RECENT ENGLISH DECISIONS.

House of Lords.

ST. HELEN'S SMELTING COMPANY *v.* TIPPING.

A. brought an action against a smelting company for injuring his trees and shrubs by noxious vapors, and the learned judge, at the trial, directed the jury to find for the plaintiff, if the evidence satisfied them that real, sensible injury had been done to the enjoyment or value of A.'s property by such vapors. The jury found for the plaintiff: *Held*, that the learned judge had rightly directed the jury, and that the defendants were liable for sensible injury done to the plaintiff's property, notwithstanding that their business was an ordinary business, carried on in a proper manner, and in a neighborhood more or less devoted to manufacturing purposes.

THIS was an appeal from a decision of the Court of Exchequer Chamber (reported 4 B. & S. 616), affirming a judgment of the Court of Queen's Bench (reported Id. 408), whereby the court refused a rule for a new trial.

In June 1860, Mr. Tipping purchased an estate of considerable value in the county of Lancaster, and in September of that year extensive smelting operations were commenced by the defendants at works within a mile and a half of the plaintiff's property. In May 1863, Mr. Tipping brought his action in the Court of Queen's Bench against the defendants. The declaration alleged that the plaintiff was possessed of a certain dwelling-house and premises, with garden, &c., adjoining, and was also entitled to the reversion of certain lands near to the said dwelling-house, in the possession of his tenants; that the defendants erected and used certain smelting works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapors, &c., to issue from the said works, and to diffuse themselves over the said land and premises of the plaintiff, whereby the hedges, trees, &c., were greatly injured, the cattle rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said premises as he would otherwise have enjoyed, and also that the reversionary lands and premises were depreciated in value. The defendants pleaded not guilty, and issue was joined on the plea, and the cause was tried before MELLOR, J., at Liverpool, in August 1863.

At the trial it was clearly proved that the effect of the vapors exhaling from the works of the defendants was very injurious to the plaintiff's property.

The learned judge directed the jury to the following effect:—

"A man may do any act on his own land which is not unlawful; when I say unlawful, I mean any act which is not wrong; he may erect a lime-kiln if it is in a convenient place; but the meaning of the word 'convenient' is, that it must be plain that he will not do an actionable injury to another; because a man may not use his own property so as to injure his neighbor. When he sends on the property of his neighbor noxious smells, smokes, &c., then he is not doing an act on his own property only, but he is doing an act on his neighbor's property also; because every man, by common law, has a right to the pure air, and to have no noxious smells sent on his land, unless, by a period of time, a man has, by what is called a prescriptive right, obtained the power of throwing a burthen on his neighbor's property. But here you have no prescriptive right at all. You are to consider this as if done quite recently, and therefore you are not embarrassed by any consideration of that sort. Now, that being the case, I tell you that if a man by an act, either by the erection of a lime-kiln, or copper works, or any works of that description, sends over his neighbor's land that which is noxious and hurtful to an extent which sensibly diminishes the comfort and value of the property, and the comfort of existence on that property, that is an actionable injury. That is the law. But when you come to the question of facts, there is no doubt you must take into consideration a variety of circumstances. In deciding whether or not a man's property has been sensibly injured by the actions of another person on his own land, of course you will consider the place, the circumstances, and the whole nature of the thing. It would not be sufficient merely to say that noxious vapors have come on the man's property, but you must consider to what degree and to what extent they have come, and whether they have come from the premises of the defendants. Now, with respect to that, I do not think I can lay it down in better words than I find expressed in a note to a very admirable book, 'Whether a nuisance has been caused by the defendants at all, the nature of the locality to work, and every other fact in the case must be taken into consideration;' and so ERLE, C. J., says in a case which has been handed up to me: 'The time, the locality, and so on, are all circumstances to be taken into consideration, upon the question of fact whether an actionable injury has been occasioned by a man to his neighbor or

