any case, divest the rightful jurisdiction of those of the United States, is a doctrine to which I am wholly unable to assent, and which does not appear to be supported by any precedent or authority. The act of congress of 1888 (25 Stat. 433) provides that any suit of a civil nature, at law or in equity, may be removed, whereever the sum in dispute amounts to $2,000, and the controversy is between citizens of different states; and the right thus accorded pertains to all proceedings of a civil nature, of whatever form, provided they are suits at law or in equity. Any case which in the state court was either the one or the other of those becomes, upon its proper removal to a circuit court of the United States, cognizable by it. Fuller v. Wright, 23 Fed. 833; In re Cilley, 58 Fed. 987; Clark v. Smith, 13 Pet. 203; Parker v. Overman, 18 How. 141; Thompson v. Railroad Co., 6 Wall. 138; Searl v. School Dist., 124 U. S. 197, 8 Sup. Ct. 460. Whether the jurisdiction of this court is upon its law side or its equity side will be determined "by the essential character of the case," but the right of removal is not affected by any such question. That right exists if, upon either side, the requisite jurisdiction exists. Where a cause brought here by removal cannot be entertained upon the one side, it must be assigned to the other; but it is not to be remitted to the state court if, upon either side, the federal court is competent to retain and decide it. Van Norden v. Morton, 99 U. S. 378. In the cases in which the right of removal has been denied or questioned, the proceedings in the state courts have been, in their nature, not civil suits, either at law or in equity, or else some independent condition of the statute (ex gr. as to the sum in dispute) has been lacking. Gaines v. Fuentes, 92 U. S 10; In re Cilley, 58 Fed. 977; Dey v. Railway Co., 45 Fed. 82; In re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141. The motion to remand is denied.

LITTLE ROCK JUNCTION RY. v. BURKE.

(Circuit Court of Appeals, Eighth Circuit. January 28, 1895.)

No. 403.

1. FEDERAL COURTS—JURISDICTION—SETTING ASIDE DECREE OF STATE COURT.
   The federal courts have no jurisdiction of a suit to set aside a decree of a state court, on the ground that such decree is utterly void when tested by an inspection of the record, since in such case a motion, appeal, or bill of review, in the court which made the decree, is the proper and sufficient remedy.
2. SAME.
   It seems that such courts may have jurisdiction of a suit to set aside such a decree on grounds outside the record, and proved by extrinsic evidence.
3. SAME—SUIT TO QUIET TITLE.
   Though the federal courts have jurisdiction, in a proper case, to entertain a bill to quiet title or remove a cloud on title, such jurisdiction does not extend to cases where the cloud consists of a judgment or decree of a state court, and proceedings taken in execution of the same, which judgment or decree is alleged to be void on its face.

4. SAME.

Suit was brought in a court of the state of Arkansas, pursuant to the statute of that state, by P. county, to establish and foreclose a tax lien on certain lands of B. The statute required an order to be made and published requiring claimants of lands affected by such a suit to appear and show cause why the same should not be sold, and provided that, upon proof of publication and failure of claimants to appear, a decree pro confesso might be entered. Such a decree was made against B.'s lands, which were sold and conveyed to one S., who sold to the L. Ry. Co. B. subsequently brought a suit in the federal court to set aside such conveyances and the decree of the state court, as clouds on his title, upon the ground that the state court acquired no jurisdiction of B. It appeared by the record of the suit in the state court, which was the only evidence offered, that the affidavit of publication of notice filed in such record was not verified. *Held*, that the suit was one to set aside the decree of the state court for defects apparent on the face of the record, and that the federal court had no jurisdiction to entertain it.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

John Burke, the appellee, claiming to be the owner by inheritance of the south part of lot 6 in block 1 of Pope's addition to the city of Little Rock, Ark., filed a complaint against the Little Rock Junction Railway, hereafter termed the "Railway Company," to establish his title thereto, and to recover the premises from the possession of the defendant. The bill averred, in substance, that the railway company was in possession of the land under a conveyance from E. S. Stiewell; that said Stiewell claimed to have purchased the property at a sale for overdue taxes, which sale had been made in obedience to a decree of the Pulaski chancery court, a state court of Arkansas, having full chancery powers; that the title thus acquired by the railway company from E. S. Stiewell, its grantor, was unfounded and void, for the reason that said Pulaski chancery court never in fact acquired jurisdiction over the appellee in the suit to condemn and sell the property for overdue taxes. The tax suit in question was brought under the provisions of an act of the legislature of the state of Arkansas entitled "An act to enforce the payment of overdue taxes," approved on March 12, 1881, and an amendatory act approved March 22, 1881. Laws Ark. 1881, pp. 63–72, 159–161. The second, third, fourth, and fifth sections of said act, which are most material to the present case, are as follows:

"Sec. 2. On the filing of such complaint, the clerk of the court shall enter on the record an order, which may be in the following form: 'State of Arkansas, on Relation of ——, Plaintiff, vs. Certain Lands on which Taxes are Alleged to be Due, Defendant. Now, on this day came said plaintiff, and files here in court his complaint, in which he sets forth that there are certain taxes due on the following lands: [Here insert a description of the land.] Now, therefore, all persons having any right or interest in said lands, or any of them, are required to appear in this court within forty days from this date, then and there to show cause, if any they can, why a lien shall not be declared on said lands for unpaid taxes, and why said lands shall not be sold for non-payment thereof.'

"Sec. 3. The clerk of said court shall at once cause a copy of said order to be published for two insertions in some newspaper published in the county; and if there is no newspaper published in the county, he shall cause a copy of said order to be posted at the door of the court house of the county, or of the room in which the court is held; and such publication shall be taken to be notice to all the world of the contents of the complaint filed as aforesaid, and of the proceedings had under it.

