
T
98919927 3

UNITED STATES REPORTS

VOLUME 183

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1901

J. C. BANCROFT DAVIS

REPORTER

THE BANKS LAW PUBLISHING CO.
21 MURRAY STREET, NEW YORK
1902

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.

PHILANDER CHASE KNOX, Attorney General.
JOHN KELVEY RICHARDS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1901.

HOLZAPFEL'S COMPOSITIONS COMPANY *v.* RAHTJEN'S AMERICAN COMPOSITION COMPANY.

CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 54. Argued April 25, 26, 1901.—Decided October 21, 1901.

This was a controversy relating to a trade-mark for protective paint for ships' bottoms. The Court *held:*

(1) That no valid trade-mark was proved on the part of the Rahtjens Company in connection with paint sent from Germany to their agents in the United States, prior to 1873, when they procured a patent in England for their composition;

(2) That no right to a trade-mark which includes the word "patent," and which describes the article as "patented," can arise when there has been no patent;

(3) That a symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, and no right to its exclusive use can be maintained;

(4) That of necessity when the right to manufacture became public, the right to use the only word descriptive of the article manufactured became public also;

(5) That no right to the exclusive use in the United States of the words "Rahtjen's Compositions" has been shown.

THE respondent, a New York corporation, commenced this suit in equity in the Circuit Court for the Southern District of

New York, against the petitioner, which is a foreign corporation, organized under the laws of the Kingdom of Great Britain, and having a place of business in the city of New York, to restrain it from the use of the trade-mark which the respondent averred it had acquired in the name "Rahtjen's Composition" and to obtain an accounting of the profits and income which the petitioner had unlawfully derived from the use of such trade-mark, and which it had by reason thereof diverted from the respondent. Issue was taken on the various allegations in the bill, and upon the trial the Circuit Court dismissed the same, 97 Fed. Rep. 949; but upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was reversed and the case remanded to that court with instructions to enter a decree enjoining the petitioner from selling or offering to sell Rahtjen's Composition under that name, and from using the name upon its packages or in its advertisements. 101 Fed. Rep. 257; 41 C. C. A. 329.

Judge Wallace dissented from the judgment and opinion of the Circuit Court of Appeals, holding that the case was properly decided in the court below, and that the decree ought to be affirmed.

The defendant and petitioner then prayed this court for a writ of certiorari, which was granted, and the case thus brought here.

The trade-mark in regard to which this contest arises pertains to a certain kind of paint for the protection of ships' bottoms from rust and from vegetable or animal growth thereon, either in salt or fresh water. The paint was of three kinds, numbered, respectively, Nos. 1, 2 and 3. The evidence in the record shows that some time between the years 1860 and 1865, one John Rahtjen invented in Germany a particular kind of paint for the purpose above mentioned. In connection with his sons he began in 1865 to manufacture the paint for general use, and it speedily acquired a high reputation among owners of shipping as valuable for the purposes intended. The elder Rahtjen never obtained a patent for the article in Germany, neither did he or his sons apply for or obtain one in the United States. They first shipped some of the paint manufactured by them in Ger-

many to the United States in 1870, consigned to Henry Gelien. They did not put it upon the market by sending generally to those who might wish to use it, but all their consignments from 1870 to 1878 were made to Gelien. Under what marks he sold the article does not appear.

On November 19, 1869, one of the firm wrote to Mr. Gelien from Bremerhaven, making him the sole agent of the firm for the sale of its paint in the United States, and informing him that they had not obtained a patent for their composition in America nor applied for one in the United States, as there was no danger in introducing the composition in America, the invention not being of a nature facilitating good imitations. The father died in 1873, after which the sons continued the business.

Gelien was succeeded as the consignee of the paint in the United States, in 1878, by the firm of Hartmann, La Doux & Maecker, to whom for a short time the paint was consigned from Germany, and then it was sent them from England through Rahtjen's assigns there. The Hartmann firm was succeeded in July, 1886, by Emil Maecker, as agent for the sale of the paint in the United States, and on January 1, 1889, Maecker was succeeded by one Otto L. Petersen, and in 1891 Petersen was succeeded by the respondent corporation, and was made its president.

On January 15, 1878, "Joh" Rahtjen assigned to "Messrs. Suter, Hartmann & Co., in London, the exclusive right of sale of my patent composition paint for the United States of North America, for the period of twelve years from the commencement of 1878 to the end of 1889." After 1870 the firm of Hartmann Brothers, or Suter, Hartmann & Co., manufactured the composition for themselves in England, by the license of the Rahtjens, and for a time after 1874 Rahtjen also manufactured in England as well as in Germany. During this time the composition when manufactured by Hartmann was marked "Rahtjen's Patent Composition, Hartmann's Manufacture." Up to the time of the above assignment the Rahtjens had consigned their paint to New York in barrels or casks addressed to Gelien, and with labels affixed thereon, in which the article

was described as "Rahtjen's Patent Composition," and after Hartmann, La Doux & Maecker became agents, the casks were addressed to that firm at New York and labeled the same way.

While Gelien acted as consignee he prepared and issued a show card and also letter heads and circulars with "Rahtjen's Composition Paint, known as the German Paint," on the cards and on the heading of his letters and circulars, and also directly underneath was the picture of a vessel. The show cards and circulars were issued for the purpose of advertising the paint, and the show card was copyrighted by Gelien for himself.

After the assignment to Suter, Hartmann & Co. of the exclusive right of sale in the United States, and up to the year 1883, that firm sent the paints to the United States under the description of "Rahtjen's Patent Composition," and the Rahtjens themselves sent no more paint to the United States from Germany.

In 1873 they entered into negotiations with Suter, Hartmann & Co., in England, for the sale of their paint in that country, and on November 29, 1873, Heinrich Rahtjen obtained in England a patent for the paint for the term of fourteen years from the date thereof, provided, among other conditions, he should at the end of seven years pay a stamp duty of one hundred pounds, and in case he did not pay, the patent was to "cease, determine and become void." It remained in existence for seven years, or until November 29, 1880, and then ceased because of the failure to pay the one hundred pounds stamp duty as provided for in the patent.

The label used by Suter, Hartmann & Co. in sending the paint to their different agents and customers contained the words "Rahtjen's Patent Composition" and "None genuine without this signature, Suter, Hartmann & Co." These words were used by them from the outset of their career as consignees for the composition.

In May, 1883, two years and a half after the expiration of the English patent, the predecessors of the petitioner commenced in England to make and sell this paint, and in 1884 they sent it to the United States under the name of "Rahtjen's Composition, Holzapfel's Manufacture."

Statement of the Case.

On June 25, 1883, John Rahtjen filed with the English office an application for registration as a trade-mark of the words "Genuine Rahtjen's Composition for Ships' Bottoms," etc. This application was opposed by Holzapfel & Co., through their solicitors, and no counter-statement having been filed by Rahtjen the application was deemed to be withdrawn.

On July 7, 1883, Rahtjen filed another application for registration of the words "Rahtjen Composition." This, too, was opposed, and the application thereafter held to be withdrawn.

On June 28, 1883, Suter, Hartmann & Co. filed an application for the registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoys, &c. None genuine without this signature, Suter, Hartmann & Co." This application was opposed by defendant's predecessors, Holzapfel & Co., and was withdrawn.

On the 25th of April, 1883, Hartmann Brothers filed an application for a trade-mark in this form:

The application was granted, and from that time they had an exclusive right to use that mark. It is not charged that the defendant has ever in any way imitated or infringed upon it.

On January 9, 1884, Suter, Hartmann & Co. filed an application for the registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoys, &c. Directions. Suter, Hartmann & Co." In their application for registration they said: "We do not claim the exclusive use of the words 'Raht-

jen's Patent Composition for Ships' Bottoms, Buoys &c., Directions,' or any of such words, except as part of the combination constituting our trade-mark, as represented annexed, and to which we claim exclusive right." This trade-mark was registered. The following is a copy:

RAHTJEN'S

PATENT COMPOSITION,

FOR SHIPS' BOTTOMS, BUOYS, &C.

Directions.

SUTER, HARTMANN & CO.

There has never been any infringement of it by defendant, but it has used the words "Rahtjen's Composition" in connection with the statement that it was manufactured by Holzapfel & Co., and it has so used them on goods sold in the United States, and did so at the time of the commencement of this suit.

Before the assignment to Suter, Hartmann & Co. of the exclusive right to sell the composition in the United States, Rahtjen had transferred to Hartmann Brothers in England the exclusive right to manufacture it there, and so in their manufacture it was described as "Rahtjen's Composition. Hartmann Brothers' Manufacture."

In 1888, Suter, Hartmann & Rahtjen's Composition Company (Limited) was formed, and Suter, Hartmann & Co. assigned their rights and interests in the paint and trade-mark to that company, and in 1891 the respondent company was formed and the English company transferred to it all rights to the trade-marks belonging to and used by the English company in America, and agreed not to carry on any business of a like character in the United States.

In 1899 complaint was made before the Court of Commerce, sitting at Antwerp, by Rahtjen and by Suter, Hartmann & Co.

against defendant W. Wright, in which they complained of the defendant that he had put on the sign of his house the inscription "Manufacturers of Rahtjen's Composition," and that in his prospectus and other publications he announced that he sells the "Original Rahtjen's Composition for Ships' Bottoms, manufactured by the London Oil and Color Co., Limited." This use of the name of the complainant by the defendant, the court held, constituted an illegal act, and even if the complainants had not retained their right to the use of the words "Rahtjen's Composition," that the defendant had not acquired the right to use the name in such a way as to cause the public to believe that his product was the product of Rahtjen or of his delegates. The defendant was therefore condemned in judgment and enjoined from the use of the words in future. An appeal was taken from this decision and the court above reversed the judgment, holding that the name "Rahtjen's Composition" had become the property of the public, which had the right to "offer it for sale under the name generally used to describe it, because any other name would completely mislead the purchaser, always supposing that the public is not to be led astray as to the individuality of the manufacturer, or as to the source of the said products. As it is shown by the documents deposited in the present process that the varnish invented by the associate is generally known in England and in Belgium under the name of Rahtjen's composition; so that in the eyes of the public this name of Rahtjen has become a sort of qualifying adjective indicative of this special product; as the appellant has always in his sign and in his circulars been careful to announce that the product that he sells was manufactured by the 'London Oil and Color Company,'" the court held that the intention of bad faith which constitutes an element necessary to the establishment of breach of faith had no actual existence, and the judgment was therefore reversed.

Complaint had also been made by Mr. John Rahtjen in the court at Hamburg against Holzapfel and others for the wrongful use of the words "Rahtjen's Composition," and that court held in substance that there was no longer any exclusive property in the words used, and that the defendants should, therefore, be discharged.

Mr. William McAdoo and *Mr. J. G. Carlisle* for petitioner. *Mr. R. B. McMasters* was on their brief.

Mr. Timothy D. Merwin and *Mr. Thomas B. Kerr* for respondent.

Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court.

We are of opinion that no valid trade-mark was proved on the part of the Rahtjens, in connection with the paint sent by them from Germany to their agents in the United States prior to 1873, when they procured a patent in England for their composition. It appears from the record that from 1870 to 1879, or late in 1878, the paint was manufactured in Germany by Rahtjen and sent to the United States in casks or packages marked "Rahtjen's Patent Composition Paint."

Prior to November, 1873, the article was not patented anywhere, and a description of it as a patented article had no basis in fact, and was a false statement tending to deceive a purchaser of the article. No right to a trade-mark which includes the word "patent," and which describes the article as "patented" can arise when there is and has been no patent, nor is the claim a valid one for the other words used where it is based upon their use in connection with that word. A symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained. *Manhattan Medicine Company* v. *Wood*, 108 U. S. 218, 225; *Wrisley Co.* v. *Iowa Soap Co.*, 104 Fed. Rep. 548.

In 1873 an English patent had been obtained, and from that time to 1878, when the Rahtjens assigned the exclusive right of sale in the United States to Suter, Hartmann & Co., the words "Rahtjen's Patent Composition" were used on casks containing the paint sent by the Rahtjens to the United States, and must have referred to the English patent, as there was no other, and the right to use those words depended upon the existence of the patent, although up to 1878 the article sent to the

United States was manufactured in Germany. As the right to use the word depended upon the English patent, the right to so designate the composition fell with the expiration of that patent, and from that time (1880) until 1883, when the trade-mark was obtained by Suter, Hartmann & Co., there can be no claim made of an exclusive right to designate the composition as Rahtjen's composition, because from 1880 that right became public as a description of the article and not of the name of the manufacturer. During its whole existence the name had been given to the article, and that was the only name by which it was possible to describe it.

The labels used by Suter, Hartmann & Co., from the outset of their career as sole consignees, contained the description "Rahtjen's Patent Composition, None genuine without signature, Suter, Hartmann & Co." These labels were affixed to the packages, and were sent to Rahtjen in Germany when he manufactured for them, to be placed on packages, and when he subsequently made the composition in England the labels were sent to him there to be affixed. This way of designating the composition was employed by Rahtjen in Germany for his own sales, and Suter, Hartmann & Co. simply copied his method of describing the same. How else could this article thereafter be described? When the right to make it became public, how else could it be sold than by the name used to describe it? And when a person having the right to make it described the composition by its name and said it was manufactured by him, and said it so plainly that no one seeing the label could fail to see that the package on which it was placed was Rahtjen's composition manufactured by Holzapfel & Co., or Holzapfel's Composition Company (Limited), how can it be held that there was any infringement of a trade-mark by employing the only terms possible to describe the article the manufacture of which was open to all? Of necessity when the right to manufacture became public the right to use the only word descriptive of the article manufactured became public also.

This rule held good when at the expiration of the patent in November, 1880, Suter, Hartmann & Co. continued to send the paint to the United States as "Rahtjen's Patent Composi-

tion, Hartmann's Manufacture," because it is plain that the name of Rahtjen had, as we have said, become descriptive of the article itself, and was not a designation of the manufacturer. It had been manufactured both in Germany and in England at the same time, and that which was manufactured in England by Hartmann Brothers or Suter, Hartmann & Co. had been distinguished from the German article by the statement that it was "Rahtjen's Genuine Composition, Hartmann's Manufacture." If any one had desired to use this paint and had called for it in the market, he would necessarily have been compelled to describe it as "Rahtjen's Composition," as there was no other name for the article, and though in England while the patent lasted no one but the patentee or his licensees could manufacture the article, yet the description would still have been "Rahtjen's Composition;" but when the patent expired the exclusive right to manufacture the article expired with it, while the name which described it became, under the facts of this case, necessarily one of description and did not designate the manufacturers. There was no other name for the article, and in order to obtain it a person would have to describe it by the words "Rahtjen's Composition." The words thus became public property descriptive of the article, and the right to manufacture it was open to all by the expiration of the English patent. After Suter, Hartmann & Co. obtained the trade-mark of an open hand, originally painted red, together with the name "Rahtjen's Patent Composition," which was some time in 1883, the paint was sent to the United States under that designation; but the trade-mark was not obtained without the positive disclaimer by the plaintiffs of the right of exclusive use of the words "Rahtjen's Composition," and unless they disclaimed that exclusive right they could have obtained no trade-mark.

The registration of the trade-mark of Hartmann, La Doux & Maecker in the United States in June, 1885, was not only subsequent to the expiration of the English patent, but also subsequent to the time when the defendant company had commenced to manufacture the paint as "Rahtjen's Composition, Holzapfel's Manufacture," and had sent the same to the United States under that description, at least as early as 1884. The United

States registered trade-mark could not, therefore, interfere with the prior (but not exclusive) right of the defendant to the use of those words.

The respondent company advertised and sold in the United States the composition under the name of "Rahtjen's Composition, Hartmann's Manufacture," while the petitioner advertised and sold its composition as "Holzapfel's Rahtjen's" or "Holzapfel's Improved Rahtjen's Composition," or "Holzapfel's Improved American Rahtjen's;" so it is seen there is no room for the claim that the composition manufactured by the petitioner purports to be manufactured by Rahtjen or Hartmann. It is a clear cut description of the name of the article which it manufactures, and there is no pretense of deceit as to the person who in fact manufactures it.

The trade-marks which have been spoken of, and which were obtained in 1883 and 1884, do not cover the right to use the name "Rahtjen" exclusively. The trade-mark obtained in April, 1883, by Hartmann Brothers, described as the "red hand symbol," does not purport to contain any name, while that issued to Suter, Hartmann & Co., while it contained the name "Rahtjen's Patent Composition," was obtained only by the disclaimer on the part of the applicants of the right to the exclusive use of those words, except as part of the combination constituting the trade-mark. Prior to the English patent, the respondent's predecessors or assigns had no valid trade-mark in England for the same reason the Rahtjens had acquired none in the United States, viz., they had no right to designate the composition as a patented article when in fact there was no patent. From 1873 to 1880, while the patent was in life, they were entirely justified in calling it a patented article, and when that patent expired, it seems clear they had no right to retain the exclusive use of the only name which described the composition, and that no such right could be claimed by virtue of a valid trade-mark antedating the patent, for there was none, assuming even that such fact, if it had existed, would have justified the claim to the exclusive use of the descriptive words after the patent had expired.

The judgments in the Antwerp and Hamburg courts simply

showed that in those countries the use of the words "Rahtjen's Composition" or "Rahtjen's Patent Composition" had become descriptive of the article itself and did not in any way designate the persons who manufactured it; but even without those judgments, the record shows beyond question that when the English patent expired the use of the words became open to the world as descriptive of the article itself, and to manufacture an article under that name was a right open to the world. There was no trade-mark in that name in the United States.

The principles involved in *Singer Manufacturing Company* v. *June Manufacturing Company*, 163 U. S. 169, apply here.

It is said there is a distinction between the case at bar and the one cited, because in the latter the patent and the trade-mark were both domestic, while here the trade-mark is domestic and the patent foreign. The respondent claims the right to use these words by virtue of assignments from the Messrs. Rahtjen and also Suter, Hartmann & Co. in England, and also by virtue of a domestic trade-mark which it or its predecessors had acquired from user and registration in the United States. The rights of Suter, Hartmann & Co. to the exclusive use of these words had been disclaimed by them in 1883, long before any assignment of their rights to the respondent, and we do not see why that disclaimer should be confined to England. It was a general disclaimer of any right whatever to the exclusive use of these words, and it was only upon the filing of that disclaimer that they obtained the trade-mark which they did in England. The disclaimer, however, was as broad as it could be made. When they assigned their rights the assignment did not include a right to an exclusive use which, in order to obtain the trade-mark registration, they had already disclaimed. The assignment of the Rahtjen firm could not convey the exclusive right to the use of such words, because they had no valid trade-mark in those words prior to 1873, and by the expiration of the English patent, in 1880, the right to that use had become public. These various assignors, therefore, did not convey by their assignment a right to the exclusive use of the words in the United States. The domestic trade-mark, which the respondent also claims gives it that right, was not used until after the sale of

the composition by the petitioner in the United States under the name of "Rahtjen's Composition, Holzapfel's Manufacture." We think the principle which prohibits the right to the exclusive use of a name descriptive of the article after the expiration of a patent covering its manufacture applies here.

In the manufacture and sale of the article, of course, no deceit would be tolerated, and the article described as "Rahtjen's Composition" would, when manufactured by defendant, have to be plainly described as its manufacture. The proof shows this has been done, and that the article has been sold under a totally different trade-mark from any used by respondent, and it has been plainly and fully described as manufactured by defendant or its assignors, the Holzapfels.

We are of the opinion that no right to the exclusive use in the United States of the words "Rahtjen's Composition" has been shown by respondent, and that the decree of the Circuit Court of Appeals for the Second Circuit should be reversed, and that of the Circuit Court for the Southern District of New York affirmed, and it is so ordered.

KNOXVILLE IRON COMPANY *v.* HARBISON.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 22. Argued and submitted March 7, 1901.—Decided October 21, 1901.

The act of the legislature of the State of Tennessee, passed March 17, 1899, Statutes of 1899, c. 11, p. 17, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employés, does not conflict with any provisions of the Constitution of the United States relating to contracts.

In the chancery court of Knox County, Tennessee, Samuel Harbison, a citizen of said State, on June 2, 1899, filed a bill of complaint against the Knoxville Iron Company, a corporation organized under the laws of the State of Tennessee, alleging

that he was the *bona fide* holder by purchase in due course of trade of certain specified accepted orders for coal that had been issued by the defendant company in payment of wages due to its employés; that he had made due demand for their redemption in cash according to law, which demand had been refused; and that he was entitled to a decree for the amount of said orders with interest. The company filed an answer, denying that the complainant was a *bona fide* holder of the orders in question, and alleging an agreement between the company and its employés that the latter would accept coal in payment of said orders, etc.

Proof was taken and the case heard by the chancellor, who rendered a decree in favor of the complainant for $1702.66 as principal and interest of said orders with costs. An appeal was taken by the defendant company to the Court of Chancery Appeals of Tennessee, an intermediate court of reference in equity causes, where the decree of the chancery court of Knox County was affirmed.

The facts as found by the Court of Chancery Appeals are as follows:

"The defendant is a corporation chartered under chapter 57, Acts of 1867—'8. The following powers are given by section 4: 'To purchase, hold and dispose of such real estate, not to exceed seventy thousand acres, leases, minerals, iron, coal, oil, salt and personal property as they may desire, or as they may deem necessary for the legitimate transaction of their business; to mine, bore, forge, smelt, work and manufacture, transport, refine and vend the same. The company to have and enjoy, and exercise, all the rights, privileges and powers belonging to, or incidental to corporations, which may be convenient to carry out any business they are in this act authorized to engage in.'

"The defendant has its principal office at Knoxville, where it is engaged in the manufacture of iron. As an incident to this business, it also mines and sells coal. Its mines are located in Anderson County. It works about two hundred employés. It has now and has had for many years a regular pay day, being that Saturday in every month which is nearest the 20th day of the month. Upon this pay day each employé is paid

in cash the amount then due him, excepting what may be due him from the first of the month up to said pay day; that is, the company keeps in arrears with its employés all the time to the extent of their wages for about twenty days' time so far as concerns the matter of cash payments, but they may collect this sum and all sums that may be due them in coal orders, as stated below. It does not and will not pay cash to employés for wages at any other time than upon said regular pay days. Defendant, however, nearly always has on hand in its Knoxville yard a large amount of coal which it sells to all persons who are willing to purchase, whether such persons are its laborers or the public generally. For some time prior to the filing of the bill and at the time the bill was filed the defendant was and had been accustomed to accept from its laborers after work had been performed orders for coal in the following form:

"'Let bearer have——bushels of coal and charge to my account.

——— ———.'

"The defendant's employés are accustomed to sign orders, and in this form they are accepted by a stamp in these words:

"'Accepted———1899.

"'KNOXVILLE IRON COMPANY.'

"Many of the defendant's employés have never drawn an order on the defendant, and many others have used them only in the purchase of coal for themselves; but the defendant in this way pays off about seventy-five per cent of the wages earned by its employés. Many of the employés who draw these orders get small wages, ninety cents to one dollar and twenty cents per day, and sell these orders to get money to live on, but those who get the largest wages, $65.00 to $175 per month, draw more of such coal orders in proportion than do those who get small wages. Defendant has never insisted upon any of its laborers giving any such orders but has been willing to accept such orders when any employé would draw them and ask their acceptance. Defendant, however, sets apart every Saturday afternoon, from one o'clock to five o'clock, for the acceptance of such orders. It makes some profit in accepting said orders in that, instead of paying the wages of its employés in cash, it

pays them in coal at 12 cents per bushel, and also, to some extent, its coal business is increased thereby. On the other hand, such orders are a convenience to the defendant's employés in the way of enabling them to realize on their wages before the regular monthly pay day and up to that pay day. When these orders are drawn by defendant's employés and accepted, defendant credits itself with said orders on its accounts with the persons so drawing them at the rate of twelve cents per bushel for the amount of coal called for by said orders. There is no proof of an express agreement between the defendant and its employés that the orders should be paid only in coal, unless the face of the order shall be construed as setting forth such an agreement. The only proof of any implied agreement to that effect is to be found in such inferences as may be drawn from the face of the orders and from the custom of the company to issue them and the employés to receive them on other than the regular cash pay days and the fact that no employé has ever presented one of such orders for redemption in anything else than coal. There is no proof of any compulsion on the part of the defendant upon its operatives, except in so far as compulsion may be implied from the fact that unless defendant's operatives take their wages in coal orders they must always on each monthly pay day suffer the defendant to be in arrears about twenty days—that is, that on the regular pay day on that Saturday which is the nearest the 20th of the month the defendant will not pay wages, except up to the last day of the preceding month, but will pay in coal orders the whole wages due at the end of each week, and that such is the course of business between the defendant and its employés. The complainant purchased six hundred and fourteen of said accepted orders from defendant's employés, and within thirty days from the issuance of each of said orders he presented each of them to the Knoxville Iron Company, defendant hereto, and demanded that it redeem them in cash, which was refused by defendant. Complainant is a licensed dealer in securities and sent his agents among the employés of the defendant to buy these coal orders. They had previously been selling at seventy-five cents on the dollar—that is, before the passage of chapter 11, Acts of 1899—but he in-

structed his agents to give eighty-five cents on the dollar, and the orders now in suit were purchased at that price. They amount in dollars and cents to $1678.00. There is no evidence of bad faith on the part of the complainant in the purchase of said orders."

The orders sued on in this case were issued after the passage of the act of March 17, 1899.

From the decree of the Chancery Court of Appeals an appeal was taken by the company to the Supreme Court of Tennessee, by which court the decrees of the courts below were affirmed. The case was then brought to this court by a writ of error allowed by the Chief Justice of the Supreme Court of Tennessee.

Mr. Edward T. Sanford for the Knoxville Iron Company. *Mr. Cornelius E. Lucky* and *Mr. James A. Fowler* were on his brief.

Mr. John W. Green for Harbison submitted on his brief, upon which brief was also *Mr. Samuel G. Shields.*

Mr. Justice Shiras, after stating the case as above, delivered the opinion of the court.

This is a suit in equity brought to this court by a writ of error to the Supreme Court of the State of Tennessee, involving the validity, under the Federal Constitution, of an act of the legislature of Tennessee, passed March 17, 1899, Acts of 1899, c. 11, p. 17, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employés.

The caption and material portions of this act are as follows:

"An Act requiring all persons, firms, corporations, and companies using coupons, scrip, punchout, store orders or other evidences of indebtedness to pay laborers and employés for labor, or otherwise to redeem the same in good and lawful money of the United States in the hands of their employés, laborers, or a *bona fide* holder, and to provide a legal remedy for collection of same in favor of said laborers, employés and such *bona fide* holder.

"SEC. 1. Be it enacted by the General Assembly of the State of Tennessee, That all persons, firms, corporations and companies, using coupons, scrip, punchouts, store orders or other evidences of indebtedness to pay their or its laborers and employés, for labor or otherwise, shall, if demanded, redeem the same in the hands of such laborer, employé or *bona fide* holder, in good and lawful money of the United States: *Provided*, The same is presented and redemption demanded of such person, firm, company or corporation using same as aforesaid, at a regular pay day of such person, firm, company or corporation to laborers or employés, or if presented and redemption demanded as aforesaid by such laborers, employés or *bona fide* holders at any time not less than thirty days from the issuance or delivery of such coupon, scrip, punchout, store order or other evidences of indebtedness to such employés, laborers or *bona fide* holder. Such redemption to be at the face value of said scrip, punchout, coupon, store order or other evidence of indebtedness: *Provided, further*, Said face value shall be in cash the same as its purchasing power in goods, wares and merchandise at the commissary, company store or other repository of such company, firm, person or corporation aforesaid.

"SEC. 2. Be it further enacted, That any employé, laborer or *bona fide* holder referred to in section 1 of this act, upon presentation and demand for redemption of such scrip, coupon, punchout, store order or other evidence of indebtedness aforesaid, and upon refusal of such person, firm, corporation or company to redeem the same in good and lawful money of the United States, may maintain in his, her or their own name an action before any court of competent jurisdiction against such person, firm, corporation or company, using same as aforesaid for the recovery of the value of such coupon, scrip, punchout, store order or other evidence of indebtedness, as defined in section 1 of this act."

The views of the Supreme Court of Tennessee, sustaining the validity of the enactment in question, sufficiently appear in the following extracts from its opinion, a copy of which is found in the record:

"Confessedly, the enactment now called in question is in all

respects a valid statute and free from objection as such, except that it is challenged as an arbitrary interference with the right of contract, on account of which it is said that it is unconstitutional and not the 'law of the land' or 'due process of law.'

"The act does, undoubtedly, abridge or qualify the right of contract, in that it requires that certain obligations payable in the first instance in merchandise shall in certain contingencies be paid in money, yet it is as certainly general in its terms, embracing equally every employer and employé who is or may be in like situation and circumstances, and it is enforcible in the usual modes established in the administration of governments with respect to kindred matters. The exact and precise requirement is that all employers, whether natural or artificial persons, paying their employés in 'coupons, scrip, punchouts, store orders, or other evidences of indebtedness' shall redeem the same at face value in money, if demanded by the employé or a *bona fide* holder on a regular pay day or at any time not less than thirty days from issuance (sec. 1), and that if payment be not so made upon such demand, the owner may maintain a suit on such evidence of indebtedness and have a money recovery for the face value thereof in any court of competent jurisdiction (sec. 2).

"There is no prohibition against the issuance of any of the obligations referred to, nor against payment in merchandise or otherwise according to their terms, but only a provision that they shall be paid in money at the election and upon a prescribed demand of the owner. In other words, the effect of the act is to convert into cash obligations such unpaid merchandise orders, etc., as may be presented for money payment on a regular pay day or as much as thirty days after issuance.

"Under the act the present defendant may issue weekly orders for coal, as formerly, and may pay them in that commodity when desired by the holder, but instead of being able, as formerly, to compel the holder to accept payment of such orders in coal, the holder may, under the act, compel defendant to pay them in money. In this way and to this extent the defendant's right of contract is affected.

"Under the act, as formerly, every employé of the defend-

ant may receive the whole or a part of his wages in coal orders, and may collect the orders in coal or transfer them to some one else for other merchandise or for money. His condition is bettered by the act, in that it naturally enables him to get a better price for his coal orders than formerly, and thereby gives him more for his labor; and yet, although the defendant may not in that transaction realize the expected profit on the amount of coal called for in the orders, it in no event pays more in dollars and cents for the labor than the contract price.

"The scope and purpose of the act are thus indicated. The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him or his *bona fide* transferee, at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employé upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation. Being general in its operation and enforcible by ordinary suit, and being unimpeached and unimpeachable upon other constitutional grounds, the act is entitled to full recognition as the 'law of the land' and 'due process of law' as to the matters embraced, without reference to the state's police power, as was held of an act imposing far greater restrictions upon the right of contract, in the case of *Dugger* v. *Insurance Company*, 95 Tennessee, 245, and as had been previously decided in respect of other limiting statutes therein mentioned. Ib. 253, 254.

"Furthermore, the passage of the act was a legitimate exercise of police power, and upon that ground also the legislation is well sustained. The first right of a State, as of a man, is self-protection, and with the State that right involves the universally acknowledged power and duty to enact and enforce all such laws not in plain conflict with some provision of the state or Federal Constitution as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people.

"The act before us is, perhaps, less stringent than any one considered in any of the cases mentioned. It is neither prohibitory nor penal; not special, but general; tending towards equality between employer and employé in the matter of wages; intended and well calculated to promote peace and good order, and to prevent strife, violence and bloodshed. Such being the character, purpose and tendency of the act, we have no hesitation in holding that it is valid, both as general legislation, without reference to the state's reserved police power, and also as a wholesome regulation adopted in the proper exercise of that power."

The Supreme Court of Tennessee justified its conclusions by so full and satisfactory a reference to the decisions of this court as to render it unnecessary for us to travel over the same ground. It will be sufficient to briefly notice two or three of the latest cases.

In *Holden* v. *Hardy*, 169 U. S. 366, the validity of an act of the State of Utah, regulating the employment of workingmen in underground mines and fixing the period of employment at eight hours per day, was in question. There, as here, it was contended that the legislation deprived the employers and employés of the right to make contracts in a lawful way and for lawful purposes; that it was class legislation, and not equal or uniform in its provisions; that it deprived the parties of the equal protection of the laws; abridged the privileges and immunities of the defendant as a citizen of the United States, and deprived him of his property and liberty without due process of law. But it was held, after full review of the previous cases, that the act in question was a valid exercise of the police power of the State, and the judgment of the Supreme Court of Utah, sustaining the legislation, was affirmed.

Where a contract of insurance provided that the insurance company should not be liable beyond the actual cash value of the property at the time of its loss, and where a statute of the State of Missouri provided that in all suits brought upon policies of insurance against loss or damage by fire, the insurance company should not be permitted to deny that the property insured was worth at the time of issuing the policy the full

amount of the insurance, this court held that it was competent for the legislature of Missouri to pass such a law even though it places a limitation upon the right of contract. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557.

In *St. Louis, Iron Mountain &c. Railway* v. *Paul*, 173 U. S. 404, a judgment of the Supreme Court of Arkansas, sustaining the validity of an act of the legislature of that State which provided that whenever any corporation or person engaged in operating a railroad should discharge, with or without cause, any employé or servant, the unpaid wages of any such servant then earned should become due and payable on the date of such discharge without abatement or deduction, was affirmed. It is true that stress was laid in the opinion in that case on the fact that, in the constitution of the State, the power to amend corporation charters was reserved to the State, and it is asserted that no such power exists in the present case. But it is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State and its inhabitants, the police power of the State may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters. *Atchison, Topeka & Santa Fé Railroad* v. *Matthews*, 174 U. S. 96.

The judgment of the Supreme Court of Tennessee is

Affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

DAYTON COAL AND IRON COMPANY *v.* BARTON.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 26. Argued and submitted March 7, 1901.—Decided October 21, 1901.

Knoxville Iron Company v. *Harbison, ante* 13, followed.

THIS was an action tried in the circuit court of Rhea County, Tennessee, wherein T. A. Barton, a citizen of Tennessee, sought to recover from the Dayton Coal and Iron Company (Limited), a corporation organized under the laws of Great Britain, and doing business as manufacturer of pig iron and coke in said county. The company owns a store where it sells goods to its employés and other persons. The company also has a monthly pay day, and settles in cash with its employés on said pay day. In the mean time, and to such of its employés as see fit to request the same, it issues orders on its storekeeper for goods.

On March 17, 1899, the legislature of Tennessee passed an act requiring "all persons, firms, corporations and companies, using coupons, scrip, punchout, store orders, or other evidences of indebtedness to pay laborers and employés for labor or otherwise, to redeem the same in good and lawful money of the United States in the hands of their employés, laborers, or a *bona fide* holder, and to provide a legal remedy for collection of same in favor of said laborers, employés and such *bona fide* holders."

This was a suit brought by said Barton to recover as a *bona fide* holder of certain store orders that had been issued by the defendant company to some of its laborers in payment for labor. The defendant company denied the validity of the legislation, as well under the laws and constitution of Tennessee as the Fourteenth Amendment of the Constitution of the United States. The plaintiff recovered a judgment against the company in the circuit court of Rhea County, and this judgment was affirmed by the Supreme Court of Tennessee, whereupon a writ of error from this court was allowed by the Chief Justice of the state Supreme Court.

Mr. Frederick Lee Mansfield for the Dayton Coal and Iron Company.

Mr. Benjamin Gorden McKenzie for Barton.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

The only question presented for our consideration in this record is the validity, under the Fourteenth Amendment of the Constitution of the United States, of the act of the legislature of the State of Tennessee, prescribing that corporations and other persons, issuing store orders in payment for labor shall redeem them in cash, and providing a legal remedy for *bona fide* holders of such orders.

In the case of *The Knoxville Iron Company* v. *Samuel Harbison*, in error to the Supreme Court of Tennessee, decided at the present term, we affirmed the judgment of that court sustaining the constitutional validity of the state legislation in question, and the cause now before us is sufficiently disposed of by a reference to that case.