not.' You must apply your common sense to the question on the one side, and on the other. The defendants say, 'If you do not mind you will stop the progress of works of this description.' I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on—works which are the means for developing the national wealth—you must not stand on extreme rights, and allow a person to say, 'I will bring an action against you for this, and that, and so on.' Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore, the law does not regard trifling and small inconveniences, but only regards sensible inconveniences—injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected. Therefore, you see there are two questions here, and no doubt they are questions of some difficulty. At the same time, when you come to a review of the facts, it will be for you to say whether or not the plaintiff has satisfied you that there have been sent out from the defendants' works noxious vapors which have affected his trees and shrubs. If they have sensibly affected his trees and shrubs, and if they come from the defendants' works, they do tend to diminish the real comfort and enjoyment of the estate; because if a man has got a fine estate and gardens and plantations, and noxious vapors are sent from neighboring works on his trees and shrubs so as to injure them, it is perfectly clear that it is an actionable injury, because it affects the enjoyment and comfort of a place which a man has created for his own enjoyment. The defendants' case is, that the district in which the plaintiff lives is almost without a living tree, and the hedges are universally blackened and destroyed. In point of fact, there is no doubt that the effect of the manufactories throughout the district is entirely destructive to vegetation. However, looking at the evidence on both sides, taking those considerations into view which I have alluded to, I ask you has the plaintiff satisfied you that the effect of the noxious vapors, to a sensible extent, can be traced to have come from the defendants' works to the plaintiff's property, and to have injured it? This is a case in which the burthen of proof rests on the plaintiff. Consider all the circumstances, and apply your own experience to the evidence which has been given, and then say, has the plaintiff satisfied you that a real, sensible injury has been done to the enjoyment of his pro-

perty, or the value of it by reason of the noxious vapors which have been sent forth from the defendants' works? If that is made out to your satisfaction, you will find for the plaintiff; if not, then you will find for the defendants."

The jury intimated that they found a verdict for the plaintiff.

The learned judge, at the request of the defendants' counsel, put the following questions to the jury:—

Q. 1. Was the enjoyment of the plaintiff's property sensibly diminished?—A. We think so.

Q. 2. Do you consider the business there carried on to be an ordinary business for smelting copper?—A. We consider it an ordinary business, and carried on in a proper manner; in as good a manner as possible.

Q. 3. Do you consider, supposing that makes any difference, that it was carried on in a proper place?—A. Well, no, we do not.

The jury then found a verdict for the plaintiff, damages 361*l.* 18*s.* 4½*d.*

In Michaelmas Term, 1863, a motion was made for a rule to show cause why the verdict found for the plaintiff should not be set aside, and a new trial had between the parties; this rule was refused by the Court of Queen's Bench.

The defendants then appealed to the Court of Exchequer Chamber, who affirmed the judgment of the court below.

The defendants now appealed to the House of Lords.

The following learned judges were present at the hearing: BLACKBURN, SHEE, WILLES, and KEATING, JJ., and MARTIN and PIGOTT, BB.

Sir *R. Palmer*, A. G., and *Webster*, Q. C., for the appellants, contended that the learned judge who tried the action had misdirected the jury, inasmuch as sensible discomfort from carrying on a necessary trade, in an ordinary and proper manner, and in a convenient or suitable locality, was not an actionable injury. They referred to *Hole* v. *Barlow*, 27 L. J., C. P. 207; 6 Weekly Rep. 619; *Bainford* v. *Turnley*, 3 B. & S. 62, 66; *Cavey* v. *Ledbitter*, 13 C. B., N. S. 470; *Wanstead* v. *Hill*, Id. 479; *Stockport* v. *Potter*, 7 H. & Norm. 160; and Com. Dig., *Action on the Case for Nuisance*, C.

Mellish, Q. C., *Brett*, Q. C., and *Milward*, Q. C., for the respondent, were not called upon. At the conclusion of the

argument for the appellants, the following question was submitted by their lordships to the learned judges:—

"Were the directions given by the learned judge at Nisi Prius to the jury correct, or ought a new trial to be granted?"