"Sec. 4. That any person who can show that he has any interest in any of the lands mentioned in the said order, may appear in the court in which such complaint is filed, or before the clerk thereof in vacation, and file an answer, showing why the prayer of such complaint shall not be granted; * * * *

"Sec. 5. At the end of the forty days mentioned in section 2 of this act, the clerk shall enter upon the record a decree pro confesso, covering all lands

named in the complaint, regarding which no answer has been filed, which order may be in the following form: 'State of Arkansas, on the Relation of —— Plaintiff, vs. Certain Lands on which Taxes are Alleged to be Due, Defendant. It appearing that the order herein made, requiring the owners of the lands in this suit to appear and show cause, if any they could, why a lien should not be declared on certain lands named in the complaint herein, has been duly published in the manner required by statute, and that no answer has been put in as to the following tracts or parcels of land, that is to say: [Here describe the lands.] It is now, therefore, ordered that the complaint be taken as true and confessed as to said lands above described.'"

Other provisions of said act authorized said court, if no cause to the contrary was shown, to fix a lien upon the lands for the amount of all the taxes, penalties, and costs ascertained to be due thereon, and to direct a judicial sale of the lands for the payment thereof if the sum ascertained to be due was not paid within 20 days from the date of the decree. The bill in the present case charged that the order made by the clerk in said proceeding on the filing of the complaint was not published, as required by the statute aforesaid; that there was no record in said cause showing that said order was ever published; that no proof of the publication of said order was made by the editor, proprietor, or chief accountant of any newspaper, or by any other person authorized to make such proof; that there was no record in said court showing that such proof was ever made; that said order was not in fact published as required by law; and that all of the proceedings of the Pulaski chancery court in said tax suit were coram non judice and void. The defendants denied all of the material allegations of the bill touching the jurisdiction of the chancery court, and averred that said court acquired full jurisdiction of the case and of all persons having any interest in the property. The defendants also pleaded, in substance, that the case made by the bill of complaint was not a case of which the federal circuit court sitting in equity could properly take cognizance. The circuit court rendered a decree in favor of the complainant, whereby it adjudged that his title was not divested by the sale under the aforesaid decree. It also decreed that he be restored to the possession of the property, and that he recover of the railway company the sum of $2,467 for the rents and profits of the land. To reverse said decree, the railway company has prosecuted an appeal to this court.

George E. Dodge and B. S. Johnson filed brief for appellant.

P. C. Dooley filed brief for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is manifest from an examination of the record in the case at bar that the circuit court found and decided that the decree of the Pulaski chancery court condemning the land in controversy to be sold for the nonpayment of taxes was utterly void for want of jurisdiction; and that issue as to the validity of the decree of the chancery court appears to have been tried and determined by the circuit court solely upon an inspection of the record in the tax suit. No evidence seems to have been offered for the purpose of impeaching the decree in question, except the record in the suit to foreclose the tax lien. For the purpose of showing that the Pulaski chancery court had acted without jurisdiction, and that its decree was a nullity, the complainant below, who is now the appellee, offered the following documentary evidence, to wit: The bill of complaint in the tax suit; the warning order that was entered therein on the filing of the bill pursuant to section 2 of the act of March 12, 1881, supra; the decree pro confesso that was entered in said proceed-

ing; the final decree therein; and a paper produced by the clerk of the chancery court, that purported to be the proof of publication of the warning order, which paper was in the following form, to wit:

"Notice of Delinquent Lands.

"In the Pulaski Chancery Court, at the March Term Thereof, A. D. 1881.

"Pulaski County, Plaintiff, vs. Certain Lands upon which Taxes are Alleged to be Due.

"Comes the plaintiff, the county of Pulaski, by P. C. Dooley, Esq., its solicitor, and files here in court its complaint, which sets forth that there are certain taxes due on the following lands, to wit: * * * ; S. pt. being ¼ lot 6, block one, Pope's addition. Now, therefore, all persons having any right or interest in said lands or city lots, or any of them, are required to appear in this court within forty days from this date, then and there to show cause, if any they can, why a lien shall not be declared on said lands for unpaid taxes, and why said lands shall not be sold for nonpayment thereof.

"A true copy from the record. J. W. Callaway, Clerk.

"June 11, 1881.

"State of Arkansas, County of Pulaski—ss.: I, J. O. Blakeney, do solemnly swear that I am principal accountant of the Arkansas Democrat, a daily newspaper printed in said county, and that I was such principal accountant at the dates of publication hereinafter stated, and that said newspaper had a bona fide circulation in such county at said dates and had been regularly published in said county for the period of one month next before the date of the first publication of the advertisement hereto annexed, and that the said advertisement was published in said newspaper two times, for two days consecutively, the first insertion therein having been made on the 13th day of June, 1881, and the last on the 14th day of June, 1881.

"J. O. Blakeney, Princ. Acc't.

"Sworn to and subscribed before me, this ——— day of ———, 188–.

"———, Notary Public.

* * * * * * * * * * * * * * * * *

"In testimony that the above and foregoing writing is a true copy of the matter therein recited, as appears from the original paper purporting to be proof of publication in the case mentioned in the caption, and which paper is now in my custody, I have hereto set my hand, and affixed the seal of said court, at my office in the city of Little Rock, this 16th day of February, 1893.

"[Seal.] I. J. Hicks, Clerk."

In addition to the documentary proof aforesaid, no extrinsic evidence was produced by the complainant which tended to show that the warning order was not in fact published or posted as section 3 of the act of March 12, 1881, required, but the case was submitted to the circuit court for decision, on the evident assumption that the defect in the proof of publication was such as to demonstrate the utter invalidity of the decree of the chancery court. It is a proposition which admits of no controversy that the Pulaski chancery court acquired no jurisdiction to condemn the land in question to be sold for taxes, and that its decree in that behalf was of no effect, and conveyed no title to the purchaser thereunder, if the warning order was not in fact published in the mode prescribed by the statute. It was held in Gregory v. Bartlett, 55 Ark. 33, 17 S. W. 344, that a lawful publication of the warning order prescribed by the act of March 12, 1881, supra, is necessary to confer jurisdiction in a suit under that act to enforce a lien for overdue taxes, and that a publication of the order in the mode prescribed by law is unavailing to confer jurisdiction if the clerk of the court neglects

