for "seventeenth," 13th line from the bottom, p. 77; "port" for "court," 9th line from the top, and "party" for "person," 11th line from the bottom, p. 79; "course" for "cause," 8th line from the bottom, p. 92; "defendant" for "defendants," 15th line from the top, p. 236; "Circuit Courts" for "circuits," 2d line from the top, p. 224; the words "and under the same regulations," omitted between the words "manner" and "shall have," 19th line from the top, p. 561; "suspended" for "superseded," 6th line from the bottom, p. 697, and the same correction, 5th line from the top, p. 698; "any" for "and," 17th line from the bottom, p. 740.

Substitute the words "any State" for the words "the United States," in the 12th line from the bottom, p. 184; and supply the words "the validity and effect whereof depend upon the law of nations," after the word "thereof" in the 19th line from the bottom, p. 322.

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