MARTIN, B.—In answer to the questions proposed by your lordships to the judges, I have to state their unanimous opinion, that the directions given by the learned judge to the jury are correct, and that a new trial ought not to be granted. As far as the experience of us all goes, the directions are such as we have given in these cases for the last twenty years.

LORD CHANCELLOR (Lord WESTBURY).—I think your lordships will be satisfied with the answer we have received from the learned judges, to the question put by the House. In matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance, upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance, on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom—anything that discomposes or injuriously affects the senses or the nerves—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstance where the thing complained of actually occurs. If a man lives in a town, of necessity he should submit himself to the consequence of those obligations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop; but when an occupation is carried on by one person in the neighborhood of another, and the result of that trade, or occupation, or business is material injury, then, unquestionably, arises a very different consideration; and I think that, in a case of that description, the submission which is required from persons living in society, to

that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances, the immediate result of which is sensible injury to the value of the property.

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from large smelting works. What the occupation of these copper-smelting premises were, anterior to the year 1860, does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June 1860. In the month of September 1860, very extensive smelting operations began on the property of the present appellants—the works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to the trees and shrubs, there is abundance of evidence; the action has been brought for that; the jury have found the existence of the injury, and the only ground upon which your lordships are asked to set aside that verdict, and to direct a new trial, is this: that the whole neighborhood where these copper-smelting works are carried on, is a neighborhood more or less devoted to manufacturing purposes; and therefore it is said, that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction of the value of the plaintiff's property. I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," when the law is laid down on the subject. The word "suitable" unquestionably cannot carry with it this consequence—that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course I except the cases where any prescriptive right has been acquired by a lengthened use of the place. On these grounds, therefore, shortly, without dilating further upon them, as they are sufficiently unfolded by the judgment of the learned judges in the court below, I advise your lordships to affirm the decision of the court below, and to refuse this appeal, and to refuse it with costs.

Lord Cranworth.—I entirely agree with my noble and learned friend, and also in the opinion expressed by the judges, that this has been considered to be the proper mode of directing a jury, as

Mr. Baron MARTIN said, for the last twenty years; I believe I should have carried it back rather further. I have always understood that the proper question was, and I cannot do better than adopt the language of Mr. Justice MELLOR: "It must be plain that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another; and that that place where it is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but, in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound fact which must be looked to, to see whether or not the mode of carrying it on did or did not occasion so serious an injury as to interfere with the comforts of life and enjoyment of property. I perfectly well remember, when I had the honor of being one of the barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfered with a certain person, but I said, "You must look at it, not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to the person living in the town of Shields," because if it only added in an infinitesimal degree to the quantity of the smoke, I thought that the state of the town rendered it altogether impossible to call that a nuisance. There is nothing of that sort in the present case; it seems to me that the distinction, in matter of fact, was most correctly pointed out by Mr. Justice MELLOR, and I do not think he could possibly have stated the law, either abstractedly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE.—I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included: "The defendants say, if you do not mind you will stop the progress of works of this description I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on—works which are the means of developing the national wealth, you must not stand on extreme right, and allow a person to say, 'I will bring an action against you for this

or that, and so on.' Business could not go on if that were so. Everything must be looked to from a reasonable point of view; therefore the law does not regard trifling or small inconveniences, but only regards sensible inconveniences which sensibly diminish the comfort, enjoyment, or value of the property which is affected." I do not think that the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Appeal dismissed, with costs.

THE SUPREME COURT OF THE UNITED STATES AND THE COURT OF CLAIMS.

THE Supreme Court of the United States, at its last Term, decided that it could not entertain appeals from the Court of Claims, and that the Act of Congress of March 3d 1863, c. 92, so far as it provided for such appeals, was unconstitutional.