to enter the warning order of record before the same is published. The doctrine of that case has recently been cited and approved by the supreme court of the United States in Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124. These decisions, however, do not decide the proposition, which appears to have been maintained in the circuit court, that the decree of the Pulaski chancery court in the tax suit is void upon the face of the record. In that suit the record discloses that the warning order was duly entered; the decree pro confesso recites that the warning order had "been duly published in the manner required by statute more than forty days before this date"; and the final decree contains the same recital, in substance, and a further finding by the court "that proof of publication, of which notice, verified and proved as required by law, was filed as required by law." No other portion of the record showed affirmatively, or by necessary intendment, that the recital as to the due publication of the warning order was in fact false. For aught that appears on the face of the record in the tax suit, the warning order may have been published precisely as the statute requires, and proof of that fact may have been made to the satisfaction of the chancery court. The contention of the complainant in the circuit court seems to have been that the decree of the chancery court was void upon the face of the record, and assailable in any collateral proceeding, because the proof of publication aforesaid, which was on file in the case, was not verified, and because a general statute of the state of Arkansas declares that "the affidavit of any editor, publisher or proprietor, or the principal accountant of any newspaper, authorized by this act to publish legal advertisements, to the effect that a legal advertisement has been published in his paper for the length of time and number of insertions it has been published, with a printed copy of such advertisement appended thereto, subscribed before any officer of this state authorized to administer oaths, shall be the evidence of the publication thereof as therein set forth." Mansf. Dig. § 4359. In other words, it seems to have been claimed and decided that a decree rendered in a suit founded on the act of March 12, 1881, supra, is utterly void, if the record does not contain the statutory evidence of publication above indicated, and that decrees rendered in such suits are not entitled to the benefit of any of those presumptions which ordinarily attend and support the judgments of courts of superior jurisdiction when the record does not affirmatively show that no jurisdiction was in fact acquired.

We have been thus particular in describing the character of the testimony that was offered and the nature of the issue that appears to have been tried and determined in the circuit court, for the purpose of showing that the trial of the case clearly resolved itself into a review of the proceedings of the Pulaski chancery court for matters apparent on the face of the record. It is manifest that the evidence offered to impeach the decree in the suit to foreclose the tax lien was such testimony as would have been admissible to support a bill of review, or a motion in the nature of a bill of review, to vacate the decree, had the complainant seen fit to commence a

proceeding of that kind in the Pulaski chancery court. It is also obvious, we think, that if the decree of the chancery court is in fact void on the ground that was and is relied upon to establish its invalidity,—that is to say, for want of jurisdiction apparent on the face of the record,—then the complainant could have obtained as full relief by a bill of review filed in the chancery court as by an original bill filed in the federal circuit court. In addition to the consideration that a bill of review would have furnished an adequate remedy, it must be also borne in mind that the remedy by appeal was originally open to the complainant if he had seen fit to prosecute an appeal. Moreover, it is a general rule that, unless restrained by the terms of an express statute, a court of superior jurisdiction has power at any time to vacate its own judgments when it appears from an inspection of its record that a particular judgment or decree is utterly void for want of jurisdiction either over the person or the subject-matter. This is an inherent power, which all courts of superior jurisdiction possess as a necessary part of the machinery for administering justice, and as a means of preventing their orders and decrees from becoming instruments of injustice. Black, Judgm. §§ 297, 307, and cases there cited.

Inasmuch, then, as the case at bar was essentially a suit to annul the decree of the Pulaski chancery court and the proceedings that had been taken thereunder, for the alleged reason that the decree was utterly void when tested by an inspection of the record, it becomes important and necessary to inquire whether the circuit court could properly entertain jurisdiction of a suit of that nature. It may be admitted that the federal circuit courts have power to entertain suits to enjoin persons from asserting any right or title under a judgment or decree of a state court of co-ordinate jurisdiction that is alleged to have been obtained by fraud or collusion. Gaines v. Fuentes, 92 U. S. 10; U. S. v. Norsch, 42 Fed. 417. Possibly, a bill in equity to obtain the same relief may be entertained in any case where it is shown by proper averments that the judgment of a state court which is apparently regular and valid, and for that reason is not subject to collateral attack, for some reason not disclosed by the record is in fact invalid and of no effect. A complaint alleging such facts would furnish a proper foundation for an original suit in equity because additional issues would be raised and new facts would be brought upon the record as the basis for independent judicial action. But a complaint or a petition which seeks to impeach a decree, without the aid of extrinsic evidence, for want of jurisdiction apparent upon the face of the record, simply imposes upon the court to which it is addressed the duty of re-examining questions that have once been tried and decided, and for that reason a proceeding of that nature cannot be regarded as a new action, but is rather a continuation of the original suit. The case of Barrow v. Hunton, 99 U. S. 80, 82, furnishes an apt illustration of the distinction which exists between a suit to impeach a judgment which is apparently valid, by evidence dehors the record, and a proceeding to vacate a judgment for matters disclosed upon the face of the record. In that case, Hunton had obtained a final

judgment by default in a state court of Louisiana in an attachment suit. Subsequently, the judgment debtor filed a complaint against Hunton in the state court to nullify the judgment, on the ground that he had not been lawfully served with process. Hunton caused the proceeding to nullify the judgment to be removed to the circuit court of the United States, where the question arose whether the federal court could lawfully entertain jurisdiction of the proceeding. With reference to that question, Mr. Justice Bradley, in delivering the opinion of the supreme court of the United States, said:

"The question presented with regard to the jurisdiction of the circuit court is whether the proceeding to procure [the] nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the circuit courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; and according to the doctrine laid down in Gaines v. Fuentes, 92 U. S. 10, the case might be within the cognizance of the federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

In that case it was held that as the proceeding in question merely involved a review of the action of the state court, as disclosed by its record, the state court was the proper tribunal to dispose of the proceeding, and that it could not be entertained by the federal court. In some other cases it has been ruled that, as between state courts of co-ordinate jurisdiction, one of such courts has no power to annul and enjoin the judgments or decrees of another. Plunkett v. Black, 117 Ind. 14, 19 N. E. 537; Grattan v. Matteson, 51 Iowa, 622, 2 N. W. 432.