The only difference in the cases is, that in the former the plaintiff in error was a domestic corporation of the State of Tennessee, while, in the present, the plaintiff in error is a foreign corporation. If that fact can be considered as a ground for a different conclusion, it would not help the present plaintiff in error, whose right, as a foreign corporation, to carry on business in the State of Tennessee, might be deemed subject to the condition of obeying the regulations prescribed in the legislation of the State. As was said in *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 566, that "which a State may do with corporations of its own creation it may do with foreign corporations admitted into the State. . . . The power of a State to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper* v. *California*, 155 U. S. 648."

We do not care, however, to put our present decision upon the fact that the plaintiff in error is a foreign corporation, nor

to be understood to intimate that state legislation, invalid as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the State. *Home Ins. Co.* v. *Morse*, 20 Wall. 445; *Blake* v. *McClung*, 172 U. S. 239, 254.

The judgment of the Supreme Court of Tennessee is

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

McMASTER *v.* NEW YORK LIFE INSURANCE COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 29. Argued March 18, 1901. — Decided October 28, 1901.

The policies sued on provided for forfeiture on nonpayment of premiums, and as to payments subsequent to the first, which were payable in advance, for a grace of one month, the unpaid premiums to bear interest and to be deducted from the amount of the insurance if death ensued during the month. The applications, which were part of the policies, were dated December 12, 1893, and by them McMaster applied, in the customary way, for insurance on the ordinary life table, the premiums to be paid annually; the company assented and fixed the annual premium at $21, on payment of which, and not before, the policies were to go into effect. After the applications were filled out and signed, and without McMaster's knowledge or assent, the company's agent inserted therein: "Please date policy same as application;" the policies were issued and dated December 18, 1893, and recited that their pecuniary consideration was the payment in advance of the first annual premiums, "and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy." They were tendered to McMaster by the company's agent, December 26, 1893, but McMaster's attention was not called to the terms of this provision, and on the contrary he "asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one

dollars on each policy and without reading the policies he received them and placed them away." McMaster died January 18, 1895, not having paid any further premiums, and the company defended on the ground that the policies became forfeited January 12, 1895, being twelve months from December 12, 1893, with the month of grace added. *Held* that,

(1) The statutes of Iowa where the insurance was solicited, the applications signed, the premiums paid and the policies delivered, govern the relation of the solicitor to the parties.

(2) Under the circumstances plaintiff was not estopped to deny that McMaster requested that the policies should be in force December 12, 1893, or, by accepting the policies, agreed that the insurance might be forfeited within thirteen months from December 12, 1893.

(3) The rule in respect of forfeiture that if policies of insurance are so framed as to be fairly open to construction that view should be adopted, if possible, which will sustain rather than forfeit the contract is applicable.

(4) Tested by that rule these policies were not in force earlier than December 18, 1893, and as the annual premiums had been paid up to December 18, 1894, forfeiture could not be insisted on for any part of that year or of the month of grace also secured by the contracts.

THIS was an action brought by Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, against the New York Life Insurance Company on five policies of insurance of one thousand dollars each upon the life of Frank E. McMaster.

The applications were dated December 12, and the policies December 18, 1893. The premiums for a year in advance were paid, and the policies delivered December 26, 1893.

McMaster died January 18, 1895, and the defence was that the insurance had been forfeited by failure in payment of the second annual premiums on or before January 12, 1895, that is to say, within thirty days after December 12, 1894, when the company contended they became due.

The company alleged in a substituted and amended answer that the policies were executed and delivered December 12, 1893, and set forth:

"2. This defendant, for further answer, says that said application is dated the 12th day of December, 1893, and asked the issuing of five policies of $1000 each upon the life of the said

Frank E. McMaster, deceased. Said application also contained a request that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued.

"This defendant grants to the insured in said defendant company a grace of one month on the payment of premiums, which extended the day of payment of premiums from December 12th, 1894, as in the policies issued to said Frank E. McMaster, deceased, late as the 12th day of January, 1895, but not later.

"3. This defendant, for further answer, says that payment of the premiums due upon said policies were not paid within the time prescribed as aforesaid, and that said Frank E. McMaster died on the 18th day of January, 1895, six days after said policies had lapsed and were forfeited for non-payment of premiums as required.

* * * * * * * *

"6. This defendant, further answering said petition, says that said application is a part of said policies, in each case, that said assured received and accepted said policies during his lifetime and had them all in his possession for a long time, and was aware and knew, or could have known, the contents in each policy.

"That said assured had paid the premiums when said policies were delivered to him; that by reason of said assured's acceptance of said policies, his representative, the plaintiff herein, is estopped from denying the date of said policies or claiming that said policies should have a different date from the application, and is estopped for the reasons above stated from claiming that said words, to wit: 'Please date policy same as application' were not in said application when insured signed same, for by accepting said policies the assured waived said right to object, if said words were inserted, as alleged in petition after the signing of the application, which this defendant denies."

The case was tried by the Circuit Court without a jury; special findings of fact made; and judgment rendered in favor of defendant. 90 Fed. Rep. 40.

Plaintiff prosecuted a writ of error from the Circuit Court of

Appeals and the judgment was affirmed. 99 Fed. Rep. 856. The writ of certiorari was then allowed.

Pending the trial below, plaintiff filed a bill in equity for the reformation of the policies, and the Circuit Court granted the relief prayed. 78 Fed. Rep. 33. On appeal this decree was reversed, 57 U. S. App. 638; and an application to this court for certiorari was denied. 171 U. S. 687. The Circuit Court of Appeals expressed the opinion in that case that no recovery could be had at law or in equity, and accordingly the Circuit Court in this case, although of opinion that plaintiff was entitled to recover, gave judgment for defendant.

Separate opinions were given by the judges of the Court of Appeals, Sanborn and Thayer, JJ., concurring in affirming, and Caldwell, J., dissenting.

The findings of fact by the Circuit Court were as follows:

"1st. The plaintiff, Fred A. McMaster, was when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the probate court of Woodbury County, Iowa, and furthermore said plaintiff was, when this suit was brought and is now a citizen of the State of Iowa, and a resident of Woodbury County, Iowa.

"2d. That the defendant, the New York Life Insurance Company, was when this suit was brought and is now, a corporation created under the laws of the State of New York having its principal office and place of business in the city of New York in the State of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa, and other States.

"3d. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster, to insure his life in that company, and as an inducement to taking the insurance pressed upon McMaster the provision adopted by the company and set forth in the circular issued by the company, and printed on the back of the policies issued by the company under the heading, 'Benefits and Provisions referred to in this Policy' in the following words: 'After this policy shall have been in force three

months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during said month, this indebtedness will be deducted from the amount of the insurance.'

"4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

"5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5000 to be evidenced by five policies for $1000 each, on the ordinary life table, the premium to be payable annually.

"6th. There now appears on the face of the application, interlined in ink, the words, 'please date policy same as application.' These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

"7th. By the express understanding had between F. W. Smith,

the agent of the New York Life Insurance Company and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

"8th. The defendant company, at its home office in New York City, upon receipt of the application determined to grant the insurance applied for and issued five policies each for the sum of $1000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21.00 and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made a part of this finding of fact, and each policy contains the recital: 'This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and———cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.'

"9th. The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth.

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster, of the coming due of the premiums

on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

"11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as she understood it, the grace on the second premiums would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it, before the grace expired.

"12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

"13th. That on or about January 15th, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received, and in reply McMaster said: 'All right, just hold them, there is no hurry about them,' and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

"14th. That the action of Frank E. McMaster shows, and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would

continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

"15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

"16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

"17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premiums coming due on said policies.

"18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon November 1, 1898, the sum of ($5965) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895."

The policies were dated December 18, 1893, and provided:

Annual Premium $21.00.

"This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ———— cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.

Statement of the Case.

Incontestability.

"After this policy shall have been in force one full year if it shall become a claim by death the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed.

"The benefits and provisions placed by the company on the next page, are a part of this contract, as fully as if recited over the signatures hereto affixed."

"Benefits and provisions referred to in this policy.

Benefits at end of Accumulation period.

"If the insured is living on the 12th day of December in the year nineteen hundred and thirteen, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:" [cash value; annuity; paid up policy, etc., etc.] If the insured made no selection dividends were to be apportioned as provided.

"(Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder.)

Powers not Delegated.

"No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice president, second vice president, actuary, or secretary of the company, and will not be delegated.

Payment of Premiums.

"All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice president, second vice president, actuary or secretary, and countersigned by such agent. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

"After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 % per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

Grace.

The applications were dated December 12, 1893, and contained, among other things, the following:

"Sum to be insured, $5000.

"Five policies of $1000 each.

"*Please date policy same as application.*" [It was averred in the complaint and found by the Circuit Court that these words in italics were inserted by the agent after the applications were signed and without applicant's knowledge.]

"Premium payable { Annually. ~~Semi annually~~. ~~Quarterly~~. }

Note: Strike out the rates not desired.

"On what table { Ordinary Life. Life premium. Endowment payable in.....years. Limited endowment payable in.....years. }

"I do hereby agree as follows: . . . 2. That inasmuch as only the officers at the home office of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office in this application. . . . 4. That any policy which may be

issued under this application shall not be in force, until the actual payment to and acceptance of the premium by said company, or an authorized agent, during my lifetime and good health."

Mr. Henry J. Taylor for McMaster. *Mr. F. E. Gill* and *Mr. E. A. Burgess* were on his brief.

Mr. W. E. Odell and *Mr. Frederick D. McKenney* for the Insurance Company. *Mr. George W. Hubbell* was on their brief.

Mr. Chief Justice Fuller delivered the opinion of the court.

By the payment of the annual premiums in advance and the delivery of the policies, McMaster's life became insured in the sum of five thousand dollars.

The contracts were not assurances for a single year, with the privilege of renewal from year to year on payment of stipulated premiums, but were entire contracts for life, subject to forfeiture by failure to perform the condition subsequent of payment as provided; or to conversion in 1913 at the election of the assured. *Thompson* v. *Insurance Company*, 104 U. S. 252; *New York Life Insurance Company* v. *Statham*, 93 U. S. 24.

The contention of the company presented by its answer was that McMaster requested that the policies "should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893;" that the policies were accordingly so issued; and that McMaster's acceptance of them estopped his representative from denying that date, or claiming that the request that the policies should be so dated was not made by him.

But the policies were not dated December 12, and were dated December 18, the day on which they were actually issued. The applications were in terms parts of the policies, and by them it was agreed that the policies, though issued, should not be in

force until the actual payment and acceptance of the premiums. This was a provision intended to cover any time which might elapse between issue and delivery and payment. So that notwithstanding the premiums in this instance were not actually paid and received, and the policies delivered until December 26, it may be conceded that, and in accordance with the practice in such matters, the contracts of insurance commenced to run from December 18 rather than from December 26. They were certainly not in force on December 12, 1893. No controversy was raised as to fractions of a day, or the exclusion or inclusion of the first day, and it was conceded that payment on January 12, in one view, or on January 18, in the other, would have averted a forfeiture.

Assuming, however, that the alleged request was not made by McMaster; that it was not, at least literally, complied with; or that it was immaterial; the company insists that the policies expressly required payment of the annual premiums, subsequent to the first, (payable and paid on delivery,) on December 12 in each year, commencing with December 12, 1894; that McMaster in accepting them without objection became bound by this requirement, and could not plead ignorance thereof resulting from not reading them when tendered; and that, therefore, these policies were properly forfeited January 12, 1895, being twelve months from December 12, 1893, with a month of grace added.

The applications were part of the policies, and from them it appeared, and was found by the Circuit Court, that McMaster applied for insurance "on the ordinary life table, the premium to be payable annually." He was solicited to insure by the company's agent, and might, according to the company's form which was used, have asked that the premiums be payable annually, semi-annually or quarterly, but he chose that they should be payable annually, and that the rate of premium should be calculated on that basis by the ordinary life table. The company assented to this, and fixed the annual premium on each policy at $21, on the payment of which, that is, payment in advance, the policy was to go into effect. The payments were made, and the insurance was put in force for McMaster's life,

subject, it is true, to forfeiture for nonpayment of subsequent premiums, but forfeiture when? If within the first year, then the payment for that year did not secure the immunity from forfeiture during the year, which had been contracted and paid for.

But the company says that McMaster requested that the policies should go into effect on December 12, 1893, and that his representative is estopped from denying that that is the operation of the policies as framed and accepted, or that the second premiums matured December 12, 1894.

It was found from the evidence that after McMaster had signed the applications, and without his knowledge or assent, the agent of the company inserted therein: "Please date policy same as application;" and it was further found that when the policies were returned to Sioux City, and were taken by the company's agent to McMaster, he "asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy, and without reading the policies he received them and placed them away."

We think the evidence of this unauthorized insertion and of what passed between the agent and McMaster when the policies were delivered, taken together, was admissible on the question whether McMaster was bound by the provision that subsequent payments should be made on December 12, commencing with December 12, 1894, because requested by him, or because of negligence on his part in not reading the policies.

The applicable statutes of Iowa declared that "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

Each policy provided that after it had been in force for three months, "a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per

annum for the number of days during which the premium remains due and unpaid. During the said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and, in the event of death during said month, this indebtedness will be deducted from the amount of the insurance." This was a month in addition to the period covered by premiums already paid.

McMaster was justified in assuming, and on the findings must be held to have assumed, that if he paid the first annual premium in full he would be entitled to one year's protection, and to one month of grace in addition, that is, to thirteen months' immunity from forfeiture. And the findings show that the company, by its agent, gave that meaning to the clause, and that McMaster was induced to apply for the insurance by reason of the protection he supposed would be thus obtained.

In *Continental Life Insurance Company* v. *Chamberlain*, 132 U. S. 304, it was decided that a person procuring an application for life insurance in Iowa became by force of the statute the agent of the company in so doing, and could not be converted into the agent of the assured by any provision in the application.

In that case the applicant was required to state whether he had any other insurance on his life. He was in fact a member of several coöperative associations, and therefore did have other insurance; but the soliciting agent of the company, to whom he stated the facts, believing that insurance of that kind was not insurance within the meaning of the question, wrote "No other" as the proper answer, at the same time assuring the applicant that it was such. And this court held that the company was bound by the interpretation put upon the question by its soliciting agent.

When, then, McMaster signed these applications he understood, and the company by its agent understood, that if the risks were accepted at the home office he would by paying one year's premium in full obtain contracts of insurance which could not be forfeited until after the expiration of thirteen months.

The company accepted the risks and issued the policies December 18, and they were delivered and the premiums paid December 26.

Opinion of the Court.

Bearing in mind that McMaster had made no request of the company in respect of antedating the policies and was ignorant of the interpolation of the agent, and ignorant in fact, and not informed or notified in any way, of the insertion of December 12 as the date for subsequent payments, he had the right to suppose that the policies accorded with the applications as they had left his hands, and that they secured to him on payment of the first annual premiums in advance immunity from forfeiture for thirteen months. And the agent assured him that this was so.

The situation being thus we are unable to concur in the view that McMaster's omission to read the policies, when delivered to him and payment of the premiums made, constituted such negligence as to estop plaintiff from denying that McMaster by accepting the policies agreed that the insurance might be forfeited within thirteen months from December 12, 1893. *Knights of Pythias* v. *Withers*, 177 U. S. 260, and cases cited; *Fitchner* v. *Fidelity Mut. Fire Assoc.*, 103 Iowa, 276; *Hartford &c. Ins. Co.* v. *Cartier*, 89 Mich. 41.

On the other hand, can the company deny that McMaster obtained insurance which was not forfeitable for nonpayment of premiums within thirteen months after the first payment?

If it can, by reason of its own act, without McMaster's knowledge, actual, or legally imputable, then the company's conduct would have worked a fraud on McMaster in disappointing, without fault on his part, the object for which his money was paid. The motive of the agent to get a bonus for himself rather than to deceive McMaster is not material, as the result of his action would be the same. To permit the company to deny the acts and statements on which the transaction rested would produce the same injury to McMaster, no matter what the agent's motives.

But what is the proper construction of these contracts in respect of the asserted forfeiture? The company, although retaining the premiums paid and not offering to return them, contends that if McMaster was not bound by an agreement that the subsequent premiums should be paid on December 12, then that the minds of the parties had not met because it had not

contracted except on the basis of payments so to be made, but the question still remains whether the right of recovery in this case is dependent on such payment on the 12th day of December, 1894, or within thirty days thereafter.

We are dealing purely with the question of forfeiture, and the rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract. *Thompson* v. *Phœnix Insurance Company*, 136 U. S. 287; *National Bank* v. *Insurance Company*, 95 U. S. 673.

Each of these policies recited that it was made in consideration of the written application therefor, which was made part thereof, and of the payment in advance of an annual premium of twenty-one dollars, "and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

Does this latter provision require payment of an annual premium during the year already secured from forfeiture by payment made in advance?

May not the words "in every year thereafter" mean in every year after the year, the premiums for which have been paid? Or, in every year after the current year from the date of the policy?

At all events, if the payment in advance was a payment which put in force a contract good for life, determinable by nonpayment of subsequent premiums, and this first payment was payment of the premiums for a year, could the requirement of payment of a second annual premium within that year be given greater effect than the right to cancel the policies from January 18, 1895, if such payment were not tendered until after the lapse of thirteen months from December 12, 1893?

To hold the insurance forfeitable for nonpayment of another premium within the year for which payment had already been fully made would be to contradict the legal effect under the applications and policies of the first annual payment. Clearly, such a construction is uncalled for, if the words "the twelfth day of December in every year thereafter" could be assumed

to mean in every year after the year for which the premiums had been paid. But if not, taking all the provisions together, and granting that the words included December 12, 1894, nevertheless it would not follow that forfeiture could be availed of to cut short the thirteen months' immunity from December 18, 1893, as the premiums had already been paid up to December 18, 1894. And the company could not be allowed, on this record, by making the second premiums payable within the period covered by the payment of the first premium, to defeat the right to the month of grace which had been proffered as the inducement to the applications, and had been relied on as secured by the payment. If death had occurred on December 18, 1894, or between the twelfth and eighteenth, it is quite clear that recovery could have been had, and as the contracts were for life, and were not determinable, (at least for twenty years,) at a fixed date, but only by forfeiture, it appears to us that the applicable rules of construction forbid the denial of the month of grace in whole or in part.

It is worthy of remark that it was specifically provided that after the policies had been in force one full year they should become incontestable on any other ground than nonpayment of premiums, and we suppose it will not be contended that if any other ground of contest had existed and death had occurred between December 12 and December 18, 1894, the company would have been cut off from making its defence, because the policies had been in force "one full year" from December 12.

And if not in force until December 18, the date of actual issue, how can it be said that liability to forfeiture accrued before the twelve months had elapsed?

The truth is the policies were not in force until December 18, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the twelfth to the eighteenth. And, as the policies could not be forfeited for nonpayment during that time, the month of grace could not be shortened by deducting the six days which belonged to McMaster of right.

In our opinion the payment of the first year's premiums made

the policies non-forfeitable for the period of thirteen months, and inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defence to the action.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause is remanded to the latter court with a direction to enter judgment for plaintiff in accordance with the eighteenth finding, with interests and costs.

MR. JUSTICE BREWER did not hear the argument and took no part in the decision.

MITCHELL *v.* POTOMAC INSURANCE COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 51. Argued October 23, 24, 1901. — Decided November 11, 1901.

The Potomac Company insured Mitchell in a sum not exceeding five thousand dollars on his stock of stoves and their findings, tins and tinware, tools of trade, etc., kept for sale in a first-class retail stove and tin store in Georgetown, D. C., with a privilege granted to keep not more than five barrels of gasoline or other oil or vapor. The policy also contained the following provisions: "It being covenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only." "Or if gunpowder, phosphorus, naphtha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time without written consent, or if the risk be increased by any means within the control . . . of the assured, this policy shall be void." An extra premium was charged for this gasoline privilege. A fire took place in which the damage to the insured stock amounted to $4568.50. This fire was due to an explosion which caused the falling of the building and the crushing of the stock. Mitchell claimed that there was evidence of a fire in the back cellar which caused that explosion, and that the explosion

was therefore but an incident in the progress of the fire, and that the company was therefore liable on the policy. The court instructed the jury that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to fire; but if the explosion were not an incident to a precedent fire, but was the origin and the direct cause of the loss, then there was no destruction by fire, and the plaintiff was not entitled to recover anything from the defendant. *Held:*

(1) That it was not important to inquire whether there was any evidence tending to prove the existence of the alleged fire in the front cellar because the submission of the question to the jury was all that the plaintiff could ask, and the verdict negatives its existence.

(2) That there was no evidence of any fire in the back cellar preceding the lighting of the match in the front cellar.

(3) That the instructions in regard to gasoline as more fully set forth in the opinion of this court were correct.

The court further charged the jury: (1) That if the loss was caused solely by an explosion or ignition of explosive matter, not caused by a precedent fire, the plaintiff cannot recover; (2) that if an explosion occurred from contact of escaping vapor with a match lighted and held by an employé of the plaintiff, and the loss resulted solely from such explosion, the verdict must be for the defendant; (3) that a match lighted and held by an employé of the plaintiff coming in contact with vapor and causing an explosion, is not to be considered as "fire" within the meaning of the policy. *Held*, that each of these instructions was correct.

There is no error in the other extracts from the charge set forth in the opinion of this court.

The statement of the case will be found in the opinion of the court.

Mr. Samuel Maddox for plaintiff in error.

Mr. J. Holdsworth Gordon for defendant in error.

Mr. Justice Peckham delivered the opinion of the court.

This is an action brought by the plaintiff in error upon a policy of insurance issued by the defendant. On the trial the insurance company had a verdict upon which judgment was entered, and the Court of Appeals of the District of Columbia having affirmed it, (16 App. Cas. D. C. 241,) the plaintiff has brought the case here. The policy was for $5000 on the plain-

tiff's stock in trade, which was destroyed on September 27, 1896. The property insured was described in the written part of the policy as follows:

"On his stock of stoves and their findings, tins and tinware, tools of trade, and such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C.

"Privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor."

The policy also contained the following printed indemnity clause:

"Against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided. . . ."

In finer print are the following conditions and exceptions among others:

"It being convenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only.

"Or, if gunpowder, phosphorus, naphtha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid or refined coal or earth oils are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time without written consent, . . . this policy shall be void."

The damage to the insured stock amounted to $4568.50 and was due to the falling of the building and the crushing of the stock as hereafter detailed. The defendant denied liability on the ground that the falling of the building and injury to the stock had been caused solely by explosion, no fire ensuing, and was therefore excepted from the policy.

An extra premium was charged for the gasoline privilege.

The plaintiff in error conducted a business at 3108 M street, Georgetown, D. C., in a two-story-and-attic brick structure, his stock consisting of stoves and tinware, and he did besides a general repairing business. There was a cellar under the build-

ing divided into two compartments by a division, with room for a doorway, but there was no door between the divisions. The gasoline which the insurance policy permitted the plaintiff to keep was stored in the cellar in a tank underneath the back cellar floor. Customers were supplied with gasoline from a pump which was operated in the back of the store above the cellar where the gasoline tank was. There was no gas jet in the cellar, and no artificial lighting of any kind. When near the door one could see without the use of a match, or candle, or any other light, but when seven or eight feet away it was necessary to have artificial light of some kind. In the front cellar stove castings and brick, surplus stoves and ranges were kept. Along the sides shelving was arranged upon which brick and castings were put. No trouble had been experienced with gasoline vapor on account of the furnace which was in the cellar, or from matches or candles which were used to light persons about. There was no fire in the furnace at the time of the loss. Frequently half a dozen candles were around on the floor when work was to be done. The back cellar was used for the same purpose as the front cellar, except that stoves were not put in there; it was lighted only by a small window looking out into the alley. Matches and candles were used in the back cellar as in the front. When the workmen found what they were looking for, it was customary to drop these charred matches upon the floor, or put them on the stoves or castings.

The clerk who went into the cellar on the occasion testified in regard to the disaster as follows:

"It was about one o'clock in the day. When I went down there was no odor of gasoline in the cellar. I know the odor, which is pungent, unmistakable and easily detected. The particular piece of casting that was wanted was in a tier of bins in the shelving on the east side of the main cellar and about fifteen feet from the back cellar. It was so far from the door that I could not see it without the use of a light. On reaching the tier I struck a match and looked in the particular place where we were accustomed to keep this kind of casting; but it was not there. As I had been away from the store three weeks previous and did not know to what bin in the shelves they had been

moved, I started looking from one to the other, beginning near the top. The first match burned my fingers, and I dropped it and lit another, with which I continued my search down, when all of a sudden the place was enveloped or filled with this blue flame. It was a bluish color, and I knew at once that it was gasoline vapor that had ignited. I knew it at once because I remembered the appearance of it—had seen it before. Where it started I do not know; but the first I knew of it, it was all over the place and I was in the midst of it. I don't know distinctly whether the blaze started at my hand or not. When I became conscious of the fact that there were flames there, it was all over the place; not only where I was, but all over the cellar. I noticed it first all over the cellar; there was no noise connected with it, except the sh-sh-sh like the swish of a whip or anything of that kind. I could see it play around. I became unconscious, either from the burns or from the walls falling on me, I don't know which. The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and, knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. I crawled towards the front, where I was pulled through the front wall. I had been protected from the débris by the way in which the joist fell. They broke in the middle, one end remaining on the east wall and the other resting on the floor, thus leaving a little angle at the side. This condition existed all the way to the front of the building. It was very dark—like the darkness of Egypt. The brick work was shattered in front and the house had fallen down."

Plaintiff in error claimed on the trial that there was evidence of a fire in the back cellar preceding the explosion and causing it, and that the explosion was therefore but an incident in the progress of the fire, and the company was therefore liable on the policy. He made the following request to charge the jury:

"If the jury find from the evidence that on the 28th day of September, 1896, at or before the time the witness Oliver went into the cellar of the plaintiff's premises, as described by him, a fire originating in accidental or other causes was in progress in the back cellar of said premises, and that afterward and

while such fire was in progress the gas or vapor generated by the evaporation of liquid gasoline came in contact with the flames of such fire and exploded and prostrated portions of the building in which the insured commodities were stored, then the damage done to such commodities by reason of such prostration was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

The court refused the request, and the exception to such refusal brings up the first question argued by the plaintiff in error.

In the course of the charge it was stated as follows:

"The court has granted an instruction to this effect, that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, but if the explosion were not an incident to a precedent fire, but was the origin and the direct cause of the loss, then there was no destruction by fire, and the plaintiff is not entitled to recover anything from the defendant."

It is not important to inquire whether there was in truth any evidence tending to prove the existence of a fire in the front cellar preceding the lighting of the match therein, because the submission of the question to the jury was all that the plaintiff could ask, and the verdict negatives its existence. But the court drew a distinction between the front and rear cellar, and refused the foregoing request by the plaintiff's counsel, for the reason given, as follows:

"The court was asked to instruct you with reference to the theory that there was a precedent fire in the back room. The court felt obliged to refuse such an instruction, because there is no testimony in the case that would justify the jury in reaching the conclusion that before Mr. Oliver struck that match there existed a fire in the rear portion of that cellar. There is no testimony and no evidence of the fact."

The court also charged as follows:

"It is not contended that any fire followed the explosion, and that any portion of this stock in trade was injured by a subsequent fire, but it is claimed by the plaintiff that there ex-

isted a precedent fire, and that the explosion was an incident of that precedent fire. The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to fire."

The court also charged:

"Now the question for you to determine in the light of all this testimony and your own knowledge and experience is this: Was the falling of this building and the injury to the stock in trade contained within it due to an explosion or not? If it was, and there was no antecedent fire, the verdict should be for the defendant. If you find in the case evidence that there was an antecedent fire, which did not amount to an explosion, but which was simply rapid combustion, which resulted in a collapse of the building and not in an explosion, then it is conceded that the plaintiff is entitled to recover such damages as you shall find that he sustained. If you find a verdict for the plaintiff, you ought to give him interest on the amount to which he is entitled from the 19th day of January, 1897. You may take the case, gentlemen."

With relation to the denial of the request of plaintiff's counsel, the Court of Appeals, in the opinion delivered by Mr. Justice Shepard, said:

"The instruction undertook to direct the special attention of the jury, first, to the probable existence of an accidental fire in the rear cellar before the entry of the witness Oliver into the front one, and second, to the probable ignition of the vapor in the front cellar by that fire instead of by the match lighted by Oliver immediately before the explosion, which took place in the front cellar. Neither of these inferences seemed to have any reasonable foundation in the evidence, and the second is directly opposed to the testimony of Oliver, upon which the plaintiff's case rests. Had this been the only issue in the case the court might, without error, have directed a verdict for the defendant. *Gunther* v. *Liverpool & London & Globe Ins. Co.*, 134 U. S. 110, 116." And also *Griggs* v. *Houston*, 104 U. S. 553.

Opinion of the Court.

A careful perusal of the evidence in the case brings us to the same conclusion. There was no evidence of any fire in the back cellar preceding the lighting of the match in the front cellar, and it would have been error to submit such a question to the jury for that reason. The request was therefore properly denied.

It is also contended that gasoline being kept for sale by the insured in his store, was covered by the written language of the policy, which included not only his stock of stoves, etc., but also "such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C." It is then argued that as gasoline is in its nature explosive, the risk arising therefrom was covered by the policy, and the loss occasioned thereby was one for which the company was liable, and if the printed provisions of the policy provided otherwise they are inconsistent with the written part of the policy, and the latter must prevail. This construction would render unnecessary the privilege to keep not more than five barrels of gasoline, which is also written in the policy. We think the construction contended for is inadmissible.

The language of the policy did not insure the plaintiff upon any property which he might choose to keep and sell in his store. The language means not only the particular property specifically described, but such other goods as are kept for sale in a first-class retail stove and tin store, which in this case was situated as stated in the policy. Identifying the store by naming its situation does not alter the significance of the language, in effect, prescribing that the goods are such as are kept for sale in a first-class retail stove and tin store. The "other goods" must be such as are ordinarily, usually, customarily kept for sale in a first-class retail stove and tin store, and not such other classes of property as the insured may then or at any time choose to keep for sale in this particular store. This we think is the plain meaning of the language. The cases cited in the opinion delivered in the Court of Appeals make this plain, if anything more than the language itself were wanted for that purpose. Unless gasoline is such a commodity as is usually kept for sale in a first-class retail stove and tin store, it would not be included

in that language. There is no evidence showing that gasoline is thus usually kept, and without evidence to that effect it cannot be presumed that such is the fact. The language which immediately follows, "privilege granted to keep not more than five barrels of gasoline or other oil or vapor," also tends to show quite conclusively that the parties did not consider the description already given of the property insured, as permitting the keeping and selling of gasoline, for otherwise the privilege would not have been necessary to be inserted in the policy.

Taking the written and the printed language of the policy together, there is no inconsistency therein. The extent and limits of the insurance are, as stated in the printed provision, "against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured;" and there is the further condition, "it being covenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only."

The written part insured the plaintiff on property therein described, which does not cover gasoline in the description of "other goods." What the insurance is and its limits are stated in the printed portions. Taking all the language together, the written and the printed, the contract is plain and unambiguous, without inconsistency or contradiction between the written and printed portions thereof, and therefore there is no room for the application of the principle that where such inconsistency or ambiguity exists the written portion prevails.

In regard to the keeping of gasoline for sale and the reason for writing the privilege to so keep it in the policy, and the effect thereof, the court charged as follows:

"You hardly need be told, I think, as ordinary business men, that a privilege to keep something does not bring the privileged article within the articles insured by the policy. Suppose that clause read 'privilege to keep not more than fifty pounds of gunpowder,' on the premises, and the party insured was keeping a dry goods store or a drug store, would it be contended by any sensible man that the gunpowder was an article insured

by the policy? Clearly this privilege to keep was inserted to offset the forfeiture of the policy if the provision contained in this policy were violated without this privilege, and that provision is this:

"If gunpowder, phosphorus, naphtha, benzine or crude earth or coal oil are kept on the premises, or if camphene, burning fluid or refined coal or earth oils are kept for sale, stored or used on the premises in quantities exceeding one barrel at any one time, without written consent of the company, the policy should be void.

"So that if these five barrels of gasoline were kept upon those premises without the written consent of the company, the policy would have been absolutely forfeited and the plaintiff would not have been entitled to recover damages for loss if the whole stock had been destroyed by fire. So it must be believed that the plaintiff, when he took his policy, fully understood what its terms and provisions were. That is the reason that he asked for, received and paid for this privilege of keeping not more than five barrels of gasoline on the premises. I suppose that inasmuch as keeping such inflammable material upon the premises would naturally increase the risk of loss, the insurance company would require the payment of a larger premium than it would have required if such inflammable material were not kept on the premises."

We regard this part of the charge as unexceptionable.

The plaintiff also claims that error was committed by the court in charging the jury, at the request of the defendant, in substance:

(1) If the loss was caused solely by an explosion or ignition of explosive matter, not caused by a precedent fire, the plaintiff cannot recover.

(2) If an explosion occurred from contact of escaping vapor with a match lighted and held by an employé of the plaintiff, and the loss resulted solely from such explosion, the verdict must be for the defendant.

(3) A match lighted and held by an employé of the plaintiff coming in contact with the vapor and causing an explosion is not to be considered as "fire" within the meaning of the policy.

We think each instruction was correct. A loss occurring solely from an explosion not resulting from a preceding fire is covered by the exception in the policy. And an explosion which occurred from contact of escaping vapor with a lighted match, under the facts stated, would also plainly come within the exception of the policy. Also a lighted match is not a "fire" when used as stated in the above third clause of the charge. *United Life &c. Insurance Company* v. *Foote*, 22 Ohio St. 340; *Transatlantic Fire Insurance Company* v. *Dorsey*, 56 Maryland, 70; *Briggs* v. *Insurance Company*, 53 N. Y. 446, 449.

Exception was also taken to the charge of the judge explaining the meaning of the word "explosion" as used in the policy. Upon that the court charged:

"Now, gentlemen of the jury, when the word 'explosion' was used in the policy, the company as ordinary men — at least its officers were ordinary men and not, as I assume, scientific men — and the party insured an ordinary man, are presumed to have understood the word 'explosion' in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word. And, after all, the question here being explosion or non-explosion, is, what do you, as ordinary men, understand occurred at that time in the light of all the testimony? Was it an explosion in the ordinary and popular sense of that word, or was it a fire with a subsequent explosion or a subsequent collapse of the building as a sequence to the fire?"

The plaintiff claimed there was some evidence that the collapse of the building was the result, not of explosion, but of rapid combustion of the gasoline vapor, which first expanded the atmosphere of the cellar, and then, through cooling, produced a vacuum that caused the crushing in of the floor by the unresisted pressure of the external atmosphere.

With reference to that contention the court charged:

"If the jury believe from the evidence that on the 28th day of September, 1896, the commodities of the plaintiff mentioned in the policy of insurance, offered in evidence, were destroyed

or injured or lost in the manner testified to by the plaintiff's witnesses, and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured was the immediate result thereof, then the loss was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

We think these two extracts from the charge of the judge fairly presented the question to the jury, and the exception to the charge is not available.

We find no error in the case, and the judgment of the Court of Appeals is

Affirmed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* MISSOURI RAILROAD AND WAREHOUSE COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 11. Argued and submitted October 16, 1901.—Decided November 11, 1901.

When a state court refuses permission to remove to a Federal court a case pending before the state court, and the Federal court orders its removal, this court has jurisdiction to determine whether there was error on the part of the state court in retaining the case.

The plaintiffs were citizens of the State of Missouri, in which this action was brought. The railway company was a citizen of the State of Kansas. On the face of record there was therefore diverse citizenship, authorizing, on proper proceedings being taken to bring it about, the removal of the action from the state court to the Federal court; and the State of Missouri is not shown to have such an interest in the result as would warrant the conclusion that the State was the real party in interest, and the consequent refusal of the motion for removal.

Statement of the Case.

THIS case involves the question of removal from a state to a Federal court.

The State of Missouri has a body of statutes for the regulation of railroads. By one section a board of railroad commissioners is created. To this board is committed the duty of supervising the conduct and charges of railroads, of hearing and deciding complaints against them, and making such orders as the circumstances require. Section 1143, Rev. Stat. Missouri, (1899), identical with section 2646, Rev. Stat. Missouri, (1889), contains this provision:

"SEC. 1143. Commissioners to See to Enforcement of Article—Investigate Complaints.—It shall be the duty of the railroad commissioners of this State to see that the provisions of this article are enforced. When complaint is made in writing by any person having an interest in the matter about which complaint is made, that any rate or rates established by any common carrier are unreasonable, unjust or extortionate, or that any of the provisions of this article have been or are being violated, it shall be the duty of said railroad commissioners to proceed at once to investigate such complaint and determine the truth of the same."

