Rex v. Rogers, 3 Burrows, 1809, 1812; Rex v. Wyatt, Russ. & R. 230; Ex parte Howard, 17 N. H. 545; State v. Kitchens, 2 Hill, (S. C.) 612; Bland v. State, 2 Ind. 608; Lowenberg v. People, 27 N. Y. 336; State v. Oscar, 13 La. Ann. 297; State v. Cardwell, 95 N. C. 643; Ex parte Nixon, 2 S. C. 4.

The application for the writs must be denied.

(146 U. S. 387)

ILLINOIS CENT. R. CO. v. STATE OF ILLINOIS et al. CITY OF CHICAGO v. ILLINOIS CENT. R. CO. et al. STATE OF ILLINOIS v. ILLINOIS CENT. R. Co. et al.

(December 5, 1892.)

Nos. 419, 608, 609.

CONSTITUTIONAL LAW—TIDE LANDS — LANDS UNDER THE GREAT LAKES—RIPARIAN RIGHTS.

1. The common-law doctrine as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; and in this country such dominion, sovereignty, and ownership belongs to the states, respectively, within whose borders such lands are situated, subject always to the right of congress to control the navigation so far as may be necessary for the regulation of foreign and interstate commerce.

2. The title which a state holds to lands under tide waters bordering on the sea or under the navigable waters of the Great Lakes, lying within her limits, is different in character from the title of the state to lands intended for sale, or from that of the United States to the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from obstruction or interference by private parties, and it is not within the legislative power of the state to abdicate this trust by a grant whereby it surrenders its property and general control over the lands of an entire harbor, bay, sea, or lake, though it may grant parcels thereof for the foundations of wharves, piers, docks, and other structures in aid of commerce, or parcels which, being occupied, do not substantially impair the public interest in the waters remaining. Mr. Justice Shiras, Mr. Justice Gray, and Mr. Justice Brown dissenting.

3. Act Ill. April 16, 1869, purporting to grant to the Illinois Central Railroad Company all the right and title of the state to the submerged lands constituting the bed of Lake Michigan, for one mile from the shore opposite the company's tracks and breakwater in the city of Chicago, to be held in perpetuity without power to alienate the fee, was in excess of the legislative power of the state, and inoperative to affect, modify, or in any respect control the sovereignty and dominion of the state over such lands, or its ownership thereof, and was annulled by the repealing act of April 15, 1873, which was valid and effective to that extent. Mr. Justice Shiras, Mr. Justice Gray, and Mr. Justice Brown, dissenting.

4. The reclamation by the Illinois Central Railroad Company from the waters of Lake Michigan of a tract 200 feet wide, extending along the front of the city of Chicago, and the construction of its tracks, crossings, guards, etc., and the erection of the breakwater on the east thereof, and the necessary works for the protection of the shore on the west, all as required by the ordinance under which it was permitted to enter the city, did not interfere with any useful freedom in the use of the waters of the lake for commerce,—foreign, interstate, or domestic,—or constitute such an encroachment upon the domain of the state as to require the interposition of a court for their removal, or for any restraint in their use. 33 Fed. Rep. 730, affirmed.

5. The railroad company did not, however, acquire, by such reclamation, an absolute fee in the lands reclaimed, or any right of use, disposal, or control, except for a right of way and for railroad purposes; nor did it thereby acquire any rights, as a riparian owner, to reclaim still further lands from the lake for its use, or for the construction of piers, docks, and wharves in furtherance of its business.

6. In respect to the lots lying north of Randolph street, in said city, and the lots in front of Michigan avenue, all bordering on the lake, and to which the company acquired the fee by purchase, it was vested with riparian rights, and thereby became entitled to fill up the shallow waters of the lake, and to construct piers, wharves, docks, and slips not extending beyond the point of navigability. 33 Fed. Rep. 730, affirmed.

7. The fee in the streets, alleys, commons, and public grounds, as exhibited on the maps of subdivision of fractional sections 10 and 15, lying on the lake front of Chicago, is vested in the city, together with the riparian rights appertaining thereto; and these rights were not divested by the fact that the Illinois Central Railroad occupied the lands underlying the immediate front, and filled them in for its right of way, under authority of a city ordinance; and the city still has the right to exercise such riparian rights, subject to the terms of the ordinance and to the authority of the state to prescribe the lines beyond which no structures may be extended, and also subject to such supervision and control as the United States may lawfully exercise. 33 Fed. Rep. 730, affirmed.

Appeals from the circuit court of the United States for the northern district of Illinois. Modified and affirmed.

B. F. Ayers and John N. Jewett, for Illinois Cent. R. Co. John S. Miller and S. S. Gregory, for the City of Chicago. George Hunt, for the State of Illinois.

*433

*Mr. Justice FIELD delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a circuit court of Illinois, by an information or bill in equity filed by the attorney general of the state, in the name of its people, against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago. The United States were also named as a party defendant, but they never appeared in the suit, and it was impossible to bring them in as a party without their consent. The alleged grievances arose solely from the acts and claims of the railroad company, but the city of Chicago was made a defendant because of its interest in the subject of the litigation. The railroad company filed its answer in the state court at the first term after the commencement of the suit, and upon its petition the case was removed to the circuit court of the United States for the northern district of Illinois. In May following the city appeared to the suit and filed its answer, admitting all the allegations of fact in the bill. A subsequent motion by the complainant to remand the case to the state court was denied. 16 Fed. Rep. 881. The pleadings were afterwards altered in various particulars. An amended information or bill was filed by the

attorney general, and the city filed a cross bill for affirmative relief against the state and the company. The latter appeared to the cross bill, and answered it, as did the attorney general for the state. Each party has prosecuted a separate appeal.

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago river and Sixteenth street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers, and other structures used by the railroad company in its business, and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the *434 south line of the south pier near Chicago * river, extended eastwardly, and a line extended in the same direction from the south line of lot 21 near the company's roundhouse and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers, and docks in the harbor.

We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company; and the court, in its elaborate opinion, (33 Fed. Rep. 730,) for that purpose referred to the legislation of the United States and of the state, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed, and are satisfied with its entire accuracy. It would therefore serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated. In what we may say of the rights of the railroad company, of the state, and of the city, remaining after the legislation and proceedings taken, we shall assume the correctness of that history.