We think, therefore, that it may be accepted as a general rule, in the absence of any statutory provisions on the subject, that the proper forum in which to seek relief, otherwise than by an appeal or writ of error, against a judgment or decree which is alleged to be void on the face of the record, is in the court by which such judgment or decree was rendered, and that other courts of co-ordinate jurisdiction have no authority to grant relief in such cases. But, whatever may be the correct rule in this respect as between state courts of equal authority, it is manifestly true, we think, that, owing to the peculiar relations which exist between state and federal courts of co-ordinate jurisdiction, the federal circuit court ought not to review, modify, or annul a judgment or decree of a state court, unless such review is sought on a state of facts not disclosed by the

record of the state court, which, for that reason, has not undergone judicial examination. The sufficiency of the service, whether by publication or otherwise, to support a final adjudication, and every other matter apparent upon the face of the record, are supposed to have received due consideration by the court rendering a judgment or decree before the same was entered. Therefore, when a suit is instituted to nullify a decree for matters disclosed by the record, and for no other reason, the proceeding is not a new suit, but is essentially in the nature either of an appeal from the original adjudication or a bill of review. The federal courts should remit proceedings such as these to the judicial tribunal of the state which made the record that is to be reviewed or impeached.

We have not overlooked the fact that in the case at bar the bill prays that the complainant's title may be quieted against the claims of the Little Rock Junction Railway, and that he may be restored to the possession of the premises now wrongfully withheld from him by the defendant. Neither has it escaped our observation that the complaint was filed after the alleged void decree of the chancery court was fully executed, and after the defendant had acquired a title thereunder. It might be argued with some force that the circumstance last mentioned was of sufficient weight to authorize the circuit court to review the proceedings of the chancery court, and to afford relief, if it appeared that the complainant was without means of redress for the alleged wrong in the state court by which the supposed void decree was rendered. But such was not the fact. As we have heretofore sufficiently shown, the remedy by a bill of review or by an appeal was at one time open to the complainant, and no reason is perceived why the relief obtainable by a bill of review would not have been as effectual as the decree rendered by the circuit court. Moreover, as the present action was brought and prosecuted upon the theory that the decree of the chancery court is utterly void when tried by the record, it follows that the remedy by ejectment was also open to the complainant, for no doctrine is better established than that a sale under a decree that was rendered without jurisdiction confers no title, and that such a decree is open to impeachment in any collateral proceeding when the want of jurisdiction is apparent upon the face of the record. Galpin v. Page, 18 Wall. 350; Coit v. Haven, 30 Conn. 190; Adams v. Cowles, 95 Mo. 501, 8 S. W. 711; Frankel v. Satterfield (Del. Super.) 19 Atl. 898; Furgeson v. Jones (Or.) 20 Pac. 842; Black, Judgm. §§ 278, 407, and cases there cited.

Forasmuch, then, as the injury complained of was subject to redress in the modes above indicated, we are constrained to hold that the federal court ought not to have intervened, as it did, notwithstanding the fact that the decree complained of had already been executed. The federal circuit courts sitting in equity have an undoubted right, in certain cases, to entertain a bill to quiet title or to remove a cloud upon a title, for this has been from time immemorial one of the well-known functions of a court of equity where the remedy at law is inadequate, either because the complainant is in possession, or because his title is of an equitable

nature, or because the land the title whereof is affected is vacant and unoccupied. This court has several times recognized the jurisdiction in question, and attempted to define its limits. Bigelow v. Chatterton, 10 U. S. App. 267, 2 C. C. A. 402, and 51 Fed. 614; Sanders v. Devereux, 8 C. C. A. 629, 633, 60 Fed. 311; Frey v. Willoughby, 11 C. C. A. 463, 63 Fed. 865. But we think that this jurisdiction does not extend, and ought not to be extended, to cases where the cloud upon a title consists of a judgment or decree of a state court, and proceedings that have been taken in execution of the same, which are alleged to be utterly void, and on that account require the introduction of no evidence to establish their invalidity other than the record of the state court. Because the federal courts have power to entertain a bill to quiet title, it does not follow that, under the guise of administering such relief, they will review the proceedings of a state court, and vacate the judgment of a state court which is obviously void when tested by the record, or that they will undo what may have been done by virtue of proceedings taken under such a judgment, so long as it is possible for the complainants to have such judgment and the proceedings taken thereunder vacated by a proper application addressed to the state court. For these reasons, our conclusion is that the facts proven at the trial were not of such a character as are essential to support an original bill in the federal courts.

The decree of the circuit court is therefore reversed, and the cause is remanded, with directions to the circuit court to vacate its decree and to dismiss the bill of complaint, without prejudice to the appellee's right to take such action in the state court as he may deem proper.

SANBORN, Circuit Judge (concurring). I concur in the result in this case on the following grounds: A bill in equity cannot be maintained in the national courts to recover possession of real property in cases in which there is no impediment to an action of ejectment. Sanders v. Devereux, supra. The only evidence produced by the appellee in this case to impeach the tax judgment on which the appellant's title rested was that which appeared on the face of the files and records of the Pulaski county chancery court, and the only contention on which he relied to overthrow that judgment was that these files and records disclosed the fact that that court never had jurisdiction to render the judgment. If this position was sound, the appellee could have maintained ejectment to recover the property in question, inasmuch as the appellant was in possession, and for that reason the bill should have been dismissed. If, on the other hand, the files and records of the Pulaski county chancery court did not disclose its want of jurisdiction, and hence the invalidity of the tax judgment, then there was no evidence in the court below to sustain the claim of its invalidity, and the bill should have been dismissed for that reason.

SEARCY COUNTY v. THOMPSON.

(Circuit Court of Appeals, Eighth Circuit. January 21, 1895.)

No. 497.

PRACTICE—QUESTIONS REVIEWABLE ON ERROR—GENERAL FINDING.