The section also authorizes the commissioners to summon witnesses, to punish for failure or refusal to attend or testify, declares that any common carrier wilfully or knowingly obstructing or preventing the commissioners from making such investigations shall be deemed guilty of a misdemeanor and punished by a fine. Other sections provide for penalties and forfeitures. In section 1144, the same as section 2647, Rev. Stat. 1889, is this clause:

"SEC. 1144. Forfeitures, How Recovered and Disposed of.—The forfeitures and penalties herein provided for shall go to the county school fund of the county where sued for, and may be recovered in a civil action in the name of the State of Missouri, at the relation of the board of railroad commissioners to the use of said fund."

Section 1150 (sec. 2653, Rev. Stat. 1889) reads as follows:

"SEC. 1150. Proceedings when Order of Commissioners is Disobeyed—Circuit Court—Enforce or Renew Order—Proceed-

ings.—Where the complaint involves either a private or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employé thereof, shall violate, refuse or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any circuit court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable. And such notice may be served on such common carrier, its officers, agents or servants in such manner as the court may direct; and said court shall proceed to hear and determine the matter speedily in such manner as to do justice in the premises; and to this end said court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as may seem needful to enable it to form a just judgment in the matter of such petition. On such hearing the report of said commissioners shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to the court on such hearing, or on report of such persons appointed as aforesaid, that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. If such court shall hold and decide that any order of said board of railroad commissioners involved in such proceeding was not a lawful order, said court shall, without any reference to the regularity or legality of the proceedings of said board or of the order thereof, proceed to make such order as the said board should have made, and to enforce said order by the process of said court, and to enforce and collect

the forfeitures and penalties herein provided in all respects according to the provisions of this act. And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. When the subject in dispute shall be of the value of one hundred dollars or more, either party to such proceeding before such court may appeal to the proper appellate court in the State, in the same manner that appeals are taken from such courts in this State in other proceedings involving like sums of money; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless stay of proceedings be ordered by the court from which the appeal is taken, or by the appellate court to which the appeal is taken, upon the application of the appealing party. Whenever any such petition shall be filed by the commissioners as aforesaid it shall be the duty of the attorney general, when requested by said commissioners, to prosecute the same. All proceedings commenced upon such petition shall, upon application of the

petitioner, be advanced upon the docket and take precedence of any other case upon the docket except criminal cases. The cost of such proceedings may be, with the approval of the attorney general and governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case."

Under the authority of these statutes, upon a hearing after complaint and notice, the railroad commissioners found that the railway company was charging excessive and illegal rates for travel over what is known as the Boonville Bridge across the Missouri River, and made and entered of record an order directing it to discontinue such charges. This order was dated July 22, 1895. The railway company not complying with the order, a suit was instituted on August 17, 1895, in the Circuit Court of Cooper County, Missouri, by such commissioners, setting forth the facts and praying process, mandatory or otherwise, to restrain the defendant from further continuing to violate the law and the order of the commissioners. The company in due time filed a petition for removal to the Circuit Court of the United States, alleging that it was a corporation created and existing under the laws of the State of Kansas and a citizen of that State, and that the plaintiffs were citizens of the State of Missouri. No question was made as to the sufficiency of the petition and bond in respect to any formal matter. The state court refused to order the removal. Notwithstanding which the railway company took a transcript of the record and filed it in the Federal court, where a motion to remand was made and overruled. 97 Fed. Rep. 113. The state court, after refusing to order the removal, proceeded with the hearing of the case, the railway company declining to take any part therein. On such hearing a decree was entered in accordance with the petition of the railroad commissioners. This decree was ap-

pealed to the Supreme Court of the State, and by that court on June 30, 1899, affirmed. 151 Missouri, 644.

Mr. George P. B. Jackson for plaintiff in error.

Mr. Edward C. Crow for defendant in error, submitted on his brief, on which was also *Mr. Samuel B. Jeffries.*

Mr. Justice Brewer, after making the above statement of the case, delivered the opinion of the court.

The single question presented for our consideration is whether the railway company was entitled to remove this suit from the state to the Federal court. The state court refused the removal, and the Federal court, on the other hand, denied a motion to remand. Under these circumstances this court has jurisdiction to determine whether there was error on the part of the state court in retaining the case. *Removal Cases*, 100 U. S. 457; *Stone* v. *South Carolina*, 117 U. S. 430; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 582.

On the face of the record the railway company was entitled to a removal. The plaintiffs were citizens of Missouri, the State in which the suit was brought. The railway company was a citizen of the State of Kansas. There was, therefore, diverse citizenship, the defendant a citizen of another State than that in which the suit was brought petitioning for removal, and the removal appears perfect in form.

But it was held by the Supreme Court of the State of Missouri that it was proper to go behind the face of the record and inquire who was the real party plaintiff, and, making such examination, that court decided that the real party plaintiff was the State of Missouri. If that conclusion be correct then no removal in this case was justifiable, because a State is not a citizen within the meaning of the Removal Acts. *Stone* v. *South Carolina*, 117 U. S. 430; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473; *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482.

Was the State the real party plaintiff? It was at an early

day held by this court, construing the Eleventh Amendment, that in all cases where jurisdiction depends on the party, it is the party named in the record. *Osborn* v. *United States Bank*, 9 Wheat. 738. But that technical construction has yielded to one more in consonance with the spirit of the Amendment, and in *In re Ayers*, 123 U. S. 443, it was ruled upon full consideration that the Amendment covers not only suits against a State by name but those also against its officers, agents and representatives where the State, though not named as such, is nevertheless the only real party against which in fact the relief is asked, and against which the judgment or decree effectively operates. And that construction of the Amendment has since been followed. That Amendment refers only to suits brought against a State. But applying the same principles of construction to the Removal Acts and to cases in which it is claimed that the State, though not the nominal is in fact the real party plaintiff, it may be fairly held that the State is such real party when the relief sought is that which enures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. Such a case was *Ferguson* v. *Ross*, 38 Fed. Rep. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the State, and it was held by the Circuit Court for the Eastern District of New York that the action was one in which the real party plaintiff was the State. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery.

But this case is not like *Ferguson* v. *Ross*, and does not come within the rule above stated. It is not an action to recover any money for the State. Its results will not enure to the benefit of the State as a State in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real

parties in interest, and in respect to whom the decree will effectively operate.

It is true that the State has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the State, as an organized political community, a party in interest in the litigation, for if that were so the State would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the State, either statute or common. The interest must be one in the State as an artificial person. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362–390.

While not controverting these general propositions, the Supreme Court of the State was of the opinion that the State had a direct, pecuniary interest in the result of the litigation, by virtue, first, of its possible liability for costs, and, secondly, because were the litigation pushed to the extreme there might be penalties imposed which would when collected pass into the school fund of the State. We quote its language:

"This section of the statute makes provision for a civil action to enforce the requirement in behalf of two classes of persons: First, 'the board of railroad commissioners;' second, 'any person or company interested in such order or requirement.' Now, while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under this statute by persons of the first class, its board of railroad commissioners. In such actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid under the express provision of the statute out of any money in the treasury not otherwise appropriated, and is moreover pecuniarily interested not only by reason of the liabilities it incurs in the action, but because of its pecuniary interest in the judgments which may be obtained and which when pushed to the final extremity of execution may result in the payment of penalties, not directly into the state treasury, it is true, but into the treasury of one of its political subdivisions for the benefit

of the public schools, to the establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the State in addition to its governmental has a real pecuniary interest in the subject-matter of this controversy, and that the suit is being prosecuted for its benefit in every sense and is not subject to removal to the United States court, and we so hold."

We are unable to concur in these views. Whatever may be the result of any subsequent or ancillary proceeding the direct object of this suit is to obtain a decree of the court commanding the railway company to comply with the order of the commissioners. Such a decree is similar to the ordinary decrees of a court of equity, and it is familiar that a court of equity may enforce compliance with its orders and decrees by penalties upon the delinquents. So that if this possible pecuniary result is sufficient to make the State the real party plaintiff it would follow that in Missouri the State is the real party plaintiff in every equity suit, because in every equity suit such penalties may be imposed.

Neither can it be held that the state's voluntary assumption of the costs of the litigation when the decree is adverse to the railroad commissioners makes it the real party plaintiff. That is simply an incidental matter and does not determine its relations to the suit any more than its payment of the salary of the judge, fees of jurors or any other expenses of the litigation. We are of opinion, therefore, that the party named in the record as plaintiff is the real party plaintiff, and that the voluntary assumption by the State of the costs in some contingencies of the litigation, or the indirect and remote pecuniary results which may follow from a disobedience of the orders of the court, do not make it the party to whom alone the relief sought enures and in whose favor a decree for the plaintiff will effectively operate.

The judgment of the Supreme Court of the State of Missouri is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

DISTRICT OF COLUMBIA *v.* ESLIN.

APPEAL FROM THE COURT OF CLAIMS.

No. 36. Argued October 23, 1901.—Decided November 3, 1901.

The act of June 16, 1880, c. 243, gave the Court of Claims jurisdiction of claims against the District of Columbia like the one which forms the subject of this action. This case was duly heard by the Court of Claims, and final judgment was entered in favor of the claimants. The District of Columbia appealed to this court, and later moved to set aside the judgment, and to grant a new trial, pending the decision upon which Congress repealed the act of June 16, 1880, and enacted that all proceedings under it should be vacated, and that no judgment rendered in pursuance of that act should be paid. *Held*, that this appeal must be dismissed for want of jurisdiction, and without any determination of the rights of the parties.

THE statement of facts will be found in the opinion of the court.

Mr. Robert A. Howard for appellant. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. George A. King and *Mr. J. W. Douglass* for appellee. *Mr. William B. King* filed a brief for same.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an act of Congress approved June 16, 1880, c. 243, the jurisdiction of the Court of Claims was extended to all claims then existing against the District of Columbia arising out of contracts by the late Board of Public Works and extensions thereof made by the Commissioners of the District, as well as to such claims as had arisen out of contracts by the District Commissioners after the passage of the act of June 20, 1874, 18 Stat. 116, c. 337, and all claims for work done by the order or direction of the Commissioners and accepted by them for the use, purposes or benefit of the District prior to March 14,

1876. It was provided that all such claims against the District should in the first instance be prosecuted before the Court of Claims by the contractor, his personal representatives or his assignee, in the same manner and subject to the same rules in the hearing and adjudication of the claims as the court then had in the adjudication of claims against the United States. 21 Stat. 284, 285, §§ 1, 2.

By the same act it was provided that if no appeal was taken from the judgment of the Court of Claims in the cases therein provided for, within the term limited by law for appealing from the judgments of that court, "and in all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court where the same are affirmed in favor of the claimant, the sum due thereby shall be paid, as hereinafter provided, by the Secretary of the Treasury." § 5.

These consolidated suits were brought under the above act, and within the time limited by its provisions.

In the progress of the cause a judgment was rendered in one of the cases in favor of the District for $658.05, and in the others the petitions were severally dismissed. New trials were granted in each case, and time was given for further proof.

By an act of Congress approved February 13, 1895, c. 87, amendatory of the above act of June 16, 1880, it was provided that in the adjudication of claims brought under the act of 1880, "the Court of Claims shall allow the rates established by the Board of Public Works; and whenever said rates have not been allowed, the claimant or his personal representative shall be entitled, on motion made within sixty days after the passage of this act, to a new trial of such cause." 28 Stat. 664.

The cases were heard on the exceptions of the defendant to a referee's report, and the aggregate amount found due from the District was $13,458.33. And the record states that upon the facts set forth in the referee's report "the court, under the act of February 13, 1895, 28 Stat. 664, and in accordance with the agreement of the parties, decides as conclusions of law as to the said sum of $13,458.33, so found due from the District of Columbia, that the several claimants named below each recover judgment against the United States in the amounts stated, viz."

Here follows, in the record, a statement of the amount found due each claimant, the aggregate being the above sum.

The order referring the cause for a statement of the several accounts was made after the passage of the act of February 13, 1895, and the referee's report was made pursuant to the provisions of that act.

In accordance with the findings of fact and of law the court, on the 22d of June, 1896, entered final judgment in favor of the respective claimants for the amounts found due them respectively, the judgment upon its face purporting to be "within the intent and meaning of the act of February 13, 1895."

On the 3d of September, 1896, the District of Columbia, by the Attorney General of the United States, made application for and gave notice of an appeal to this court. Subsequently, February 25, 1897, the District moved to set aside the judgment of June 22, 1896, and to grant a new trial.

While the motion for new trial was pending Congress passed the act of March 3, 1897, c. 387, making appropriations for the expenses of the government of the District for the fiscal year ending June 30, 1898. That act among other things provided that the above act of February 13, 1895, "be, and the same is hereby, repealed, and *all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid.*" 29 Stat. 665, 669.

Our attention was called by counsel to the case of *In re Hall*, 167 U. S. 38, 41, in which it is stated that the Court of Claims made the following general order: "The act of 13 February, 1895, 28 Stat. 664, having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments and all other papers in such suits be restored to and retained upon the files of the court without further proceedings being had." This order is not found in the present record.

What was the effect of the act of 1897 upon the power of this court to reëxamine the final judgment of the Court of Claims in these cases? In our opinion, there can be only one solution of this question.

The present cases were brought under the act of 1895, and

were determined with reference to its provisions. In view of the repeal of that act by Congress, the requirement that pending proceedings be vacated, and the express prohibition of the payment of judgments theretofore rendered, any declaration by this court as to the correctness of the final judgment entered by the Court of Claims under the act of 1895 would be useless for every practical or legal purpose, and would not be in the exercise of judicial power within the meaning of the Constitution. It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897. A proceeding against the Secretary having that object in view would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the Government. It seems therefore clear that a declaration by this court in relation to the matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties. What was said by Chief Justice Taney in *Gordon* v. *United States*, 117 U. S. 697, 702, may be here repeated. After stating that this court should not express an opinion where its judgment would not be final and conclusive upon the rights of the parties, and that it was an essential part of every judgment passed by a court exercising judicial power that it should have authority to enforce it, or to give effect to it, the Chief Justice said: "It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not a judicial power confided to this court in the exercise of its appellate ju-

risdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress." See also *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40, 46; *In re Sanborn*, 148 U. S. 222, and *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 483, 486.

It results that:

As no judgment now rendered by this court would have the sanction that attends the exercise of judicial power, in its legal or constitutional sense, the present appeal must be dismissed for want of jurisdiction and without any determination of the rights of the parties. It is so ordered.

GULF AND SHIP ISLAND RAILROAD COMPANY *v.* HEWES.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 5. Argued October 15, 16, 1901.—Decided November 18, 1901.

Although the certificate of the chief justice of a state supreme court that a Federal question was raised is insufficient to give this court jurisdiction, where such question does not appear in the record, it may be resorted to, in the absence of an opinion, to show that a Federal question, which is otherwise raised in the record, was actually passed upon by the court.

A charter of a railroad company incorporated by an act of the legislature of Mississippi, passed in 1882, contained an exemption from all taxation for twenty years. The state constitution adopted in 1869 provided that the property of all corporations for pecuniary profit, should be subject to taxation, the same as that of individuals, and that taxation should be equal and uniform throughout the State. Prior to the incorporation of the railroad company, the supreme court of the State had construed this provision of the constitution as authorizing exemptions from taxation, but had declared that such exemptions were repealable. *Held*, That this court was bound by this construction of the constitution, and, therefore, that the railroad company could not claim an irrepealable exemption in its charter. *Held*, also, That the exemption being repealable, the question whether it had in fact been repealed was a local and not a Federal question.

A ruling of a state supreme court that a repealable exemption has been in

Statement of the Case.

fact repealed by a subsequent statute, is one which turns upon the construction of a state law, and is not reviewable here, although if the exemption were irrepealable and thus constituted a contract, it would be the duty of this court to decide for itself whether the subsequent act did repeal it or impair its obligation.

A privilege tax upon a railroad corporation is a tax upon property.

THIS was a bill in equity filed in the court of chancery of Harrison County, Mississippi, by the railroad company, against the tax collector of that county to enjoin the collection of certain property and privilege taxes assessed against the railroad company for the fiscal year 1896.

The bill averred in substance the incorporation of the railroad company by an act of the legislature of the State of Mississippi, approved February 23, 1882, c. 542, p. 849, the eighteenth section of which act declared: "That said company, its stock, its railroads and appurtenances and all its property in this State, necessary or incident to the full exercise of all powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act;" that immediately thereafter the corporation entered upon the construction of its road, and at the time of the filing of the bill had about seventy-five miles in operation; that, notwithstanding this charter exemption, the State Railroad Commission has returned its property for taxation, and that defendant has demanded not only a privilege tax, but a property tax levied for state and county purposes, and threatens seizure of its property. Wherefore an injunction was prayed.

To this bill, defendant interposed a demurrer for want of equity, and because the exemption was a mere bounty, repealable at the pleasure of the legislature, and void of any element of contract. The demurrer was sustained, and leave granted the plaintiff to amend its bill. Thereupon it filed an amendment alleging that the exemption in the charter constituted a contract between the plaintiff and the State; that the railroad was constructed upon the faith of such contract, and that it was not within the power of the State to repeal the exemption, and invoking in that connection the contract clause of the Constitution. Defendant again demurred. The demurrer was sustained,

and an appeal granted to the Supreme Court of the State, which affirmed the decree of the court below. Whereupon plaintiff sued out a writ of error from this court, which defendant moved to dismiss.

Mr. Eaton J. Bowers and *Mr. Edward Mayes* for plaintiffs in error.

Mr. R. C. Beckett for defendant in error. *Mr. Frank A. Critz* was on his brief.

Mr. Justice Brown, after making the above statement, delivered the opinion of the court.

1. The motion to dismiss must be overruled. Counsel for the railroad company appear to have invoked the contract clause of the Constitution upon the original argument; but whether this be so or not, the bill was subsequently amended under leave of the court, by averring that the charter and the exemption from taxation contained in the eighteenth section constituted a contract between the plaintiff corporation and the State of Mississippi that the State would not demand any taxes upon its capital, property or stock for the term of twenty years from the enactment of the charter; and that, if said exemption from taxation had been repealed, which the company denied, it was not within the power of the State to repeal such exemption for the reason that the same constituted a contract upon which the company had acted, and upon the faith of which it had constructed the road; and that such repeal was a violation of the contract clause of the Constitution The Federal question was properly raised, and there is at least sufficient color for it to sustain our jurisdiction. No opinion was delivered by the Supreme Court, but the Chief Justice certifies that the validity of the state legislation subsequent to the charter of 1882 was drawn in question upon the ground of its impairment of the contract contained in such charter, and that the decision was in favor of the validity of such legislation. While such a certificate is insufficient to give us jurisdiction, where

such jurisdiction does not appear in the record, it may be resorted to, in the absence of an opinion, to show that a Federal question which was otherwise raised in the record, was actually passed upon by the court. *Armstrong* v. *Athens County Treasurer*, 16 Pet. 281; *Yazoo & Mississippi Railroad* v. *Adams*, 180 U. S. 41, 48; *Railroad Co.* v. *Rock*, 4 Wall. 177; *Parmelee* v. *Lawrence*, 11 Wall. 36; *Gross* v. *U. S. Mortgage Co.*, 108 U. S. 477.

2. The bill set out, and, until the argument in this court, the plaintiff company relied solely upon, a charter granted February 23, 1882, by the legislature of Mississippi to incorporate the Gulf and Ship Island Railroad Company, the eighteenth section of which declared: "That in order to encourage the investment of capital in the works which said Company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said Company, its stock, its railroad, and appurtenances, and all its property in the State necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this Act."

To strengthen its position, and to enable the company to rally to its support an exemption antedating the constitution of 1869, upon which the defendant relies, the plaintiff calls to our attention an act passed in 1850 to incorporate the Gulf and Ship Island Railroad Company, and a further act approved March 1, 1854, c. 66, amendatory of that act, the eleventh section of which declares "that the property and investments of the Company connected with this enterprise, within this State, shall not be subject to taxation until the road shall be in full operation and completed."

The position of the plaintiff in this connection is that, prior to the Code of 1857, there was no general law and no constitutional provision in any way restraining the legislature from granting irrepealable exemptions, and that the charter of 1882 was a mere continuance of the original charter of 1850–1854; that the construction of the road, authorized by that charter,

had never been abandoned, and that so late as 1872 the legislature had adopted a memorial to Congress praying that a land grant made by Congress in 1858 for the benefit of the Gulf and Ship Island Railroad Company, and which had lapsed to the United States by the intervention of the Civil War, might be revived in favor of that railroad.

But we are of opinion that the charter of 1882 cannot be considered as a revival or continuation of the charter of 1854, since the names of the incorporators are entirely different, the routes of the two railroads are also different, and no reference is made in the charter of 1882 to the prior charters, although the names of the two corporations are identical. There is nothing in the act of 1882 to indicate even the existence of a prior act incorporating a road under the same name. It is true that, at the same session of the legislature (1882), another memorial to Congress was adopted by the legislature for a revival of the grant of public lands made by the United States in 1856 to aid in the construction of the Gulf and Ship Island Railroad, but in this very memorial it was stated that "at its present session our legislature has granted *a new act of incorporation* with liberal provisions, thus again attesting the abiding and earnest interest felt by our people in this important work."

It is also true that on March 13, 1884, the legislature passed another act to facilitate the construction of the Gulf and Ship Island Railroad, and for other purposes, c. 612, p. 971, the eighth section of which declared: "That said Gulf and Ship Island Railroad Company are hereby subrogated to all the rights and privileges heretofore granted by the State of Mississippi to the Gulf and Ship Island Railroad Company, and shall have the right to use and enjoy such field notes, maps and surveys as have been heretofore made in the interest of said road as were authorized and granted by the State under the acts approved March 2, 1854, and December 3, 1858." This is an effort to subrogate the new railroad to the rights and privileges of the former one, but its language contains an implied admission that, without such subrogation, the rights and privileges of the former company had lapsed, and that a new act was necessary to revive them. But if the act be considered as a

revival of the rights and privileges which had formerly belonged to the old company, such rights and privileges would be subordinated to the provisions of the new constitution of 1869, which in the meantime had been adopted. *Planters' Ins. Co.* v. *Tennessee*, 161 U. S. 193, 198. In addition to all this, however, the better opinion is that a subrogation to the "rights and privileges" of a former corporation does not include an immunity from taxation. *Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 174.

We are unable to see that there is anything in this legislation to indicate that the plaintiff company stands in a position to escape the application of the constitution of 1869. Indeed, it seems to us entirely clear that the injunction of the charter of 1850–1854 into this case was a mere afterthought; and that the charter upon which the plaintiff must rely is that of 1882, set forth in this bill, and that such charter must be construed in subordination to the constitution of 1869, which we now proceed to consider.

3. The only provisions of the constitution pertinent to this case are the following sections of Article XII:

"SEC. 13. The property of all corporations for pecuniary profit, shall be subject to taxation, the same as that of individuals."

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

As it is not altogether clear from the language of these sections whether it was competent for the legislature to grant to a railroad company an exemption from taxation, it is conceded by both sides to this controversy that we are bound to look to the decisions of the Supreme Court of Mississippi at the time this charter was granted, for their proper interpretation. *Douglass* v. *County of Pike*, 101 U. S. 677. While the question of contract or no contract in a particular case is one which must be determined by ourselves, every such alleged contract is presumed to have been entered into upon the basis, and in contemplation of, the existing constitution and statutes, and upon the established construction theretofore put upon them by the highest judicial

authority of the State. *Taylor* v. *Ypsilanti*, 105 U. S. 60; *Wade* v. *Travis County*, 174 U. S. 499, 509, and cases cited.

We are referred to the case of *Mississippi Mills* v. *Cook*, 56 Mississippi, 40, decided in 1878, four years prior to this charter, as settling the proper construction of these sections of the constitution. Indeed, counsel stipulate that the stockholders invested their money in reliance upon this adjudication. The Mississippi Mills were chartered in 1871 for the purpose of manufacturing cotton and woolen fabrics, and in 1872 an act was passed, of which the Mississippi Mills were subsequently given the benefit, providing that all taxes upon the property of said company should be applied to the payment of debts which the company had incurred in the construction of their factory. In 1877 this act was so far amended as to be substantially repealed; and in 1878 the company filed a bill in chancery against the tax collector, setting up the acts of 1872 and 1873 as constituting a contract with the company, and alleging that the act of 1877 impaired the obligation of such contract, and was in violation of the Constitution of the United States.

The bill was held not to be maintainable, the court deciding:

(1.) That it was not intended by section 13 of article XII of the constitution to confer power on the legislature to tax the property of corporations, because that existed without this section as an inherent legislative power.

(2.) That the property of the corporations mentioned was declared to be *subject* to taxation, that is, liable to taxation, the same as that of individuals, but it was not necessarily to be *subjected* to taxation. Since overruled in *Adams* v. *Yazoo & Mississippi Valley Railroad*, 77 Mississippi, 194.

(3.) That any legislative act, "whether it be a charter or other form of law, which says it shall be exempt, and not subject to taxation, is in conflict with the constitution." But that the legislature might exempt property of a certain class, whether the owners were corporations or natural persons, but corporate property could never be placed beyond the reach of the taxing power. "It may not be taxed, but it must be ever liable. It need not be *subjected*, but it must always be *subject*, to taxation,

the same as that of individuals, for the constitution so declares. The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper, in common with the property of individuals, which may be taxed or not for the time being." See also *Vicksburg Bank* v. *Worrell*, 67 Mississippi, 47; *Natchez, Jackson & Columbus Railroad Co.* v. *Lambert*, 70 Mississippi, 779.

(4.) That it followed from this that it was competent for the legislature to modify or repeal the act of 1872, and that the repealing act of 1877 was constitutional, and operated as a repeal of the exemption. This was reaffirmed in *Attala Co.* v. *Kelly*, 68 Mississippi, 40; *Railroad Co.* v. *Lambert*, 70 Mississippi, 779.

(5.) In a concurring opinion, delivered by the Chief Justice, he held that if the exemption were granted in the form of a contract in the charter, it was prohibited.

Although the decision of the case was put upon the ground that the exemption from taxation contained in the acts of 1872 and 1873 was a mere bounty, and subject to repeal by the legislature, the report would seem to indicate the opinion of the court to have been that no exemption was valid which was contained in the charter of a particular corporation; (a question not necessarily involved,) but whether this be so or not, it is entirely clear that the court intended to decide that, under the constitution of 1869, any exemption granted by the legislature was a mere bounty and subject to repeal.

Under this construction of the constitution it becomes unnecessary to decide whether the exemption contained in the charter of 1882 be void or not, since, as it appears by the certificate of the Chief Justice, the decision of the court below was put upon the ground that the subsequent legislation, and particularly the Annotated Code of 1892, which was construed by the court as repealing the exemption in the charter, was constitutional and valid. Indeed, counsel for the collector, in their brief, expressly disclaim any reliance upon the position that the exemption in this case was originally unconstitutional and void, putting their case expressly upon the ruling of the Supreme Court that such exemption had been repealed.

Holding then, as we do, that the exemption was subject to repeal, it only remains to consider whether the Code of 1892 did in fact repeal and abrogate it. In this connection the State relies upon section 3744 of the Annotated Code of 1892, which declares that "following property, *and no other*, shall be exempt from taxation, to wit." Here follows a list of some twenty classes of property, among which, however, railroads are *not* included. If an exemption under a special act be repealed by the words "and no other," contained in a general act declaring what property shall be exempt from taxation, it would follow that this exemption was repealed by the Code of 1892, and the principle applied in *Louisville Water Company* v. *Clark*, 143 U. S. 1, 11, would also be applicable here. The railroad company, however, insists that its rights are saved by section eight of the same code, which declares that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption, unless it be expressly so provided herein." There being no such express provision in the code respecting the act of 1882, it is insisted that the exemption contained in that act is saved. The Supreme Court, however, seems to have held, as it had already done with respect to a similar section in the Code of 1880, *Adams* v. *Railroad Co.*, 77 Mississippi, 194, 317, that the exemption was not saved.

We do not find it necessary to pass upon the soundness of this conclusion, as we are of opinion that the question whether the ruling of the Supreme Court, that a *repealable* exemption has been in fact repealed by a subsequent statute, is one which turns upon the construction of a state law, and is not reviewable here, although if the exemption were *irrepealable* and thus constituted a contract, it would be our duty to decide for ourselves whether the subsequent act had repealed it or impaired its obligation. The only contract relied upon is one exempting the property of a particular corporation from taxation for a certain number of years; a contract which, in the light of the state constitution and the prior decisions of the state courts, must be read as if it contained a proviso that the legislature might in the meantime alter, amend or repeal the act. Hence, as the legislature is left entirely free to act upon the sub-

ject, no subsequent legislation could possibly impair the obligation of the contract, if such exemption can be called a contract at all. If no statute *could* impair it, it goes without saying that none *did* impair it. If, then, the decision of the Supreme Court that the legislature had in fact repealed the exemption was right, the railroad company cannot complain, since the legislature had done no more than it had a right to do. If, upon the other hand, we should be of opinion that the Supreme Court was wrong in holding the exemption repealed, such exemption would be abrogated not by the act of 1892, but by an erroneous construction of that act. Our only authority to review the action of the state courts in this class of cases under Rev. Stat. sec. 709, arises when the validity of a state *statute* is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. Now, if the statute, adjudged to be valid, does not impair the obligation of any contract, it is not repugnant to the Constitution. It is the fact that the act, as construed by the Supreme Court, impairs the obligation of a contract that gives us jurisdiction, and if there be in the act of 1882 no contract that can be impaired by subsequent legislation, it is of no consequence that the Supreme Court may have given it a wrong construction. "Before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired." *New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79, 88. Indeed the whole foundation of our jurisdiction in this class of cases must rest upon a *contract* which cannot be legally impaired.

This court has repeatedly held that we cannot revise the judgment of the highest court of a State unless, by its terms, or necessary operation, it gives effect to some provision of a state constitution or law which, as thus construed, impairs the obligation of a precedent contract. In *Railroad Co.* v. *Rock*, 4 Wall. 177, 181, this court pronounced it a "fundamental error that this court can, as an appellate tribunal, reverse the judgment of a state court, because that court may hold a contract

to be void, which this court might hold to be valid." So, too, in *Knox* v. *Exchange Bank*, 12 Wall. 379, 383, it was said by Mr. Justice Miller: "But we are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." To the same effect are *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392, and *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 30. In the latter case it is said by Mr. Justice Gray: "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." See also *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109.

We are therefore of opinion that we cannot review the action of the state court in holding this exemption to have been repealed.

4. A single point with regard to the *privilege* taxes included in the assessment sought to be enjoined remains to be considered.

By section 18 of the company's charter of 1882 it was declared "that such Company, its stock, its railroad and appurtenances, and all its *property* in this State, necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act." This undoubtedly implies an exemption from privilege as well as *ad valorem* taxes, and such has been the construction given to it by the Supreme Court of Mississippi. *Grand Gulf and Port Gibson Railroad* v. *Buck*, 53 Mississippi, 246.

But, as we have already held, this section must be construed as subservient to section 13, article XII, of the constitution of

1869, providing that "the *property* of all corporations for pecuniary profit shall be subject to taxation."

Now, if privilege taxes are taxes upon the *property* of corporations, an exemption from such taxes was subject to repeal as much as we have already held an exemption of *ad valorem* taxes to be.

Whatever may have been the fluctuations of opinion upon this subject, and it is not to be denied that there are many cases in the state courts holding that a privilege tax is not a tax upon property, the law in this court, so far as concerns railway franchises, must be deemed to have been settled by the case of *Wilmington Railroad* v. *Reid*, 13 Wall. 264, in which an exemption in the charter of the Wilmington and Raleigh Railway Company of "the property of said company and the shares therein" from taxation, was decided to extend to a tax upon the franchise and rolling stock. In delivering the opinion of this court, Mr. Justice Davis observed: "It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature, therefore, was not inhibited from taxing it. The position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed and depot grounds, but it is equally with them covered by the general term 'the property of the company,' and therefore equally within the protection of the charter." To the same effect are *Adams Express Co.* v. *Ohio*, 165 U. S. 195, and *Veazie Bank* v. *Fenno*, 8 Wall. 533, 547.

This also appears to be the law in Mississippi. *Coulson* v. *Harris*, 43 Mississippi, 728; *Drysdale* v. *Pradat*, 45 Mississippi, 445.

In *West River Bridge Co.* v. *Dix*, 6 How. 507, 534, the franchise of a bridge company was held to be property subject to condemnation under the law of eminent domain. See also *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Spring*

Valley Waterworks v. *Schottler*, 62 California, 110; *Nichols* v. *New Haven & Northampton Railroad*, 42 Connecticut, 103, 125; *Porter* v. *Rockford &c. R. R.*, 76 Illinois, 561, 574; *State* v. *Anderson*, 90 Wisconsin, 550, 561; *Richmond & Danville Railroad* v. *Brogden*, 74 N. C. 707.

It follows, then, that privilege taxes being taxes upon property are subject to the constitutional limitations of 1869, and their exemption was equally repealable as that of *ad valorem* taxes.

The railroad company also calls attention to section 181 of the constitution of 1890, by virtue of which "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature." The words "sooner repealed" in this section apparently refer to a repeal before the expiration of the exemption under their respective charters, and as the Supreme Court has held that the exemption in this case was repealed by the Annotated Code of 1892 the company can gain no additional advantage by this section. *Adams* v. *Tombigbee Mills*, 78 Mississippi, 676.

Inasmuch as the statute in question could not, and in the opinion of Supreme Court did not, impair the obligation of any prior contract, its judgment must be

Affirmed.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

COTTING v. KANSAS CITY STOCK YARDS COMPANY AND THE STATE OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 1. Argued November 14, 15, 1899. Re-argued, January 23, 24, 1901, before a full bench. Decided November 25, 1901.

The Statute of Kansas of March 3, 1897, entitled "An act defining what shall constitute public stock yards, defining the duties of the person or persons operating the same, and regulating all charges thereof, and removing restrictions in the trade of dead animals, and providing penalties for violations of this act," is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company, and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws.

In March, 1897, Charles U. Cotting, a citizen of the State of Massachusetts, filed in the Circuit Court of the United States for the District of Kansas a bill of complaint against the Kansas City Stock Yards Company, a corporation of the State of Kansas, and certain officers of that company, and Louis C. Boyle, Attorney General of the State of Kansas. A few days later, Francis Lee Higginson, a citizen of the State of Massachusetts, filed a bill of complaint in the same court and against the same parties.

These suits were subsequently ordered by the court to be consolidated, and were thereafter proceeded in as one.

The plaintiffs respectively alleged that they were stockholders of the Kansas City Stock Yards Company, and that the suits were brought in their own behalf and that of other stockholders having a like interest, who might thereafter join in the prosecution thereof. The main purpose of the suits was to have declared invalid a certain act of the legislature of the State of Kansas, approved March 3, 1897, entitled "An act defining what shall constitute public stock yards, defining the duties of

the person or persons operating the same, and regulating all charges thereof, and removing restrictions in the trade of dead animals, and providing penalties for violations of this act."

A temporary restraining order was granted, and subsequently a motion for a preliminary injunction was made. Pending that motion the court appointed a special master, with power to take testimony and report the same with his findings, as to all matters and things in issue upon the hearing of the preliminary injunction prayed for. 79 Fed. Rep. 679. On August 24, 1897, the special master filed his report. On October 4, 1897, the motion for a preliminary injunction was heard on affidavits, the master's report, exceptions thereto on behalf of both parties, and arguments of counsel. The motion was refused, and the restraining order, which had remained in force in the meantime, was set aside. 82 Fed. Rep. 839.

A stipulation was thereupon entered into that the defendants should forthwith file their answers to the bills; that replications thereto should be immediately filed, and that the cases, thus put at issue, should be heard on final hearing, upon the pleadings, proofs, master's report and exhibits, without further testimony from either party.