As the opinion of the majority of the court, delivered by the Chief Justice, is very brief, it is annexed entire:—

"*Supreme Court of the United States.*

"No. 160. March 10th 1865.

"DAVID GORDON and SARAH GORDON, Administrators of DAVID "FISHER, Appellants, *v.* The UNITED STATES.

"Opinion of Chief Justice CHASE.

"The court has duly considered the able and instructive opinion of counsel upon the question of jurisdiction which presents itself at the threshold of this cause, and has found itself constrained to the conclusion that, under the Constitution, it can exercise no appellant jurisdiction over the decisions of the Court of Claims.

"We think that the authority given to the head of an executive department by necessary implication, in the 14th section of the amended Court of Claims Act, to revise all the decisions of this Court requiring the payment of money, denies to it the judicial power from the exercise of which appeals can be taken to this court.

"The reasons which necessitate this conclusion may be more fully announced hereafter. At present we restrict ourselves to

this general statement, and to the direction that the case be dismissed for want of jurisdiction.

"Justices MILLER and FIELD dissented."[1]

We annex, also, all of the statute that relates to the action of the Secretary of the Treasury, including the 14th section, on which the court rests its decision:—

"SECTION 7.—And be it further enacted, that in all cases of final judgments by said court, or on appeal by the said Supreme Court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation, to the Secretary of the Treasury, of a copy of said judgment, certified by the clerk of said Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. And in cases where the judgment appealed from is in favor of said claimant, or the same is affirmed by the said Supreme Court, interest thereon, at the rate of five per centum, shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance unless presented for payment to the Secretary of the Treasury as aforesaid: *Provided*, That no interest shall be allowed on any claim up to the time of the rendition of the judgment by said Court of Claims, unless upon a contract expressly stipulating for the payment of interest; and it shall be the duty of the Secretary of the Treasury, at the commencement of each Congress, to include in his report a statement of all sums paid at the Treasury on such judgments, together with the names of the parties in whose favor the same were allowed."

"SECTION 14.—And be it further enacted, that no money shall be paid out of the Treasury for any claims passed upon by the Court of Claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury."

In terms, the decision of the Supreme Court is, that by necessary implication from the 14th section, the Secretary of the Treasury is "*to revise* all the decisions of the Court of Claims requiring the payment of money." But in effect it is that, by

[1] The report of the case in 2 Wallace 561 does not give the opinion above cited, but only the decision made.

the statute as enacted, the decisions of the Court of Claims, including those affirmed by the Supreme Court, are (by such necessary implication) to be reviewed by the Secretary, and sanctioned, altered, or annulled by him, so that the final adjudication of claims shall be by the Secretary, and his judgments, and not those of the judicial tribunals, be the things to be paid.

The proposition is extreme. It is the function of the Supreme Court to declare the law, and thereby in all matters of a judicial nature to control the actions of the other branches of the government. And that its decisions in matters purely judicial should be submitted to an executive officer for his sanction or correction, is an unprecedented legislative intent, inconsistent with the consti tutional functions and relations of the different branches of the government, and not to be imputed to Congress on anything less than—a "*necessary implication.*"

What the intention of the legislature was in enacting the 14th section, is indicated by the debate upon it in the Senate, where it originated. It made no part of the original bill, but was moved as an amendment to it by Mr. Hale, Senator from New Hampshire, who said:—

"Let me explain this amendment. It does not require a specific appropriation, but it simply requires a general appropriation, the meaning of which is that if the Court of Claims passes on a large claim, there shall be a session of Congress intervene before it is paid, so that Congress may know what they appropriate for, and that the Secretary may know how much to estimate for."

And the section was adopted without further debate on it.