An action was submitted to the court, jury trial being waived. No exceptions to the admission or rejection of evidence were taken, no ruling was asked in the nature of a demurrer to evidence, nor was the court asked to make special findings of fact; but the defendant requested the court to make certain rulings, upon the whole case, as to the right of the plaintiff to a recovery. The court found generally for the plaintiff, and the defendant excepted to the refusal of the court to adopt the conclusions submitted by it. *Held*, that the exceptions presented nothing which the appellate court could review. Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action by W. H. Thompson against Searcy county, Ark., to recover upon certain county warrants.

Eben W. Kimball and A. Y. Barr, filed brief for plaintiff in error.

H. M. Hill (U. M. Rose, W. E. Hemingway, and G. B. Rose, on brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was before this court on a previous occasion, and is reported in 12 U. S. App. 618, 6 C. C. A. 674, and 57 Fed. 1030. After the case was remanded by this court for a new trial, Searcy county, the plaintiff in error, filed an amended answer, wherein it alleged, in substance, that the warrants sued upon were issued in pursuance of a fraudulent and unlawful agreement between the county and McCabe & Greenhaw, who were the contractors for building a courthouse for the county, whereby the price for doing the work was fixed at a sum known to be three times in excess of its actual value, to cover a known depreciation in the value of county warrants that were to be issued and received in payment for building the courthouse. A stipulation was filed, waiving a jury, and the case was subsequently tried before the court—resulting in a judgment in favor of Thompson, who was the plaintiff, for the sum of $23,500. The bill of exceptions in the present record contains a statement of the substance of the testimony that was adduced at the trial. It also shows that the trial court elected to make a general, rather than a special, finding, which finding is as follows:

"The case was then argued and submitted to the court, and the court found for the plaintiff, upon all of the warrants sued on and rendered judgment against the defendant for the sum of twenty-three thousand five hundred dollars and costs, from which judgment the defendant claimed an appeal; and time was allowed the defendant, for sixty days from this date, to prepare and file its bill of exceptions herein."

No exceptions were taken in the course of the trial, either to the admission or exclusion of testimony. Neither did the defendant ask an instruction in the nature of a demurrer to the evidence,—

that, on the proof offered, the plaintiff was not entitled to recover. Such being the condition of the record, we are confronted at the outset with the inquiry whether the record presents any question which this court can review.

Section 700 of the Revised Statutes, which was enacted on March 3, 1865 (13 Stat. 501), provides that:

"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 six hundred and forty-nine, 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."

In one of the earliest cases involving a construction of this statute, Dirst v. Morris, 14 Wall. 484, 491, Mr. Justice Bradley, in delivering the opinion of the supreme court of the United States, said:

"But, as the law stands, if the jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress, on error, except for the wrongful admission or rejection of evidence."

In a subsequent case, in which a jury had been waived pursuant to the provisions of the aforesaid statute, the supreme court had occasion to consider whether it could review the action of the circuit court in refusing certain instructions that had been asked by the defendant. With reference to that question, the court said:

"Requests that the court would adopt certain conclusions of law were also presented by the defendants, in the nature of prayers for instruction, as in cases where the issues of fact are tried by a jury, which were refused by the circuit court, and the defendants also excepted to such refusals. None of these exceptions have respect to the rulings of the court in admitting or rejecting evidence, nor to any other ruling of the circuit court which can properly be denominated a ruling in the progress of the trial, as every one of the refusals excepted to appertain to some request made to affect or control the final conclusion of the court as to the plaintiff's right to recover. Such requests or prayers for instruction, in the opinion of the court, are not the proper subjects of exception in cases where a jury is waived, and the issues of fact are submitted to the determination of the court." Insurance Co. v. Folsom, 18 Wall. 237, 253.

In the case of Cooper v. Omohundro, 19 Wall. 65, 69, which was also a case that had been tried by the court without the intervention of a jury, it appeared that five instructions had been asked by the defendant which were refused by the circuit court, and the refusal of the same was assigned for error. One of these instructions was in the following form:

"(5) That, upon the whole case, judgment should be for the defendant."

Concerning the alleged errors, Mr. Justice Clifford, in delivering the opinion of the supreme court, said:

"Beyond all doubt, the only effect of the exception to the refusal of the court to grant the fifth request, if the exception is admitted to be well taken, will be to require the court here to review the finding of the circuit court in a case where the finding is general, and where it is unaccompanied by any authorized statement of the facts, which it is plain this court cannot do, for the reasons

given in the opinion of the court in the case of Insurance Co. v. Folsom, decided at the present term. Our decision in that case was, that in a case where issues of fact are submitted to the circuit court, and the finding is general, nothing is open to review by the losing party, under a writ of error, except the rulings of the circuit court in the progress of the trial, and that the phrase, 'rulings of the court in the progress of the trial,' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding, which certainly disposes of the exceptions to the refusals of the circuit court to decide and rule as requested in the first four prayers presented by the defendant, as it is clear that those exceptions seek to review certain conclusions of the circuit court which are necessarily embodied in the general finding of the circuit court."

In the case of Martinton v. Fairbanks, 112 U. S. 670, 675, 676, 5 Sup. Ct. 321, the following statement is found with reference to the act of March 3, 1865, which is now under consideration. The court said:

"Prior to the enactment of the act of March 3, 1865 (now sections 649, 700, Rev. St. U. S.), it was held by this court that 'when the case is submitted to the judge to find the facts, without the intervention of a jury, he acts as a referee by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony nor to his judgment on the law,' * * * and that 'no exception can be taken where there is no jury, and where the question of law is decided in delivering the final judgment of the court.' * * * Section 4 of the act of March 3, 1865, was passed to allow the parties, where, a jury being waived, the case was tried by the court, a review of such rulings of the court in the progress of the trial as were excepted to at the time and duly presented by bill of exceptions, and also a review of the judgment of the court upon the question whether the facts specially found by the court were sufficient to support its judgment. In other respects the old law remained unchanged. In the present case the bill of exceptions presents no ruling of the court made in the progress of the trial, and there is no special finding of facts. The general finding is conclusive of the issues of fact against the plaintiff in error, and there is no question of law presented by the record of which we can take cognizance."