The state of Illinois was admitted into the Union in 1818 on an equal footing with the original states, in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio river, out of which the state was formed. But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the state were prescribed by congress and accepted by the state in its original constitution. They are given in the bill. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the mainland of the state and the middle of the lake, south of latitude 42 degrees and 30 minutes.

*435 * It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. Pollard's Lessee v. Hagan, 3 How. 212; Weber v. Commissioners, 18 Wall. 57.

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. There, as said in the case of The Genesee Chief, 12 How. 443, 455, "'tide water,' and 'navigable water' are synonymous terms, and 'tide water,' with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones;" and writers on the subject of admiralty jurisdiction "took the ebb and flow of the tide as the test, because it was a convenient one, *436 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."

But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide,—indeed, for hundreds of miles,—by the largest vessels used in commerce. As said in the case cited: "There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction,

nor anything in the absence of a tide that renders it unfit. If it is a public, navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same, and, if a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it."

The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable; "tide waters" and "navigable waters," as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment,—a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty, and proprietary right have been encroached upon by the railroad company, and how far that company had at the time the assent of the state to such encroachment, and also the validity of the claim which the company asserts, of a right to make further encroachments thereon by virtue of a grant from the state in April, 1869.

The city of Chicago is situated upon the southwestern shore of Lake Michigan, and includes, with other territory, fractional sections 10 and 15, in township 39 N., range 14 E. of the third P. M., bordering on the lake, which forms their eastern boundary. For a long time after the organization of the city, its harbor was the Chicago river, a small, narrow stream opening into the lake near the center of the east and west line of section 10; and in it the shipping arriving from other ports of the lake and navigable waters was moored or anchored, and along it were docks and wharves. The growth of the city in subsequent years, in population, business, and commerce, required a larger and more convenient harbor, and the United States, in view of such expansion and growth, commenced the construction of a system of breakwaters and other harbor protections in the waters of the lake in front of the fractional sections mentioned. In the prosecution of this work there was constructed a line of breakwaters or cribs of wood and stone covering the front of the city between the Chicago river and Twelfth street, with openings in the piers or lines of cribs for the entrance and departure of vessels; thus inclosing a large part of the lake for the uses of shipping and commerce, and creating an outer harbor for Chicago. It comprises a space about one mile and one half in length from north to south, and is of a width from east to west varying from 1,000 to 4,000 feet. As commerce and shipping expand, the harbor will be further extended towards the south; and, as alleged by the amended bill, it is expected that the necessities of commerce will soon require its enlargement so as to include a great part of the entire lake front of the city. It is stated, and not denied, that the authorities of the United States have in a general way indicated a plan for the improvement and use of the harbor which had been inclosed as mentioned, by which a portion is devoted as a harbor of refuge, where ships may ride at anchor with security and within protecting walls, and another portion of such inclosure, nearer the shore of the lake, may be devoted to wharves and piers, alongside of which ships may load and unload, and upon which warehouses may be constructed and other structures erected for the convenience of lake commerce.

The case proceeds upon the theory and allegation that the defendant the Illinois Central Railroad Company has, without lawful authority, encroached, and continues to encroach, upon the domain of the state, and its original ownership and control of the waters of the harbor and of the lands thereunder, upon a claim of rights acquired under a grant from the state and ordinance of the city to enter the city and appropriate land and water 200 feet wide, in order to construct a track for a railway and to erect thereon warehouses, piers, and other structures in front of the city, and upon a claim of riparian rights acquired by virtue of ownership of lands originally bordering on the lake in front of the city. It also proceeds against the claim asserted by the railroad company, of a grant by the state in 1869 of its right and title to the submerged lands constituting the bed of Lake Michigan, lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended in the same di-

rection from the south line of lot 21 south of and near the machine shops and roundhouse of the company, and of a right thereby to
*439 construct at its pleasure, in the harbor, wharves, piers, and other works for its use.
*The state prays a decree establishing and confirming its title to the bed of Lake Michigan, and exclusive right to develop and improve the harbor of Chicago by the construction of docks, wharves, piers, and other improvements, against the claim of the railroad company that it has an absolute title to such submerged lands by the act of 1869, and the right, subject only to the paramount authority of the United States in the regulation of commerce, to fill all the bed of the lake within the limits above stated, for the purpose of its business, and the right, by the construction and maintenance of wharves, docks, and piers, to improve the shore of the lake for the promotion generally of commerce and navigation. And the state, insisting that the company has, without right, erected, and proposes to continue to erect, wharves and piers upon its domain, asks that such alleged unlawful structures may be ordered to be removed, and the company be enjoined from erecting further structures of any kind.

And first as to lands in the harbor of Chicago possessed and used by the railroad company under the act of congress of September 20, 1850, (9 St. p. 466, c. 61,) and the ordinance of the city of June 14, 1852. By that act congress granted to the state of Illinois a right of way, not exceeding 100 feet in width, on each side of its length, through the public lands, for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch to Chicago, and another, via the town of Galena, to a point opposite Dubuque, in the state of Iowa, with the right to take the necessary materials for its construction; and to aid in the construction of the railroad and branches, by the same act it granted to the state six alternate sections of land, designated by even numbers, on each side of the road and branches, with the usual reservation of any portion found to be sold by the United States, or to which the right of pre-emption had attached at the time the route of the road and branches was definitely fixed, in which case provision was made for
*440 the selection of equivalent lands in contiguous sections.
*The lands granted were made subject to the disposition of the legislature of the state; and it was declared that the railroad and its branches should be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of their property or troops.

The act was formally accepted by the legislature of the state, February 17, 1851, (Laws 1851, pp. 192, 193.) A few days before, and on the 10th of that month, the Illinois Central Railroad Company was incorporated. It was invested generally with the powers, privileges, immunities, and franchises of corporations, and specifically with the power of acquiring by purchase or otherwise, and of holding and conveying, real and personal estate which might be needful to carry into effect, fully, the purposes of the act.

It was also authorized to survey, locate, construct, and operate a railroad, with one or more tracks or lines of rails, between the points designated and the branches mentioned; and it was declared that the company should have a right of way upon, and might appropriate to its sole use and control, for the purposes contemplated, land not exceeding 200 feet in width throughout its entire length, and might enter upon and take possession of and use any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, engine houses, shops, and other buildings necessary for completing, maintaining, and operating the road. All such lands, waters, materials, and privileges belonging to the state were granted to the corporation for that purpose; and it was provided that when owned by or belonging to any person, company, or corporation, and they could not be obtained by voluntary grant or release, the same might be taken and paid for by proceedings for condemnation, as prescribed by law.