On October 28, 1897, after argument, the court dismissed the bills of complaint. 82 Fed. Rep. 850. In the opinion of Circuit Judge Thayer there was the following order, which was also embodied in the final decree:

"The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance by the Supreme Court in *Hovey* v. *McDonald*, 109 U. S. 150, 161, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are

of such moment and the questions at issue so balanced with doubt, as to justify and require an exercise of the power in question. Therefore, although the bills will be dismissed, yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted for the term of ten days, and if in the meantime an appeal shall be taken, such injunction will be continued in force until the appeal is heard and determined in the Supreme Court of the United States: provided that, in addition to the ordinary appeal bond, the Kansas City Stock Yards Company shall make and file in this court its bond in the penal sum of $200,000, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that in the event of the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stock yards in Kansas City, Kansas, and Kansas City, Missouri, which it may have exacted in violation of sections 4 and 5 of the Kansas statute relative to stock yards, approved March 3, 1897, since an injunction was first awarded herein, to wit, on April —, 1897; and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal; said obligation to become void if the statute in question shall be pronounced invalid by the Supreme Court." 82 Fed. Rep. 857.

On November 4, 1897, an appeal was duly taken and allowed to this court.

Subsequently, Louis C. Boyle's term of office as Attorney General having expired, his successor, A. A. Godard, was substituted as a party defendant.

The act of the legislature of the State of Kansas is in the following terms:

"SEC. 1. Any stock yards within this State, into which live stock is received for the purpose of exposing or having the same exposed for sale or feeding, and doing business for a compensation, and which for the preceding twelve months shall have had an average daily receipt of not less than one hundred head

of cattle, or three hundred head of hogs, or three hundred head of sheep, are hereby declared to be public stock yards.

"SEC. 2. Any person, company, or corporation owning or operating any public stock yard or stock yards in this State is hereby declared to be a public stock yards operator, whether living or being within this State or not.

"SEC. 3. Every such public stock yards operator or operators shall annually, on the 31st day of December of each year, file with the secretary of State, an itemized statement certified and sworn to, setting forth the number of head of cattle, calves, sheep, hogs, horses and mules received in his or their public stock yards during the year next preceding.

"SEC. 4. It shall be unlawful for the owners, proprietors, or the employés of the owners or proprietors of any such public stock yards within this State, to charge for driving, yarding, watering, and weighing of stock, greater prices than the following: For driving, yarding, watering and weighing of cattle, 15 cents per head; calves, 8 cents per head; hogs, 6 cents per head; sheep, 4 cents per head; and there shall be but one yardage charged.

"SEC. 5. It shall be unlawful for the owner, owners, or proprietors, or their employés, of any such stock yards within this State, to sell and deliver at the rate of less than two thousand pounds for a ton of hay, or any part thereof, the same to be of good quality, or to charge for or to sell the same at more than one hundred per cent above the average market price, or value of such hay upon the markets of the towns or cities wherein such stock yards are located, upon the day preceding such sale and delivery; and it shall also be unlawful for any such owners, or proprietors, or employés, to sell and deliver less than seventy pounds of corn in the ear for a bushel, or less than fifty-six pounds of shelled corn for a bushel or to charge for or to sell the same at more than one hundred per cent above the average market price or value of such ear corn or shelled corn on the markets of the towns or cities wherein said stock yards are located, on the day next preceding such sale and delivery. All feed not above named shall be sold for no greater per cent of profit than hereinbefore provided.

"SEC. 6. It shall be unlawful for the owners or proprietors of any stock yards to prohibit the owner or owners, or the representatives of any owner or owners of any dead stock in such yard or yards from selling such dead stock to any person or persons.

"SEC. 7. That any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined for the first offence not more than one hundred dollars; for the second offence not less than one hundred dollars nor more that two hundred dollars; and for the third offence not less than two hundred dollars nor more than five hundred dollars and by imprisonment in the county jail not exceeding six months for each offence; and for each subsequent offence he or they shall be fined in any sum not less than one thousand dollars and by imprisonment in the county jail not less than six months.

"SEC. 8. It is hereby made the duty of the attorney general to prosecute all violations of the provisions of this act.

"SEC. 9. All acts or parts of acts in conflict with this act are hereby repealed.

"SEC. 10. This act shall take effect and be in force from and after its publication in the official state paper." Laws of Kansas, 1897, chap. 240, p. 448.

Mr. William D. Guthrie and *Mr. B. P. Waggener* for appellants. *Mr. Albert H. Horton* was on their brief.

Mr. A. A. Godard for appellees. *Mr. B. H. Tracy* was on his brief.

MR. JUSTICE BREWER, after making the above statement, delivered the following opinion, and announced the conclusion and judgment of the court.

The learned Circuit Judge, in deciding the case, appreciated the importance of the questions involved, and although denying the relief sought by the plaintiffs, exercised his power of continuing the restraining order until such time as these ques-

tions could be determined. Twice has this case been argued before us. We have had the benefit of able arguments and elaborate briefs of distinguished counsel. That the questions are difficult of solution no one reading the following statement will we think doubt.

It has been wisely and aptly said that this is a government of laws and not of men; that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them.

We shall not attempt to determine all the questions presented, and yet it is fitting that we should state them, and some of the reasons urged in support of their decision one way or the other.

The first we notice is the principal matter in respect to which testimony was offered, which has been most largely discussed by counsel on both sides, and that is the validity of the reduction in the charges of the stock yards company made by the act in question. Has the State the power to legislate on this matter, and, if so, can its legislation be upheld?

In *Munn* v. *Illinois*, 94 U. S. 113, it was held that the State had power to fix the maximum charges for the storing of grain in warehouses in Chicago, the court saying (p. 126):

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to the use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

While there was a division of opinion in the court, yet the doctrine thus stated received the assent of a majority of its members and has been reaffirmed since, although accompanied by a constant dissent. *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391. See also the following cases in state courts: *People* v. *Budd*, 117 N. Y. 1; *Lake Shore &*

Michigan Southern Railway v. *Cincinnati, Sandusky &c. Railway*, 30 Ohio St. 604; *State* v. *Columbus Gas Light & Coke Co.*, 34 Ohio St. 572; *Davis* v. *The State*, 68 Alabama, 58; *Baker* v. *The State*, 54 Wisconsin, 368; *Nash* v. *Page*, 80 Kentucky, 539; *Girard Point Storage Co.* v. *Southwark Co.*, 105 Penn. St. 248; *Sawyer* v. *Davis*, 136 Mass. 239; *Brechbill* v. *Randall*, 102 Indiana, 528; *Delaware, Lackawanna &c. Railroad Co.* v. *Central Stock Yard Co.*, 45 N. J. Eq. 50.

These decisions go beyond but are in line with those in which was recognized the power of the State to regulate charges for services connected with any strictly public employment, as, for instance, in the matter of common carriage, supply of water, gas, etc. *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Railroad Commission Cases*, 116 U. S. 307; *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557; *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649; *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Chicago, Milwaukee & St. Paul Railway* v. *Tompkins*, 176 U. S. 167.

Tested by the rule laid down in *Munn* v. *Illinois*, it may be conceded that the State has the power to make reasonable regulation of the charges for services rendered by the stock yards company. Its stock yards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and, therefore, must be considered as subject to governmental regulation.

But to what extent may this regulation go? Is there no limit beyond which the State may not interfere with the charges for services either of those who are engaged in performing some public service, or of those who, while not engaged in such service, have yet devoted their property to a use in which the pub-

lic has an interest? And is the extent of governmental regulation the same in both of these classes of cases?

In *Munn* v. *Illinois*, one of the latter class, in which the power of governmental regulation was affirmed, it was said (p. 125):

"From this it is apparent that down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all."

In *Budd* v. *New York* it was not charged or shown that the rates prescribed by the legislature were unreasonable, and the only question was the power of the legislature to interfere at all in the matter. The same is true of *Brass* v. *Stoeser*, in which nothing was presented calling for any consideration of the test of reasonableness, or of a limit to the legislative power.

As to those cases in which governmental regulation of charges was in respect to parties doing some public service the following is a résumé of the decisions. In *Spring Valley Water Works* v. *Schottler* it was said (p. 354):

"What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all."

In *Railroad Commission Cases* (p. 331):

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

In *Wabash Railway Co.* v. *Illinois* nothing was said affect-

ing the question of the extent of the power of the legislature. In *Dow* v. *Beidelman* the quotation heretofore made from the *Railroad Commission Cases* was quoted with approval. In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, the same passage was quoted, and it was added (p. 458):

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In *Chicago &c. Railway Co.* v. *Wellman* it was said (p. 344):

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

In *Reagan* v. *Farmers' Loan & Trust Co.* (p. 399):

"The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

And again (p. 412):

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money

or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road."

In *St. Louis & San Francisco Ry. Co.* v. *Gill* is this language (p. 657):

"This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business."

In *Covington &c. Turnpike Co.* v. *Sandford* (pp. 596–7):

"The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use and the amount that may have been really and necessarily invested in the enterprise. In short, each

case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling the public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law."

In *Smyth* v. *Ames*, after an elaborate discussion of the question of rates and the power of the legislature in respect thereto, it was said (pp. 546, 547):

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

In *San Diego Land Co.* v. *National City* (p. 757):

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of oper-

ating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

And also affirming the limits of judicial interference with legislative action (p. 754):

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily

have the effect to deny just compensation for private property taken for the public use."

Nothing was said in *Chicago &c. Ry. Co.* v. *Tompkins* throwing any light upon the questions heretofore referred to.

In the light of these quotations, this may be affirmed to be the present scope of the decisions of this court in respect to the power of the legislature in regulating rates: As to those individuals and corporations who have devoted their property to a use in which the public has an interest, although not engaged in a work of a confessedly public character, there has been no further ruling than that the State may prescribe and enforce reasonable charges. What shall be the test of reasonableness in those charges is absolutely undisclosed.

As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which, if enforced, would amount to a confiscation of property. But it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation and leave the property in the hands and under the care of the owners without any remuneration for its use. It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates.

In this case, as heretofore indicated, a volume of testimony has been taken, mainly upon the question of the cost and value of the stock yards and the effect upon the income of the company by reason of the proposed reduction. This testimony was taken before a master, with instructions to report the cost of the stock yards, the present value of the property, the receipts and expenditures thereof, the manner of operation, and such other matters as might be pertinent for a determination of the case. Stated in general terms, his findings were that the value of the property used for stock yard purposes, including the value

of certain supplies of feed and materials which were on hand December 31, 1896, is $5,388,003.25; that the gross income realized by the stock yards company during the year 1896, which was taken as representing its average gross income, was $1,012,271.22. The total expenditures of the company for all purposes during the same period amounted to $535,297.14—thus indicating a net income for the year of $476,974.08. The court, however, increased the estimate of the net income by adding to the expenditures the sum of $113,584.65, expended in repairs and construction, thus placing the net income at the amount of $590,558.73. If the rates prescribed by the Kansas statute for yarding and feeding stock had been in force during the year 1896 the income of the stock yards company would have been reduced that year $300,651.77, leaving a net income of $289,916.96. This would have yielded a return of 5.3 per cent on the value of property used for stock yard purposes, as fixed by the master. Or, if the capital stock be taken, after deducting therefrom such portion thereof which represents property not used for stock yard purposes, the return would be 4.6 per cent.

Counsel for appellants challenge the correctness of these findings, and seek to show by a review of the testimony that no such per cent of return on the real value of the investment would be received by the company in case the proposed reduction is put into effect. But without stopping to enter into the inquiry suggested by their contention, it is enough for our present purpose to state in general the conclusions of the master and the court.

On the other hand, it is shown by the findings, approved by the court, that the prices charged in these stock yards are no higher, and in some respects lower, than those charged in any other stock yards in the country, and finding 37 is—

"The other stock yards heretofore enumerated are operated generally in the same manner as those at Kansas City, and there is and was for a long time prior to March 12, 1897, active and growing competition among their owners to attract and secure to each the shipment of live stock from competitive territories. Kansas City is the greatest stocker and feeder market in the world, and while Chicago exceeds it as a general market,

yet, because of the expense of transportation from Kansas City there, and the loss in weight by shrinkage during such transportation, the live stock shipped to and sold at Kansas City in 1896 realized for its owners more than $1,500,000 in excess of the amount which would have been realized if forwarded from Kansas City to and sold on the Chicago market."

Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that willingly or unwillingly the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself. In the other that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the State believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said

again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public?

Again, wherever a purely public use is contemplated the State may and generally does bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain by which property can be taken, and taken not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the State, and exercising those powers and doing the work of the State is it wholly unfair to rule that he must submit to the same conditions which the State may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public has an interest in.

In reference to this latter class of cases, which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of the State. He is not using his property in the discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He can force no one to sell to him, he cannot prescribe the price which he shall pay. He must deal in the market as others deal, buying only when he can buy and at the price at which the owner is willing to sell, and selling only when he can find a purchaser and at the price which the latter is willing to pay. If under such circumstances he is bound by all the conditions

of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all state regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile business.

Pursuing this thought, we add that the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law even in respect to those engaged in a quasi public service independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered? As said by Mr. Justice Bradley, in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699:

"It is also obvious that since a wharf is property and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what dis-

position he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant."

In *Canada Southern Railway Co.* v. *International Bridge Co.*, 8 App. Cas. 723, 731, Lord Chancellor Selborne thus expressed the decision of the House of Lords:

"It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of

the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their Lordships can hardly characterize that argument as anything less than preposterous."

The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness. In other words, it is a legislative declaration that such charges are reasonable compensation for the services rendered, but it does not follow therefrom that the legislature has power to reduce any reasonable charges because by reason of the volume of business done by the party he is making more profit than others in the same or other business. The question is always not what does he make as the aggregate of his profits, but what is the value of the services which he renders to the one seeking and receiving such services. Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and is not that which finally determines the question of reasonableness. Now, the controversy in the Circuit Court proceeded upon the theory that the aggregate of profits was the pivotal fact. To that the testimony was adduced, upon it the findings of the master were made, and in recognition of that fact the opinion of the court was announced. Obviously, as as we think, in all this the lines of inquiry were too narrowly pursued.

It may be said that the conclusion of the court was directly against the plaintiffs, and therefore was a decision against all their contentions. It was found, however, that the charges made by the defendant were no greater (and in many instances, less) than those of any other stock yards in the country. Nothing is stated to outweigh the significance of that finding. While custom is not controlling, for there may be a custom on

the part of all stock yards companies to make excessive charges, yet in the absence of testimony to the contrary a customary charge should be regarded as reasonable and rightful. In Gunning on Laws of Tolls, the author says (p. 61): "Long usage and acquiescence in one uniform payment for toll is undoubtedly cogent evidence that it is reasonable." In *Shephard* v. *Payne*, 12 C. B. (N. S.) 414, 433, Willes, J., said:

"A fee need not be of a fixed and ascertained, but may be of a reasonable amount; and, exercising the power conferred upon us by the case, to draw inferences of fact, we may conclude that, if the claim can be sustained in point of law, it was in fact for a reasonable fee. If so, then, looking to the amount established for similar services by other officers, and remembering what fees have been paid and received within the memory of us all in the Courts of Westminster Hall and at the Assizes, we think there can be little doubt that the fees in question, so far as amount is concerned, are in fact reasonable."

In *Louisville, Evansville &c. Railroad Co.* v. *Wilson*, 119 Indiana, 352, 358, is this language:

"The law makes it the duty of every common carrier to receive and carry all goods, . . . and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure, subject to the agreement of the parties; but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained by the amount commonly, or customarily paid for other like services. *Johnson* v. *Pensacola &c. Railroad Co.*, 16 Florida, 623; Angell, Carriers, section 392; Lawson, Contracts of Carriers, section 125."

Again, the findings show that the gross receipts for the year 1896 were $1,012,271.22; that the total number of stock received during the same time was 5,471,246. In other words, the charge per capita was 18 cents and 5 mills. So that one shipping to the stock yards one hundred head of stock was charged $18.50 for the privileges of the yard, the attendance of the employés and the feed furnished. While from these figures alone we might not say that the charges were reasonable or unreasonable, we cannot but be impressed with the fact that the

smallness of the charge suggests no extortion. Further, as heretofore noticed, the findings show that the establishment of these yards has operated to secure to the shippers during a single year $1,500,000 more than they would have realized in case of their non-existence and a consequent shipment to Chicago, the other great stock market of the country.

It is not to be wondered that the trial court, in deciding the case, observed:

"Conceding, as we must, that the legislation complained of was radical in its nature and effect, that it reduced the company's income about fifty per cent, and that it prevents it from realizing on the capital invested in its plant such a per cent as is ordinarily realized on capital invested in other mercantile and business enterprises, still," etc.

But inasmuch as the inquiry in that court proceeded upon lines which we have indicated were too narrow, it might well be that if there were no other questions we ought to simply send back the case for further investigation upon the true lines of inquiry. There are, however, other questions which compel notice, and one is that suggested by the seventh section in the statute, which provides a punishment for the first offence of not more than $100, for the second offence not less than $100 nor more than $200, for the third offence not less than $200 nor more than $500 and imprisonment in the county jail not exceeding six months, and for each subsequent offence a fine of not less than $1000 and imprisonment not less than six months. The language of this section, taken in connection with the balance of the statute, is not entirely clear. The previous prescriptions of the statute are of a certain charge per head. Now, does this section contemplate a separate offence with a separate penalty for each excessive charge per head, or does it contemplate a single penalty for a violation of the statute in respect to the entire number of stock received in one shipment? The difference is significant. Taking the total number shipped to these stock yards in the year 1896, it amounted to an average of about 15,000 head per day. Would that in case of an excessive charge for each head mean 15,000 violations of the statute? If so, as after the third offence the fine could not be less

than $1000 for each offence, a single day's penalties would aggregate at least $15,000,000. While the fact is not clearly disclosed by the testimony, doubtless the shipments were made by separate shippers in bunches all the way from 50 to 500 in number. If the penalty attaches simply to the charge for each shipment as a single act, the burden, though large, might not be deemed excessive, but if it attaches to that for each particular head of stock the penalties become enormous. It may be said that this is a penal statute, and therefore it is to be construed in favor of the delinquent, and that we have a right to expect that the state courts will construe the penalty as not attaching to the charge for each head of stock, but only to that upon the separate bunches shipped by different individuals. But is the language so clear that there is no doubt as to the construction? Is there not enough in it to justify a construction which may be accepted by the trial courts and approved by the Supreme Court of the State, and the construction of a state statute by the Supreme Court of the State is in a case like this conclusive upon us. Must the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute? If the one construction is placed upon it, then obviously, even accepting the largest estimate of value placed by any witness upon the property of the company, a single day's violation of the statute would exhaust such entire value in satisfaction of the penalties incurred. In this feature of the case we are brought face to face with a question which legislation of other States is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defence subject to the condition that upon a failure to make good that claim or defence the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought.

Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defence, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him,

and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defence is not sufficient if upon him and upon him alone there is visited a substantial penalty for a failure to make good his entire claim or defence. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defence, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws? Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defence should subject him to a forfeiture of all his property or to some other great penalty; then, even if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? Of course, these are extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defence a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. It may be said that these illustrations are not pertinent because they are of civil actions, whereas this statute makes certain conduct by the stock yards company a criminal offence, and simply imposes punishment for such offence; that it is within the competency of the legislature to prescribe the penalties for all offences, either those existing at common law or those created by statute; and further, that although the penalties herein imposed may be large, yet obedience to a statute like this can only be secured by large penalties; for otherwise the company, being wealthy and powerful, might defiantly disregard its mandates,

trusting to the manifold chances of litigation to prevent any serious loss from disobedience. A penalty of a dollar on a large corporation, whose assets amount to millions, would not be very deterrent from disobedience. It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

But it is not necessary to rest our decision upon this consideration, which was not fully discussed by counsel, but pass to a question which is of a kindred nature and in which there is presented no matter of the doubtful construction of a statute.

The act in terms applies only to those stock yards within the State "which for the preceding twelve months shall have had an average daily receipt of not less than one hundred head of cattle, or three hundred head of hogs, or three hundred head of sheep."

It appears affirmatively from the testimony that there are other stock yards in the State, one at Wichita and one at Jamestown, and it is stated by counsel for appellants that there are many others scattered through the State, each doing a small business. Neither the yard at Wichita nor that at Jamestown, so far as the testimony shows, comes within the scope of this act. So it may be assumed from the record that the legislature of Kansas, having regard simply to the stock yards at Kansas City and the volume of business done at those yards, passed this act to reduce their charges. Undoubtedly, the act is general in its terms, and we may not, therefore, stop to inquire whether it conflicts with the constitutional prohibition contained in article 2, sec. 17, of the constitution of Kansas:

"SEC. 17. All laws of a general nature shall have a uniform

operation throughout the State; and in all cases where a general law can be made applicable no special law shall be enacted."

It may be assumed, for the purposes of the question now to be considered, that so far as the constitution of Kansas is concerned its legislature may enact a law, general in its terms, and yet so phrased as necessarily to have operation only upon a single individual or corporation, but, while making that concession, we cannot shut our eyes to the fact that this act is precisely the same in its effect as though the legislature had said in terms that the Kansas City stock yards alone shall be subjected to its provisions. Accepting, however, the full force of the general language in which the statute is couched, it appears that a classification is attempted between stock yards doing a large and those doing a small business. The express and only basis of classification is in the amount of business done by the two classes. As evidence that we are right in our construction, we may refer to the brief of the learned Attorney General, in which he says:

"The legislature has, by this act, classified the stock yards of the State into two classes, and has adopted the most natural and reasonable basis for such purposes that could be used, namely, the volume of business done. The reason for this is obvious; the stock yards doing a large volume of business are necessarily more of monopolies than those doing a smaller business. The public has greater interest in the business of large stock yards than it has in the business of smaller ones.

* * * * * * * *

"Another reason why the classification should be based upon the volume of business done is, that rates which are reasonable and proper and furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is large, while in a smaller plant doing a smaller volume of business higher rates may be necessary in order to afford adequate returns."

If the average daily receipts of a stock yard are more than one hundred head of cattle, or more than three hundred head of hogs, or more than three hundred head of sheep, it comes

within the purview of this statute. If less than that amount it is free from legislative restriction. No matter what yards it may touch to-day or in the near or far future, the express declaration of the statute is that stock yards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling a hundred or more passengers a day to charge only a specified amount per mile for each, leaving those hauling ninety-nine or less to make any charge which would be reasonable for the service; or (if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts), one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or, forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down.

The question thus presented is of profoundest significance. Is it true in this country that one who by his attention to busi-

ness, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? We cannot shut our eyes to well-known facts. Kansas is an agricultural State. Its extensive and fertile prairies produce each year enormous crops of corn and other grains. While portions of these crops are shipped to mills to be manufactured into meal and flour, it is found by many that there is a profit in feeding them to stock, so that the amount of stock which is raised and fattened in Kansas is large, and makes one of the great industries of the State. Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services; and this not because any particular charge is unreasonable, but because you are making by the aggregate of those charges too large a sum, and ought therefore to divide with us. The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron of this court, when in *Vanzant* v. *Waddel*, 2 Yerger, 260, 270, he said:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

The Fourteenth Amendment forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." The scope of this prohibition has been frequently considered by this court.

In *Barbier* v. *Connolly*, 113 U. S. 27, 31, it was said:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

And in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their constitution. But clear and hostile

discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases."

In *Gulf, Colorado & Santa Fé Railway Co.* v. *Ellis*, 165 U. S. 150, 159, in which was presented solely the question of classification, we said, referring to many cases, both State and national:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

These authorities are referred to again with approval in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283.

But we may, perhaps, come closer to the particular statute when we consider the decisions of the Supreme Court of Kansas, the State by whose legislature this act was passed. In *The State* v. *Haun*, 61 Kansas, 146, there was presented for consideration a statute providing for the payment of the wages of laborers in money, coupled with this provision in sec. 4:

"SEC. 4. This act shall apply only to corporations or trusts, or their agents, lessees or business managers, that employ ten or more persons."

The act was held unconstitutional. After referring to an alleged defect in the title, the court said (p. 152):

"We have no hesitation in saying that if this statute had, without defect as to title, clearly and in express terms amended corporate charters, retaining the section classifying corporations to which it was applicable by the number of men in their employ, it would be obnoxious to the Fourteenth Amendment to the Constitution of the United States."

Again on pp. 153, 154:

"The obvious intent of the act is to protect the laborer and not to benefit the corporation. Why should not the nine employés who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them, when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. Such inequality destroys the law. In the instance cited, two of the eleven men might quit the employment of the company for which they worked, and by this act alone make a method of payment by the corporation lawful which was unlawful while the eleven were employed. The criminality or innocence of an act done ought not to depend on the happening of such a circumstance. Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. . . . A classification of the kind attempted makes a distinction between corporations identically

alike in organization, capital and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character."

And in support of these views the court quoted from Cooley's Constitutional Limitations, 5th ed. 484, 486.

"Every one has a right to demand that he be governed by general rules and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

So we have the clear declaration of the Supreme Court of Kansas that legislation by which one individual or even one set of individuals is selected from others doing the same business in the same way and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the constitution of Kansas and in that of the United States to the effect that the equal protection of the laws is guaranteed to all.

May we not rightfully accept this declaration of law by the highest tribunal of the State by whose legislature the act in question was passed, and, accepting the reasoning of that decision, does it not follow that, if an act which provides certain regulations for corporations employing ten or more laborers and leaving corporations employing less than that number free from such regulations is an unjust discrimination and a denial of the equal protection of the laws, an act which imposes regulations upon corporations doing business over a certain amount and leaving all corporations doing a like business less than that amount free from such regulations is equally obnoxious to constitutional prohibition?

The significance of the question thus clearly stated and forcibly answered by the Supreme Court of Kansas cannot be overestimated. It is not the province of this or any other court to consider its purely economic features. It may or it may not be wise, looking at it from such standpoint, to say to every citizen that his industry, ability, activity and foresight may be rewarded up to a certain extent and that beyond that he may not go. But whether it is wise or unwise, is not for the courts to determine. Their limits of inquiry are purely judicial. And the single matter for our present consideration is whether in the restraint which the legislature of Kansas has attempted to impose upon this stock yards company it has trespassed upon those rights which by the Constitution of the United States are secured to every individual against state action. It has been more than once said judicially that one of the principles upon which this government was founded is that of equality of right. It is emphasized in that clause of the Fourteenth Amendment which prohibits any State to deny to any individual the equal protection of the laws. That constitutional provision does not, it is true, invalidate legislation on the mere ground of inequality in actual result. Tax laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. But that inequality is something which it is impossible to foresee and guard against, and therefore such resultant inequality in the operation of a law does not defeat its validity. As was said in this court in *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 463:

"If it be said that a lack of uniformity renders the statute obnoxious to that part of the Fourteenth Amendment to the Federal Constitution which forbids a State to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national, rests the ordinary state tax of four mills. To every bank, State and national, and all alike, is given the privilege of discharging all tax obli-

gations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only worth par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the State should see fit to wholly exempt certain named corporations from all taxation. Of course, the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution."

So again exercising the undoubted right of classification it may often happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed on certain classes of business, while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another — certain burdens imposed on one which do not rest upon another.

But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal

upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretence that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think therefore that the principle of the decision of the Supreme Court of Kansas in *State* v. *Haun*, *supra*, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional, as in conflict with the equal protection clause of the Fourteenth Amendment.

There yet remains a question of jurisdiction. The two suits which were consolidated were each brought by a stockholder in behalf of himself and all other stockholders against the corporation, its officers, and also the Attorney General of the State of Kansas. The object of the suits was to restrain the Attorney General from putting in force the statute, and the

defendants from reducing the funds of the corporation, and therefore the dividends to the stockholders, by yielding compliance to the mandates of the statute, and failing to charge reasonable rates.

Of the jurisdiction of the court over the consolidated suit as one involving a controversy between the stockholders and the corporation and its officers, no serious question is made. *Dodge* v. *Woolsey*, 18 How. 331; *Hawes* v. *Oakland*, 104 U. S. 450; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *Smyth* v. *Ames*, 169 U. S. 466, seem conclusive on the question. There is no force in the suggestion that the officers of the corporation agreed with the stockholders as to the unconstitutionality of the statute, and that therefore the suit is a collusive one. That was the condition in *Dodge* v. *Woolsey*, *supra*, and it only emphasizes the fact that the officers were refusing to protect the interests of the stockholders, not wantonly, it is true, but from prudential reasons.

But the serious contention is that the court had no jurisdiction over the suit as against the Attorney General of the State, and this on two grounds: First, because it is in effect a suit against the State, and therefore forbidden by the Eleventh Amendment to the Federal Constitution; and, secondly, because it is an attempt on the part of a court of equity to restrain criminal proceedings. It is contended on the other hand that it is not a suit against the State because it does not in any way involve its pecuniary interest, and is only an effort to prevent an officer of the State from putting in force an unconstitutional statute; that it does not attempt to interfere with criminal proceedings, because none have been commenced and none are pending, but involves simply a challenge of the constitutionality of the statute. It is also urged that the Attorney General, when served with process, did not raise either defence; did not suggest that this was in effect a suit against the State, or that it was an attempt to interfere with criminal proceedings; that he pleaded several defences and went into a trial of the merits on a motion for permanent injunction; took part in the taking of an immense amount of testimony and in an argument before the trial judge upon the question of the validity of the

statute, and when its validity had been adjudged, then for the first time and as a preliminary to a final decree, to be entered without further testimony, filed an answer containing a formal plea that the suit was one in effect against the State. It is further contended that by the statutes of Kansas, (Comp. Laws, Kans. 1879, p. 901, sec. 5589,) the Governor may require the Attorney General to appear for the State in any court and prosecute or defend therein any cause or matter, civil or criminal, in which the State may be a party or interested, and that while no request from the Governor was shown the trial court was justified, in the absence of some challenge of its jurisdiction, in assuming that such request had been given, and that it would be grossly inequitable, after a full inquiry upon the merits in such court and an adjudication in favor of the validity of the statute, to permit the Attorney General by a formal plea of jurisdiction to prevent any review of the merits in this court.

Without expressing any opinion as to the jurisdiction of the court if it had been properly and seasonably challenged, we think the true solution of this matter will be found in reversing the decree upon the merits, and directing a dismissal of the suit as to the Attorney General, without prejudice to any other suit or action. It is, therefore,

Ordered, that the decree of the Circuit Court be reversed, and the case remanded to that court, with instructions to enter a decree in favor of the plaintiffs and against the corporation and its officers, in accordance with the prayer of the bills, and also a decree dismissing the suit as to the Attorney General of Kansas, without prejudice to any further suit or action.

Mr. Justice Harlan, with whom concurred Mr. Justice Gray, Mr. Justice Brown, Mr. Justice Shiras, Mr. Justice White and Mr. Justice McKenna.

We assent to the judgment of reversal—so far as the merits of this case are concerned—upon the ground that the statute of Kansas in question is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company and not to

other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws. Upon the question whether the statute is unconstitutional upon the further ground that, by its necessary operation, it will deprive that company of its property without due process of law, we deem it unnecessary to express an opinion.

DINSMORE *v.* SOUTHERN EXPRESS COMPANY AND GEORGIA RAILROAD COMMISSION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 136. Argued Febuary 25, 1901.—Decided November 18, 1901.

This suit was brought in the Circuit Court of the United States for the Southern District of Georgia, by citizens of New York against the Southern Express Company, a corporation of Georgia, and the Railroad Commission of that State, to prevent the company from applying any of its moneys to meet the requirements of the War Revenue Act of June 13, 1898, in relation to adhesive stamps to be placed on bills of lading, etc. The Circuit Court having enjoined the commission from proceedings, appeal was taken to the Circuit Court of Appeals, which reversed that decree, and ordered the case to be dismissed. The case was then brought to this court and submitted here on February 25, 1901. On the 2d of March, 1901, an act was passed, (to take effect July 1, 1901), excluding express companies from the operation of the War Revenue Act of 1898. *Held:*

(1) That no actual controversy now remains or can arise between the parties.

(2) That as the order of the Circuit Court of Appeals, directing the dismissal of the suit, accomplishes a result that is appropriate in view of the act of 1901, this court need not consider the grounds upon which the court below proceeded, nor any of the questions determined by it or by the Circuit Court, and that the judgment must be affirmed without costs in this court.

THE case is stated in the opinion of the court.

Mr. William K. Miller and *Mr. Frank H. Miller* for Dinsmore.

Mr. Joseph M. Terrell for the Railroad Commissioners.

Mr. Fleming G. Du Bignon filed a brief for the Southern Express Company.

Mr. Justice Harlan delivered the opinion of the court.

William B. Dinsmore and others, citizens of New York—some of them being executors and trustees under the will of the late William B. Dinsmore of that State—brought this action on the 17th day of April, 1897, in the Circuit Court of the United States for the Southern District of Georgia against the Southern Express Company, a corporation of Georgia, having its principal place of business in that State, and also against L. N. Trammell, Thomas C. Crenshaw and Spencer R. Atkinson, constituting the Railroad Commission of Georgia, and Joseph M. Terrell, Attorney General of Georgia, the individual defendants being citizens of Georgia.

The plaintiffs sued as owners and holders of shares of stock in the defendant express company, and sought a decree that would prevent the application by that corporation of any of its moneys to meet the requirement of the War Revenue Act of June 13, 1898, c. 448, in relation to adhesive stamps to be placed upon bills of lading, manifests or other evidences of the receipt of goods for carriage or transportation.

The portion of that act to which the bill referred is the following:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, *express company*, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and cancelled, as is in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, a stamp of

the value of one cent: *Provided*, that but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such a bill of lading, manifest or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offence, and no such bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 30 Stat. 448, 459.

After the passage of the above act complaint was made by citizens of Georgia to the Railroad Commission of that State to the effect that the defendant express company required shippers or consignors to supply the requisite stamps for bills of lading or receipts given to them. The Commission thereupon, July 11, 1898, ordered that the Southern Express Company appear before it on the 18th day of July, 1898, "then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this Commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

The company appeared and denied the jurisdiction of the Commission. But on August 2, 1898, the Commission, after hearing the parties, ordered that the required stamp be supplied by the express company, and not by shippers in whole or in part.

Appropriate allegations having been made to show that the suit was not a collusive one to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance, the relief asked was—

That it be adjudged and decreed that the order of the Railroad Commission of the State of Georgia of August 2, 1898, requiring the express company to pay the amount of the war revenue tax on business from one point to another in the State without endeavoring to collect the same from shippers, or requiring them to make the payment thereof before the issuing

of receipts or bills of lading, was unconstitutional, null and void; that the express company, its officers and agents be restrained from voluntarily complying with the order of the Commission of August 2, 1898, and paying such tax; that the Attorney General of the State be restrained from instituting any suit against the express company for the purpose of enforcing the provisions of the above order of the Railroad Commission; that a perpetual injunction, of the same purport, tenor and effect be granted to complainants; and that the plaintiffs have such other and further relief in the premises as the nature of the case required and to a court of equity might seem meet.

The Railroad Commissioners and the Attorney General of the State severally demurred to the bill. The case having been argued upon the demurrers, Judge Speer delivered an opinion which is reported in 92 Fed. Rep. 714.

That opinion was accompanied by the following order, entered March 7, 1899: "It is now upon consideration ordered, adjudged and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war-stamp tax in question be, and the same is hereby, denied; ordered, adjudged and decreed further that the defendants, the Railroad Commission of Georgia, and each member thereof, to wit, the individual defendants, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, be, and the same are hereby, enjoined from any and all order, direction, action or legal steps instituting or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said commission, dated August 2, 1898, for the reason that said order is null and void, and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax." The court in its opinion said: "It is not deemed necessary to enjoin the Attorney General, for it is presumed that the eminent lawyer, who is the official head of the bar of the State, will, without such injunction, accord all appropriate respect to the decision of the court."

Opinion of the Court.

Upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was reversed, June 7, 1900, with directions to dismiss the case, Judge McCormick delivering the opinion of the court, Judge Shelby dissenting. 102 Fed Rep. 794.

The case was thereupon brought to this court upon writ of certiorari, and was submitted for decision at the last term.