Again, in Stanley v. Supervisors of Albany, 121 U. S. 535, 547, 7 Sup. Ct. 1234, it was said by Mr. Justice Field, in delivering the opinion of the supreme court, that:

"Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here. It matters not how convincing the argument that upon the evidence the findings should have been different."

It is also well settled that "a special finding of facts," in the sense in which that phrase is used in the statute, is not a mere report of all the evidence adduced at the trial, but consists of a statement of the ultimate conclusions of the trial court upon issues of fact raised by the pleadings. Norris v. Jackson, 9 Wall. 125; Burr v. Des Moines Co., 1 Wall. 99, 102.

The decisions in Insurance Co. v. Folsom and Cooper v. Omohundro, supra, were cited and approved in the late case of Lehnen v. Dickson, 148 U. S. 71, 73, 13 Sup. Ct. 481; and, so far as we are aware, the doctrine enunciated in those cases has never been criticised or overruled by the supreme court. It is true, however, as has been suggested, that in the case of Clement v. Insurance Co., 7 Blatchf. 51, Fed. Cas. No. 2,882, Judge Blatchford, while circuit judge, gave expression to some views which seem to be at variance with the ruling of the supreme court in the cases heretofore cited.

But it is to be noted that the case of Clement v. Insurance Co. was decided by Judge Blatchford some two years prior to the decisions in Dirst v. Morris and in Insurance Co. v. Folsom, so that at the present time the decision in question cannot be regarded as authoritative. It becomes necessary, therefore, to apply the doctrine above stated to the case at bar. The plaintiff in error asked two instructions which were refused, and, on account thereof, exceptions were saved to the action of the circuit court. These instructions were as follows:

"(1) The plaintiff is entitled to recover for the building of this courthouse only the legal, ordinary, and customary price for such a building, estimating a dollar in county warrants at par with lawful currency of the United States, if at the time of letting the contract the contractor and the county judge understood that the price bid was in excess of the real cost of the building, and the contract was let with the understanding that county warrants were and would be at a discount, and the price fixed in the contract was put larger than the customary price for such work in order to enable the contractor to dispose of the warrants at a discount, and from the proceeds obtain enough to realize the actual value of such a contract. * * * (3) Upon the whole case, the judgment should be for the plaintiff for the amount only which such a courthouse was worth to build, at customary prices, in cash, deducting therefrom the amount already paid by the county for such building."

It will be observed that the last of these instructions is the counterpart of an instruction that was asked and refused in the case of Cooper v. Omohundro, supra, with reference to which the supreme court in that case remarked that the only effect of the exception to the refusal of the request, if the exception was well taken, would be to require the supreme court to review the general finding of the circuit court, which it was plain it could not do in the absence of any special finding. What was thus said is strictly applicable to the case in hand. Instruction No. 3, above quoted, having been asked by the plaintiff below, is not in the nature of a demurrer to the evidence, and cannot be treated as such. It is an instruction which would obviously compel this court to pass upon every contested issue of law and fact disclosed by the record, if we concede that the action of the circuit court in refusing the request is a matter that can be reviewed here. We conclude, therefore, that the alleged error in refusing the request is not subject to consideration by this court.

With reference to the first instruction above quoted, it is sufficient to say that the action of the circuit court in refusing that request cannot be reviewed here, for the following reasons: That instruction was evidently offered for the purpose of affecting or controlling the final conclusion of the circuit court, embodied in its general finding, as to the plaintiff's right to recover, and as was said in the case of Insurance Co. v. Folsom, with reference to similar instructions, "such requests or prayers for instruction * * * are not the proper subjects of exception in cases where a jury is waived, and the issues of fact are submitted to the determination of the court." Furthermore, this request was founded upon a hypothetical state of facts, which may or may not have been established by the testimony. It is impossible for an appellate court, which has no power to review the testimony, to say that an error was committed in the refusal of

the instruction, unless the record shows that a state of facts was found to exist which rendered such an instruction applicable. It may have been that the circuit court found and determined that the evidence did not establish the supposed facts recited in the instruction, and that the case did not require a decision upon the question of law which was presented by the instruction. If that was the view entertained, this court cannot say that an error was committed in refusing the request; for by waiving a jury the trial judge became invested with an exclusive power to ascertain the facts, and we cannot interfere, either directly or indirectly, with his action in that behalf. In all cases where a jury is waived, and the finding is general, the construction that has heretofore been placed on the act of March 3, 1865, will necessarily preclude a party from assigning error on account of the refusal of an instruction which is asked with reference to some supposed phase of the testimony, and is merely calculated to affect or to control the final conclusion of the court as to the party's right to recover. In this respect the practice in the federal court differs, no doubt, from the practice which obtains in many, if not all, of the state courts, but at this day it is a practice which is too well settled by judicial decisions to be disregarded. To obviate the difficulty which is encountered in the present case, and has heretofore been encountered in other cases of a like character, the parties to suits at law pending in the federal courts, which are to be tried without the intervention of a jury, should make a seasonable application to the trial court to find the facts specially. Though the circuit courts of the United States are not bound by the act of March 3, 1865, to make a special finding of the facts when a jury is waived, yet we apprehend that it will rarely happen that a trial judge will refuse to make a special finding, when requested to do so, especially if counsel will take the trouble to prepare and submit such a finding for the inspection and approval of the trial judge. We can conceive of no reason that will be likely to induce trial judges to refuse to sign a special finding when it conforms to their view of the facts. When the facts of a case are found specially, and the finding is duly incorporated into the record by a bill of exceptions, it is made the duty of a federal appellate court, by the act of March 3, 1865, to determine whether the facts found are sufficient to support the judgment; and it will generally happen, we think, that the right to thus determine whether the special finding is adequate to support the judgment will enable an appellate court, where the special finding is properly prepared, to consider and to decide all of those questions of law pertinent to the case which are ordinarily presented, or attempted to be presented, in the form of instructions. The result is that, because the present record fails to disclose any error committed during the course of the trial which this court can review, the judgment of the circuit court must be, and it is hereby, affirmed.