It was also enacted that nothing in the act should authorize the corporation to make a location of its road within any city without the consent of its common council. This consent was given by an ordinance of the com-
441 mon council of Chicago, adopted June 14, 1852. By its first section it granted permission to the company to lay down, construct, and maintain within the limits of the city, and along the margin of the lake within and adjacent to the same, a railroad, with one or more tracks, and to operate the same with locomotive engines and cars, under such rules and regulations, with reference to speed of trains, the receipt, safe-keeping, and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as the company might from time to time establish, and to have the right of way and all powers incident to and necessary therefor, in the manner and upon the following terms and conditions, namely: That the road should enter the city at or near the intersection of its then southern boundary with Lake Michigan, and follow the shore on or near the margin of the lake northerly to the southern bounds of the open space known as "Lake Park," in front of canal section 15, and continue northerly across the open space in front of that section to such grounds as the company might acquire between the north line of Randolph street and the Chicago river, in the Ft. Dearborn addition, upon which grounds should be located the depot of the railroad company within the city, and such

other buildings, slips, or apparatus as might be necessary and convenient for its business. But it was understood that the city did not undertake to obtain for the company any right of way, or other right, privilege, or easement, not then in its power to grant, or to assume any liability or responsibility for the acts of the company. It also declared that the company might enter upon and use in perpetuity for its line of road, and other works necessary to protect the same from the lake, a width of 300 feet from the southern boundary of the public ground near Twelfth street, to the northern line of Randolph street; the inner or west line of the ground to be not less than 400 feet east from the west line of Michigan avenue, and parallel thereto; and it was authorized to extend its works and fill out into the lake to a point in the southern pier not less than 400 feet west from the then *442 east end of the same, thence parallel with Michigan avenue to the north side of Randolph street extended; but it was stated that the common council did not grant any right or privilege beyond the limits above specified, nor beyond the line that might be actually occupied by the works of the company.

By the ordinance the company was required to erect and maintain on the western or inner line of the ground pointed out for its main tracks on the lake shore such suitable walls, fences, or other sufficient works as would prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger, and to construct such suitable gates at proper places at the ends of the streets, which were then or might thereafter be laid out, as required by the common council, to afford safe access to the lake; and provided that, in the case of the construction of an outside harbor, streets might be laid out to approach the same in the manner provided by law. The company was also required to erect and complete within three years after it should have accepted the ordinance, and forever thereafter maintain, a continuous wall or structure of stone masonry, pier work, or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan avenue, opposite thereto, from the north side of Randolph street to the southern bound of Lake Park, at a distance of not more than 300 feet east from and parallel with the western or inner line of the company, and continue the works to the southern boundary of the city, at such distance outside of the track of the road as might be expedient, which structure and works should be of sufficient strength and magnitude to protect the entire front of the city, between the north line of Randolph street and its southern boundary, from further damage or injury from the action of the waters of Lake Michigan; and that that part of the structure south of Lake Park should be commenced and prosecuted with reasonable dispatch after acceptance of the ordinance. It was also enacted that the company should "not in any manner, nor for any purpose whatever, occupy, use, or intrude upon the open ground known as 'Lake Park,' belonging to the city of Chicago, lying between Michigan avenue and the western *443 or inner line before mentioned, except so far as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground;" and it was declared that the company should "erect no buildings between the north line of Randolph street and the south side of the said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains, nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives, cars, or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks, and protection of the same."

The company was allowed 90 days to accept this ordinance, and it was provided that upon such acceptance a contract embodying its provisions should be executed and delivered between the city and the company, and that the rights and privileges conferred upon the company should depend upon the performance on its part of the requirements made. The ordinance was accepted and the required agreement drawn and executed on the 28th of March, 1853.

Under the authority of this ordinance the railroad company located its tracks within the corporate limits of the city. Those running northward from Twelfth street were laid upon piling in the waters of the lake. The shore line of the lake was at that time at Park Row, about 400 feet from the west line of Michigan avenue, and at Randolph street, about 112½ feet. Since then the space between the shore line and the tracks of the railroad company has been filled with earth under the direction of the city, and is now solid ground.

After the tracks were constructed the company erected a breakwater east of its roadway upon a line parallel with the west line of Michigan avenue, and afterwards filled up the space between the breakwater and its tracks with earth and stone.

We do not deem it material, for the determination of any questions presented in this case, to describe in detail the extensive works *444 of the railroad company under the permission given to locate its road within the city by the ordinance. It is sufficient to say that, when this suit was commenced, it had reclaimed from the waters of the lake a tract 200 feet in width, for the whole distance allowed for its entry within the city, and constructed thereon the tracks needed for its railway, with all the guards against danger in its approach and crossings as specified in the ordinance, and erected the designated breakwater beyond its tracks on the east, and the necessary works for the protection of the shore on

the west. Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce,—foreign, interstate, or domestic. They were constructed under the authority of the law by the requirement of the city, as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the state as to require the interposition of the court for their removal or for any restraint in their use.

The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated,—the construction and operation of a railroad thereon, with one or more tracks and works in connection with the road or in aid thereof. The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials, and privileges belonging to the state were granted solely for that purpose. It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed. While the grant to it included waters of streams in the line of the right of way belonging to the state, it was accompanied with a declaration that it should not be so construed as to authorize the corporation to interrupt the navigation of the streams. If the waters of the lake may be deemed to be included in the designation of streams, then their use would be held equally restricted. The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry, so far at least as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety. Nor did the railroad company acquire, by the mere construction of its road and other works, any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks, and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordinance, which was simply for the construction of a railroad on a track not to exceed a specified width, and of works connected therewith.

We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, but at present we are speaking only of what rights it acquired from the reclamation of the tract upon which the railroad and the works in connection with it are built. The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership, and pass with the transfer of the land; and the land must not only be contiguous to the water, but in contact with it. Proximity, without contact, is insufficient. The riparian right attaches to land on the border of navigable water, without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage. See Gould, Waters, § 148, and authorities there cited.

The riparian proprietor is entitled, among other rights, as held in Yates v. Milwaukee, 10 Wall. 497, 504, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. In the case cited the court held that this riparian right was property, and valuable, and, though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired. It had been held in the previous case of Dutton v. Strong, 1 Black, 23, 33, that, whenever the water of the shore was too shoal to be navigable, there was the same necessity for wharves, piers, and landing places as in the bays and arms of the sea; that, where that necessity existed, it was difficult to see any reason for denying to the adjacent owner the right to supply it; but that the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceased.