On this explanation, the purpose of the 14th section was to change the *time*, but not the nature, of the Secretary's action. The procedure contemplated by the original bill was that the Secretary, on the presentation of the judgments to him, should pay them, as they were certified to him, out of "any general appropriation made by law for the payment and satisfaction of private claims." But on the amendment, as explained by its mover, the procedure contemplated was that the Secretary should pay the judgments, as they were certified to him, out of a general appropriation, *after* they had been presented to him and by him "estimated for" to Congress. And this legislative intent would seem to be the intent of the statute, and the precise effect of the 7th

section as amended by the 14th, if both are construed according to the ordinary meaning of their words.

The 7th section provides that the Secretary shall pay the judgments certified to him on their "*presentation*" to him, while the 14th section prohibits his payment of them "till after an appropriation therefor has been estimated for" by him. The latter of these provisions is repugnant to the former and repeals it, and, as an amendment, is substituted for it. But the repeal is no broader than the positive repugnance, and the other provisions of the 7th section remain in force. These specify, as the fund from which the judgments are to be paid, *a general* appropriation for the payment of private claims. Whether an appropriation is general or specific does not depend on the estimate made by the Secretary, but only on the terms of the Act of Congress making the appropriation, and these terms Congress may shape as it pleases. It may, therefore, make an appropriation general in its terms on estimates from the Secretary specifying particular claims. So that, in the words of Mr. Hale, the 14th section "does not require a specific appropriation," and is not repugnant therefore to the provision of the 7th section, and does not repeal it. And then, as the statute in its 7th section specifies a general appropriation and nowhere specifies any other, the 14th section must be construed to refer to a general appropriation. And the 7th section also provides that the Secretary shall pay on the judgments certified to him "the sum due *thereby*," which can only be the dollars and cents specified in them. So that he is to pay the judgments as they are certified to him.

Then the only action by the Secretary recognised by the 14th section, in the ordinary meaning of its terms, is that he should make an estimate for an appropriation. To *estimate* is to calculate that which cannot be precisely determined; and *an estimate for an appropriation*, is the legislative phrase for the Secretary's official report of his calculation of the amount required for a specific expenditure. And, so construed, the terms of the 14th section are appropriate to the circumstances in which the Secretary is to act. For his estimates would include judgments which by the provisions of the 7th section carry interest from the date of their presentation to him until they are paid. And as the Secretary could not know, when making his estimate, what inter-

est would accrue thereafter on those judgments, he could not then know or state the precise amount required for an appropriation; and all he could do would be to calculate *or estimate* for an appropriation according to the terms of the 14th section and his usual and proper official action.

If the 7th and 14th sections may be construed and executed together, according to the above exposition of them, then the implication of the Supreme Court is not "*a necessary implication.*"

And the decision of the Supreme Court would seem to conflict with settled rules of construction.

Where, of two constructions of part of a statute, one is consistent and the other is inconsistent with the purpose of the statute, the rule is that the former shall be adopted and the latter be discarded. Apart from the 14th section, the plain purpose of the statute is that the final settlement of claims shall be on the decisions of the Court of Claims, subject to the appeal given to the Supreme Court. And the 14th section is consistent with such purpose, and aids in it, if it is construed according to the ordinary meaning of its words, to require only an estimate. Whereas, if the 14th section is construed according to the decision of the Supreme Court to require a revision of the cases by the Secretary, it defeats such purpose of the statute, and its terms are strained beyond their ordinary and their proper meaning; for, *to estimate* is not to adjudicate, and "*an appropriation estimated for*" is not the judicial determination of suits at law between litigants.

And another rule of construction is that the sections of a statute shall be so construed as to be consistent with each other. And it is a necessary consequence, or corollary of this rule, that where two sections of a statute, when construed according to the ordinary meaning of their terms, are sensible and consistent with each other, so that both may be executed without conflict between them they cannot be made repugnant to each other by mere *implication* or construction beyond the ordinary meaning of their terms. Now, it has been said that the 7th section provides that the Secretary shall pay, on the judgments certified to him, "the sum due *thereby*," which can only be the dollars and cents specified in the judgments. Under this provision of the 7th section there could be no alteration of the judgments by the Secretary, and consequently no revision of them by him. And with this provision of

the 7th section, the 14th section is consistent and sensible, if it is construed according to the ordinary meaning of its terms, to require only an estimate by the Secretary. Whereas if the 14th section is construed according to the decision of the Supreme Court to require a revision of the cases by the Secretary, it is by *implication* or construction beyond the ordinary meaning of its terms made repugnant to the provision of the 7th section, and to repeal it. And this seems to be contrary to the rule of construction and its corollary above stated.