After the submission of the case in this court the above part of the War Revenue Act of 1898 relating to stamps to be attached to bills of lading, manifests, etc., was amended in important particulars by an act of Congress approved March 2, 1901, c. 806. One amendment, which took effect on and after July 1, 1901, provided that the above part of the act of 1898 should be amended to read as follows:

"FREIGHT: It shall be the duty of every railroad or steamboat company, carrier or corporation, or person whose occupation is to act as such, *except persons, companies or corporations engaged in carrying on a local or other express business*, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and cancelled, as is in this act provided, to each of said bills of lading, manifest or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such a bill of lading, manifest or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier or corporation, or person to a penalty of fifty dollars for each offence, and no such bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 31 Stat. 938, 945.

This change in the law renders it unnecessary to consider any of the important questions determined in the Circuit Court and Circuit Court of Appeals under the act of 1898. The object of this suit was to prevent the enforcement of the order of

the Railroad Commission based upon its construction of that act. But whatever might be now held as to the meaning and scope of the act of 1898 as applied to express companies, the amendatory statute of 1901, in declaring what companies, corporations and persons shall attach the required stamp to bills of lading, manifests and receipts for goods or other property to be transported, distinctly excludes express companies. So that no actual controversy now remains or can arise between the parties. The plaintiffs do not need any relief, because the act of 1901 accomplishes the result they wished.

Although this cause was determined in the Circuit Court of Appeals and was submitted here prior to July 1, 1901, our judgment must have some reference to the act of 1901. In *United States* v. *Schooner Peggy*, 1 Cranch, 103, 109, the Chief Justice, delivering the opinion of the court, said: "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation." *Mills* v. *Green*, 159 U. S. 651, 653; *New Orleans Flour Inspector* v. *Glover*, 160 U. S. 170; *Same* v. *Same*, 161 U. S. 101.

If the cause had not been submitted in the Circuit Court of Appeals until after the act of 1901 took effect, that court, we apprehend, would have dismissed the suit upon the ground that by the operation of that legislation the whole subject-matter of litigation had disappeared and that the order of the Railroad Commission, even if orignally valid, ceased to have any effect. The question whether the express company or the shipper was required by the act of 1898 to furnish the required stamp, as well as the question whether the Railroad Commission had any power to make the order of which complaint is made, would thus have become immaterial, and the dismissal of the suit would have resulted without any reference to the merits of the case as affected by the act of 1898.

As the order of the Circuit Court of Appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of the act of 1901, we need not consider the grounds upon which that court proceeded, or any of the questions determined by it or by the Circuit Court, and

The judgment must be affirmed without costs in this court, and it is so ordered.

WILSON v. MERCHANTS' LOAN & TRUST CO. OF CHICAGO.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 67. Argued October 29, 30, 1901. — Decided December 2, 1901.

An agreed statement of facts which is so defective as to present, in addition to certain ultimate facts, other and evidential facts upon which a material ultimate fact might have been but which was not agreed upon or found, cannot be regarded as a substantial compliance with the requirements of Rev. Stat. § 649 and of Rev. Stat. § 700.

THE statement of facts will be found in the opinion of the court.

Mr. Delevan A. Holmes for plaintiff in error. *Mr. W. E. Mason* was on his brief.

Mr. John N. Jewett for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error brings this case here to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, 98 Fed. Rep. 688, affirming a judgment of the District Court of Illinois in favor of the defendant. The plaintiff in error is the receiver of the First National Bank of Helena,

Montana, and brought this action against the defendant to enforce an assessment of 100 per cent ordered by the Comptroller of the Currency on all owners of shares in that bank. In his declaration the plaintiff, after alleging the organization of the bank, his appointment as receiver and the assessment by the Comptroller, averred that "the Merchants' Loan and Trust Company, a corporation, at some time between the first day of December, 1894, and first day of June, 1895, (the exact date being to plaintiff unknown,) purchased and became the owner of 120 shares of the capital stock of said First National Bank of Helena, Montana, of the par value of one hundred dollars each, and continued to be and was at the time said bank suspended and ceased to do business the real owner of the same; but in order to evade the responsibility imposed by law upon the shareholders in said bank caused said shares to be placed on the books of said bank in the name of P. C. Peterson, one of its employés, in whose name said shares appeared on the said books at the time of said failure. And the plaintiff avers that the said Peterson was at the time said stock was issued to him as aforesaid and at the time of the failure of said bank, a person of small means and not responsible financially."

The plaintiff demanded judgment for the sum of $12,000, being $100 on each share of the stock in the bank owned (as alleged) by the defendant.

As one of several defences to the action, the defendant pleaded that the plaintiff ought not to maintain his action "because it says that it did not, at any time between the first day of December, 1894, and the first day of June, 1895, or at any other time, purchase or become the owner of one hundred and twenty shares of the capital stock of the said First National Bank of Helena, Montana, or any share or shares of the capital stock of said bank, and of this the said defendant puts itself upon the country," etc.

Under these pleadings the plaintiff, of course, had the burden of proving ownership of the stock by the defendant.

The parties waived a trial by jury and entered into the following stipulation:

"It is hereby stipulated and agreed between the parties

herein that trial by jury in this case be waived; that this cause may be submitted to the Honorable Christian C. Kohlsaat, judge of this court, upon the foregoing statement of facts, duly signed by the attorneys of the parties respectively, and that for the purpose of such trial the said statements of facts shall be taken as absolutely true, and shall be taken and considered as all the facts concerning the transactions therein referred to, subject to any and all objections which might properly be urged to the competency or materiality of any part thereof."

Upon the trial before the court, without a jury, the statement of facts as agreed upon between the parties was put in evidence, and such statement contained all the evidence in the case, which was thereupon submitted to the court for its decision. The court made no special findings of facts but made a general finding of the issues for the defendant, embodied in a judgment which was entered as follows:

"Now come the parties by their attorneys, and thereupon a jury is waived by written stipulation, and this cause is submitted to the court for trial, and the court having heard the evidence and arguments of counsel, and being now fully advised, finds the issues for the defendants, to which finding the plaintiff excepts, and thereupon the plaintiff enters his motion for a new trial, which is heard and overruled, to which ruling the plaintiff excepts. It is thereupon considered and adjudged by the court that the defendants recover of the plaintiff their costs in this behalf to be taxed and that execution issue therefor, to which judgment the plaintiff then and there excepts."

The statement of facts agreed upon and filed in the court was subsequently allowed as a bill of exceptions. There was no exception taken to any fact contained in this statement, nor in the progress of the trial, nor was there any request to find other special facts. The only exception taken was to the general finding of the court in favor of the defendant. From this agreed statement of facts it appears that on April 15, 1893, the defendant loaned to one Ashby of Helena, Montana, $12,000, and took his note in the usual form payable on August 16, 1893. As collateral security for the payment of the note at maturity, Ashby signed in blank and delivered to the defendant a certificate rep-

resenting 150 shares of the capital stock of the Helena National Bank of Helena, Montana. The note taken for the loan was of the kind usually termed a collateral note, and authorized the sale of the collateral deposited as security therefor upon default in the payment of the note. At the time of the loan Ashby was president of the Helena National Bank. On July 26, 1893, Ashby made a general assignment for the benefit of his creditors, and among the property assigned by him was the certificate for 150 shares of the capital stock of the Helena National Bank, described by the assignor as then held by the Merchants' Loan and Trust Company in pledge. About the date of the assignment Ashby resigned the presidency of the Helena National Bank. In the summer of 1894 the Ashby note still remained unpaid, and the certificate of stock remained in the possession of the defendant, no transfer thereof being made upon the books of the bank. Later in the year 1894 the parties in interest in Helena proposed to consolidate the Helena National Bank with the First National Bank of Helena, and the consent of a sufficient number of shareholders in the bank was obtained before the defendant was asked to consent to the transfer of the shares held by it in pledge, on the same terms upon which the owners of shares in the Helena National Bank had agreed to a consolidation of the two banks, by taking shares in the First National Bank of Helena in exchange for their shares in the Helena National Bank, at the rate of 80 per cent of new shares in exchange for the old. In response to such request the defendant sent the certificates for the 150 shares in the Helena National Bank to the president of that bank. In exchange therefor certificates for 120 shares of stock in the First National Bank of Helena were sent to the defendant, the shares being entered, at request of defendant, on the books of the bank and in the certificates, in the name of P. C. Peterson, an employé of the defendant. Subsequently, the First National Bank of Helena went into the hands of a receiver, who found the 120 shares standing on its books in the name of Peterson. The receiver, after the assessment was made, commenced this action against the defendant trust company, alleging that it was the real owner of the stock, and that

it stood in the name of Peterson for the purpose of enabling the defendant to evade liability as owner.

The note remains unpaid, although two small payments on account have been made by the assignee of the maker since the assignment.

It is part of the statement agreed upon that the original shares of stock were placed in defendant's possession simply as a pledge or collateral security for the payment of the note made by Ashby, and the certificates which have been substituted for them, as already mentioned, "have ever since been and now are in the possession and control of the defendant, and are held by it in the same way and for the same purpose as the certificates for one hundred and fifty shares of the capital stock of the Helena National Bank were originally held, except as the conditions may have been changed by the facts hereinbefore stated, but that neither the defendant nor the said Peterson ever took any part in the management of either of said banks or participated in the administration of their affairs." The "facts hereinbefore stated" consisted not only of those which have been given above, but also of correspondence between the officers of defendant and the officers of the Helena National Bank and the assignee of the pledgor Ashby, which is set out in the agreed statement.

This statement has been referred to for the purpose of understanding the materiality of certain facts not found or agreed upon, the failure to do which prevents our use of the statement in the decision of the case. The contention of the plaintiff herein is that the substitution of the original stock for that of the First National Bank of Helena was made without the consent of the pledgor, and amounted to a conversion of the stock and made the defendant, when it took the shares of stock in the consolidated bank, the owner thereof, and rendered it liable to assessment as such owner, notwithstanding the fact that the stock was entered and remained on the books of the bank and in the certificate issued by the bank, in the name of Peterson, as owner.

Aside from the question whether the defendant had or had not the right as pledgee of the stock in the Helena National

Bank to cause the same to be transferred into shares of the other bank after a majority of the stockholders had consented to a consolidation, it would seem that if Ashby, the owner, had himself consented to the arrangement, or subsequently ratified it, the substituted stock would remain under the same terms and conditions as attached to the original stock, and it would be simply a pledge to and not an ownership of stock by the defendant, and as the stock never stood in the name of the defendant, the case would be governed by that of *Pauly* v. *State Loan & Trust Company*, 165 U. S. 606, and the cases there cited, and *Jackson* v. *Emmons*, 176 U. S. 532.

The difficulty we meet, which prevents the decision of the case from resting on the statement of facts, lies in the omission therefrom of any finding or agreement upon the question of fact whether the pledgor had or had not consented to the change, and instead of any such finding or agreement there is placed in the statement certain correspondence from which, together with other facts stated, an inference of consent or perhaps ratification might be drawn, but is not found or agreed upon, thus leaving the ultimate fact of consent or non-consent a matter of inference, and an inference of fact and not of law, and this is a material fact arising upon the statement as agreed upon.

Neither is there any finding upon the question of the consent of the assignee of the pledgor, to the substitution of the stock, or upon the question of ratification by him. There are facts from which the consent or ratification might be inferred, or the contrary, but there is no finding of any ultimate fact regarding the matter.

The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court, Rev. Stat. § 649, and Rev. Stat. § 700, is that when there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be

inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.

As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held that upon a trial by the court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties, and if the finding of facts be general, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by a bill of exceptions, and in such case the bill cannot be used to bring up the whole testimony for review any more than in a trial by jury. *Norris* v. *Jackson*, 9 Wall. 125.

In this case the finding is general, and, strictly construing the statute, the only questions which would be reviewable would be those questions which arose during the progress of the trial, and which were presented by bill of exceptions. It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. *Supervisors* v. *Kennicott*, 103 U. S. 554. But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts and the statement must not merely present evidence from which such facts or any of them may be inferred.

An exception to a general finding of the court on a trial without a jury brings up no question for review. The finding is conclusive, and there must be exceptions taken to the rulings of the court during the trial in order to permit a review thereof. *Insurance Company* v. *Folsom*, 18 Wall. 237.

In *Martinton* v. *Fairbanks*, 112 U. S. 670, which was a trial before the judge without the intervention of a jury and where there was only a general finding of facts and a judgment for the plaintiff below, the court decided that an exception to the

general finding of the court for the plaintiff upon the evidence adduced at the trial presented no question of law which the court could review. In that case there was no agreed statement of facts.

Here, although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts together with certain other facts evidential in their nature from which an important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute.

In *Raimond* v. *Terrebonne Parish*, 132 U. S. 192, it was said that the agreed statement of facts by the parties or a finding of facts by the Circuit Court must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts or from which they may be inferred.

In *Glenn* v. *Fant*, 134 U. S. 398, there was a stipulation that the case should be heard upon an agreed statement of facts annexed, with leave to refer to exhibits filed therewith. It was held that the stipulation could not be regarded as taking the place of a special verdict or of a special finding of facts, and that the court had no jurisdiction to determine the question of law arising thereon.

It is true there was no bill of exceptions in that case, but the bill in this case presents no exception taken during the progress of the trial, and only contains an exception to the conclusion of the trial court in ordering judgment upon the issues in favor of the defendant.

Lehnen v. *Dickson*, 148 U. S. 71, 77, decided that any mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, could not be deemed a special finding of facts within the scope of the statute; and if there were a general finding and no agreed statement of facts, the court must accept that finding as conclusive and limit its inquiry to the sufficiency of the complaint and to the rulings, if any be preserved on questions of law arising during the trial. The court, in the opinion written by Mr. Justice Brewer, said:

"But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

In *St. Louis* v. *Western Union Telegraph Company*, 166 U. S. 388, it was held that the special finding of facts referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court is not a mere report of the evidence, but a finding of those ultimate facts, upon which the law must determine the rights of the parties, and if the finding of facts be general, only such rulings made in the progress of the trial can be reviewed as are presented by a bill of exceptions, and in such case the bill cannot be used to bring up the whole testimony for review any more than in a trial by jury.

We now hold, in accordance with the authorities, that an agreed statement of facts which is so defective as to present, in addition to certain ultimate facts, other and evidential facts upon which a material ultimate fact might have been but which was not agreed upon or found, cannot be regarded even as a substantial compliance with the statute. Being concluded by the general finding of the issues in favor of defendant, there is no error in the record, and the judgment must be

Affirmed.

Counsel for Parties.

HASELTINE *v.* CENTRAL BANK OF SPRINGFIELD, MISSOURI (NO. 1).

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 62. Submitted October 29, 1901.—Decided December 2, 1901.

The judgment of the Supreme Court of a State reversing that of the court below, and remanding the case for further proceedings to be had therein, is not a final judgment, nor is this court at liberty to consider whether such judgment was an actual final disposition of the merits of the case. The face of the judgment is the test of its finality.

THIS was an action brought originally in the Circuit Court for Greene County, Missouri, by the Haseltines against the Central National Bank, to recover double the amount of certain alleged usurious interest paid by the plaintiffs to defendant, and which they sought to recover under the second clause of Rev. Stat. sec. 5198, providing that "in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same."

The trial court rendered judgment in favor of the plaintiffs for $831.70. From this judgment defendant appealed to the Supreme Court of the State, which reversed the judgment of the trial court upon the ground that the plaintiffs had neither paid nor tendered the principal sum due, and remanded the cause "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered."

Defendant moved to dismiss the writ of error upon the ground that this was not a final judgment.

Mr. S. A. Haseltine and *Mr. James Baker* for plaintiffs in error.

Mr. John Ridout for defendant in error.

Opinion of the Court.

Mr. Justice Brown delivered the opinion of the court.

The motion to dismiss must be granted. We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. The case of *Mower* v. *Fletcher*, 114 U. S. 127, is not in point, as the judgment of the Supreme Court of the State remanded that case to the inferior court with an order to enter a specified judgment, nothing being left to the judicial discretion of the court below. A like ruling was made in *Atherton* v. *Fowler*, 91 U. S. 143, and *Commissioners of Tippecanoe County* v. *Lucas*, 93 U. S. 108.

While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher*, they might have sued out a writ of error at once.

McComb v. *Knox County Commissioners*, 91 U. S. 1, is a case in point. That was a writ of error to the Court of Common Pleas of the State of Ohio. The case had been taken to the Supreme Court of the State, where the judgment of the Common Pleas was reversed for error in sustaining a demurrer to the replies, and overruling that to the answer. Upon suggestion by defendant that he might ask leave to amend his answer, the case was remanded "for further proceedings according to

law." Upon the mandate being filed, defendant did not ask leave to amend his answer, but elected to rely upon his defence already made. Thereupon the court gave judgment against him, and he sued out a writ of error from this court. We held that the judgment of the Supreme Court, being one of reversal only, was not final; that so far from putting an end to the litigation, it purposely left it open; that the law of the case upon the pleadings as they stood was settled, but ample power was left in the Common Pleas to permit the parties to make a new case by amendment; that the final judgment was that of the Common Pleas; that "it may have been the necessary result of the decision of the question presented for its determination; but it is none the less, on that account, the act of the Common Pleas," and was, when rendered, open to review by the Supreme Court. The writ was dismissed. A similar case is that of *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339.

This writ of error is therefore dismissed upon the authority of *Brown* v. *Union Bank of Florida*, 4 How. 465; *Pepper* v. *Dunlap*, 5 How. 51; *Tracy* v. *Holcombe*, 24 How. 426; *Moore* v. *Robbins*, 18 Wall. 588; *St. Clair Co.* v. *Lovingston*, 18 Wall. 628; *Parcels* v. *Johnson*, 20 Wall. 653; *Baker* v. *White*, 92 U. S. 176; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Johnson* v *Keith*, 117 U. S. 199.

Dismissed.

HASELTINE *v.* CENTRAL BANK OF SPRINGFIELD, MISSOURI (NO. 2).

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 63. Submitted October 29, 1901.—Decided December 2, 1901.

In an action upon a note given to a national bank, the maker cannot set off, or obtain credit for, usurious interest paid in cash upon the renewals of such note, and others of which it was a consolidation.

In cases arising under the second clause of Rev. Stat. sec. 5198, the person by whom the usurious interest has been paid can only recover the same back in an action in the nature of an action of debt. The remedy given by the statute is exclusive.

Statement of the Case.

This was an action instituted in the Circuit Court of Greene County, Missouri, by the Central National Bank to recover of the defendants the amount of a promissory note for $2240, executed June 15, 1896, by two of the defendants as principals and two others as sureties.

The answer was a general denial and a special defence of usury in the original notes, and partial payments, as set up in the several paragraphs of the answer.

The case was referred to a referee, who reported the note sued upon to be a renewal note, and a consolidation of five original notes, the first of which was for $800, given July 27, 1891; the second for $100, of the same date; the third for $500, dated January 24, 1892, and credited by $100 payment thereon; the fourth for $340, dated January 16, 1893, and the fifth and last for $600, dated May 29, 1893.

The referee further found that the defendants had received on this note of $2240 (or rather out of the notes constituting that note) the sum of $2199.35 in cash, making the amount reserved out of the note when it was made of $40.65. That there had been paid *cash* discounts upon the several *renewals* of the notes which constituted the $2240 note sued upon, down to October 24, 1894, exclusive of the amounts reserved out of the notes at the time they were originally given, the sum of $566.70, which cash discounts were paid in advance at the dates of the several renewals. That the whole amount of discounts and interest paid, as well as those deducted by the bank, upon all said loans from the beginning to the end down to and including the note sued on, was $947.50. That these payments were made in excess of the legal rate for said loans.

Upon this report the court entered judgment in favor of the plaintiffs for $2199.35, (or, apparently, by mistake $2199,) that being the face of the note sued on after deducting the discount of $40.65, reserved when the note was executed. Upon appeal to the Supreme Court this judgment was affirmed, 155 Missouri, 58, and defendant sued out this writ of error.

Mr. S. A. Haseltine and *Mr. James Baker* for plaintiffs in error.

Mr. John Ridout for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

The only question involved in this case is whether, in an action upon a note given to a national bank, the maker may set off usurious interest *paid in cash* upon renewals of such note, and of all others of which it was a consolidation.

In this case, defendants sought to show that they had paid to the plaintiff bank within two years prior to the execution of this note, upon other notes of which this was a consolidation, and also upon this note, usurious interest aggregating $580; which they asked to have deducted from the principal sum of $2240, represented by this note, thereby reducing the plaintiff's claim to $1660.

We understand it to be conceded that, as the note in question was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the National Banking Act and not by the law of the State. *Farmers' & Mechanics' Bank* v. *Dearing*, 91 U. S. 29. In that case it was held that a law of New York forfeiting the entire debt for usury was superseded by the National Banking law, and that such law was only to be regarded in determining the penalty for usury.

That part of the original National Banking Act which deals with the subject of usury and interest is now embraced in sections 5197 and 5198 of the Revised Statutes, the first one of which authorizes national banks to charge interest "at the rate allowed by the laws of the State," and when no rate is fixed by such laws, a maximum rate of seven per cent. The next section is as follows:

"5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover

back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Two separate and distinct classes of cases are contemplated by this section: *first*, those wherein usurious interest has been taken, received, reserved or charged, in which case there shall be "a forfeiture of the entire interest which the note, bill or other evidence of debt *carries with it*, or which has been *agreed to be paid* thereon;" *second*, in case usurious interest has been *paid*, the person paying it may recover back twice the amount of the interest "thus paid from the association taking or receiving the same."

While the first class refers to interest taken and received, as well as that reserved or charged, the latter part of the clause apparently limits the forfeiture to such interest as the evidence of debt carries with it, or which has been agreed to be paid, in contradistinction to interest actually *paid*, which is covered by the second clause of the section. Carrying this perfectly obvious distinction in mind, the cases in this court are entirely harmonious.

That of *Brown* v. *Marion National Bank*, 169 U. S. 416, arose under the *first* clause. The facts are not stated in the report of the case, but referring to the original record, it appears that plaintiff sued the bank to recover twice the amount of certain usurious interest paid to it. Another action was consolidated with this in which plaintiff sought to enjoin defendant from proving certain notes against the estate of which he was assignee, in which a large amount of usurious interest had been included.

In the opinion, a distinction is drawn between usurious interest carried with the evidence of debt or which has been agreed to be paid, and interest which has actually been paid, and it was said that interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of section 5198, and become principal; and that, in a suit by a national bank upon the note, the debtor may insist that the entire interest, legal and usurious, included in his

written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt with interest at the legal rate from the commencement of the suit; and that the forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. It was further held that interest included in a renewal note is not interest *paid*, since if it were so, the borrower could, under the second clause of the section, sue the lender and recover back twice the amount of the interest thus paid, when he had not, in fact, *paid* the debt nor any part of the interest as such. The words, "in case the greater rate of interest has been paid," in section 5198, refer to interest actually paid as distinguished from interest included in the note and "agreed to be paid."

The cases under the *second* clause of the section are more numerous. *Barnet* v. *National Bank*, 98 U. S. 555, was an action by a national bank upon a bill of exchange. Defendants set up that the acceptors had been constant borrowers from the bank for several years, and that it had taken from them a large amount of usurious interest; that the bill in suit was the last of eight renewals, and that illegal interest had been taken upon the series to the amount of $1116, which it was insisted should be applied as a payment upon the bill in question. It was also insisted that illegal interest had been taken upon other bills of exchange to the amount of $6363.24, and that the defendants were entitled to recover double this amount from the bank. It was *held* that the state statutes upon the subject of usury should be laid out of view, and that where a statute created a new right or offence and provided a specific remedy or punishment, that remedy alone could apply; that the *payment* of usurious interest being distinctly averred, it could not be recovered by way of offset or payment of the bill in suit, and that the same rule applied to the payment of interest upon other bills of exchange which the defendants sought to recover back.

The case of *Driesbach* v. *National Bank*, 104 U. S. 52, was a like suit by a bank upon a note, upon several renewals of

which usurious interest had been paid. It was said that, as the claim was not for interest stipulated for and included in the note sued on, but for the application of what had been actually *paid* as interest to the discharge of principal, there could be no set-off against the face of the notes.

In *Stephens* v. *Monongahela Bank*, 111 U. S. 197,—a similar case of interest actually paid—the averments of the defence were made under the first clause of the section; that "the bank knowingly took, received and charged" usurious interest, but as it elsewhere appeared that the interest stipulated had not been included in the note, but that interest had been actually paid at the time of the discount and renewals, which it was sought to apply to the discharge of the principal, the defence was held insufficient.

The construction of both clauses of this section having been thus settled by this court, it only remains to determine to which class of cases the one under consideration properly belongs. As to this there can be no room for doubt. The referee finds that there was paid cash discounts on the several renewals of the notes which constitute the $2240 note, as well as the renewal of said note as executed, down to October 24, 1894, exclusive of the amounts reserved out of the notes at the time they were originally given, the sum of $566.70, which cash discounts were paid in advance at the date of the several renewals. He further found that the "defendants in their answer are only asking credit for the payments down to and including October 29, 1894, which aggregate the sum of $540.40." Under the rulings last above cited the person making these cash payments can only recover them back by a direct action against the association taking or receiving the same.

The Supreme Court of Missouri was correct in holding that the defendants could not be allowed set-off or credit for the usurious interest thus paid, the remedy provided by the statute being exclusive, and its judgment is therefore

Affirmed.

STORTI *v.* MASSACHUSETTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 378. Argued November 19, 20, 1901. — Decided December 2, 1901.

The Federal Constitution neither grants nor forbids to the governor of a State the right to stay the execution of a sentence of death.

The question whether, under a state statute a convicted party has a year in which to file a motion for a new trial, and that therefore no sentence can be executed on him until that time, is a question to be determined by the courts of the State.

The treaty of February 26, 1871, between the United States and Italy only requires equality of treatment, and that the same rights and privileges be accorded to a citizen of Italy that are given to a citizen of the United States under like circumstances, and there is nothing in the petition tending to show such lack of equality.

Section 761 of the Revised Statutes provides as to *habeas corpus* cases that "the court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require;" and this mandate is applicable to this court, whether exercising original or appellate jurisdiction.

On May 23, 1901, the appellant filed in the Circuit Court of the United States for the District of Massachusetts his petition in *habeas corpus*.

In that petition he stated that he was a citizen of Italy, and a subject of its King; that he was detained by the respondent under a warrant issued by the superior court of Suffolk County, reciting a conviction of murder, and directing the warden to inflict death by passing a current of electricity through him; that the time fixed for the execution of the sentence was on the week beginning April 7, 1901; that on April 9, 1901, the governor, with the advice of the council, issued a document purporting to respite the execution of sentence, the respite to expire on Saturday May 11, 1901; that on May 10, 1901, he presented a petition for a writ of *habeas corpus* to the said Circuit Court, which petition was denied on May 11, 1901; that

from such denial he forthwith claimed and was allowed an appeal to the Supreme Court of the United States, and that such appeal was there pending and undetermined. The petition further stated that on May 10, he filed in the superior court for the county of Suffolk a motion for a new trial, in accordance with the provisions of the Massachusetts statutes, which motion was still pending and undetermined.

Upon these facts he asserted, first, that no law of Massachusetts provided for the punishment of a person sentenced to death, where the week appointed by the court for the execution had elapsed without execution and without any lawful action by the governor in the way of pardon, commutation or respite, and therefore that the detention by the warden was contrary to the provisions of the first section of the Fourteenth Amendment of the Federal Constitution; second, that for the same reason the detention was contrary to the third article of the treaty of February 26, 1871, between the United States of America and His Majesty the King of Italy, 17 Stat. 845, and contrary to section 2 of Article 6 of the Constitution of the United States; third, that by section 28 of chapter 214 of the Public Statutes of Massachusetts the court in which the trial of an indictment is had may at the term of the trial, or within one year thereafter, grant a new trial; that therefore execution could not lawfully be done upon him until the expiration of a year from the term at which he was convicted, to wit, in this case before July 1, 1901, and that the execution of the sentence before that date would deprive him of his life without due process of law, and would deny to him the equal protection of the laws, contrary to the first section of the Fourteenth Amendment; fourth, that for the same reason the execution of the sentence would be contrary to the third article of the treaty between the United States and Italy; fifth, that the execution of the sentence within the year would deprive him of his right under the statutes of Massachusetts to move for a new trial within the year, and of his right to be present at the decision of such motion, which right was guaranteed to him by article 23 of the treaty between the United States and Italy, which reads as follows: "The citizens of either party shall have free access

to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ, in defence of their rights, such advocates, solicitors, notaries, agents and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials;" sixth, that the motion for a new trial which he had filed on May 10, not having been determined, execution could not lawfully be done upon him until the decision of that motion, notwithstanding which he had reason to apprehend that the respondent intended to immediately, upon the determination of the appeal to the Supreme Court of the United States, cause execution to be done upon him, which execution would deprive him of his rights under the Fourteenth Amendment and article 23 of the treaty; seventh, that the respondent derives his authority to hold the petitioner in custody solely by virtue of the provisions of chapter 326 of the Massachusetts Statutes of 1898, and that by them no authority was given to him to retain the custody of the petitioner after the expiration of the week appointed by the court for the execution of the sentence, except through the lawful action of the governor in granting a respite, that no lawful action had been taken by the governor in the matter, and that therefore the petitioner was detained of his liberty contrary to the Fourteenth Amendment: and, eighth, that for the same reason he was deprived of his liberty contrary to the Fourteenth Amendment and the third article of the treaty between the United States and Italy. The third article of the treaty between the United States and Italy, referred to in this petition, is as follows:

"The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges

as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

On the presentation of this petition to the Circuit Court, that court dismissed the same for want of jurisdiction, without prejudice to an application to the courts of the State. *In re Storti*, 109 Fed. Rep. 807. A certificate of this fact was signed by the Circuit Judge, and from the order dismissing the petition an appeal was taken to this court.

Mr. G. Philip Wardner and *Mr. William M. Stockbridge* for appellant.

Mr. Hosea M. Knowlton for appellee. *Mr. Arthur W. DeGoosh* was on his brief.

Mr. Justice Brewer delivered the opinion of the court.

The grounds set forth in this petition for a discharge by the Federal court of the petitioner from the custody of the warden are wholly without foundation, and the case is another of the numerous instances in which, as said by Mr. Chief Justice Fuller, in *Craemer* v. *Washington State*, 168 U. S. 124, 128:

"Applications for the writ have been made, and appeals taken from refusals to grant it, quite destitute of meritorious grounds, and operating only to delay the administration of justice."

It is an attempt to substitute a writ of *habeas corpus* for a writ of error, and to review the proceedings in a criminal case in the state court by such collateral attack rather than by direct proceedings in error—something which this court has repeatedly said ought seldom to be done. See, among other cases, *Baker* v. *Grice*, 169 U. S. 284; *Tinsley* v. *Anderson*, 171 U. S. 101, 104, and cases cited in the opinion; *Markuson* v. *Boucher*, 175 U. S. 184; *Minnesota* v. *Brundage*, 180 U. S. 499.

Many of the allegations in the petition are general and obscure, and it is not easy to determine therefrom in what particular the petitioner considers the proceedings against him to be

in conflict with the Federal Constitution or the treaty with Italy.

Some of the matters presented involve only the construction of state statutes and should be determined by the courts of the State, whose determination in respect thereto is binding upon this court. It must be borne in mind that under section 763 of Rev. Stat. the jurisdiction of the Federal court to issue a writ of *habeas corpus* is limited to "the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States," and to cases arising under the laws of nations.

With these considerations in mind we pass to notice more particularly the matters set forth in the petition. It is stated that the petitioner was sentenced to be put to death at a given time; that he was not then put to death on account of a respite granted by the governor, and that such respite was unlawfully granted. Wherein the unlawfulness consisted is not stated, and whether it were lawful or not is a matter dependent on the laws of the State, and to be determined by its courts. The Federal Constitution neither grants nor forbids to the governor of a State the right to stay the execution of a sentence. So also it is said that under the Massachusetts statutes the party convicted has a year in which to file a motion for a new trial, and, therefore, no sentence can be executed on him until that time. Whether that be so or not is also a question depending on the statutes of the State, and to be determined by its courts. The State may see fit to postpone the execution of a capital sentence for a year, or provide that it shall be carried into effect more speedily, and what the State has provided in the matter is for its courts to decide.

It is averred that the proceedings in the Massachusetts courts are in conflict with the rights secured by the treaty between Italy and the United States, but the articles of the treaty referred to only require equality of treatment and that the same rights and privileges be accorded to a citizen of Italy that are given to a citizen of the United States under like circumstances, and there is nothing in the petition tending to show a lack of

such equality of treatment. The petition, therefore, is plainly without merit.

But the principal contention of counsel is that the petition was dismissed by the Circuit Court for want of jurisdiction and a certificate thereof given, and that under section 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, the only question that we can consider is one of jurisdiction, and the following cases are referred to: *Horner* v. *United States*, 143 U. S. 570; *Chappell* v. *United States*, 160 U. S. 499; *Press Publishing Company* v. *Monroe*, 164 U. S. 105, and *Huntington* v. *Laidley*, 176 U. S. 668.

We do not question that rule as applied to ordinary suits and actions, but section 761, Rev. Stat., provides as to *habeas corpus* cases that "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." That mandate is applicable to this court, whether it is exercising its original or appellate jurisdiction. Proceedings in *habeas corpus* are to be disposed of in a summary way. The interests of both the public and the petitioner require promptness; that if he is unlawfully restrained of his liberty it may be given to him as speedily as possible; that if not, all having anything to do with his restraint be advised thereof, and the mind of the public be put at rest, and also that if further action is to be taken in the matter it may be taken without delay. Especially is this true when the *habeas corpus* proceedings are had in the courts of a jurisdiction different from that in pursuance of whose mandate he is detained. This matter of promptness is not peculiar to these cases in Federal courts, but is the general rule which obtains wherever the common law is in force. It is one of those things which give to such proceedings their special value, and is enforced by statutory provisions, both state and Federal. The command of the section is "to dispose of the party as law and justice require." All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in *habeas corpus*.

As the petition presented no case entitling the petitioner to

a discharge, as the grounds stated therein are absolutely frivolous, and as the result reached in the Circuit Court was in accordance with law and justice,

The judgment is affirmed and it is further ordered that the mandate issue at once.

PINNEY *v.* NELSON.

ERROR TO THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, CALIFORNIA.

No. 65. Submitted April 26, 1901.—Decided December 2, 1901.

When a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liability which those laws impose will attend the transaction of such business.

THIS was an action to enforce a personal liability of stockholders. It was commenced in a justice's court of Los Angeles city, Los Angeles County, California, on September 30, 1898, by the defendant in error against the plaintiffs in error. It was subsequently transferred to the superior court of the county, where a trial was had on January 17, 1900, before the court without a jury. A stipulation was signed as to the truth of various averments in the complaint and answer, which concluded as follows:

"And it is stipulated that the only question in this case is as to whether section 322 of the Civil Code of California is in violation of the provisions of the Constitution of the United States, and if it is in violation of such provisions defendants are entitled to judgment, but if said section is not in violation of said provisions, then plaintiff is entitled to judgment as prayed for in his complaint."

Findings of fact were also made, among which were the following:

Statement of the Case.

"II. That the Los Angeles Iron and Steel Company was a corporation organized on the 8th day of March, 1893, and incorporated under the laws of the State of Colorado; that the seventh provision of its articles of incorporation is as follows, to wit: The said company is created for the purpose of carrying on part of its business beyond the limits of the State of Colorado, and the principal office of said company in the State shall be kept at the city of Denver, Arapahoe County, and the principal plant and principal operations of said company beyond the limits of the State shall be in Los Angeles County, State of California, and such other places in the State of California as may be decided upon by the board of directors. The principal business of said company in the State of Colorado shall be carried on in Arapahoe County.

"III. That the defendants are and were at all times herein mentioned residents and citizens of the State of California.

"IV. That all the indebtedness of said Los Angeles Iron and Steel Company to plaintiff and to plaintiff's assignors was created by contracts made, executed and to be performed in the State of California."

"VI. That at the time the said indebtedness was created and incurred by the said company there were issued of the capital stock thereof the number of 1311 shares, and that the defendants were at said times the owners respectively of the number of said shares as set opposite their respective names, as follows, to wit: H. L. Pinney, 50 shares; C. L. Pinney, 42 shares; W. C. Patterson, 35 shares; C. W. Damerel, 91 shares; F. E. Little, 22 shares; Thomas Brooks, 38 shares."