In this case it appears that fractional section 10, which was included within the city limits bordering on the lake front, was, many years before this suit was brought, divided, under the authority of the United States, into blocks and lots, and the lots sold. The proceedings taken and the laws passed on the subject for the sale of the lots are stated with great particularity in the opinion of the court below, but for our purpose it is sufficient to mention that the lots laid out in fractional section 10 belonging to the United States were sold, and, either directly or from purchasers, the title to some of them fronting on the lake north of Randolph street became vested in the railroad company, and the company, finding the lake in front of those lots shallow, filled it in, and upon the reclaimed land constructed slips, wharves, and piers, the last three piers in 1872–73, 1880, and 1881, which it claims to own and to have the right to use in its business.

According to the law of riparian owner-

ship which we have stated, this claim is well founded, so far as the piers do not extend beyond the point of navigability in the waters of the lake. We are not fully satisfied that such is the case, from the evidence which the company has produced, and the fact is not conceded. Nor does the court below find *447 that such navigable point had been established by any public authority or judicial decision, or that it had any foundation, other than the judgment of the railroad company.

The same position may be taken as to the claim of the company to the pier and docks erected in front of Michigan avenue between the lines of Twelfth and Sixteenth streets extended. The company had previously acquired the title to certain lots fronting on the lake at that point, and, upon its claim of riparian rights from that ownership, had erected the structures in question. Its ownership of them likewise depends upon the question whether they are extended beyond or are limited to the navigable point of the waters of the lake, of which no satisfactory evidence was offered.

Upon the land reclaimed by the railroad company as riparian proprietor in front of lots into which section 10 was divided, which it had purchased, its passenger depot was erected north of Randolph street; and to facilitate its approach the common council, by ordinance adopted September 10, 1855, authorized it to curve its tracks westwardly of the line fixed by the ordinance of 1852, so as to cross that line at a point not more than 200 feet south of Randolph street, in accordance with a specified plan. This permission was given upon the condition that the company should lay out upon its own land, west of and alongside its passenger house, a street 50 feet wide, extending from Water street to Randolph street, and fill the same up its entire length, within two years from the passage of the ordinance. The company's tracks were curved as permitted, the street referred to was opened, the required filling was done, and the street has ever since been used by the public. It being necessary that the railroad company should have additional means of approaching and using its station grounds between Randolph street and the Chicago river, the city, by another ordinance, adopted September 15, 1856, granted it permission to enter and use, in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its then breakwater and a line drawn from a point thereon 700 feet south of the north line of Randolph street extended, and running *448 thence on a straight line to the southeast corner of its present breakwater, thence to the river, and the space thus indicated the railroad company occupied and continued to hold pursuant to this ordinance; and we do not perceive any valid objection to its continued holding of the same for the purposes declared,—that is, as additional means of approaching and using its station grounds.

We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks, and other works therein as it may deem proper for its interest and business. The claim is founded upon the third section of the act of the legislature of the state passed on the 16th of April, 1869, the material part of which is as follows:

"Sec. 3. The right of the Illinois Central Railroad Company under the grant from the state in its charter, which said grant constitutes a part of the consideration for which the said company pays to the state at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for a distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same, and that all gross receipts from use, profits, leases, or otherwise, of said lands, or the improvements *thereon, or that may hereafter be* made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the state treasury, semiannually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided, also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor."

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The act of which this section is a part was accepted by a resolution of the board of directors of the company at its office in the city of New York, July 6, 1870, but the acceptance was not communicated to the state until the 18th of November, 1870. A copy of the resolution was on that day forwarded to the secretary of state, and filed and re-

corded by him in the records of his office. On the 15th of April, 1873, the legislature of Illinois repealed the act. The questions presented relate to the validity of the section cited, of the act, and the effect of the repeal upon its operation.

The section in question has two objects in view: One was to confirm certain alleged rights of the railroad company under the grant from the state in its charter and under and "by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident" thereto, in and to the lands submerged or otherwise lying east of a line parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15. The other object was to grant to the railroad company submerged lands in the harbor.

The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed from its ownership of lands in sections 10 and 15 on the shore of the lake. Whether the piers or docks constructed by it after the passage of the act of 1869 extend beyond the point of navigability in the waters of the lake must be the subject of judicial inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found, on such inquiry, to extend beyond the point of such navigability, then the state will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the state and the facts established, may be authorized by law.

As to the grant of the submerged lands, the act declares that all the right and title of the state in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot 21, south of and near to the roundhouse and machine shops of the company, "are granted in fee to the railroad company, its successors and assigns." The grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell, or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor, or impair the public right of navigation, or be construed to exempt the company from any act regulating the rates of wharfage and dockage to be charged in the harbor.

This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor, or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations, the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers, and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period, and renew it at its pleasure; and the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is by the act converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

The circumstances attending the passage of the act through the legislature were on the hearing the subject of much criticism. As originally introduced, the purpose of the act was to enable the city of Chicago to enlarge its harbor, and to grant to it the title and interest of the state to certain lands adjacent to the shore of Lake Michigan, on the eastern front of the city, and place the harbor under its control; giving it all the necessary powers for its wise management. But during the passage of the act its purport was changed. Instead of providing for the cession of the submerged lands to the city, it provided for a cession of them to the railroad company. It was urged that the title of the act was not changed to correspond with its changed purpose, and an objection was taken to its validity on that account. But the majority of the court were of opinion that the evidence was insufficient to show that the requirement of the constitution of the state, in its passage, was not complied with.

The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state.

That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdi- *453 cation of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always *454 remains with the state the right to *revoke* those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.

The harbor of Chicago is of immense value to the people of the state of Illinois, in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose,—one limited to transportation of passengers and freight between distant points and the city,—is a proposition that cannot be defended.