And there would seem to be this practical objection to the decision of the Supreme Court, that the Secretary has no means of making the revision which the decision requires of him. He has no power in relation to the judgments of the Court of Claims but what the statute gives him, and all that gives him is a certified copy of the judgment. This tells him the amount to be paid and to whom it is due, and enables him to make an estimate for an appropriation, and to pay the judgment-debt. But he has not the records of the cases nor their pleadings or evidence. These are in the official custody of others, and he cannot command them. He has therefore neither the facts nor the law of the cases nor any means of obtaining them, and, without them, his revision of the judgments certified to him is impossible.

And if, as the Supreme Court has decided, the statute authorizes the Secretary to revise the decisions of the judicial tribunals and substitute his own, it does not authorize him to pay the judgments he renders; for the only authority the statute gives him for making any payments whatever of the claims litigated, is contained in the provisions of the 7th section, and is by express specification confined to "all cases of final judgments by said Court (of Claims) or on appeal by the said Supreme Court," &c. And on these judgments he is to pay "the sum due *thereby*." An authority so specific cannot be extended to other judgments or other sums. And thus the *implication* of the Supreme Court would seem to prevent the payment and discharge of claims under the statute, for which that was enacted and for which its 7th section provides in express terms.

And if the Supreme Court are correct in their construction of the 14th section, viz., that the Secretary is not merely to estimate for, but is "*to revise*," *i. e.* to review, the decisions certified to him, yet the conclusion of the court would seem to be unauthorized.

The only ground of the Supreme Court's opinion is that the Secretary is "to revise all the decisions of the Court of Claims requiring the payment of money," and this would seem not to be so.

The only question here is as to cases appealed, for cases not appealed never come within the action of the Supreme Court, and are not within the scope of its opinion; and the provisions of the statute as to these cannot affect the question as to cases appealed.

And in cases appealed, the decisions of the Court of Claims cannot be revised by the Secretary, for they do not go to him; they go the Supreme Court to be revised there, and whether they are modified or affirmed there, it is the action of the Supreme Court, superseding and taking the place of the action of the Court of Claims, which gives to the judgment certified to the Secretary all its legal effect. It is, therefore, the decision of the Supreme Court that goes to him and which he is to revise, if he is to revise anything. And it must appear to be the decision of the Supreme Court to inform the Secretary that interest accrues on the amount adjudged due and to authorize him to pay interest, for that only accrues in the cases appealed to and decided by the Supreme Court. The result would seem to be that, in cases appealed, the Secretary does not revise the decisions of the Court of Claims, and that the opinion of the Supreme Court rested on a mere mistake of fact.

The facts are, that, in cases appealed, the decision of the Supreme Court is certified to the Secretary in the form of a judgment and by the Court of Claims. But the opinion of the Supreme Court does not say that the Secretary is to revise *the judgments* of the Court of Claims, and, if it did, it would be unsubstantial and impotent, for the formal judgment is only the evidence of the decision it authenticates, and it is the decision in a case adjudged that is revised when the case is reviewed. And the Supreme Court must have meant exactly what its opinion expresses when it uses the word "*decisions*," instead of the word *judgments*, viz., that the findings of fact and the conclusions of law, by the Court of Claims, were to be revised and reviewed by the Secretary; for this was necessary to the force of their argument, which otherwise would be only this, viz., that the judicial character of the Court of Claims was destroyed, and the right of appeal was taken away by the provisions of the statute, that, after the Supreme Court had acted on the appeal, its decision should be

revised by the Secretary, on being certified to him, by the Court of Claims, in the form of a judgment.