SANBORN, Circuit Judge (dissenting). I am of the opinion that, in an action at law, any ruling of the trial court, during the progress of the trial, which would have been subject to review in this court

if the trial had been before a jury, is reviewable here, in a case in which a jury has been waived, and the court has made a general finding upon the facts, under section 649, Rev. St. Section 649, after providing for a waiver of a jury, declares that:

"The finding of the court upon the facts * * * shall have the same effect as the verdict of a jury."

Section 700 provides that:

"When an issue of fact in any civil cause in the 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."

In Clement v. Insurance Co., 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882, Judge Blatchford (afterward Mr. Justice Blatchford, of the supreme court), in a careful, exhaustive, and well-considered opinion, said upon this subject:

"The trial is to proceed in all respects as if before a jury, except that there is to be no charge to a jury, and, instead of a verdict by a jury, there is to be a finding by the court on the facts, which finding, if general, is to have the same effect as the general verdict of a jury, and, if special, is to have the same effect as the special verdict of a jury. The rulings of the court in admitting or rejecting evidence are to be made and excepted to as on a trial before a jury. When the evidence is concluded, the respective parties are to propound to the court the propositions of law which they respectively conceive to arise therefrom, as on a trial before a jury, except that a proposition of law, instead of running to the effect that, if the jury find thus and so, the law on such a state of fact is thus and so, will run that, if the court find thus and so, the law on such a state of fact is thus and so. The court must pass on such a proposition of law, when it tries an issue of fact, just as it must pass on a proposition of law, when made at a like stage of the trial, on a trial before a jury. * * * And such ruling, being, within the fourth section of the act of 1865, a ruling of the court, in the cause, in the progress of the trial, and being excepted to at the time, may, under that section, when duly presented by a bill of exceptions, be reviewed by the supreme court upon a writ of error, or upon appeal."

Speaking of a question of law which the counsel in that case desired to obtain a ruling upon, he said:

"Now, the proper and effectual way to raise this point is to have it appear by the record that the defendants requested the court to rule, as matter of law, that if it should find that McCoy had notice in Cincinnati, as early as the 5th of August, 1857, of the loss of the tobacco, and that McCoy was the agent of the plaintiffs to transport the tobacco to New York, and that the plaintiffs had put it into McCoy's custody, to be retained therein at least until it reached Cincinnati, then McCoy was bound to communicate notice of the loss, by telegraph, to the consignees at New York, as soon as he had notice of it himself, and that, if it should find that McCoy did not communicate such notice by telegraph, the plaintiffs could not recover. This would be the mode adopted to raise the point on a trial before a jury, and there is no reason why it should not be adopted on a trial by the court without a jury."

Speaking of the last clause of section 700, Rev. St., he said:

"But there is a further provision in the fourth section of the act of 1865, namely, that 'when the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment.' A losing party in a case can always have the substantial benefit of this provision, without a special finding on the facts, by requesting the court to rule, as matter of law, that unless every one of such and such facts is found by it

to exist, or unless a particular fact is found to exist, his adversary cannot have a general finding in his favor."

In 1869, in Norris v. Jackson, 9 Wall. 125, Mr. Justice Miller, in delivering the opinion of the supreme court, said that:

"Whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In case of a general verdict, which includes, or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law."

It may be remarked, in passing, that this is exactly the effect of a verdict of a jury. The verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law, and there seems to me to be nothing in this opinion which holds that the general finding of the court concludes anything more.

In Dirst v. Morris, 14 Wall. 484, 490, Mr. Justice Bradley, in delivering the opinion of the supreme court, said:

"This court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence, and there was no special finding of the facts. Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or, had the law which authorizes the waiver of a jury allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon such findings as upon a special verdict. But, as the law stands, if a jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence."

The last sentence quoted is obiter dictum. No request was made in that case for any declaration of law at the close of the evidence.

In 1873, in Insurance Co. v. Folsom, 18 Wall. 237, Mr. Justice Clifford, in delivering an opinion of the supreme court in a case where the trial court had been requested, at the close of the evidence, to make certain declarations of law, said, at page 253:

"Requests that the court would adopt certain conclusions of law were also presented by the defendants, in the nature of prayers for instruction, as in cases where the issues of fact are tried by a jury, which were refused by the circuit court, and the defendants also excepted to such refusals. None of these exceptions have respect to the rulings of the court in admitting or rejecting evidence, nor to any other ruling of the circuit court which can properly be denominated a ruling in the progress of the trial, as every one of the refusals excepted to appertain to some request made to affect or control the final conclusion of the court as to the plaintiff's right to recover. Such requests or prayers for instruction, in the opinion of the court, are not the proper subjects of exception in cases where a jury is waived, and the issues of fact are submitted to the determination of the court."

He cites in support of this declaration Dirst v. Morris, supra, and undoubtedly rests it upon the obiter dictum in that case to which we have referred. At page 250 of the opinion he concludes a general discussion of the rules that should govern the trial of a case by the court without a jury with the declaration that:

"Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial."

In Cooper v. Omohundro, 19 Wall. 65, a case in which, at the close of the evidence, the plaintiff requested the circuit court to make certain declarations of law, the supreme court refused to consider the questions presented by these requests; and Mr. Justice Clifford, in delivering the opinion, cited Insurance Co. v. Folsom, supra, and said:

"Our decision in that case was, that in a case where issues of fact are submitted to the circuit court, and the finding is general, nothing is open to review by the losing party, under a writ of error, except the rulings of the circuit court in the progress of the trial; and the phrase, 'rulings of the court in progress of the trial,' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding."

In Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321,—a case in which no request for any declaration of law was made before the close of the trial,—Mr. Justice Woods, in delivering the opinion of the supreme court, said:

"Upon the issues of fact raised by the pleadings in this case, there was a general finding for the plaintiff. The defendant contends that the evidence submitted to the court did not justify this general finding. But, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by section 1011. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question by a request for a definite ruling upon that point. * * * The court below having made a general finding, which, by the statute, has the same effect as the verdict of a jury, the plaintiff in error can resort to no other means of redress than those open to it had the case been tried by a jury, and a general verdict rendered." Pages 672 and 674, 112 U. S., and page 321, 5 Sup. Ct.