The area of the submerged lands proposed to be ceded by the act in question to the railroad company embraces something more than 1,000 acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor, but embracing adjoining submerged lands, which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly, if not quite, equal to the pier area along the water front of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are

equal to those of New York and Boston combined. Chicago has nearly 25 per cent. of the lake carrying trade, as compared with the arrivals and clearings of all the leading ports of our great inland seas. In the year ending June 30, 1886, the joint arrivals and clearances of vessels at that port amounted to 22,096, with a tonnage of over 7,000,000; and in 1890 the tonnage of the vessels reached nearly 9,000,000. As stated by counsel, since the passage of the lake front act, in 1869, the population of the city has increased nearly 1,000,000 souls, and the increase of commerce has kept pace with it. It is hardly conceivable that the legislature can divest the state of the control and management of this harbor, and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company to a foreign state or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant, which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands, and the right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated.

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney in Martin v. Waddell, 16 Pet. 367, 410: "When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." In Arnold v. Mundy, 6 N. J. Law, 1, which is cited by this court in Martin v. Waddell, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made "with great deliberation and research," the supreme court of New Jersey comments upon the rights of the state in the bed of navigable waters, and, after observing that the power exercised by the state over the lands and waters is nothing more than what is called the "jus regium," the right of regulating, improving, and securing them for the benefit of every individual citizen, adds: "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." Necessarily must the control of the waters of a state over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.

In the case of Stockton v. Railroad Co., 32 Fed. Rep. 9, which involved a consideration by Mr. Justice Bradley, late of this court, of the nature of the ownership by the state of lands under the navigable waters of the United States, he said:

"It is insisted that the property of the state in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the state house at Trenton, and the surrounding grounds belonging to the state, and appropriate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the state holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that prior to the Revolution the shore and lands under water of the naviga-

ble streams and waters of the province of New Jersey belonged to the king of Great Britain, as part of the jura regalia of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were publici juris; in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder."

Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the *68 state in their character as sovereign in trust for public *uses for which they are adapted. Martin v. Waddell, 16 Pet. 367, 410; Pollard's Lessee v. Hagan, 3 How. 212, 220; McCready v. Virginia, 94 U. S. 391, 394.

In People v. Ferry Co., 68 N. Y. 71, 76, the court of appeals of New York said:

"The title to lands under tide waters, within the realm of England, were by the common law deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise De Jure Maris (page 22) Lord Hale says: 'The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the sea are affected to public use.' And Mr. Justice Best, in Blundell v. Catterall, 5 Barn. & Ald. 268, in speaking of the subject, says: 'The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil.' * * *

"The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right." *459

*While the opinion of the New York court contains some expressions which may require explanation when detached from the particular facts of that case, the general observations we cite are just and pertinent.

The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state.

In Newton v. Commissioners, 100 U. S. 548, it appeared that by an act passed by the legislature of Ohio in 1846 it was provided that upon the fulfillment of certain conditions by the proprietors or citizens of the town of Canfield the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874 the legislature passed an act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill setting forth the act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the court refused the injunction, holding that there could be no contract and no irrepealable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment,—neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

As counsel observe, if this is true doctrine

as to the location of a county seat, it is apparent that it must apply with greater force to the control of the soils and beds of navi-
*460 gable waters in the great public harbors held by the people in trust for their common use and of common right, as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

The legislation of the state in the lake front act, purporting to grant the fee of the submerged lands mentioned to the railroad company, was considered by the court below, in view of the preceding measures taken for the improvement of the harbor, and because further improvement in the same direction was contemplated, as a mere license to the company to prosecute such further improvement as an agency of the state, and that to this end the state has placed certain of its resources at the command of the company, with such an enlargement of its powers and privileges as enabled it to accomplish the objects in view; and the court below, after observing that the act might be assumed as investing the railroad company with the power, not given in its original charter, of erecting and maintaining wharves docks, and piers in the interest of commerce, and beyond the necessities or legitimate purposes of its own business as a railroad corporation, added that it was unable to perceive why it was not competent for the state, by subsequent legislation, to repeal
*461 the act and withdraw the additional powers of the company, thereby restricting it to the business for which it was incorporated, and to resume control of the resources and property which it had placed at the command of the company for the improvement of the harbor. The court, treating the act as a license to the company, also observed that it was deemed best, when that act was passed, for the public interest, that the improvement of the harbor should be effected by the instrumentality of a railroad corporation interested to some extent in the accomplishment of that result, and said:

"But if the state subsequently determined, upon consideration of public policy, that this great work should not be intrusted to any railroad corporation, and that a corporation should not be the owner of even a qualified fee in the soil under the navigable waters of the harbor, no provision of the national or state constitution forbade the general assembly of Illinois from giving effect by legislation to this change of policy. It cannot be claimed that the repeal of the act of 1869 took from the company a single right conferred upon it by its original charter. That act only granted additional powers and privileges, for which the railroad company paid nothing, although, in consideration of the grant of such additional powers and privileges, it agreed to pay a certain per centum of the gross proceeds, receipts, and incomes which it might derive either from the lands granted by the act, or from any improvements erected thereon. But it was not absolutely bound, by anything contained in the act, to make use of the submerged lands for the purposes contemplated by the legislature,—certainly not within any given time,—and could not have been called upon to pay such per centum until after the lands were used and improved, and income derived therefrom. The repeal of the act relieved the corporation from any obligation to pay the per centum referred to, because it had the effect to take from it the property from which alone the contemplated income could be derived. So that the effect of the act of 1873 was only to remit the railroad company to the exercise of the powers, privileges, and franchises granted in its original charter, and withdraw from it the additional powers given by the act of 1869 for the accomplishment of certain public objects." *462
If the act in question be treated as a mere license to the company to make the improvement in the harbor contemplated as an agency of the state, then we think the right to cancel the agency and revoke its power is unquestionable.

It remains to consider the claim of the city of Chicago to portions of the east water front, and how such claim, and the rights attached to it, are interfered with by the railroad company.

The claim of the city is to the ownership in fee of the streets, alleys, ways, commons, and other public grounds on the east front of the city bordering on the lake, as exhibited on the maps showing the subdivision of fractional sections 10 and 15, prepared under the supervision and direction of United States officers in the one case, and by the canal commissioners in the other, and duly recorded, and the riparian rights attached to such ownership. By a statute of Illinois the making, acknowledging, and recording of the plats operated to vest the title to the streets, alleys, ways, and commons, and other public grounds designated on such plats, in the city, in trust for the public uses to which they were appli-

cable. Trustees v. Havens, 11 Ill. 556; Chicago v. Rumsey, 87 Ill. 354.

Such property, besides other parcels, included the whole of that portion of fractional section 15 which constitutes Michigan avenue, and that part of the fractional section lying east of the west line of Michigan avenue, and that portion of fractional section 10 designated on one of the plats as "Public Ground," which was always to remain open and free from any buildings.