Nor can it be said that, in a case appealed, the final decision that goes to the Secretary is to be taken as the decision of the Court of Claims, because it is to be certified to him as the *judgment* of the Court of Claims; for it is not to be so certified to him. The statute itself distinguishes between judgments of the Court of Claims and judgments of the Court of Claims affirmed by the Supreme Court, and not only in terms, but practically; for the latter carry interest, and the former do not. And interest accrues on the latter, not by the authority or force of the judgment certified to the Secretary, but only by force of the statute which he is to execute. He therefore must always know that the judgment certified to him is not the judgment of the Court of Claims, and is the judgment of the Court of Claims affirmed by the Supreme Court; and the only means for this knowledge, that the statute gives him, is the certificate made to him. For this the statute prescribes no form of words, but it must state the truth, and the precise truth, and it must not state an untruth which would mislead the Secretary in the action the statute prescribes to him. And therefore it cannot certify, as a judgment of the Court of Claims, that which is in fact a judgment of the Court of Claims affirmed by the Supreme Court.

If, in cases appealed, "*the decisions* of the Court of Claims" do not go to, and are not revised by, the Secretary, then the opinion of the Supreme Court falls with the mistake of fact it is rested upon.

And if, in cases appealed, it is the decisions of the Supreme Court which go to the Secretary, as the case before it was of that class, the only question it raised was as to the effect of the 14th section in providing that the decisions of the Supreme Court should be revised by the Secretary. And in this respect the 14th section (as construed by the court) was unconstitutional, because it subjected the Supreme Court to an appellant tribunal, and that not judicial. And the effect of this would seem to be that the 14th section, being unconstitutional in its action on the Supreme Court, was as to that a nullity and merely void, and that therefore the Supreme Court was to administer the statute in cases appealed to it, as if the 14th section had not been enacted.

The argument of the Supreme Court would seem to be in sub

stance this: The authority of the Secretary to revise the decisions of the Court of Claims denies to that court judicial power or character, and reduces it to a mere board of commissioners, and therefore the appeal to this court cannot be sustained. This is like the argument used for the decision of the case of *The United States* v. *Ferreira*, 13 How. 40. But that case would seem to be the reverse of this. There the question was as to an appeal from a commissioner to the Supreme Court; while here the ques tion is as to an appeal from the Supreme Court to a commissioner. For, on the construction of the 14th section by the Supreme Court, the Secretary is to act as a commissioner, and not officially.

To sum up our remarks, we say:—

1st. That the Secretary is not *to revise* any of the decisions certified to him.

2d. That, in cases appealed, he is not to revise the decisions of the Court of Claims.

3d. That if, in cases appealed, he is to revise the decisions of the Supreme Court, the provision for that is unconstitutional and of no legal effect.

If either of these propositions is correct, the decision of the Supreme Court would seem to be erroneous. And if it is not erroneous it establishes this proposition: that the authority of the Secretary to revise the decisions of the Supreme Court denies judicial power to the Court of Claims.

The construction of the 14th section, on which the court rests its decision, was not suggested to the learned counsel in the case by the statute itself nor by the court, and therefore was not argued at the bar; and as two of the justices dissented and two others were absent, the decision was in fact made by a majority of one, in the nine members of the court. These circumstances, and the fact that only the conclusion of the court is given, tend to make the decision less authoritative in itself, and less satisfactory to the profession than it would otherwise have been. The opinion of the court states that the reasons for its decision "*may be more fully announced hereafter.*" This would seem to be desirable on many accounts. It would remove any doubts there may be in the profession as to the correctness of the decision. These, if they exist, affect the consideration and dignity of the court, and anything impairing in any degree the public estimation of that time-honored tribunal would be a public calamity. Then the decision,