In 1892, in Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, Mr. Justice Brewer, in delivering the opinion of the supreme court, said, at page 72, 148 U. S., and page 481, 13 Sup. Ct.:

"Sections 648 and 649 of the Revised Statutes, while committing generally the trial of issues of fact to a jury, authorize parties to waive a jury, and submit such trial to the court; adding 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.' But the verdict of a jury settles all questions of fact. As said by Mr. Justice Blatchford in Lancaster v. Collins, 115 U. S. 222, 225, 6 Sup. Ct. 33: 'This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered. The finding of the court, to have the same effect, must be equally conclusive, and equally remove from examination in this court the testimony given on the trial. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury."

And at page 78, 148 U. S., and page 481, 13 Sup. Ct., he said:

"But even if we waive all these objections, and take this statement [a statement of the court below] as intended for and equivalent to a special finding of facts, or regard the declaration of law asked by the defendant, that the court declares the law to be that under the evidence the plaintiff is not entitled to recover, as bringing properly before us the question whether there was any evidence to sustain the general finding for the plaintiff, and thus enter into an examination of the testimony, still we see no error in the conclusion of the court based thereon."

In St. Louis v. W. U. Tel. Co., 148 U. S. 92, 96, 13 Sup. Ct. 485, which was decided in 1893, Mr. Justice Brewer said:

"It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused, and exception taken; and this, as was held in Norris v. Jackson, 9 Wall. 125, presents a question of law for our consideration."

This is the last expression of the supreme court to which our attention has been called, and it clearly overrules the declaration in Dirst v. Morris, that only rulings upon the admission or rejection of evidence can be reviewed. It must be conceded that the authorities on this question are not as clear and uniform as might be desired. The two opinions of Mr. Justice Clifford in Insurance Co. v. Folsom and Cooper v. Omohundro seem to rest upon the obiter dictum in Dirst v. Morris, and lead logically to the conclusion there expressed. Between that conclusion, that rulings upon the admission and rejection of evidence alone may be reviewed, and the conclusion to which I have arrived, that any ruling of the court made during the progress of the trial, and before the finding is filed, is reviewable in the appellate court if it would have been subject to review had the trial been before a jury, there seems to me to be no secure middle ground. If we depart from both these rules, it will be difficult, and I think impossible, to draw the line by any rule so that the courts and the gentlemen of the bar may know what requests for declarations of law are, and what are not, reviewable in this court. For this reason, and because the statute provides that the general finding of the court shall have the same effect as the verdict of a jury, and that the rulings of the court in the progress of the trial of a cause may be reviewed upon a writ of error, and because I think both the earlier and later decisions of the supreme court point to this result, I have been forced to the conclusion that the true test for determining whether or not a ruling of the trial court may be reviewed when a jury has been waived is whether it would have been subject to review if the trial had been by jury. As the statute declares the general finding shall have the same effect as the verdict of a jury, I think it ought not to be given any greater or other effect. Trust Co. v. Wood, 8 C. C. A. 658, 60 Fed. 346, 348; Clement v. Insurance Co., supra; St. Louis v. W. U. Tel. Co., supra. Tested by this rule, the application of the plaintiff for a declaration of law, "that upon the whole case the finding of the court should be for the plaintiff for the amount of the warrants sued on, without deduction of any kind," presented the question whether or not, if all the evidence adduced by the defendant was admitted to be true, the plaintiff was entitled to a judgment for the amount he claimed. This application had the same effect that a request to the court to instruct the jury peremptorily to find for the plaintiff for the amount of the warrants would have had, if the trial had been before a jury. Nor does it appear to me that there is any greater difficulty in reviewing and deciding this question in a case tried before the court than there would have been if the trial had been by jury. There is in this record a bill of exceptions which declares that it contains all the evidence. It is not necessary to pass upon the weight or suffi-

ciency of the evidence to determine this question of law. It is to be decided like the question which arises upon a request for a peremptory instruction to the jury, on the concession that the evidence for the defendant must prevail on all disputed material issues. Indeed, this application is, both in form and in substance, substantially the same as that which Mr. Justice Brewer declared in St. Louis v. W. U. Tel. Co., supra, properly presented a question for the consideration of the supreme court. Nor can I persuade myself that this court ought to escape from reviewing the questions presented by the other declarations made and refused by the court on the ground that there may have been no evidence in the case to which they were applicable. All the evidence is before us, in this bill of exceptions. If there was any evidence tending to show the state of facts set forth in these declarations, the respective parties to this action were entitled to have them given, if they were the law; and I see no reason why it is not as much the duty of this court to inspect the record, and see whether or not there was any such evidence, as it would have been if the trial had been by jury. A cursory inspection of the record discloses evidence tending to show the facts set forth in these various requests, and I have been forced to the conclusion that the questions of law they present should have been reviewed by this court.

CAMFIELD et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1895.)

No. 517.

INCLOSURE OF PUBLIC LAND—ACT OF FEBRUARY 25, 1885.

The act of February 25, 1885, to prevent unlawful occupancy of the public land (23 Stat. c. 149), provides that all inclosures of public lands, to any of which lands the person making the inclosure had no bona fide claim or title at the time the inclosure was made, are unlawful. Defendant had acquired from the owners the right to use all the odd-numbered sections in two certain townships, and outside thereof, immediately adjoining the even-numbered sections lying within and on the margin of such townships, and erected on said odd-numbered sections a fence which inclosed the whole of such two townships, the even-numbered sections of which were government land. *Held*, that such inclosure was unlawful, although defendant had made gates at the section lines to give access to the government land, and without regard to any public advantages alleged to result from defendant's act. 59 Fed. 562, affirmed.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a suit by the United States against Daniel A. Camfield and William Drury, under the act of February 25, 1885 (23 Stat. c. 149), to compel the removal of an inclosure of public land. The circuit court entered a decree for the complainant, after sustaining exceptions to the answer as insufficient. 59 Fed. 562. Defendants appeal.

This was a bill filed by the United States against Daniel A. Camfield and William Drury, the appellants, in the circuit court of the United States for