The estate, real and personal, held by the trustees of the town of Chicago, was vested in the city of Chicago by the act of March 4, 1837. It followed that when the lake front act of 1869 was passed the fee was in the city, subject to the public uses designated, of all the portions of sections 10 and 15 particularly described in the decree below. And we agree with the court below that the fee of the made or reclaimed ground between Randolph street and Park row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph street, was in the city. The fact that the land which the city had a right to fill in and appropriate by virtue of its ownership of the grounds in front of the lake had been filled in by the railroad company in the construction of the tracks for its railroad and for the breakwater on the shore west of it did not deprive the city of its riparian rights. The exercise of those rights was only subject to the condition of the agreement with the city under which the tracks and breakwater were constructed by the railroad company, and that was for a perpetual right of way over the ground for its tracks of railway, and, necessarily, the continuance of the breakwater as a protection of its works and the shore from the violence of the lake. With this reservation of the right of the railroad company to its use of the tracts on ground reclaimed by it and the continuance of the breakwater, the city possesses the same right of riparian ownership, and is at full liberty to exercise it, which it ever did.

We also agree with the court below that the city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block 23, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks, and levees, subject, however, in the execution of that power, to the authority of the state to prescribe the lines beyond which piers, docks, wharves, and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise.

It follows from the views expressed, and it is so declared and adjudged, that the state of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15, 1873, repealing the same, is valid and effective for the purpose of restoring to *404 the state the same control, dominion, and ownership of said lands that it had prior to the passage of the act of April 16, 1869.

But the decree below, as it respects the pier commenced in 1872, and the piers completed in 1880 and 1881, marked 1, 2, and 3, near Chicago river, and the pier and docks between and in front of Twelfth and Sixteenth streets, is modified so as to direct the court below to order such investigation to be made as may enable it to determine whether those piers erected by the company, by virtue of its riparian proprietorship of lots formerly constituting part of section 10, extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake, and if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, then the said court shall direct the said pier or piers, to the excess ascertained, to be abated and removed, or that other proceedings relating thereto be taken on the application of the state as may be authorized by law, and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the state as may be authorized by law. Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company, and it is so ordered.

The CHIEF JUSTICE, having been of counsel in the court below, and Mr. Justice BLATCHFORD, being a stockholder in the Illinois Central Railroad Company, did not take any part in the consideration or decision of these cases.

Mr. Justice SHIRAS, dissenting. *405

That the ownership of a state in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the state, I have supposed to be well settled.

Thus it was said in Weber v. Commissioners, 18 Wall. 57, 65, that, "upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits, passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government."

In Hoboken v. Railroad Co., 124 U. S. 657, 8 Sup. Ct. Rep. 643,—a case in many respects like the present,—it was said: "Lands below high-water mark on navigable waters are the absolute property of the state, subject only to the power conferred upon congress to regulate foreign commerce and commerce between the states, and they may be granted by the state, either to the riparian proprietors or to a stranger, as the state may see fit;" and accordingly it was held "that the grant by the state of New Jersey to the United Companies by the act of March 31, 1869, was intended to secure, and does secure, to the respective grantees, the whole beneficial interest in their respective properties, for their exclusive use for the purposes expressed in the grants."

In Stevens v. Railroad Co., 34 N. J. Law, 532, it was declared by the court of errors and appeals of New Jersey that it was competent for the state to grant to a stranger lands constituting the shore of a navigable river under tide water below the tide-water mark, to be occupied and used with structures and improvements.

Langdon v. Mayor, etc., 93 N. Y. 129, 155, was a case in which it was said by the court *468 of appeals of New York: "From the earliest times in England the law has vested the title to, and the control over, the navigable waters therein, in the crown and parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as jus privatum, and was vested in the crown. But the right to use and control both the land and water was deemed a jus publicum, and was vested in parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by parliament. In this country the state has succeeded to all the rights of both crown and parliament in the navigable waters and the soil under them, and here the jus privatum and the jus publicum are both vested in the state."

These citations might be indefinitely multiplied from authorities both federal and state.

The state of Illinois, by her information or bill of complaint in this case, alleges that "the claims of the defendants are a great and irreparable injury to the state of Illinois as a proprietor and owner of the bed of the lake, throwing doubts and clouds upon its title thereto, and preventing an advantageous sale or other disposition thereof;" and in the prayer for relief the state asks that "its title may be established and confirmed; that the claims made by the railroad company may be declared to be unfounded; and that the state of Illinois may be declared to have the sole and exclusive right to develop the harbor of Chicago by the construction of docks, wharves, etc., and to dispose of such rights at its pleasure."

Indeed, the logic of the state's case, as well as her pleadings, attributes to the state entire power to hold and dispose of, by grant or lease, the lands in question; and her case is put upon the alleged invalidity of the title of the railroad company, arising out of the asserted unconstitutionality of the act of 1869, which act made the grant, by reason of certain irregularities in its passage and title, or, that ground failing, upon the right of the state to arbitrarily revoke the grant, as a *467 mere license, and which right she claims to have duly exercised by the passage of the act of 1873.

The opinion of the majority, if I rightly apprehend it, likewise concedes that a state does possess the power to grant the rights of property and possession in such lands to private parties, but the power is stated to be in some way restricted to "small parcels, or where such parcels can be disposed of without detriment to the public interests in the lands and waters remaining." But it is difficult to see how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted, or how, if it be possible to imagine that the power is subject to such a limitation, the present case would be affected, as the grant in question, though doubtless a large and valuable one, is, relatively to the remaining soil and waters, if not insignificant, yet certainly, in view of the purposes to be effected, not unreasonable. It is matter of common knowledge that a great railroad system, like that of the Illinois Central Railroad Company, requires an extensive and constantly increasing territory for its terminal facilities.

It would seem to be plain that, if the state of Illinois has the power, by her legislature, to grant private rights and interests in parcels of soil under her navigable waters, the extent of such a grant, and its effect upon the public interests in the lands and waters remaining, are matters of legislative discretion.

Assuming, then, that the state of Illinois possesses the power to confer by grant, upon the Illinois Central Railroad Company, private rights and property in the lands of the

state underlying the waters of the lake, we come to inquire whether she has exercised that power by a valid enactment, and, if so, whether the grant so made has been legally revoked.