Upon the stipulation and findings a judgment was rendered in favor of the plaintiff. A writ of error was subsequently sued out from this to that court, it being the highest court in the State to which the action could be taken.

Article 12, section 15, of the constitution of California, adopted in 1879, reads:

"No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."

Section 322 of the Civil Code of California, as amended March 15, 1876, provides as follows:

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith.

"The liability of each stockholder of a corporation, formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this State."

By the stipulation above referred to the truthfulness of the following averment in the answer was admitted:

"Defendants allege that there is no statute of the State of Colorado providing that stockholders shall be liable for any portion of the indebtedness of a corporation, and allege that under the laws of the State of Colorado a stockholder in a corporation is not liable for any portion of the indebtedness of said corporation."

Mr. M. L. Graff and *Mr. J. W. McKinley* for plaintiffs in error.

Mr. W. S. Taylor, *Mr. Edward W. Forgy* and *Mr. J. A. Anderson* for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The plaintiffs in error rely upon the proposition that the liability of a stockholder is determined by the charter of the cor-

poration and the laws of the State in which the incorporation is had. "If the constitution to which a corporator has agreed does *not* provide for individual liability to creditors, he cannot be charged with individual liability anywhere. (Morawetz on Corporations, 2d ed. sec. 874.)" They invoke the *lex loci contractus*, and say that the stockholders' contract was made in Colorado, that being the State in which the Los Angeles Iron and Steel Company was incorporated; that by the laws of that State there is no personal liability of stockholders; that it is not within the power of California to change the terms of that contract, the Federal Constitution (Art. I, sec. 10) forbidding a State to pass a law impairing the obligation of contracts; that while California, which prescribes an individual liability of stockholders, may if it sees fit exclude every corporation of another State whose stockholders do not assent to such liability, yet if it fails to do so, and such Colorado corporation actually comes into California to transact business, such coming into the State and the transaction of business therein do not change the terms of the stockholders' contracts, or impose a personal liability; and also that in such a case an attempt to enforce the statutory provisions of California so far as to change the personal liability of corporators in the foreign corporation, is in conflict with the due process and equal protection clauses of the first section of the Fourteenth Amendment.

With reference to the contention that the law of California impairs the obligation of the contract of the stockholders, it is enough to say that that law, both constitutional and statutory, was enacted long before the incorporation of the Los Angeles Iron and Steel Company, and that therefore section 10 of Article I of the Federal Constitution has no application. "It is equally clear that the law of the State to which the Constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is claimed to be impaired." *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 391. See also *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111; *McCullough* v. *Virginia*, 172 U. S. 102, 116.

Passing to a consideration of the stockholders' contract in the light of the other contention, it may be said that ordinarily

it is controlled by the law of the State in which the incorporation is had. That is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation and obligation. While this is so, it is also true that parties in making a contract may have in view some other law than that of the place, and when that is so that other law will control. That the parties have some other law in view and contract with reference to it is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract and the purpose with which it is entered into. In *Pritchard* v. *Norton*, 106 U. S. 124, many cases were cited by Mr. Justice Matthews, delivering the opinion of the court, in which these propositions were illustrated and enforced, and on page 136 it was said:

"The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 48, where he defined it as a principle of universal law, 'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 Burr. 1077, 1078, 'the law of the place,' he said, 'can never be the rule where the transaction is entered into with *an express* view to the law of another country, as the rule by which it is to be governed.' And in *Lloyd* v. *Guibert*, Law Rep. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter.' *Le Breton* v. *Miles*, 8 Paige [N. Y.], 261."

The subject was also discussed at length by Mr. Justice Gray in *Liverpool Steam Company* v. *Phenix Insurance Company*, 129 U. S. 397. In *Coghlan* v. *South Carolina Railroad Company*, 142 U. S. 101, 110, Mr. Justice Harlan, referring to these two opinions, observed: "The elaborate and careful re-

view of the adjudged cases, American and English, in the two cases last cited, leaves nothing to be said upon the general subject."

In *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588, Chief Justice Taney said:

"It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. . . . But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible, yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *The United States* v. *Amedy*, 11 Wheat. 412, and in *Beaston* v. *The Farmers' Bank of Delaware*, 12 Pet. 135. Now natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place?"

And then, after discussing the question of comity, added (p. 589):

"Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction, and we can perceive no sufficient reason for excluding them when they are not contrary to the known policy of the State, or injurious to its interests.

"It is nothing more than the admission of the existence of an artificial person created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another State."

As then a corporation can have no legal existence outside of the State in which it is incorporated, the contract of the stockholders with one another, by which the corporation is created, is presumed to have been made with reference to the laws of that State, nothing being said in the charter to the contrary. But as comity permits a corporation to enter another State and do business therein, it is competent for the stockholders in making their charter to contract with reference to the laws of a State in which they propose the corporation shall do business. And in this case the stockholders in their charter specified that the purpose of the incorporation was partly business beyond the limits of Colorado, and that the principal part of such outside business should be carried on in California. Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California, and transact business therein, they in terms set forth that a part of the purpose of the incorporation was the transaction of business by the corporation in California. Now when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the State, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other States and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liabilities created by the partnership business in California? And if this rule obtains as to contracts of partners between themselves, why not also as to contracts of stockholders between themselves in forming a corporation?

Syllabus.

In this case it appears that the business transactions out of which these liabilities arose were carried on in California. They resulted from business done in California by virtue of an express contract made by the stockholders with reference to such business. It is unnecessary to express an opinion upon the question whether any personal liability would be assumed by the stockholders in reference to business transacted in Colorado. Parties may contract with special reference to carrying on business in separate States, and when they make an express contract therefor the business transacted in each of the States will be affected by the laws of those States, and may result in a difference of liability. Neither is it necessary to express any opinion upon the question whether the defendants could have been held liable under the California statutes, independently of the provisions of the Colorado charter. All that we here hold is that when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business.

The judgment of the Superior Court is

Affirmed.

DOOLEY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 207. Argued January 8, 9, 10, 11, 1901.—Decided December 2, 1901.

The act of Congress taking effect May 1, 1900, and known as the Foraker act, which requires all merchandise going into Porto Rico from the United States to pay a duty of fifteen per cent of the amount of duties paid upon merchandise imported from foreign countries, is constitutional.

The Constitution, in declaring that no tax or duty shall be laid on articles exported from any State, is limited to articles exported to a foreign country, and has no application to Porto Rico, which, in the case of *De Lima*

v. *Bidwell*, 182 U. S. 1, was held not to be a foreign country within the meaning of the general tariff law then in force.

The fact that the duties so collected were not covered into the general fund of the Treasury, but held as a separate fund to be used for the government and benefit of Porto Rico, and were made subject to repeal by the legislative assembly of that island, shows that the tax was not intended as a duty upon exports, and that Congress was undertaking to legislate for the island temporarily, and only until a local government was put in operation.

This was an action begun in the Circuit Court as a Court of Claims by the firm of Dooley, Smith & Co., to recover duties exacted of them and paid under protest to the collector of the port of San Juan, Porto Rico, upon merchandise imported into that port from the port of New York after May 1, 1900, and since the Foraker act. This act requires all merchandise "coming into Porto Rico from the United States" to be "entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries."

A demurrer was interposed by the District Attorney upon the ground that the court had no jurisdiction of the subject of the action, and also that the complaint did not state facts sufficient to constitute a cause of action. The demurrer to the complaint for insufficiency was sustained, and the petition dismissed.

The case was argued with *De Lima* v. *Bidwell*, 182 U. S. 1; *Downes* v. *Bidwell*, 182 U. S. 244; *Dooley* v. *United States*, 182 U. S. 222; and *Armstrong* v. *United States*, 182 U. S. 243.

Mr. Henry M. Ward and *Mr. John G. Carlisle* for plaintiff in error. *Mr. Edmund Curtis* was on their brief.

Mr. Attorney General and *Mr. Solicitor General* for defendant in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case raises the question of the constitutionality of the

Foraker act, so far as it fixes the duties to be paid upon merchandise imported into Porto Rico from the port of New York. The validity of this requirement is attacked upon the ground of its violation of that clause of the Constitution (Art. I, sec. 9) declaring that "no tax or duty shall be laid on articles exported from any State."

While the words "import" and "export" are sometimes used to denote goods passing from one State to another, the word "import," in connection with the provision of the Constitution that "no State shall levy any imposts or duties on imports or exports," was held in *Woodruff* v. *Parham*, 8 Wall. 123, to apply only to articles imported from foreign countries into the United States.

That was an action to recover a tax imposed by the city of Mobile for municipal purposes, upon sales at auction. Defendants, who were auctioneers, received in the course of their business for themselves, or as consignees or agents for others, large amounts of goods and merchandise, the products of other States than Alabama, and sold the same in Mobile to purchasers, in unbroken and original packages. The Supreme Court of Alabama decided the case in favor of the tax, and the case came here for review.

The question, as stated by Mr. Justice Miller, was "whether merchandise brought from other States and sold, under the circumstances stated, comes within the prohibition of the Federal Constitution, that no State shall, without the consent of Congress, levy any imposts or duties on imports or exports." Defendants relied largely upon a dictum in *Brown* v. *Maryland*, 12 Wheat. 419, to the effect that the principles laid down in that case as to the non-taxability of imports from foreign countries might perhaps apply equally to importations from a sister State.

In discussing this question, and particularly of the power of Congress to levy and collect taxes, duties, imposts and excises, Mr. Justice Miller observed: "Is the word, 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State to another? Or is the power limited to duties on foreign imports? If the

former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not at the same time exported from the former. But if we give to the word 'imposts' as used in the first mentioned clause, the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries the power and its limitations concerning imposts."

"It is not too much to say that, so far as our research has extended, neither the word 'export,' 'import' or 'impost' is to be found in the discussion on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause," (that no State shall, without the consent of Congress, levy any impost or duty upon any export or import,) "the right of one State to tax articles brought into it from another." This definition of the word impost was afterwards approved in *Brown* v. *Houston*, 114 U. S. 622. See also *Fairbank* v. *United States*, 181 U. S. 283.

It follows, and is the logical sequence of the case of *Woodruff* v. *Parham*, that the word "export" should be given a correlative meaning, and applied only to goods exported to a foreign country. *Muller* v. *Baldwin*, L. R. 9 Q. B. 457. If, then, Porto Rico be no longer a foreign country under the Dingley act, as was held by a majority of this court in *De Lima* v. *Bidwell*, 182 U. S. 1, and *Dooley* v. *United States*, 182 U. S. 222, we find it impossible to say that goods carried from New York to Porto Rico can be considered as "exported" from New

York within the meaning of that clause of the Constitution. If they are neither exports nor imports, they are still liable to be taxed by Congress under the ample and comprehensive authority conferred by the Constitution "to lay and collect taxes, duties, imposts and excises." Art. 1, sec. 8.

In another view, however, the case presented by the record is, whether a duty laid by Congress upon goods arriving at Porto Rico from New York is a duty upon an export from New York, or upon an import to Porto Rico. The fact that the duty is exacted upon the arrival of the goods at San Juan certainly creates a presumption in favor of the latter theory. At the same time it is possible that it may also be a duty upon an export. The mere fact that the duty is not laid at the port of departure is by no means decisive against its being such. It is too clear for argument that if vessels bound for a foreign country were compelled to stop at an intermediate port and pay into the Treasury of the United States a duty upon their cargoes, such duty would be a tax upon an export, and the place of its exaction would be of little significance. The manner in which and the place at which the tax is levied are of minor consequence. Thus in *Brown* v. *Maryland*, 12 Wheat. 419, it was held that an act of a state legislature requiring importers of foreign goods to take out a license was a violation of the Constitution declaring that no State shall, without the consent of Congress, lay an impost or duty on imports or exports; and in the recent case of *Fairbank* v. *United States*, 181 U. S. 283, we held that a discriminating stamp tax upon bills of lading, covering goods to be carried to a foreign country, was a tax upon exports within the same provision of the Constitution.

One thing, however, is entirely clear. The tax in question was imposed upon goods imported into Porto Rico, since it was exacted by the collector of the port of San Juan after the arrival of the goods within the limits of that port. From this moment the duties became payable as upon imported merchandise. *United States* v. *Howell*, 5 Cranch, 368; *Arnold* v. *United States*, 9 Cranch, 104; *Meredith* v. *United States*, 13 Pet. 486. Now while an import into one port almost necessarily involves a prior export from another, still, in determining the character

of the tax imposed, it is important to consider whether the duty be laid for the purpose of adding to the revenues of the country from which the export takes place, or for the benefit of the territory into which they are imported. By the third section of the Foraker act imposing duties upon merchandise coming into Porto Rico from the United States, it is declared that "whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty." And by section four, "the duties and taxes collected in Porto Rico in pursuance of this act, less the cost of collecting the same, and the gross amount of all collections and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico until the government of Porto Rico, herein provided for, shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico."

Now, there can be no doubt whatever that, if the legislative assembly of Porto Rico should, with the consent of Congress, lay a tax upon goods arriving from ports of the United States, such tax, if legally imposed, would be a duty upon imports to Porto Rico, and not upon exports from the United States; and we think the same result must follow, if the duty be laid by Congress in the interest and for the benefit of Porto Rico. The truth is, that, in imposing the duty as a temporary expedient, with a proviso that it may be abolished by the legislative assembly of Porto Rico at its will, Congress thereby shows that it is undertaking to legislate for the island for the time being

and only until the local government is put into operation. The mere fact that the duty passes through the hands of the revenue officers of the United States is immaterial, in view of the requirement that it shall not be covered into the general fund of the Treasury, but be held as a separate fund for the government and benefit of Porto Rico.

The action is really correlative to that of *Downes* v. *Bidwell*, 182 U. S. 244, in which we held that Congress could lawfully impose a duty upon imports from Porto Rico, notwithstanding the provision of the Constitution that all duties, imposts and excises shall be uniform throughout the United States. It is true that this conclusion was reached by a majority of the court by different processes of reasoning, but it is none the less true that in the conclusion that certain provisions of the Constitution did apply to Porto Rico, and that certain others did not, there was no difference of opinion.

It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the first paragraph of Art. 1, sec. 8, that "all duties, imposts and excises shall be uniform throughout the United States." There is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the States, which is merely incidental to its right to regulate interstate commerce. The question, however, is not involved in this case, and we do not desire to express an opinion upon it.

These duties were properly collected, and the action of the Circuit Court in sustaining the demurrer to the complaint was correct, and it is therefore

Affirmed.

MR. JUSTICE WHITE, concurring:

Whilst agreeing to the judgment of affirmance and in substance concurring in the opinion of the court just announced, by

which the affirmance is sustained, I propose to summarize in my own language the reasoning which the opinion embodies as it is by me understood.

In my judgment the opinion of the court in the cases of *De Lima* v. *Bidwell*, 182 U. S. 1, and *Dooley* v. *United States*, 182 U. S. 222, decided in the last term, and that just announced in the case of *The Diamond Rings*, as well as the opinions of the majority of the members of the court in *Downes* v. *Bidwell*, 182 U. S. 244, also decided at the last term, when considered in connection with the previous adjudications of this court, are conclusive in favor of the affirmance of the judgment in this cause. The question is, whether a tax imposed by authority of the act of April 12, 1900, 31 Stat. 77, in Porto Rico, on merchandise coming into that island from the United States, is repugnant to clause 5, section 9, of Article I of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State." Is the tax here assailed an export tax within the meaning of the Constitution? If it is, the judgment sustaining it should be reversed; if it is not, affirmance is required.

In *Woodruff* v. *Parham* (1870), 8 Wall. 123, the validity of a tax on auction sales levied by the city of Mobile pursuant to authority conferred by the laws of the State of Alabama was called in question. One of the contentions was that, as the tax was on sales at auction of goods in the original packages brought into the State of Alabama from other States, it was repugnant to that clause of section 9 of article I of the Constitution, which forbids any State, without the consent of Congress, from laying imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. In approaching the consideration of the question thus presented, the court, in its opinion, which was announced by Mr. Justice Miller, said, p. 131:

"The words imposts, imports and exports are frequently used in the Constitution. They have a necessary co-relation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same

instrument. . . . Leaving, then, for a moment, the clause of the Constitution under consideration," (forbidding a State to lay an import or an export tax,) " we find the first use of these co-relative terms in that clause of the eighth section of the first article which begins the enumeration of the powers confided to Congress, 'that Congress shall have power to levy and collect taxes, duties, imposts and excises. . . . But all duties, imposts and excises shall be uniform throughout the United States.' Is the word impost, here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former. But if we give to the word imposts, as used in the first-mentioned clause, the definition of Chief Justice Marshall, and to the word export the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad and the prohibition to lay such duties on exports to other countries, the power and its limitation concerning imposts."

The opinion then proceeded to elaborately consider the meaning of the words imports, exports and imposts in the Constitution, with reference to the powers of Congress, and concluded that they related only to the bringing in of goods from a country foreign to the United States or the taking out of goods from the United States to such a country. From this conclusion the deduction was drawn that the words imports and exports, when used in the Constitution with reference to the power of the several States, had a similar meaning, and hence the tax levied by the city of Mobile was decided not to be repugnant to the clause of the Constitution heretofore referred to, prohibiting a State " from laying imposts or duties on imports or exports." In the course of the opinion an intimation of Mr. Chief Justice Marshall in *Brown* v. *Maryland*, that the words imports and

exports might relate to the movement of goods between the States, was referred to, and it was expressly said that this was a mere suggestion on the part of the Chief Justice, not involved in the cause, and not therefore decided. So, also, the attention of the court was directed to the case of *Almy* v. *California*, (1860), 24 How. 169. That case involved the validity of a stamp tax imposed in California on all bills of lading for the shipment of gold from California to a point without the State. The particular bill of lading which was in question was for the shipment of gold from California to New York. It was held that this stamp tax was at least an indirect burden on exports, and hence was void, because an export tax within the meaning of the Constitution. In the opinion in *Woodruff* v. *Parham*, it was expressly decided that, although the conclusion in *Almy* v. *California* that the tax was void, was sustained by the commerce clause of the Constitution which had been referred to in the argument of that case, it had been erroneously held that import or export within the constitutional sense of the words related to the movement of goods between the States and not exclusively to foreign commerce. To the extent therefore that *Almy* v. *California*, held or intimated that an export or import tax within the meaning of the Constitution embraced anything but foreign commerce, it was expressly overruled.

In *Brown* v. *Houston*, 114 U. S. 622, decided in 1884, fourteen years after the decision in *Woodruff* v. *Parham*, the question which arose in the latter case was again presented. A tax levied by the State of Louisiana on certain coal which had come down the Ohio River was assailed on the ground that it amounted to both an export and import tax within the meaning of the Constitution. The court, speaking through Mr. Justice Bradley, said (p. 628):

"It was decided by this court in the case of *Woodruff* v. *Parham*, 8 Wall. 123, that the term imports as used in that clause of the Constitution which declares that 'no State shall without the consent of Congress lay any imposts or duties on imports or exports,' does not refer to articles carried from one State into another, but only to articles imported from foreign countries into the United States."

The opinion, after stating the facts which were presented in *Woodruff* v. *Parham*, and the contention which was in that case based upon them, said (pp. 628, 629):

"This court, however, after an elaborate examination of the question, held that the terms 'imports' and 'exports' in the clause under consideration had reference to goods brought from or carried to foreign countries alone and not to goods transported from one State to the other. It is unnecessary, therefore, to consider further the question raised by the plaintiffs in error under their assignment of error so far as it is based on the assumption that the tax complained of was an impost or duty on imports."

Thus treating the meaning of the words imports and exports as having been conclusively determined by *Woodruff* v. *Parham*, the court passed to the consideration of the contention that the tax levied in the State of Louisiana was an export tax within the meaning of the Constitution, because some of the coal was intended for export to a foreign country, or had been, as it was claimed, in part actually exported to such country.

Again, in *Fairbank* v. *United States*, (1900) 181 U. S. 283, the court was called upon to determine whether the requirement in an act of Congress that a revenue stamp be affixed to every bill of lading for goods shipped to a foreign country was a tax on exports. In the course of the opinion, in considering the question, the court referred to *Almy* v. *California*, *supra*, as authority for the proposition that a tax on the bill of lading was a tax on the movement of the goods which the bill of lading evidenced. But, in referring to the *Almy* case, the court was careful to say (p. 294):

"It is true that thereafter in *Woodruff* v. *Parham*, 8 Wall. 123, it was held that the words 'imports' and 'exports,' as used in the Constitution, were used to define the shipment of articles between this and a foreign country and not that between the States, and while therefore that case is no longer an authority as to what is or what is not an export, the proposition that a stamp duty on a bill of lading is in effect a duty on the article transported remains unaffected."

A consideration of the opinons in *Woodruff* v. *Parham* and

Brown v. *Houston*, so recently in effect approved by this court in the case of *Fairbank* v. *United States*, will make it clear that an adherence to the interpretation of the words export and import which was expounded in those cases is essential to the preservation of the necessary powers of taxation of the several States, as well as of those of the government of the United States. And, by implication, in a number of cases decided by this court since the decision in *Woodruff* v. *Parham*, the doctrine of export and import there defined has been, if not expressly, at least tacitly, approved in many ways. Indeed, it may be safely assumed that many state statutes levying taxes and much legislation of Congress has been enacted upon the express or implied recognition of the settled construction of the Constitution hitherto affixed to the import and export clauses by this court in the cases referred to. And this will be made obvious when it is considered that if the words export and import as used in the Constitution be applied to the movement of goods between the States, then it amounts to not only an express prohibition on the States to impose any direct but also any indirect burden, and, therefore, under the doctrine of *Brown* v. *Maryland*, any state tax law which would indirectly burden the coming of goods from one State to the other would be wholly void. So also, as to the government of the United States, if the provision as to the laying and collection of imposts be not construed as a "distinct" provision relating to foreign commerce and co-related with the clause as to exports, it would follow, as was clearly pointed out in *Woodruff* v. *Parham*, that the Constitution had granted on the one hand a power and immediately denied it. Besides, it would follow that all the general powers of taxation conferred upon Congress would be limited by the export clause, and thus any domestic tax, although fulfilling the requirements of uniformity and not violating the prohibition against preferences which indirectly burdened the ultimate export, would be void, a doctrine which would manifestly cause to be invalid methods of taxation exercised by Congress from the beginning without question.

It being then beyond doubt that this court has, in a line of well-considered cases, determined that the words export and

import when employed in the Constitution relate to the bringing in of goods from a country foreign to the United States and to the carrying out of goods from the United States to such a country, the only question remaining is, Is Porto Rico a country foreign to the United States? In answering this question it is manifest, from the entire reasoning of the court, in the cases in which it was decided that the terms export and import relate to a foreign country alone, that the words foreign country, as used in those opinions, signified a country outside of the sovereignty of the United States and beyond its legislative authority, and that such meaning of those words was absolutely essential to the process of reasoning by which the conclusion in the cases referred to was reached.

Is Porto Rico a country foreign to the United States in the sense that it is not within the sovereignty and not subject to the legislative authority of the United States, is then the issue. In *De Lima* v. *Bidwell* and *Dooley* v. *United States*, *supra*, it was held that instantly upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country within the meaning of the tariff laws of the United States. In *Fourteen Diamond Rings*, *post*, 176, it has just been held that the Philippine Islands immediately upon the ratification of the treaty ceased to be foreign country within the meaning of the tariff laws; and of course, as these islands were acquired by the same treaty by which Porto Rico was acquired, this ruling is predicated on the decisions in *De Lima* and *Dooley*, above referred to. It is true that both in the *De Lima* and the *Dooley* cases, as well as in the case of *The Diamond Rings*, just decided, dissents were announced. None of the dissents rested, however, upon the theory that Porto Rico or the Philippine Islands had not come under the sovereignty and become subject to the legislative authority of the United States, but were based on the ground that legislation by Congress was necessary to bring the territory within the line of the tariff laws in force at the time of the acquisition; and especially was this the case where the new territory had not, as the result of the acquisition, been incorporated into the United States as an integral part thereof, though com-

ing under its sovereignty and subject, as a possession, to the legislative power of Congress.

In *Downes* v. *Bidwell*, 182 U. S. 244, the question was whether a tax imposed by Congress on goods coming into the United States from Porto Rico was repugnant to that clause of the Constitution requiring uniformity "throughout the United States" of all "duties, imposts and excises." The contention on the one hand was, that as Porto Rico had by the treaty with Spain been acquired by the United States, Congress could not impose a burden on goods coming from Porto Rico, in disregard of the requirement of uniformity "throughout the United States." On the other hand, it was contended that although Porto Rico had become territory of the United States and was subject to the legislative authority of Congress, it had not been so made a part of the United States as to cause Congress to be subject, in legislating in regard to that island, to the uniformity provision of the Constitution. The court maintained the latter view. Whilst it is true that the members of the court who agreed in this conclusion did so for different reasons, nevertheless, in all the opinions delivered by the Justices who formed the majority of the court, it was declared that Porto Rico had come under the sovereignty and was subject to the legislative authority of the United States. Indeed, this was controverted by no one, since the members of the court who dissented did so because they deemed that Porto Rico had so entirely ceased to be foreign country and had so completely been made a part of the United States, that Congress could not, in legislating for that island, disregard the provision of uniformity throughout the United States.

It having been thus affirmatively repeatedly determined that the export and import clauses of the Constitution refer only to commerce with foreign countries, that is, to a country or countries without the sovereignty and entirely beyond the legislative authority of the United States, and it having been conclusively settled that Porto Rico is not such a country, it seems to me the claim here made that the tax imposed by Congress in Porto Rico is an export or an import within the meaning of the Constitution, is untenable. But, it is said, if Porto Rico is

not foreign, and, therefore, the tax laid on goods in that island on their arrival from the United States is not within the purview of the import and the inhibition of the export clauses of the Constitution, then Porto Rico is domestic, and the tax is void because repugnant to the first clause of section 8 of article I of the Constitution conferring upon Congress "the power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States." This contention, however, is but a restatement of the proposition which the court held to be unsound in *Downes* v. *Bidwell;* for, in that case, it was expressly decided that a provision of the statute now in question which imposes a tax on goods coming to the United States from Porto Rico was valid because that island occupied such a relation to the United States as empowered Congress to exact such a tax, since requirement of uniformity throughout the United States was inapplicable. I do not propose to recapitulate the grounds of the conclusion so elaborately expressed by the opinions of the majority of the court in that case, since it suffices to say, for the purposes of the uniformity clause, that that decision is controlling in this case. If the contention be that because the impost clause of the Constitution refers only to foreign commerce, therefore there was no power in Congress to impose the tax in question, or that such power is impliedly denied, the contention is unfounded, and really but amounts to an indirect attack upon the doctrines announced in *Woodruff* v. *Parham*, *Brown* v. *Houston* and *Fairbank* v. *United States*. As held in *Woodruff* v. *Parham*, the impost clause and the export clause are correlated and refer to a distinct subject, that is, foreign commerce. By what process of reasoning it can be said that because a special enumeration on a particular subject of taxation and a particular limitation as to that subject is expressed in the Constitution, therefore other and general powers of taxation not relating to the subject in question are taken away, is not by me perceived. Certainly the argument cannot be that because a power has been conferred on Congress by the Constitution to levy a tax on foreign commerce, therefore the Constitution has taken away from Congress power to tax even indirectly domestic commerce. Be-

cause the grant of power as to imposts contained in the first clause of section 8 of article I of the Constitution relates to foreign commerce there arises no limitation on the general authority to tax as to all other subjects, which flow from the other provisions of the same clause. Referring to such power—the authority to levy and collect taxes, duties, imposts and excises—the court, in the *License Tax Cases*, (1866) 5 Wall. 462, 471, said:

"The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

Of course, the Constitution contemplates freedom of commerce between the States, but it also confers upon Congress the powers of taxation to which I have referred, and safeguards the freedom of commerce and equality of taxation between the States by conferring upon Congress the power to regulate such commerce, by providing for the apportionment of direct taxes, by exacting uniformity throughout the United States in the laying of duties, imposts and excises, and by prohibiting preferences between ports of different States. Indeed, when the argument which I am considering is properly analyzed, it amounts to a denial, as I have said, of the substantial powers of Congress with regard to domestic taxation, and, as I understand it, overthrows the settled interpretation of the Constitution, long since announced and consistently adhered to.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM, dissenting:

This is an action brought to recover back duties levied and collected under the Porto Rican act of April 12, 1900, 31 Stat. 77, at San Juan, on articles shipped to that port by citizens of New York from the State of New York. Plaintiffs were en-

gaged in the business of commission merchants, having their main office in the city of New York and a branch office at San Juan.

The second section of the act provides that, from the time of its passage, "the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries," with some exceptions not material here.

The third section, by which these duties are imposed, reads: "That on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries; and in addition thereto upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture;" and it was further provided that articles of merchandise manufactured in the United States coming into Porto Rico should, after entry, be subject to whatever internal revenue taxes might be in force on the island. And also that whenever the legislative assembly of Porto Rico should have enacted and put into operation a system of local taxation, and proclamation thereof had been made, "all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease."

Assuming that "the United States" as referred to is the United States as constituted at the date of the proclamation of the treaty, the act, explicitly recognizing the distinction between tariff duties and internal taxes, is in respect of such duties an act to raise revenue by taxing the commerce of the people of every State and Territory.

The fact that the net proceeds of the duties are appropriated

by the act for use in Porto Rico does not affect their character any more than if so appropriated by another and separate act. The taxation reaches the people of the States directly, and is national and not local, even though the revenue derived therefrom is devoted to local purposes.

Customs duties are duties imposed on imports or exports, and, according to the terms of this act, these are customs duties, not levied according to the rule of uniformity, and laid on exports as well as imports.

By the first clause of section 8 of Article I of the Constitution, Congress is empowered to lay and collect duties, imposts and excises, subject to the rule of uniformity, but this court has held that customs duties are only leviable on foreign commerce, *Woodruff* v. *Parham*, 8 Wall. 123, and that the uniformity required is geographical merely, *Knowlton* v. *Moore*, 178 U. S. 41. By the third clause of the same section, Congress is empowered "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The power to tax and the power to regulate commerce are distinct powers, yet the power of taxation may be so exercised as to operate in regulation of commerce.

Clauses 5 and 6 of section 9 provide:

"No tax or duty shall be laid on articles exported from any State.

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another."

These provisions were intended to prevent the application of the power to lay taxes or duties, or the power to regulate commerce, so as to discriminate between one part of the country and another. The regulation of commerce by a majority vote and the exemption of exports from duties or taxes were parts of one of the great compromises of the Constitution.

If, after the cession, Porto Rico remained a foreign country, the prohibition of clause 5 would be fatal to these duties; while if Porto Rico became domestic, then, as they are customs duties, they could not be sustained, according to *Woodruff* v. *Parham*,

under the first clause of section 8; and were also prohibited by clause 5 of section 9, whether customs duties or not, if the application of that clause is not limited to foreign commerce.

The prohibition, that "no tax or duty shall be laid on articles exported from any State," negatives the existence of any power in Congress to lay taxes or duties in any form on articles exported from a State, *irrespective of their destination*, and, this being so, the act in imposing the duties in question is invalid, whether Porto Rico, after its passage, was a foreign or reputed foreign territory, a domestic Territory, or a territory subject to be dealt with at the will of Congress regardless of constitutional limitations.

Confessedly the prohibition applies to foreign commerce, and the question is whether it is confined to that. In other words, whether language which embraces all articles exported can be properly restricted to particular exports. On what ground can the insertion in this comprehensive denial of power of the words "to foreign countries," thereby depriving it of effect on commerce other than foreign, be justified?

If the words "exported from any State" apply only to articles exported from a State to a foreign country, it would seem to follow that the broad power granted to Congress "to lay and collect taxes," for the purposes specified in the Constitution, may be exerted in the way of taxation on articles exported from one State to another. The right to carry legitimate articles of commerce from one State to another State without interference by national or state authority was, it has always been supposed, firmly established and secured by the Constitution. But that right may be destroyed or greatly impaired if it be true that articles may be taxed by Congress by reason of their being carried from one State to another.

Undoubtedly the clause confines the power to lay customs duties or imposts to imports only. This was so stated by Mr. Hamilton in the thirty-second number of The Federalist: "The first clause of the same section [§ 8] empowers Congress '*to lay and collect taxes, duties, imposts, and excises;*' and the second clause of the tenth section of the same article declares that '*no State shall, without the consent of Congress lay any imposts or*

duties on imports or exports, except for the purpose of executing its inspection laws.' Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned. But this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification it now only extends to the *duties on imports*."

Nevertheless because the clause secured that object, it is not to be assumed that it was not also intended to secure unrestrained intercourse between the different parts of a common country.

As was said in *Gibbons* v. *Ogden*, the right of intercourse between State and State was derived "from those laws whose authority is acknowledged by civilized man throughout the world. The Constitution found it an existing right, and gave to Congress the power to regulate it." 9 Wheat. 1, 211. From this grant, however, the power to regulate by the levy of any tax or duty on articles exported from any State was expressly withheld.

In *Woodruff* v. *Parham*, 8 Wall. 123, 132, Mr. Justice Miller, in support of the conclusion that clause 1 of section 8 was confined as to customs duties to foreign commerce, said: "Is the word impost, here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former."

In that case, clause 2 of section 10 was under consideration: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the

United States; and all such laws shall be subject to the revision and control of the Congress."

It was held that this referred to foreign commerce only, and "that no intention existed to prohibit, *by this clause*, the right of one State to tax articles brought into it from another." This was reaffirmed in *Brown* v. *Houston*, 114 U. S. 622, 630, and Mr. Justice Bradley said: "But in holding with the decision in *Woodruff* v. *Parham*, that goods carried from one State to another are not imports or exports within the meaning of the clause which prohibits a State from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a State may levy import or export duties on goods imported from or exported to another State. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by a State would not violate some other provision of the Constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, is a different question."

That question has been repeatedly answered by this court to the effect "that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." *Lyng* v. *Michigan*, 135 U. S. 161, 166. But if that power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure can be set at naught by a legislative body created by that instrument.

Such a conclusion is wholly inadmissible. The power to regulate interstate commerce was granted in order that trade between the States might be left free from discriminating legislation and not to impart the power to create antagonistic commercial relations between them.

The prohibition of preference of ports was coupled with the prohibition of taxation on articles exported. The citizens of

each State were declared "entitled to all privileges and immunities of citizens in the several States," and that included the right of ingress and egress, and the enjoyment of the privileges of trade and commerce. *Slaughter House Cases*, 16 Wall. 36.

And so the court, in *Woodruff* v. *Parham*, as the quotation from its opinion by Mr. Justice Miller demonstrates, did not put upon the absolute and general prohibition of power to lay any tax or duty on articles exported from any State that narrow construction which would limit it to exports to a foreign country, and would concede the power to Congress to impose duties on exports from one State to another in regulation of interstate commerce.

The power to lay duties in regulation of commerce with foreign nations is relied on as the source of power to pass laws for the protection and encouragement of domestic industries, and except for this clause the same effect would be attributed to the power to regulate commerce among the States. This, however, the clause, literally read, prevents, and to limit its application to foreign commerce, as the power to lay customs duties under the first clause of section 8 has been limited, would defeat the manifest purpose of the Constitution by enabling discriminating taxes and duties to be laid against one section of the country as distinguished from another.

And if the prohibition be not confined to foreign commerce then it applies to all commerce, not wholly internal to the respective States, and the destination of articles exported from a State cannot affect, or be laid hold of to affect, the result.

In short, clause 5 operates, and was intended to operate, to except the power to lay any tax or duty on articles exported from the general power to regulate commerce whether interstate or foreign. And this is equally true in respect of commerce with the territories, for the power to regulate commerce includes the power to regulate it not only as between foreign countries and the territories, but also by necessary implication as between the States and Territories. *Stoutenburgh* v. *Hennick*, 129 U. S. 141.

Nothing is better settled than that the States cannot interfere with interstate commerce, yet it is easy to see that if the

exclusive delegation to Congress of the power to regulate commerce did not embrace commerce between the States and Territories, the interference by the States with such commerce might be justified.