It was contended, on behalf of the state, that the act of 1869, purporting to confer upon the railroad company certain rights in the lands in question, did not really so operate, because the record of proceedings in the senate does not show that the bill was read three times during its passage, and because the title of the bill does not sufficiently express the purpose of the bill, both of which are constitutional requisites to valid legislation.

It is unnecessary to discuss these objections in this opinion, because the court below held them untenable, and because the opinion of the majority in this court adopts the reasoning and conclusion of the court below in this regard.

It was further contended, on behalf of the state, that, even if the act of 1869 were a valid exercise of legislative power, yet the grant thereby made did not vest in the railroad company rights and franchises in the nature of private property, but merely conferred upon the company certain powers for public purposes, which were taken and held by the company as an agency of the state, and which accordingly could be recalled by the state whenever, in her wisdom, she deemed it for the public interest to do so, without thereby infringing a contract existing between her and the railroad company.

This is a question that must be decided by the terms of the grant, read in the light of the nature of the power exercised, of the character of the railroad company as a corporation created to carry out public purposes, and of the facts and circumstances disclosed by the record.

It must be conceded, in limine, that in construing this grant the state is entitled to the benefit of certain well-settled canons of construction that pertain to grants by the state to private persons or corporations, as, for instance, that, if there is any ambiguity or uncertainty in the act, that interpretation must be put upon it which is most favorable to the state; that the words of the grant, being attributable to the party procuring the legislation, are to receive a strict construction as against the grantee; and that, as the state acts for the public good, we should expect to find the grant consistent with good morals and the general welfare of the state at large, and of the particular community to be affected.

These are large concessions, and of course, in order to defeat the grant, they ought not to be pushed beyond the bounds of reason, so as to result in a strained and improbable construction. Reasonable effect must be given to the language employed, and the manifest intent of the enactment must prevail.

*By an act of congress approved September 20, 1850, (9 St. p. 466,) the right of way not exceeding 200 feet in width through the public lands was granted to the state of Illinois for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal in that state (at La Salle) to Cairo, at the confluence of the Ohio and Mississippi rivers, with a branch from that line to Chicago, and another, via the city of Galena, to Dubuque, in the state of Iowa. A grant of public lands was also made to the state to aid in the construction of the railroad and branches, which by the terms of the act were to "be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." It was also provided that the United States mail should at all times be transported on the said railroad, under the direction of the post-office department, at such price as the congress might by law direct.

This act of congress was formally accepted by the legislature of the state February 17, 1851. Laws 1851, pp. 192, 193. Seven days before the acceptance—February 10, 1851—the Illinois Central Railroad Company was incorporated for the purpose of constructing, maintaining, and operating the railroad and branches contemplated in the act of congress.

By the second section of its charter the company was authorized and empowered "to survey, locate, construct, complete, alter, maintain, and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois & Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the state of Iowa."

It was provided in the third section that "the said corporation shall have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use, all and singular, any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road. All such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company, or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,'

approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises, and immunities in said act contemplated and provided."

The eighth section had the following provision: "Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

By the fifteenth section the right of way and all the lands granted to the state by the act of congress before mentioned, and also the right of way over and through lands owned by the state, were ceded and granted to the corporation for the "purpose of surveying, locating, constructing, completing, altering, maintaining, and operating said road and branches." There was a requirement in this section (clause 3) that the railroad should be built into the city of Chicago.

By the eighteenth section the company was required, in consideration of the grants, privileges, and franchises conferred, to pay into the treasury of the state, on the first Monday of December and June of each year, 5 per centum of the gross receipts of the road and branches for the six months then next preceding.

The twenty-second section provided for the assessment of an annual tax for state purposes upon all the property and assets of the corporation; and if this tax and the 5 per cent. charge upon the gross receipts should *471 not amount to 7 per cent. of the total proceeds, receipts, or income of the company, it was required to pay the difference into the state treasury, "so as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation." Exemption was granted in that section from "all taxation of every kind, except as herein provided for."

The act of November 5, 1849, referred to in the third section of the charter, provided a mode for condemning land required for railroad uses, and contained an express provision that upon the entry of judgment the corporation "shall become seised in fee of all the lands and real estate described during the continuance of the corporation." 2 Laws 1849, p. 27.

The consent of the common council to the location of the railroad within the city of Chicago was given by an ordinance passed June 14, 1852.

On the 16th of April, 1869, an act was passed by the legislature of Illinois, entitled "An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago." The third section of this act provided as follows:

"Sec. 3. The right of the Illinois Central Railroad Company, under the grant from the state in its charter, which said grant constitutes a part of the consideration for which the said company pays to the state at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen, (15,) township and range as aforesaid, is hereby confirmed; and all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended *472 eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same, and that all gross receipts from use, profits, leases, or otherwise of said land, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the state treasury, semiannually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided, also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly, which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor: and provided, further, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation." Laws 1869, pp. 245–248.

By this act the right of the railroad company to all the lands it had appropriated and occupied, lying east of a line drawn parallel to and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15, was confirmed; and a further grant was made to the company of the submerged lands lying east of its tracks and breakwater, with-

in the distance of one mile therefrom, between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot 21.

*What is the fair and natural import of the language used?

So long as the act stands in force, there seems to me to exist a contract whereby the Illinois Central Company is to have and enjoy perpetual possession and control of the lands in question, with the right to improve the same and take the rents, issues, and profits thereof, provided always that the company shall not have the power to sell or alien such lands, nor shall the company be authorized to maintain obstructions to the Chicago harbor, or to impair the public right of navigation; nor shall the company, its lessees or assigns, be exempted from any act of the general assembly which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor, and whereby, in consideration of the grant of these rights and privileges, it shall be the duty of the company to pay, and the right of the state to receive, 7 per cent. of the gross receipts of the railroad company from "use, profits, leases, or otherwise, of said land, or the improvements thereon, or that may be hereafter made thereon."

Should the railroad company attempt to disregard the restraint on alienating the said lands, the state can, by judicial proceeding, enjoin such an act, or can treat it as a legal ground of forfeiting the grant; or, if the railroad company fails or refuses to pay the per centum provided for, the state can enforce such payment by suit at law, and possibly by proceedings to forfeit the grant. But, so long as the railroad company shall fulfill its part of the agreement, so long is the state of Illinois inhibited by the constitution of the United States from passing any act impairing the obligation of the contract.

Doubtless there are limitations, both express and implied, on the title to and control over these lands by the company. As we have seen, the company is expressly forbidden to obstruct Chicago harbor, or to impair the public right of navigation. So, from the nature of the railroad corporation and of its relation to the state and the public, the improvements put upon these lands by the company must be consistent with their duties as common carriers, and must be calculated to promote the efficiency of the railroad in the receipt and shipment of freight from and by the lake. But these are incidents of the grant, and do not operate to defeat it.

To prevent misapprehension, it may be well to say that it is not pretended, in this view of the case, that the state can part, or has parted, by contract, with her sovereign powers. The railroad company takes and holds these lands subject at all times to the same sovereign powers in the state as obtain in the case of other owners of property. Nor can the grant in this case be regarded as in any way hostile to the powers of the general government in the control of harbors and navigable waters.

The able and interesting statement, in the opinion of the majority, of the rights of the public in the navigable waters, and of the limitation of the powers of the state to part with its control over them, is not dissented from. But its pertinency in the present discussion is not clearly seen. It will be time enough to invoke the doctrine of the inviolability of public rights when and if the railroad company shall attempt to disregard them.

Should the state of Illinois see in the great and unforeseen growth of the city of Chicago and of the lake commerce reason to doubt the prudence of her legislature in entering into the contract created by the passage and acceptance of the act of 1869, she can take the rights and property of the railroad company in these lands by a constitutional condemnation of them. So, freed from the shackles of an undesirable contract, she can make, as she expresses in her bill a desire to do, a "more advantageous sale or disposition to other parties," without offense to the law of the land.

The doctrine that a state, by making a grant to a corporation of her own creation, subjects herself to the restraints of law judicially interpreted, has been impugned by able political thinkers, who may perhaps find in the decision of the court in the present case some countenance of their views. But I am unable to suppose that there is any intention on the part of this court to depart from its doctrine so often expressed.

*"We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only durante bene placito. Such a doctrine * * * is utterly inconsistent with a great and fundamental principle of a republican government, —the right of the citizens to the free enjoyment of their property legally acquired.

"A private corporation created by the legislature may lose its franchises by a misuser or nonuser of them, and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture. * * * But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." Terrett v. Taylor, 9 Cranch, 43.

In Stone v. Mississippi, 101 U. S. 814, Chief Justice Waite, in delivering the opinion of the court, said: "It is now too late to contend that any contract which a state actually enters into, when granting a charter to a private corporation, is not within the protection of the clause in the constitution of the United States that prohibits states from passing laws impairing the obligation of contracts. The doctrines of Trustees v. Woodward, 4 Wheat. 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the constitution itself."

The obvious conclusion from the foregoing view of the case is that the act of 1873, as an arbitrary act of revocation, not passed in the exercise of any reserved power, is void; that the decree of the court below should be reversed; and that that court should be directed to enter a decree dismissing the bill of the state of Illinois and the cross bill of the city of Chicago.

I am authorized to state that Mr. Justice GRAY and Mr. Justice BROWN concur in this dissent.

(146 U. S. 360)

McMULLEN v. UNITED STATES.

(December 5, 1892.)

No. 55.

UNITED STATES MARSHAL — FEES — ATTENDING COURT WHEN "IN SESSION"—APPROVAL OF ACCOUNTS—CONCLUSIVENESS.

1. A circuit or district court is "in session," within the meaning of Rev. St. § 829, fixing the marshal's compensation for attending same "while in session," only when it is open by its own order for the transaction of business, and a marshal is not entitled, under such section, to be compensated at the rate of five dollars per day for each day of the term when the court by its own action is not open for the transaction of business. 24 Ct. Cl. 394, affirmed.

2. The approval and allowance of a marshal's account by a circuit court, under Act Feb. 22, 1875, (18 St. p. 333,) when some of the items are unauthorized by law, does not preclude a revision of the same by the proper officers. 24 Ct. Cl. 394, affirmed. United States v. Jones, 10 Sup. Ct. Rep. 615, 134 U. S. 483, 488, distinguished.

Appeal from the court of claims.

Suit by Henry H. McMullen against the United States to recover fees for attending court. The court of claims gave judgment for defendant. 24 Ct. Cl. 394. Plaintiff appeals. Affirmed.

Statement by Mr. Justice HARLAN.

The appellant was United States marshal for the district of Delaware from February 1, 1880, to July 24, 1885. The terms of the district court for that district began on the second Tuesdays in January, April, June, and September in each year, and continued until the Friday or the day preceding that for opening the next succeeding term. The terms of the circuit court began on the third Tuesdays in June and October in each year, and continued until the Tuesday or the day preceding that for opening the next succeeding term.

It is found by the court of claims (finding 2) that the appellant, as marshal, "attended the circuit and district courts when in session, during the terms of said courts, nine hundred and five days;" that those days were charged by him in his account at $5 per day; that the account, being verified, was approved by the court as just, and in accordance with law, but its payment was refused at the treasury department; and that appellant's whole compensation, if the above charges were added, would not have exceeded in any one year the maximum of $6,000.

Finding 7 was in these words: "Claimant has been paid in full at the rate of $5 per day for every day whilst the circuit and district courts of the United States in the state of Delaware were sitting or in session, from and including October term, 1879, to and including June term, 1885. The 905 days referred to in finding 2 were days occurring between sessions of the courts."

C. C. Lancaster, for appellant. Asst. Atty. Gen. Cotton, for the United States.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

We are somewhat embarrassed by the obscurity of the findings of fact. The second one states that appellant attended the circuit and district courts, "when in session," during the terms of those courts, 905 days, while the seventh states that those were days occurring "between sessions of the courts." But we assume that the question intended to be presented, and which was determined below, involved the right of a marshal to compensation at the rate of five dollars per day for each day of a term, whether the court was or was not actually in session or sitting on each day so charged. We understand the words "between sessions of the courts" to imply that there were intervening days between those sessions when the court, by its own action, was not open, or did not sit, for the transaction of business.

This question depends upon the construction to be given to that clause of section 829 of the Revised Statutes, fixing the compensation to be taxed and allowed to a marshal for different kinds of service, which provides that he shall be allowed "for attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day." When the court is open, by its order, for the transaction of business, it is in session, within the meaning of this section. If the court, by its own order, is closed for all purposes of business for an entire day, or for any given number of days, it is not in session on that day, or during those days, although the current term has not expired. It is made by stat-