Again, if, in any view, these duties could be treated as other than custom duties, the result would be the same, inasmuch as the goods were articles exported from New York, and there was a total lack of power to lay *any* tax or duty on such articles.

The prohibition on Congress is explicit, and noticeably different from the prohibition on the States. The State is forbidden to lay "any imposts or duties;" Congress is forbidden to lay "any tax or duty." The State is forbidden from laying imposts or duties "on imports or exports," that is, articles coming into or going out of the United States. Congress is forbidden to tax "articles exported *from any State*."

The plain language of the Constitution should not be made "blank paper by construction," and its specific mandate ought to be obeyed.

As said in *Marbury* v. *Madison*, "It is declared that 'no tax or duty shall be laid on articles exported from any State.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?" 1 Cranch, 137, 178.

Nor is the result affected by the fact that the collection of these duties was at Porto Rico.

In *Brown* v. *Maryland*, 12 Wheat. 419, 437, Chief Justice Marshall said: "An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less a duty or impost on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering, the port, does not limit the power to that state of things, nor, consequently, the pro-

hibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country."

And so of exports. They are the things exported—the articles themselves. A duty on exports is not merely a duty on the act of exportation, but is a duty on the article exported, and the article exported remains such until it has reached its final destination. The place of collection is purely incidental, and immaterial on the question of power.

But we are told that these duties were laid, not on articles exported from the State of New York, but on articles imported into Porto Rico. The language used, however, precludes this contention, and there is nothing in the act to indicate that at some particular point on a voyage articles exported were to cease to be such and to become imports, and nothing in the facts in this case to indicate a sea change of that sort as to these goods. The geographical origin of the shipment controls, and, as heretofore said, it is not material whether the duties were collectible at the place of exportation or at Porto Rico. They were imposed on articles exported from the State of New York, and before the articles had reached their ultimate destination and been mingled with the common mass of property on the island.

Chief Justice Marshall disposed of the suggested evasion thus: "Suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the

instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country." 12 Wheat. 445.

There is no difference in principle between the case supposed and that before us. The course of transportation is arrested until the exaction is paid.

The proposition that because the proceeds of these duties were to be used for the benefit of Porto Rico they might be regarded as if laid by Porto Rico itself with the consent of Congress, and were, therefore, lawful, will not bear examination. No money can be drawn from the Treasury except in consequence of appropriations made by law. This act does not appropriate a fixed sum for the benefit of Porto Rico, but provides that the money collected, and collected from citizens of the United States in every port of the United States, shall be placed in a separate fund or subsequently in the treasury of Porto Rico, to be expended for the government and benefit thereof. And although the destination of the proceeds in this way were lawful, it would not convert duties on articles exported from the States into local taxes.

States may, indeed, under the Constitution, lay duties on foreign imports and exports, for the use of the Treasury of the United States, with the consent of Congress, but they do not derive the power from the general government. The power preëxisted, and it is its exercise only that is subjected to the discretion of Congress.

Congress may lay local taxes in the Territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the Territories, or from any State to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress as will enable it, under the guise of taxation, to exclude the products of Porto Rico from the States as well as the products of the States from Porto Rico; and this notwithstanding it was held in *De Lima* v. *Bidwell*, 182 U. S. 1, that Porto Rico after the ratification of the

Counsel for Parties.

treaty with Spain ceased to be foreign and became domestic territory.

My brothers HARLAN, BREWER and PECKHAM concur in this dissent. We think it clear on this record that plaintiffs were entitled to recover and that the judgment should be reversed.

FOURTEEN DIAMOND RINGS, EMIL J. PEPKE, CLAIMANT *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 153. Argued December 17, 18, 19 and 20, 1900.—Decided December 2, 1901.

1. The ruling in *De Lima* v. *Bidwell*, 182 U. S. 1, reaffirmed and applied.
2. No distinction, so far as the question determined in that case is concerned, can be made between the Philippines and the Island of Porto Rico, after the ratification of the treaty of peace between the United States and Spain, April 11, 1899, and certainly not

(*a*) Because of the passage by the Senate alone, by a majority, but not two thirds of a *quorum*, of a joint resolution in respect to the intention of the Senate in the ratification;

(*b*) Or, because of the armed resistance of the native inhabitants, or of uncivilized tribes, in the Philippines, to the dominion of the United States;

(*c*) Or, because one of the justices who concurred in the judgment in *De Lima* v. *Bidwell*, also concurred in the judgment in *Downes* v. *Bidwell*, 182 U. S. 244.

The statement of the case will be found in the opinion of the court. The case was argued December 17, 18, 19 and 20, 1900. *Goetze, Appellant*, v. *United States* was heard at the same time. Leave was granted in this case to *Mr. Alexander Porter Morse* to file a brief on behalf of interested parties.

Mr. Everit Brown and *Mr. Edward C. Perkins* for appellant.

Mr. Lawrence Harmon for plaintiff in errror.

Mr. Charles H. Aldrich for plaintiff in error.

Mr. Attorney General for the United States.

Mr. Chief Justice Fuller delivered the opinion of the court.

Emil J. Pepke, a citizen of the United States and of the State of North Dakota, enlisted in the First Regiment of the North Dakota United States Volunteer Infantry, and was assigned for duty with his regiment in the island of Luzon, in the Philippine Islands, and continued in the military service of the United States until the regiment was ordered to return, and, on arriving at San Francisco, was discharged September 25, 1899.

He brought with him from Luzon fourteen diamond rings, which he had there purchased, or acquired through a loan, subsequent to the ratification of the treaty of peace between the United States and Spain, February 6, 1899, and the proclamation thereof by the President of the United States, April 11, 1899.

In May, 1900, in Chicago, these rings were seized by a customs officer as having been imported contrary to law, without entry, or declaration, or payment of duties, and an information was filed to enforce the forfeiture thereof.

To this Pepke filed a plea setting up the facts, and claiming that the rings were not subject to customs duties; the plea was held insufficient; forfeiture and sale were decreed; and this writ of error was prosecuted.

The tariff act of July 24, 1897, 30 Stat. 151, in regulation of commerce with foreign nations, levied duties "upon all articles imported from foreign countries."

Were these rings, acquired by this soldier after the ratification of the treaty was proclaimed, when brought by him from Luzon to California, on his return with his regiment to be discharged, imported from a foreign country?

This question has already been answered in the negative, in respect of Porto Rico, in *De Lima* v. *Bidwell*, 182 U. S. 1, and unless the cases can be distinguished, which we are of opinion they cannot be in this particular, that decision is controlling.

The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, "cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part." *Thorington* v. *Smith*, 8 Wall. 10. The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation.

In *Cross* v. *Harrison*, 16 How. 164, the question was whether goods imported from a foreign country into California after the cession were subject to our tariff laws, and this court held that they were.

In *De Lima* v. *Bidwell* the question was whether goods imported into New York from Porto Rico, after the cession, were subject to duties imposed by the act of 1897 on "articles imported from foreign countries," and this court held that they were not. That act regulated commerce with foreign nations, and Porto Rico had ceased to be within that category; nor could territory be foreign and domestic at the same time.

Among other things it was there said: "The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. . . . This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrec-

tions may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words."

No reason is perceived for any different ruling as to the Philippines. By the third article of the treaty Spain ceded to the United States "the archipelago known as the Philippine Islands," and the United States agreed to pay to Spain the sum of twenty million dollars within three months. The treaty was ratified; Congress appropriated the money; the ratification was proclaimed. The treaty-making power; the executive power; the legislative power, concurred in the completion of the transaction.

The Philippines thereby ceased, in the language of the treaty, "to be Spanish." Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States and they became entitled to its protection.

But it is said that the case of the Philippines is to be distinguished from that of Porto Rico because on February 14, 1899, after the ratification of the treaty, the Senate resolved, as given in the margin,* that it was not intended to incorporate the

* "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants

inhabitants of the Philippines into citizenship of the United States, nor to permanently annex those islands.

We need not consider the force and effect of a resolution of this sort, if adopted by Congress, not like that of April 20, 1898, in respect of Cuba, preliminary to the declaration of war, but after title had passed by ratified cession. It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two thirds of a quorum: and that it is absolutely without legal significance on the question before us. The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.

It is further contended that a distinction exists in that while complete possession of Porto Rico was taken by the United States, this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

We must decline to assume that the government wishes thus to disparage the title of the United States, or to place itself in the position of waging a war of conquest.

The sovereignty of Spain over the Philippines and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her or that uncivilized tribes may have defied her will did not affect the validity of her title. She granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant.

---

of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands." Cong. Rec. 55th Cong. 3d Sess. vol. 32, p. 1847.

If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected.

We do not understand that it is claimed that in carrying on the pending hostilities the government is seeking to subjugate the people of a foreign country, but, on the contrary, that it is preserving order and suppressing insurrection in territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable.

But it is sought to detract from the weight of the ruling in *De Lima* v. *Bidwell* because one of the five justices concurring in the judgment in that case concurred in the judgment in *Downes* v. *Bidwell*, 182 U. S. 244.

In *De Lima* v. *Bidwell*, Porto Rico was held not to be a foreign country after the cession, and that a prior act exclusively applicable to foreign countries became inapplicable.

In *Downes* v. *Bidwell*, the conclusion of a majority of the court was that an act of Congress levying duties on goods imported from Porto Rico into New York, not in conformity with the provisions of the Constitution in respect to the imposition of duties, imposts and excises, was valid. Four of the members of the court dissented from and five concurred, though not on the same grounds, in this conclusion. The justice who delivered the opinion in *De Lima's* case was one of the majority, and was of opinion that although by the cession Porto Rico ceased to be a foreign country, and became a territory of the United States and domestic, yet that it was merely "appurtenant" territory, and "not a part of the United States within the revenue clauses of the Constitution."

This view placed the territory, though not foreign, outside of the restrictions applicable to interstate commerce, and treated the power of Congress, when affirmatively exercised over a territory, situated as supposed, as uncontrolled by the provisions of the Constitution in respect of national taxation. The distinction was drawn between a special act in respect of the particular country, and a general and prior act only applicable to

countries foreign to ours in every sense. The latter was obliged to conform to the rule of uniformity, which was wholly disregarded in the former.

The ruling in the case of *De Lima* remained unaffected, and controls that under consideration. And this is so notwithstanding four members of the majority in the *De Lima* case were of opinion that Porto Rico did not become by the cession subjected to the exercise of governmental power in the levy of duties unrestricted by constitutional limitations.

Decree reversed and cause remanded with directions to quash the information.

MR. JUSTICE BROWN, concurring:

I concur in the conclusion of the court in this case, and in the reasons given therefor in the opinion of the Chief Justice.

The case is distinguishable from *De Lima* v. *Bidwell*, 182 U. S. 1, in but one particular, viz., the Senate resolution of February 6, 1899. With regard to this, I would say that in my view the case would not be essentially different if this resolution had been adopted by a unanimous vote of the Senate. To be efficacious such resolution must be considered either (1) as an amendment to the treaty, or (2) as a legislative act qualifying or modifying the treaty. It is neither.

It cannot be regarded as part of the treaty, since it received neither the approval of the President nor the consent of the other contracting power. A treaty in its legal sense is defined by Bouvier as "a compact made between two or more independent nations with a view to the public welfare," (2 Law Dic. 1136,) and by Webster as "an agreement, league or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the sovereigns or the supreme power of each state." In its essence it is a contract. It differs from an ordinary contract only in being an agreement between independent states instead of private parties. *Foster* v *Neilson*, 2 Pet. 253, 314; *Head Money Cases*, 112 U. S. 580. By the Constitution, (art. 2, sec. 2,) the President "shall have power, by and with the ad-

vice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." Obviously the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty. If, for instance, the treaty with Spain had contained a provision instating the inhabitants of the Philippines as citizens of the United States, the Senate might have refused to ratify it until this provision was stricken out. But it could not, in my opinion, ratify the treaty and then adopt a resolution declaring it not to be its intention to admit the inhabitants of the Philippine Islands to the privileges of citizenship of the United States. Such resolution would be inoperative as an amendment to the treaty, since it had not received the assent of the President or the Spanish commissioners.

Allusion was made to this question in the *New York Indians* v. *United States*, 170 U. S. 1, 21, wherein it appeared that, when a treaty with certain Indian tribes was laid before the Senate for ratification, several articles were stricken out, several others amended, a new article added, and a proviso adopted that the treaty should have no force or effect whatever, until the amendment had been submitted to the tribes, and they had given their free and voluntary assent thereto. This resolution, however, was not found in the original or in the published copy of the treaty, or in the proclamation of the President, which contained the treaty without the amendments. With reference to this the court observed: "The power to make treaties is vested by the Constitution in the President and the Senate, and, while this proviso was adopted by the Senate, there was no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate and House of Representatives. There is something, too, which shocks the con-

science in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso appears never to have been called to the attention of the tribes, who would naturally assume that the treaty embodied in the Presidential proclamation contained all the terms of the arrangement."

In short, it seems to me entirely clear that this resolution cannot be considered a part of the treaty.

I think it equally clear that it cannot be treated as a legislative act, though it may be conceded that under the decisions of this court Congress has the power to disregard or modify a treaty with a foreign state. This was not done.

The resolution in question was introduced as a *joint* resolution, but it never received the assent of the House of Representatives or the signature of the President. While a joint resolution, when approved by the President, or, being disapproved, is passed by two thirds of each house, has the effect of a law, (Const. art. 1, sec. 7,) no such effect can be given to a resolution of either house acting independently of the other. Indeed, the above clause expressly requires concurrent action upon a resolution "before the same shall take effect."

This question was considered by Mr. Attorney General Cushing in his opinion on certain Resolutions of Congress, 6 Ops. Attys. Gen. 680, in which he held that while joint resolutions of Congress are not distinguishable from bills, and have the effect of law, separate resolutions of either house of Congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or Heads of Departments. The whole subject is there elaborately discussed.

In any view taken of this resolution it appears to me that it can be considered only as expressing the individual views of the Senators voting upon it.

I have no doubt the treaty might have provided, as did the act of Congress annexing Hawaii, that the existing customs re-

lations between the Spanish possessions ceded by the treaty and the United States should remain unchanged until legislation had been had upon the subject; but in the absence of such provision the case is clearly controlled by that of *De Lima* v. *Bidwell*.

Mr. Justice Gray, Mr. Justice Shiras, Mr. Justice White and Mr. Justice McKenna dissented, for the reasons stated in their opinions in *De Lima* v. *Bidwell*, 182 U. S. 1, 200–220, in *Dooley* v. *United States*, 182 U. S. 222, 236–243, and in *Downes* v. *Bidwell*, 182 U. S. 244, 287–347.

ARKANSAS *v.* KANSAS AND TEXAS COAL COMPANY AND SAN FRANCISCO RAILROAD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 42. Submitted October 23, 1901.—Decided December 2, 1901.

The test of the right to remove a case from a state court into the Circuit Court of the United States under section two of the act of March 3, 1887, as corrected by the act of August 13, 1888, is that it must be a case over which the Circuit Court might have exercised original jurisdiction under section one of that act.

A case cannot be removed on the ground that it is one arising under the Constitution, laws or treaties of the United States unless that appears by plaintiff's statement of his own claim, and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings, or by taking judicial notice of facts not relied on and regularly brought into controversy.

Although it appears from plaintiff's statement of his claim that it cannot be maintained at all because inconsistent with the Constitution or laws of the United States, it does not follow that the case arises under that Constitution or those laws.

This was a bill filed in the circuit court of Sebastian County, for the district of Greenwood, Arkansas, by "The State of Ar-

kansas, on the relation of Jo Johnson, prosecuting attorney for the 12th judicial circuit," against the Kansas and Texas Coal Company and the St. Louis and San Francisco Railroad Company, which, "for her cause of action," alleged, that the railroad company was "a corporation organized under the laws of the State of Missouri, owning and operating a railroad in the 12th judicial circuit of Arkansas and more particularly in Sebastian County, of said circuit;" that the coal company was "a corporation duly organized under the laws of the State of Missouri, owning and operating a coal mine in Huntington, in the Greenwood district of Sebastian County." "That a high state of excitement and condition of hot blood now prevails between striking miners and their sympathizers in large numbers, on the one side, and said coal company and its employés, on the other. That said coal company is threatening and is about to import into said county and town of Huntington, over the line of their co-defendant's railroad, a large number of armed men of the low and lawless type of humanity, to wit, about two hundred, to the great danger of the public peace, morals, and good health of said county, and more particularly of said town. That said threatened action on the part of said defendant, if permitted to be executed, would become a great public nuisance and would destroy the peace, morals, and good health of said county and town, and would lead to riot, bloodshed, and to the dissemination of contagious and infectious diseases."

The bill prayed "that the defendant Kansas and Texas Coal Company, its agents, servants, and employés, and each of them, be restrained and prohibited from importing or causing to be imported or brought into Sebastian County or the 12th judicial circuit of Arkansas, and that the Saint Louis and San Francisco Railroad Company, its agents, servants, and employés—each, both, and all of them—be enjoined, restrained, and prohibited from importing, hauling, or bringing, or causing to be imported, hauled, or brought in the said county or circuit, and from unloading or attempting to unload from any of its cars in said county or circuit any and all large bodies of armed, lawless, or riotous persons or persons affected with contagious or infectious diseases that might endanger the peace, good order, or good

health of the State, or create a public nuisance in said county or circuit, under the pains and penalty of the law."

A preliminary injunction was granted and process issued. Defendants filed their petition and bond for removal, and made application therefor, which was denied by the circuit court of Sebastian County, whereupon defendants filed in the United States Circuit Court for the Western District of Arkansas a certified transcript of the record and of the pleadings and papers in the case.

The petition for removal averred that Jo Johnson was a citizen of Arkansas, that defendants were citizens of Missouri, and that the controversy in the suit was wholly between citizens of different States; and also that, treating the State of Arkansas as complainant, the suit was one arising under the Constitution and laws of the United States because defendants were engaged in interstate commerce, and the action was an unlawful interference therewith by reason of the commerce clause of the Federal Constitution and of laws passed in pursuance thereof; and which constituted a defence in the premises.

Complainant moved to remand the cause, and defendants moved to dissolve the injunction, and that complainant be restrained from the prosecution of the suit in the state court.

The Circuit Court of the United States overruled the motion to remand, and sustained the motion to dissolve, but declined to enjoin complainant. 96 Fed. Rep. 353. The cause came on subsequently for final hearing, the bill was dismissed, and this appeal was prosecuted.

Mr. Ben T. Du Val for appellant.

Mr. Adiel Sherwood, *Mr. Joseph M. Hill* and *Mr. James Brizzolara* for appellees.

Mr. Chief Justice Fuller delivered the opinion of the court.

The gravamen of the bill was the injury to the health, morals, peace and good order of the people of the town and county, the infliction of which was alleged to be threatened by the

bringing within their precincts of certain persons by defendants. No statute of the State was referred to as applicable, but the enforcement of the police power was sought through the interposition of a court of equity by way of prevention of an impending public nuisance. The Circuit Court was of opinion that the bill could not be maintained, but, without intimating any conclusion to the contrary, or criticising its formal sufficiency, the question that meets us on the threshold is whether the case ought to have been remanded to the state court.

We need not spend any time on the contention that this was a controversy between citizens of different States. The Circuit Court correctly held otherwise. The State of Arkansas was the party complainant, and a State is not a citizen. *Postal Telegraph Cable Company* v. *Alabama*, 155 U. S. 482.

We inquire, then, if the cause was removable because arising under the Constitution or laws of the United States.

The general policy of the act of March 3, 1887, as corrected by the act of August 13, 1888, (24 Stat. 552, c. 373; 25 Stat. 433, c. 866,) as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the Circuit Courts. Those cases, and those only, were made removable under section two, in respect of which original jurisdiction was given to the Circuit Courts by section one. Hence it has been settled that a case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. And moreover that jurisdiction is not conferred by allegations that defendant intends to assert a defence based on the Constitution or a law or treaty of the United States, or under statutes of the United States, or of a State, in conflict with the Constitution. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Chappell* v. *Waterworth*, 155 U. S. 102; *Walker* v. *Collins*, 167 U. S. 57; *Sawyer* v. *Kockersperger*, 170 U. S. 303; *Florida Central & Peninsula Railroad* v. *Bell*, 176 U. S. 321.

Opinion of the Court.

In this case the State asserted no right under the Constitution or laws of the United States, and put forward no ground of relief derived from either. There were no averments on which the State could have invoked the original jurisdiction of the Circuit Court under section one of the act, and that is the test of the right of removal under section two.

The police power was appealed to, the power to protect life, liberty and property, to conserve the public health and good order, which always belonged to the States, and was not surrendered to the general government, or directly restrained by the Constitution. The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest Congress with power to legislate upon subjects which are within the domain of state legislation. *In re Rahrer*, 140 U. S. 545, 554. It is true that when the police power and the commercial power come into collision, that which is not supreme must give way to that which is supreme. But how is such collision made to appear?

Defendants argue that the Circuit Court might have properly taken judicial notice, or did so, of the fact that the persons whose advent was objected to as perilous to the community could only be brought to Huntington by way of the Indian Territory, and also that the word "import" as used in the bill meant to bring into from another State or foreign country; that, therefore, "the question is fairly presented by the complaint whether the State of Arkansas has the authority to prevent the coal company and the railroad company from bringing into the State over the line of this railroad, laborers from other States or foreign countries;" and hence that the Circuit Court had jurisdiction. We do not agree with either premise or conclusion.

The word "import" necessarily meant bringing into the county and town from outside their boundaries, but we do not think, taking the whole bill together, that as here used its necessary signification was the bringing in from outside of the State.

And as to judicial knowledge, the principle applies "that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." Thayer, Ev. ch. VII, 281.

In *Mountain View Mining & Milling Co.* v. *McFadden*, 180 U. S. 533, which was a petition for removal, the suit was one brought in support of an adverse claim under the Revised Statutes, sections 2325, 2326, and it had been previously decided that such a suit was not one arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal courts regardless of the citizenship of the parties. And we said: 'It is conceded by counsel on both sides that those decisions, are controlling, unless the Circuit Court was entitled to maintain jurisdiction by taking judicial notice of the fact 'that the Mountain View lode claim was located upon what had been or was an Indian reservation,' and 'of the act of Congress declaring the north half of the reservation, upon which the claim was located, to have been restored to the public domain;' notwithstanding no claim based on these facts was stated in the complaint. But the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge." *Oregon Short Line &c. Railway* v. *Skottowe*, 162 U. S. 490; *Chappell* v. *Waterworth*, 155 U. S. 102; *Commonwealth* v. *Wheeler*, 162 Mass. 429; *Partridge* v. *Strange*, Plowden, 77.

But even assuming that the bill showed upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the Fourteenth Amendment, as contended, it would only demonstrate that the bill could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States.

When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide

them. If errors supervene, the remedy by writ of error is open to the party aggrieved. *Robb* v. *Connolly*, 111 U. S. 624, 637.

Decree reversed and cause remanded with a direction to remand to the state court. Costs of this court and of the Circuit Court to be paid by the appellees and defendants.

WILSON *v.* NELSON.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 31. Submitted April 22, 1901.—Decided December 9, 1901.

When a debtor, years before the filing of a petition in bankruptcy, gives to a creditor an irrevocable power of attorney to confess judgment after maturity upon a promissory note of the debtor; and the creditor, within four months before the filing of the petition in bankruptcy against the debtor, obtains such a judgment and execution thereon; and the debtor fails, at least five days before a sale on the execution, to vacate or discharge the judgment, or to file a voluntary petition in bankruptcy; the judgment and execution are a preference "suffered or permitted" by the debtor, within the meaning of the bankrupt act of July 1, 1898, c. 541, § 3, cl. 3, and the debtor's failure to vacate or discharge the preference so obtained is an act of bankruptcy under that act.

THE Circuit Court of Appeals for the Seventh Circuit certified to this court the following statement of facts and questions of law:

"On February 5, 1885, Cassius B. Nelson executed and delivered to Sarah Johnstone his promissory note in writing for the sum of $8960, payable 'five years or before after date,' with interest at the rate of four per cent per annum until paid. To this note was attached an irrevocable power of attorney, duly executed by the said Nelson under his hand and seal in the usual form, authorizing any attorney of any court of record in his name to confess judgment thereon after maturity of the

note. This note was given for so much money at the time loaned to Nelson, and the interest on the note was paid from time to time up to November 1, 1898. Nelson was a trader, and entered into business as such at the city of Madison, Wisconsin, soon after the giving of the note, and carried on such business until his stock in trade was levied upon by the sheriff under execution as hereinafter stated. On November 1, 1898, Nelson, as he well knew, was and had long been insolvent, and thereafter continued to be and is now insolvent, his liabilities largely exceeding his assets.

"On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in the circuit court of the State of Wisconsin for the county of Dane against said Nelson upon the note and warrant of attorney aforesaid for the sum of $8975, damages and costs, being the face of the note and $15 costs. Upon that judgment execution was immediately thereafter issued out of the court to the sheriff of that county, who thereunder and by authority thereof on the same day levied upon the stock and goods of Nelson, and thereafter and on December 15, 1898, sold the same at public auction, and applied the proceeds thereof, to wit, the sum of $4400, upon and in part payment of the judgment so rendered. This proceeding left the said Nelson without means to meet any other of his obligations. The judgment was so entered, and the levy made, without the procurement of Nelson and without his knowledge or consent. Such judgment was not subject to attack by Nelson, and could not have been vacated or discharged by any legal proceedings which might have been instituted by him in that behalf, nor could the levy under the execution issued upon such judgment have been set aside or vacated by Nelson, except by his filing his voluntary petition in bankruptcy prior to the sale and obtaining an adjudication of bankruptcy thereunder, or by payment of the judgment.

"On December 10, 1898, creditors of the said Nelson, of the requisite number and holding debts against him to the requisite amount, filed their petition against the said Nelson in the District Court of the United States for the Western District of Wisconsin, sitting in bankruptcy, to procure an adjudication against

him as a bankrupt. The act of bankruptcy therein alleged was in substance that while insolvent he suffered and permitted the said Sarah Johnstone, one of his creditors, to obtain preference upon his property through legal proceedings by the entry of the said judgment and the levy thereunder upon his stock of goods, and failed to vacate or discharge the preference obtained through such legal proceedings at least five days before the sale of the property under such judgment and execution. Upon issue joined the District Court ruled that the said Nelson had not, by reason of the premises, committed an act of bankruptcy, and this ruling is before us for review.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy, within the meaning of section 3*a*, subdivision (3), of the Bankrupt Act.

"2. Whether the judgment so entered and the levy of the execution thereon was a preference 'suffered' or 'permitted' by the said Nelson within the meaning of clause (3) of section 3*a* of the Bankrupt Law.

"3. Whether the failure of Nelson to vacate and discharge the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy."

Mr. James M. Flower, *Mr. Harrison Musgrave*, and *Mr. Daniel K. Tenney* for appellants.

Mr. William F. Vilas and *Mr. R. M. Bashford* for appellee.

Mr. Justice Gray, after making the above statement, delivered the opinion of the court.

On February 5, 1885, Nelson, in consideration of so much

money then lent to him by Sarah Johnstone, executed and delivered to her his promissory note for the sum of $8960, payable in five years with interest until paid. Attached to that note was an irrevocable power of attorney, executed by Nelson, in the usual form, authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. The interest on the note was paid until November 1, 1898. At that date Nelson, as he well knew, was, and long had been, and ever since continued to be, insolvent. On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in a court of Wisconsin upon the note and the warrant of attorney for the face of the note and costs. Upon that judgment, execution was issued to the sheriff, who on the same day levied on Nelson's goods, and on December 15, 1898, sold the goods by auction, and applied the proceeds thereof in part payment of the judgment. This proceeding left Nelson without means to meet any other of his obligations. The judgment was entered, and the levy made, without the procurement of Nelson, and without his knowledge or consent. The judgment and levy were unassailable in law, and could not have been vacated or discharged by any legal proceedings, except by his voluntary petition in bankruptcy. On December 10, 1898, a petition in bankruptcy was filed against Nelson; and the questions certified present, in various forms, the question whether Nelson committed an act of bankruptcy, within the meaning of section 3, cl. 3, of the Bankrupt Act of 1898.

In considering these questions, strict regard must be had to the provisions of that act, which, as this court has already had occasion to observe, differ in important respects from those of the earlier bankrupt acts. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Bryan* v. *Bernheimer*, 181 U. S. 188; *Wall* v. *Cox*, 181 U. S. 244; *Pirie* v. *Chicago Co.*, 182 U. S. 438.

In section 3 of the Bankrupt Act of July 1, 1898, c. 541, acts of bankruptcy are defined as follows: "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insol-

vent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

In the first and second of these an intent on the part of the bankrupt, either to hinder, delay or defraud his creditors, or to prefer over other creditors, is necessary to constitute the act of bankruptcy. But in the third, fourth and fifth no such intent is required.

The third, which is that in issue in the case at bar, is in these words: "(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference."

By the corresponding provision of the Bankrupt Act of 1867, any person who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, "procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors," "or with the intent, by such disposition of his property, to defeat or delay the operation of this act," was deemed to have committed an act of bankruptcy. Act of March 2, 1867, c. 176, § 39, 14 Stat. 536; Rev. Stat. § 5021.

The act of 1898 differs from that of 1867 in wholly omitting the clauses "with intent to give a preference to one or more of his creditors" or "to defeat or delay the operation of this act;" and in substituting for the words "procures or suffers his property to be taken on legal process," the words "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," and not having, five days before a sale of the property affected, "vacated or discharged such preference."

There is a similar difference in the two statutes in regard to the preferences declared to be avoided.

The act of 1867 enacted that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, "with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered or seized on execution," or makes any payment, pledge or conveyance of any part of his property, the person receiving such payment, pledge or conveyance, or to be benefited thereby, "or by such attachment," having reasonable cause to believe that such person is insolvent and that the same is made in fraud of this act, the same should be void and the assignee might recover the property. Act of March 2, 1867, c. 176, § 35, 14 Stat. 534; Rev. Stat. § 5128.

The corresponding provisions of the act of 1898 omit the requisite of the act of 1867, "with a view to give a preference."

Section 60 of the act of 1898, relating to "preferred creditors," begins by providing that "a person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 67, relating to "liens," provides, in subdivision c, as follows: "A lien created by, or obtained in, or pursuant to, any suit or proceeding at law or in equity, including an attachment upon mesne process, or a judgment by confession, which was begun against a person within four months before the filing of the petition in bankruptcy, by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, or that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant

was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act."

The same section provides, in subdivision f, "that all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt." This provision evidently includes voluntary, as well as involuntary bankrupts; for the first clause of the first section of the act, defining the meaning of words and phrases used in the act, declares that "'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition."

Taking together all the provisions of the act of 1898 on this subject, and contrasting them with the provisions of the act of 1867, there can be no doubt of their meaning.

The third clause of section 3, omitting the word "procure," and the phrase "intent to give a preference," of the former statute, makes it an act of bankruptcy if the debtor has "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," and has not "vacated or discharged such preference" five days before a sale of the property. By section 60, he is "deemed to have given a preference" if, being insolvent, he has "suffered a judgment to be entered against himself in favor of any person," "and the effect of the enforcement of such judgment" "will be to enable any one of his creditors to obtain a greater percentage of his debt" than other creditors. By section 67, subdivision c, a lien obtained in any suit, "including an attachment upon mesne process, or a judgment by confession," begun within four months before the filing of the petition in bankruptcy, is dissolved by the adjudication in bankruptcy, not only if "such lien was sought and permitted in fraud of the provisions of this act," but also if "its existence and enforcement will work a preference." And by subdivision f of the same section "all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent," within the four months,

shall be deemed null and void in case he is adjudged a bankrupt.

The act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact.

In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, "suffered or permitted" a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors; and the lien obtained by which, in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy, because "its existence and enforcement will work a preference." And the debtor did not, within five days before the sale of the property on execution, vacate or discharge such preference, or file a petition in bankruptcy. By failing to do so, he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate.

The cases on which the appellee relies, of *Wilson* v. *City Bank*, 17 Wall. 473; *Clark* v. *Iselin*, 21 Wall. 360, and *National Bank* v. *Warren*, 96 U. S. 539, have no application, because they were decided under the act of 1867, which expressly required the debtor to have acted with intent to give a preference.

The case of *Buckingham* v. *McLean*, 13 How. 150, arose under the still earlier Bankrupt Act of August 19, 1841, c. 9, § 2. 5 Stat. 442. And the point there decided was that a power of attorney to confess a judgment was an act of the bankrupt creating a "security," which that bankrupt act in express terms declared void only if made in contemplation of bankruptcy and for the purpose of giving a preference or priority over general creditors.

The careful change in the language of the provisions of the Bankrupt Act of 1898 from those of the former Bankrupt Acts upon the subject must have been intended by Congress to prevent a debtor from giving a creditor an irrevocable warrant of attorney which would enable him, at any time, during the in-

solvency of the debtor, and within four months before a petition in bankruptcy, to obtain a judgment and levy the execution on all the property of the bankrupt, to the exclusion of his other creditors.

The answer to the second and third questions certified must be that the judgment so entered and the levy of the execution thereon were a preference "suffered or permitted" by Nelson, within the meaning of clause 3 of section 3 of the Bankrupt Act; and that the failure of Nelson to vacate and discharge, at least five days before the sale on execution, the preference so obtained, was an act of bankruptcy; and it becomes unnecessary to answer the first question. Second and third questions answered in the affirmative.

MR. JUSTICE SHIRAS, with whom concurred THE CHIEF JUSTICE, MR. JUSTICE BREWER, and MR. JUSTICE PECKHAM, dissenting.

On February 5, 1885, Cassius B. Nelson made and delivered to Sarah Johnstone his promissory note for the sum of $8960, payable in five years, with interest at the rate of four per cent per annum until paid. To this note was attached an irrevocable power of attorney, duly executed by said Nelson under his hand and seal in the usual form, authorizing any attorney of any court of record in his name to confess judgment thereon after maturity of the note. This note was given for so much money at the time loaned to Nelson. The interest on the note was paid from time to time up to the 1st day of November, 1898.

On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in the circuit court of the county of Dane, State of Wisconsin, against said Nelson upon the note and warrant of attorney aforesaid for the sum of $8975. Upon that judgment execution was immediately issued out of the court to the sheriff of that county, who levied upon the stock and goods of Nelson, and on December 15, 1898, sold the same at public auction and applied the proceeds thereof, to wit, the sum of $4400, upon and in part payment of the judgment so rendered.

SHIRAS, J., THE CHIEF JUSTICE, BREWER and PECKHAM, JJ., dissenting.

It is admitted that such a judgment note was, at the time it was made and delivered under the law of the State of Wisconsin, a legal and usual form of security for money loaned. *McCaul* v. *Thayer*, 70 Wisconsin, 138; *Second Ward Savings Bank* v. *Schranck*, 97 Wisconsin, 250.

It is also admitted that the judgment was executed, and the levy made without the procurement of Nelson, and without his knowledge or consent, and that such judgment was not subject to attack by Nelson and could not have been vacated or discharged by any legal proceedings which might have been instituted by him, nor could the levy issued under the execution have been set aside or vacated by Nelson, unless his filing his voluntary petition in bankruptcy prior to the sale, and obtaining an adjudication of bankruptcy thereunder would have had that effect, or by payment of the judgment.

On December 10, 1898, creditors of said Nelson filed a petition in involuntary bankruptcy against him in the District Court of the United States for the Western District of Wisconsin. The act of bankruptcy therein alleged was in substance that while insolvent he suffered and permitted the said Sarah Johnstone, one of his creditors, to obtain preference upon his property through legal proceedings by the entry of said judgment and the levy thereunder upon his stock of goods, and failed to vacate or discharge the preference obtained through such legal proceedings at least five days before the sale of the property under such judgment and execution. Upon issue joined, the District Court ruled that Nelson had not, by reason of the premises, committed an act of bankruptcy, and dismissed the petition. An appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit, and that court has certified certain questions for the consideration of this court.

The essential question in the case is whether, under the facts disclosed, Nelson was guilty of an act of bankruptcy in failing to file a petition in voluntary bankruptcy. This question must be answered in the negative if we respect previous decisions of this court in similar cases.

The subject was considered in *Buckingham* v. *McLean*, 13 How. 151. The case arose under the Bankrupt Act of 1841,

and it appeared that one John Mahard had (on April 7, 1842) executed a power of attorney to confess judgment in favor of Buckingham for $14,000; judgment was entered the next day; execution was issued April 20, and levy was made and sale of property, real and personal. On May 27, 1842, Mahard petitioned to be declared a bankrupt.

There were other questions in the case, but Mr. Justice Curtis, in his discussion of the question now before us, and speaking for the court, made the following observations:

"In many of the States, a bond and warrant of attorney to enter up a judgment is a usual mode of taking security for a debt, and judgments thus entered are treated as securities, and an equitable jurisdiction exercised over them by courts of law. In some States, they operate only as a lien on the lands of the debtor, in others on his personal estate also, (*Brown* v. *Clark*, 4 How. 4;) and wherever, by the local law, a judgment or an execution operates to make a lien on property, we are of opinion it is to be deemed a security; and when rendered upon confession, under a power given by the debtor for that purpose, it is a security, made or given by him within the meaning of the bankrupt act, and is void, if accompanied by the facts made necessary by that act to render securities void. These facts are, that the security was given 'in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety or other person a preference or priority over the general creditors of such bankrupt.'

"The inquiry, whether this security was given in contemplation of bankruptcy, involves the question what is meant by these words? It is understood that, while the bankrupt law was in operation, different interpretations were placed upon them in different circuits. By some judges they were held to mean contemplation of insolvency—of a simple inability to pay as debts should become payable—whereby his business would be broken up; this was considered to be a state of bankruptcy, the contemplation of which was sufficient. By other judges it was held that the debtor was contemplating an act of bankruptcy, or a voluntary application for the bankrupt law. It is somewhat remarkable that this question should be presented

for the first time for the decision of this court after the law has been so long repealed, and nearly all proceedings under it terminated. Perhaps the explanation may be found in the fact that when securities have been given within two months before a petition by or against a debtor, the evidence would usually bring the case within either interpretation of the law. However this may be, it is now presented for decision; and we are of opinion that, to render the security void, the debtor must have contemplated an act of bankruptcy, or an application by himself to be decreed a bankrupt.

"Under the common law, conveyances by a debtor to *bona fide* creditors are valid, though the debtor has become insolvent and failed, and makes the conveyance for the sole purpose of giving a preference over his other creditors. This common law right, it was the object of the second section of the act to restrain; but, at the same time, in so guarded a way as not to interfere with transactions consistent with the reasonable accomplishment of the objects of the act. To give to these words, 'contemplation of bankruptcy,' a broad scope and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.

"The word bankruptcy occurs many times in this act. It is entitled 'An act to establish a uniform system of bankruptcy.' And the word is manifestly used in *other* parts of the law to describe a particular *status*, to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very precise and definite term is used in *this* clause to signify something quite different. It is certainly true in point of fact that even a merchant may contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, and the state of his affairs, and the disposition of his creditors, are such that when they shall have examined into his condition they will extend the times of payment of their debts and enable him to resume business. A person not a merchant, banker, etc., and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states,

not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them, would be a departure from sound principles of interpretation. Moreover, the provisos in *this* section tend to show what was the real meaning of the first enacting clause. The object of these provisos was to protect *bona fide* dealings with the bankrupt more than two months before the filing of the petition by or against him, provided the other party was ignorant of such an intent on the part of the bankrupt as made the security invalid under the first enacting clause. And the language is: 'Provided, that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy or of the intention of the bankrupt to take the benefit of this act.' These facts, of one of which a *bona fide* creditor must have notice, to render his security void, if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the *first* clause; or, in other words, if it be enough for the debtor to contemplate an act of insolvency it could hardly be required that the creditor should have notice of an act of bankruptcy or an intention to take the benefit of the act. It would seem that notice to the creditor of what is sufficient to avoid the security must deprive him of its benefits, and, consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid, and that we may safely take this description of the facts which a creditor must have notice of to avoid the security as descriptive also of what the bankrupt must contemplate to render it void.

"In construing a similar clause in the English bankrupt law, there have been conflicting decisions. It has been held that contemplation of a state of insolvency was sufficient. *Pulling* v. *Tucker*, 4 B. & Ald. 382; *Poland* v. *Glyn*, 2 Dow. & Ry. 310. But both the earlier and later decisions were otherwise, and, in our judgment, they contain the sounder rule. *Fidgeon* v. *Sharpe*, 5 Taunt. 545; *Hartshorn* v. *Shodden*, 2 Bos. & Pul. 582; *Gibbons* v. *Phillips*, 7 B. & C. 529; *Balcher* v. *Brittie*, 10 Bing.

408; *Morgan* v. *Brandrett*, 5 B. & M. 297. And see the opinion of Patterson, J., in the last case.

"Considering, then, that it is necessary to show that the debtor contemplated an act of bankruptcy, or a decree adjudging him a bankrupt on his own petition, at what time in this case must he have had this in contemplation? He gave the power of attorney on the 7th of April; the judgment was confessed and entered up the next day; the execution was taken out and levied, and the lien created thereby on the 22d of May; and five days afterwards, being less than two months after the execution of the power, the debtor presented the petition under which he was decreed a bankrupt. The only act done by the debtor was the execution and delivery of the power of attorney. It was a security by him made or given only by reason of that instrument. What followed were acts of the creditors and of officers of the law, with which the debtor is no more connected than with the delivery by the creditor of a deed to the office of the register to be recorded, or the act of the register in recording it. It would seem that if the *intent* of the debtor is to give a legal qualification to a transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting; and, that consequently, we must inquire whether the debtor contemplated bankruptcy when he executed the power.

"It is true this contention would put it in the power of creditors, by taking a bond and warrant of attorney, while the debtor was solvent and did not contemplate bankruptcy, to enter up a judgment and issue execution, and by a levy acquire a valid lien, down to the very moment when the title of the assignee began. But this was undoubtedly so under the statute of James, which, like ours, contained no provision to meet this mischief; and it became so great that, by the one hundred and fifth section of the revising act of 6 Geo. IV, it was enacted that 'no creditor, though for a valuable consideration, who shall sue out execution on any judgment obtained by default, confession or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid ratably

with such creditors.' If the Bankrupt Act of 1841 had continued to exist, a similar addition to its provisions would doubtless have become necessary."

This suggestion of Justice Curtis was justified by provisions contained in the bankruptcy acts of 1867 and 1898, which enacted that liens obtained by attachments upon *mesne process*, or judgment by confession, within four months before the filing of the petition in bankruptcy, by or against the creditor, shall be dissolved by the adjudication of the debtor to be a bankrupt, if it appear that such a lien was *procured or suffered*, *obtained* and *permitted*, while the debtor was insolvent and contemplating bankruptcy, the party or parties to be benefited thereby having reasonable cause to believe that the debtor was insolvent and in contemplation of insolvency. But, as we shall presently see, such provisions do not affect the question before us now.

In *Wilson* v. *City Bank*, 17 Wall. 473, decided under the provisions of the act of 1867, it was *held*, that something more than passive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property, when the debt is due and he has no defence; and that in such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law. In his opinion, discussing the facts of the case, Mr. Justice Miller said:

"There is nothing morally wrong in the course of the defendants in this matter. They were sued for a just debt. They had no defence to it, and they made none. To have made an effort, by dilatory or false pleas, to delay a judgment in the state court, would have been a moral wrong and a fraud upon the due administration of the law. There was no obligation upon them to do this, either in law or in ethics. Any other creditor whose debt was due could have sued as well as this one, and any of them could have instituted compulsory bankrupt proceedings. The debtor neither hindered nor facilitated any one of them. How is it possible to infer, logically, an ac-

tual purpose to prefer one creditor to another, or to hinder or delay the operation of the bankrupt act?

"It is said, however, that such an intent is a legal inference from such inaction by the debtor, necessary to the successful operation of the bankrupt law; that the grand feature of that law is to secure equality of distribution among creditors in all cases of insolvency, and that, to secure this, it is the legal duty of the insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy, and that this duty is to be inferred from the spirit of the law, and is essential to its successful operation.

"The argument is not without force, and has received the assent of a large number of the district judges, to whom the administration of the bankrupt law is more immediately confided. We are, nevertheless, not satisfied of its soundness. We have already said that there is no moral obligation on the part of the insolvent to do this, unless the statute requires it, and then only because it is a duty imposed by law. It is equally clear that there is no such duty imposed by the act in express terms. It is, therefore, an argument solely of implication. This implication is said to arise from the supposed purpose of the statute to secure equality of distribution in *all cases* of insolvency, and to make the argument complete, it is further necessary to hold that this can only be done in bankruptcy proceedings under that statute. Does the statute justify so broad a proposition? Does it in effect forbid all proceedings to collect debts in cases of insolvency, in other courts, and in all other modes than by bankruptcy? We do not think that its purpose of securing equality of distribution is designed to be carried so far. As before remarked, the voluntary clause is wholly voluntary. No intimation is given that the bankrupt *must* file a petition under any circumstances. While his *right* to do so is without any other limit than his own sworn averment that he is unable to pay all his debts, there is not a word from which we can infer any legal obligation on him to do so. Such an obligation would take from the right the character of a privilege, and confer on it that of a burdensome and, often, ruinous duty. It is, in its es-

sence, involuntary bankruptcy. But the initiation in this kind of bankruptcy is, by the statute, given to the creditor, and is not imposed on the debtor. And it is only given to the creditor in a limited class of cases. The argument we are combatting goes upon the hypothesis that there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt and fails to do it. We do not see the soundness of this implication from anything in the statute.

"We do not construe the act as intended to cover *all* cases of insolvency to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent to the chances that their energy, care and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy. Many find themselves with ample means, good credit, large business, technically insolvent, that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally enabled to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not, of itself, to be construed an act of bankruptcy or a fraud upon the act.

"It is also argued that inasmuch as to lay by and permit one creditor to obtain judgment and levy on property necessarily gives that creditor a preference, the debtor must be supposed to intend that which he knows will follow. The general legal proposition is true, that where a person does a positive act, the consequence of which he knows beforehand, that he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, prosecuting or pro-

curing it, a result of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

"Argument confirmatory to these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned, in direct context with the one we have considered, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to another. Why, then, should a passive indifference and inaction, where no action is required by positive law or good morals, be construed into such a preference as the law forbids? The construction thus contended for is, in our opinion, not justified by the words of either of the sections referred to, and can only be sustained by imputing to the general scope of the bankrupt act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment."

The principles of this case were approved and applied in *Clark* v. *Iselin*, 21 Wall. 360, where it was held that the giving by a debtor, for a consideration of equal value, passing at the time, of a warrant of attorney to confess judgment, is not an act of bankruptcy, though such warrant or confession be not entered of record, but to be kept as such things usually are, in the creditor's own custody, and with their existence unknown to others; that the creditor may enter judgment of record thereon when he pleases, even upon insolvency apparent, and issue execution and sell; and that his action is valid and not in fraud of the bankrupt law, unless he is assisted by the debtor.

The facts of that case were, in respect to the question before us, similar to those of the present. In the opinion Mr. Justice Strong, after citing with approval *Wilson* v. *City Bank*, said:

"Now, in a case where a creditor, holding a confession of judgment perfectly lawful when it was given, causes the judgment to be entered of record, how can it be said the *debtor* procures the entry at the time it is made? It is true the judgment is entered in virtue of his authority, an authority given when the confession was signed. That may have been years before, or, if not, it may have been when the debtor was

perfectly solvent. But no consent is given when the entry is made, where the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has nothing to do with the entry. As to that he is entirely passive. Ordinarily he knows nothing of it, and he could not prevent it if he would. It is impossible, therefore, to maintain that such a judgment is obtained by him *when* his confession is placed on record. Such an assertion, if made, must rest on a mere fiction. And so it has been decided by the Supreme Court of Pennsylvania. *Sleek* v. *Turner's Assignee*, Legal Intelligence, Sept. 25, 1894.

"More than this, as we have seen, in order to make a judgment and execution against an insolvent debtor a preference fraudulent under the law, the debtor must have procured them with a view or intent to give a preference, and that intent must have existed when the judgment was entered. But how can a debtor be said to intend a wrongful preference at the time a judgment is obtained against him when he knows nothing of the judgment? That years before he may have contemplated the possibility that thereafter a judgment might be obtained against him; that long before he may have given a warrant of attorney to confess a judgment, or by a written confession, as in this case, have put it in the power of his creditor to cause a judgment to be entered against him without his knowledge or subsequent assent, is wholly impertinent to the inquiry whether he had in view or intended an unlawful preference at a later time, at the time when the creditor sees fit to cause the judgment to be entered. For, we repeat, it is a fraudulent intent existing in the mind of the debtor at this later time which the act of Congress has in view. The preference must be accompanied by a fraudulent intent, and it is that intent that taints the transaction. Without it the judgment and execution are not void. . . .

"It has been suggested, in opposition to the view we have taken, that if a creditor may hold a confession of judgment by his debtor, or a warrant of attorney to confess a judgment, without causing it to be entered of record until the insolvency of the debtor appears, the debtor may thereby be able to main-

tain a false credit. If this be admitted, it is not perceived that it has any legitimate bearing upon the question before us. The bankrupt act was not aimed against false credits. It did not prohibit holding judgment bonds and notes without entering judgments thereon until the debtors became embarrassed. Such securities are held in some of the States, amounting to millions upon millions. The bankrupt act had a very different purpose. It was to secure equality of distribution of that which insolvents have when proceedings in bankruptcy are commenced and of that which they have collusively with some of their creditors attempted to withdraw from ratable distribution with intent to prefer some creditors over others."

Similar views prevailed in *National Bank* v. *Warren*, 96 U. S. 539, where it was held that the mere non-resistance of a debtor to judicial proceedings in which a judgment was rendered against him, when the debt was due and there was no valid defence to it, it is not the suffering and giving a preference under the bankrupt act, and that the judgment is not avoided by the facts that he does not file a petition in bankruptcy, and that his insolvency was known to the creditor.

As, then, the power of attorney given by Nelson to Mrs. Johnstone was a valid security, customary under the law of Wisconsin, as it was given long before the passage of the Bankrupt Act of 1898, and, therefore, necessarily without regard to the provisions of that act and without any intention to prevent or defeat their operation, and as the entry of the judgment and the levy of the execution are conceded to have been without the knowledge or consent of Nelson, it is undeniable that, under the provisions of the Bankrupt Act of 1867, and within the principles laid down in *Buckingham* v. *McLean*, *Wilson* v. *City Bank*, *Clark* v. *Iselin*, and *National Bank* v. *Warren*, Nelson was under no obligation, legal or moral, to bring upon himself the ruin necessarily occasioned by a decree of bankruptcy, by filing a voluntary petition, and that the questions certified to us by the Circuit Court of Appeals should be answered in the negative.

But it is claimed that, having regard to the phraseology of the act of 1898, and although the warrant to confess judgment

was given by the debtor before the passage of that act, yet being irrevocable and continuing in force, the debtor thereby, without any further act of his, suffered or permitted a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, and that he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate, by failing to file a voluntary petition.

Such a contention, in view of the various decisions of this court and hereinbefore cited, could not have been heretofore maintained, and it is, therefore, imperative that those who now urge it should be able to point to some clear and unmistakable declaration in the existing statute. So important a change in the policy of the bankrupt law must be manifested by explicit language, and cannot be safely and with due regard to sound principles of interpretation, made to depend upon conjecture and inference based upon a mere difference in phraseology between the present and prior acts of bankruptcy. In other words, the question before us must be decided by a consideration of the language actually used in the act of 1898, interpreted in the light of the previous decisions of this court.

We are concerned, in the present case, with section 3 of the act of 1898, which deals with and describes acts of bankruptcy. The section is headed "Acts of Bankruptcy," and then sets forth what are deemed to be acts of bankruptcy, as follows:

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2), transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3), suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4), made a general assignment in further benefit of his creditors; or (5), admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It is obvious that Congress here had in view voluntary acts of the debtor—"*acts* of bankruptcy by a person." Concededly clauses 1, 2, 4 and 5 require an affirmative and voluntary act. It would naturally be presumed that the same quality of act would be required by clause 3. The section consists of a single sentence, in which the several clauses all depend upon the leading phrase, "acts of bankruptcy shall consist of having done the several things enumerated in the dependent clauses." An act is defined in the Century Dictionary as "an exertion of energy or force, mental or physical; anything that is done or performed; a doing or deed; an operation or performance." And in the same work "an act of bankruptcy" is defined to be "an act the commission of which by a debtor renders him liable to be adjudged a bankrupt." In Anderson's Law Dictionary the word "act" is defined to be "a thing done or performed; the exercise of power; an effect produced by power exerted;" and it is said, "'Act' and 'intention' may mean the same as 'act,' alone, for act implies intention, as in the expression 'death by his own act or intention.'"

Black's Law Dictionary describes "an act" as follows: "In a more technical sense, it means something done voluntarily by a person, and of such a nature that certain legal consequences attach to it. Thus a grantor acknowledges a conveyance to be his act and deed, the terms being synonymous."

Independently of dictionary definitions, it may be safely said that, in common usage and understanding, the word "act" signifies something done voluntarily, or, in other words, the result of an exercise of the will.

In view, then, of the plain meaning of the language of the clause and of its association, in the section, with other acts which require affirmative and voluntary proceedings on the part of the debtor, it would seem to be clear that mere failure by a debtor, even if insolvent, to file a voluntary petition in bankruptcy, is not, in itself, under the facts conceded to exist in this case, an "act of bankruptcy."

Indeed, it seems quite clear that if section 3 of the act of 1898 had been the first enactment by Congress on the subject, no one would ever have suggested the contrary view. The

contention is mainly, if not wholly, founded on the omission of several words used in the previous statutes, or rather in the substitution of different words in section 3 for those used in the corresponding sections of the earlier laws. Those changes may be made best to appear by presenting them in parallel columns:

ACT OF MARCH 2, 1867, c. 176, 14 STAT. 517.

SEC. 39. That any person . . . who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall . . . *procure* or *suffer* his property to be taken on legal process, with intent to give a preference to one or more of his creditors, . . . or with the intent by such disposition of his property to defeat or delay the operation of this act, shall be deemed to have committed an act of bankruptcy.

SEC. 35. That if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his

ACT OF JULY 1, 1898, c. 541, 30 STAT. 544.

SEC. 3. Acts of bankruptcy by a person shall consist of his having . . . *suffered* or *permitted*, while insolvent, any creditor to obtain a *preference* through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference.

SEC. 60. A person shall be deemed to have given a preference, if, being insolvent, he has *procured* or *suffered* a judgment to be entered against himself, in favor of any person, or *made a transfer* of any of his property, and the effect of the enforcement of such judgment or transfer will be to *enable* any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

SEC. 67. . . . A lien created by, or obtained in, or pursuant to, any suit or proceeding at law, or in equity, including an

property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment or conveyance, or to be benefited thereby, or by such attachment, payment, pledge, assignment or conveyance, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this act, the same shall be void.

SEC. 29. . . . No discharge shall be granted if the bankrupt . . . within four months before the commencement of such proceedings, *has procured* his lands, goods, money or chattels to be attached, sequestered or seized on an execution, attachment on mesne process, or a judgment by confession, which was begun against a person within four weeks before the filing of the petition in bankruptcy, by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if it appears that said lien *was obtained and permitted* while the defendant was insolvent, and that its existence and enforcement will work a preference, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent, and in contemplation of bankruptcy, or that such lien was sought and permitted in *fraud* of the provision of this act.

That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt.

It having been repeatedly ruled, in the cases cited, that, under these provisions of the act of 1867, no person shall be deemed guilty of an act of bankruptcy except by reason of some affirmative and intentional act intended to defeat the purposes of the act, and that failing to file a voluntary petition in

bankruptcy where a creditor is pursuing, in a state court, a lawful remedy on a lawful security given and received before the act of bankruptcy was passed, and without any knowledge or consent by the debtor to such suit or proceeding, is not an act of bankruptcy, it is now contended that a different conclusion must be reached under the provisions of the act of 1898.

Examination and comparison of the above contrasted provisions will show, as I think, that no change was made by the latter enactment in the vital and decisive purpose that no person shall be visited with the penalty of involuntary bankruptcy unless he has brought himself within the denunciation of the law by some intentional and voluntary act, and that, this being so, the decisions under the previous act, that merely failing to file a voluntary petition is not such voluntary and intentional act in fraud of the statute, are applicable and decisive of the present case.

Arguments based on supposed differences between *permit* and *suffer* and *procure* are too uncertain on which to find that a great and important change in the theory of the bankrupt law was intended by Congress. Such an intention would have been directly and clearly expressed, and not left to uncertain inferences. That such inferences are uncertain plainly appears by the opposite conclusions reached, in respect to the meaning of the clauses in question, by the learned judges of the District and Circuit Courts. See *In re Moyer*, 93 Fed. Rep. 188; *In re Thomas*, 103 Fed. Rep. 272; *In re Nelson*, 98 Fed. Rep. 76; *Duncan* v. *Landis*, Cir. Ct. of Appeals for the Third Circuit.

The case of *Pirie* v. *Chicago Title & Trust Company*, 182 U. S. 438, the most recent decision of this court under the act of 1898, arose under another clause of the act, and is not directly applicable to the question we have here considered, but, so far as it has any bearing, sustains the views herein expressed. The question there was under sec. 60, and it was *held* that where a payment or transfer was made by an insolvent debtor, within four months prior to the filing of a petition in bankruptcy to a creditor who did not have cause to believe that an unlawful preference was intended, the creditor may keep the

payment or transfer, even though the amount of such payment or transfer was thereby withdrawn from the administration of the bankrupt court and satisfaction in full was received by the creditor, but that if such payment was only a partial discharge of his debt, the creditor cannot prove, under the distribution in bankruptcy, for the balance of his debt, unless he first surrenders to the trustee the amount of the partial payment.

The conclusion warranted by the words of the statute, interpreted in this light of our previous decisions, is that the questions certified to us by the Circuit Court of Appeals should be answered in the negative.

THE CHIEF JUSTICE, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM concurred in this dissent.

NATIONAL FOUNDRY AND PIPE WORKS *v.* OCONTO WATER SUPPLY CO.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 33. Argued and submitted March 22, 1901.—Decided January 6, 1902.

The rights asserted by the claimants are embraced in three propositions, stated in the opinion of the court. The first of these propositions does not involve a Federal question, and is not reviewed in the opinion of the court. The second and third are as follows: "2. A claim that in virtue of the sale made in the mechanics' lien suit after the decision of the Circuit Court of Appeals in the creditors' suit and the final entry and execution of the mandate, the Pipe Works became the owner of the Water Works plant, entitled to the possession of the same, with a right, however, in the defendant, as a junior lien holder, to redeem by paying the indebtedness due the Pipe Works; and, 3. An assertion that if the Pipe Works had not become the owner of the Water Works plant in virtue of the sale made as stated in the opinion of the court, that corporation, in any event, in virtue of its asserted mechanics' lien, had been vested with a paramount right as against the Water Supply Company, which it was the duty of a court of equity to enforce by compelling payment by the defendant," present Federal questions, which it is the duty of this court to determine.

Statement of the Case.

It is elementary that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court, in order to throw light upon the subject.

Every claim of a Federal right asserted in this case is without merit, and the court below did not err.

The Circuit Court simply declined, in drawing the decree, to construe the opinions of the Circuit Court of Appeals, and deemed that it discharged its duty by obeying the mandate to dismiss the bill for want of equity, without adding any provision which might be construed as adding to or taking away from either of the parties to the record any right which had been established in virtue of the judgment of the Circuit Court of Appeals.

The validity of the title claimed by Andrews & Whitcomb to have resulted from the sale to them in the mortgage foreclosure suit having been an issue and decided in the creditors' suit, all other grounds supposed to establish the invalidity of such title should have been presented in the creditors' suit, and such as were not must be deemed to have been waived, and were concluded and foreclosed by the judgment rendered in such issue.

In January, 1890, the city of Oconto adopted an ordinance authorizing the Oconto Water Company, its successors and assigns, to construct and operate waterworks in said city. Said Oconto Water Company is hereafter referred to as the Water Company. The Water Company commenced the construction of its plant. On August 28, 1890, it contracted with the plaintiff in error, the National Foundry and Pipe Works, Limited—hereafter styled the Pipe Works—for a supply of pipe to be used in said water plant, the pipe to be delivered at intervals and to be paid for partly in cash and partly on credit.

Whilst the pipe was being delivered and placed in position the Water Company, by an instrument in writing, of date September 13, 1890, agreed with a firm known as Andrews & Whitcomb, whose members were domiciled in the State of Maine, in substance as follows:

In consideration of cash advances, to aggregate $40,000, to be made by said firm from time to time for the completion of the waterworks, the Water Company was to execute its promissory notes for the amount of each advance. The Water Company agreed as to collateral security as follows:

"To make an immediate transfer, in trust, to said parties of the first part (Andrews & Whitcomb), of the Oconto water-

works franchise as issued to said Oconto Water Company, together with the entire one hundred thousand ($100,000.00) dollars of stock of said Oconto Water Company, and further agrees to make an immediate issue of one hundred thousand ($100,000.00) dollars in the first mortgage bonds of the said Oconto Water Company, the same to be secured by deed of trust on the entire Oconto waterworks franchise and all of the rights and privileges of said company in said waterwork franchise; said deed of trust to be made to some trust company to be hereafter mutually agreed upon."

About contemporaneously with the execution of said agreement a formal mortgage was given to Andrews & Whitcomb by the Water Company, upon "all the rights, privileges, immunities, franchises and powers, of whatsoever name or nature, which had been granted to it."

This mortgage was not at once placed on record, and moreover a considerable time elapsed before delivery was made to Andrews & Whitcomb of the stock and bonds provided for in the agreement previously referred to.

In the meanwhile all the pipe contracted for was delivered and the same had been used in connection with the waterworks plant. Although the Water Company was during this time obtaining money from Andrews & Whitcomb, it failed to use the money in payment for the pipe. In consequence the Pipe Works on September 15, 1890, recorded a claim for a lien on the plant of the Water Company. After the recording of this lien, and on January 13, 1891, the mortgage in favor of Andrews & Whitcomb, which, as already stated, had been executed on or about September 13, 1890, was placed on record.

On January 30, 1891, the Pipe Works filed its bill in the Circuit Court of the United States for the Eastern District of Wisconsin to foreclose its asserted lien and to procure a sale thereunder of the plant of the waterworks company and of the interest of that company in certain real estate upon which the company had constructed its pump and water wells, the legal title to the real estate being in the city, but the company having taken possession, under an agreement by which it secured the right to obtain a conveyance, from the city, upon compli-

ance with certain conditions. To this bill the Water Company was alone made defendant. The lien asserted was contested by the defendant. This litigation will be hereafter referred to as the mechanics' lien suit.

Andrews & Whitcomb having made the advances provided in the contract of September 13, 1890, and additional advances being required, they were made by Andrews & Whitcomb under contracts executed on March 13 and May 16, 1891, of tenor like unto the September agreement, the collateral security provided under that contract being made liable for the new advances. No independent mortgage was executed.

The Water Company not having performed the stipulations made in its contracts with Andrews & Whitcomb, on June 17, 1891, that firm commenced proceedings in a court of the State of Wisconsin to foreclose an asserted lien which it claimed was created upon the franchise and property by the mortgage and contracts to which we have already referred. This litigation will be hereafter referred to as the mortgage foreclosure suit. To this suit the Water Company was alone made defendant. On August 13, 1891, a personal judgment was entered for $63,889.23 and costs, and a sale was decreed to enforce the lien declared in the following clause of the conclusions of law of the court:

"Third. In addition to such personal judgment, the plaintiffs are entitled to a further judgment decreeing, adjudging and declaring the amount thereof, together with the proper costs for the enforcement of the same, a lien upon all of the property shown by the complaint in this action and the proofs adduced by the plaintiff herein in support thereof to have been sold, assigned, transferred and set over or pledged to the plaintiffs by the defendant in trust and as collateral security for the repayment of the sums loaned and advanced the defendant by the plaintiffs under the contracts set forth in the complaint."

Under this decree a sale was made at public auction to Andrews & Whitcomb of the rights, privileges, immunities, franchises and powers granted to the Water Company by the ordinance of July 9, 1890, and the stock and bonds pledged as aforesaid. The sale was confirmed by the court and possession

of the waterworks plant was taken by Andrews & Whitcomb. At the offering a representative of the Pipe Works notified those present that the Pipe Works claimed a paramount lien upon the property proposed to be sold and that the purchaser would take subject to its rights.

Pending the mechanics' lien suit and the sale and purchase by Andrews & Whitcomb, the Pipe Works brought an action at law against the Water Company in the Circuit Court of the United States for the Eastern District of Wisconsin, making also defendants thereto Andrews & Whitcomb, sued as garnishees. A judgment for the amount due was obtained on January 2, 1892, as against the Water Company, but the action was never prosecuted to a termination as against the garnishees.

On January 11, 1892, the Pipe Works filed in the Circuit Court of the United States a creditors' bill, based upon its judgment at law, and the return of execution thereon unsatisfied. This litigation will be hereafter referred to as the creditors' suit. The Water Company, Andrews & Whitcomb, an alleged corporation styled the Oconto City Water Supply Company, to be hereafter referred to as the Water Supply Company, as well as various parties whom it was claimed were liable as stockholders for unpaid subscriptions, and others, were made defendants. It would seem that in the original bill the Water Supply Company was averred to be a corporation and a resident or citizen of Wisconsin, but Andrews & Whitcomb denied such averment. Thereafter, in an amendment to the creditors' bill, it was alleged that subsequently to the filing of the bill the Water Supply Company had been organized, and that it claimed to have derived, through Andrews & Whitcomb, title to the rights and property of the Water Company, but that said claim was subordinate to the lien of the plaintiff. Whether at the time of this amendment the Water Supply Company had acquired the waterworks plant, or such acquisition was made subsequent thereto, does not appear, nor is it stated in the record that it was ever served with process.

A full statement of the grounds for the equitable relief asked for in the creditors' bill is contained in the opinion in *Andrews* v. *National Foundry & Pipe Works, Limited*, reported in 76

Fed. Rep. 167. It suffices here to say that the bill assailed the validity of the mortgages to Andrews & Whitcomb and the transfer of stock and bonds to them, and attacked their foreclosure sale, and asserted the liability, as stockholders, of Andrews & Whitcomb and others for unpaid subscriptions to the stock of the Water Company. A receiver was asked to take possession of and operate the waterworks plant, then in the possession of Andrews & Whitcomb, and an injunction was prayed to restrain Andrews & Whitcomb from holding, managing or interfering in any way with the rights, franchises, plant, property, rents, profits, bonds and affairs in the hands of said receiver, and from asserting any right, title or interest in the property or the rents, issues and profits thereof until the further order of the court.

The mechanics' lien suit culminated on October 3, 1892, in a decree in favor of the Pipe Works, recognizing its mechanics' lien for the amount of pipe unpaid for, and a sale was decreed to satisfy such indebtedness. The conclusions of the Circuit Court were supported by an elaborate opinion holding that, under the laws of the State of Wisconsin, a lien existed which it was the duty of a court of equity to enforce. 52 Fed. Rep. 43. From the decree thus rendered an appeal was prosecuted to the Circuit Court of Appeals for the Seventh Circuit.

On October 10, 1892, the Circuit Court, in the creditors' suit, appointed a receiver and allowed a preliminary injunction. 52 Fed. Rep. 29. From the interlocutory decree granting an injunction an appeal was prosecuted to the Circuit Court of Appeals for the Seventh Circuit.

On November 7, 1893, the Court of Appeals for the Seventh Circuit (Woods, Circuit Judge, and Bunn and Baker, District Judges, sitting) affirmed the decree of the court below in the mechanics' lien suit, in which decree had been declared the existence of the mechanics' lien asserted by the Pipe Works. The court in a *per curiam* opinion adopted the reasons expressed by the lower court. 18 U. S. App. 380; 59 Fed. Rep. 19, 20.

On January 11, 1894, the Circuit Court of Appeals determined the appeal taken by Andrews & Whitcomb from the

interlocutory order granting an injunction in the creditors' suit. The lower court was reversed, the court holding, for the reasons expressed in its opinion, that the contracts made between the Water Company and Andrews & Whitcomb were not *ultra vires* or otherwise invalid, and that there had been no legal justification for the allowance of an injunction. The court said, however, (p. 472): "Whether or not, and to what extent, the mortgage of the franchises covers the plant of the company, need not now be considered." After the filing in the Circuit Court of the mandate from the Circuit Court of Appeals in such cause the Pipe Works amended its bill by setting up the final decree it had obtained on October 3, 1892, in the mechanics' lien suit affirmed as above stated by the Circuit Court of Appeals. Such lien it was averred was paramount to any rights asserted by Andrews & Whitcomb or their privies. To the bill and amendment Andrews & Whitcomb filed separate and elaborate answers. Without going into detail, the answers asserted the validity as mortgages of the instruments executed by the Water Company in favor of Andrews & Whitcomb and their operative force upon the property and franchises, denied any liability of the members of said firm as stockholders, and asserted that they were not bound by the decree in the mechanics' lien suit, because they were neither parties nor privies to that action, and they further claimed that under the statutes of Wisconsin no lien could arise in favor of one furnishing materials or supplies in connection with waterworks, and that the decision of the Federal court to the contrary was erroneous, as the Supreme Court of the State of Wisconsin had, since the decision rendered by the Federal court, held that no mechanics' lien could be created by such a transaction.

Upon these issues and similar issues joined upon certain interventions of creditors asserting mechanics' liens upon the property of the Water Company, which it is unnecessary to refer to, a decree was entered on July 17, 1895, granting all the relief demanded by the Pipe Works Company and the intervenors. 68 Fed. Rep. 1006.

The court held, first, that there was a mechanics' lien in favor of the Pipe Works; that whilst it was true that, subsequent to

its decision in the mechanics' lien suit, the Supreme Court of Wisconsin had decided that a mechanics' lien could not arise, on the plant of the waterworks, under the circumstances disclosed, the Federal court was not bound by such interpretation of the state statute, and it adhered to its own previous conclusion to the contrary; second, that Andrews & Whitcomb were in legal effect the owners of all or nearly all the stock and liable for the unpaid subscriptions thereon to the extent necessary to pay the debts of the Water Company; third, that as stockholders said firm were bound by the decree in the mechanics' lien suit, because, as stockholders, they were privies to the decree; fourth, that assuming the validity of the mortgage in favor of Andrews & Whitcomb, yet as it was recorded subsequent to the time when the mechanics' lien in favor of the Pipe Works became operative, the mortgage was subordinate to such mechanics' lien; fifth, that the bonds issued by the Water Company and which were delivered to Andrews & Whitcomb and a defendant trust company were void; and, sixth, that the instruments executed in the name of the Water Company in favor of Andrews & Whitcomb were made in good faith and for a valuable consideration, and were not withheld from record by the consent or procurement of Andrews & Whitcomb nor in fraud of creditors.

An appeal was prosecuted by the city of Oconto, by Andrews & Whitcomb, and also by the Water Supply Company, as the successor in interest of Andrews & Whitcomb, by reason of having acquired, pending the suit, the rights of the firm in the matter in controversy. On this appeal, the Circuit Court of Appeals—Woods and Showalter, Circuit Judges, and Seaman, District Judge, sitting—first considered whether the alleged mechanics' lien existed in favor of the Pipe Works. The court declared that by the authority of the thing adjudged, resulting from the decree in the mechanics' lien suit, the existence of such a lien was established as between the Pipe Works and the Water Company. Coming to consider whether the lien existed as between the Pipe Works and Andrews & Whitcomb and their privies, the Water Supply Company, the court held that inasmuch as the Supreme Court of the State of Wisconsin, inter-

preting the statutes of Wisconsin, since the decision of the Circuit Court of Appeals in the mechanics' lien suit, had held that no mechanics' lien was authorized by such statutes against the plant of the Water Company, the Federal court should follow the construction of the Wisconsin statute announced by the highest court of the State, even though in doing so it became necessary to take a different view from that which the court had previously announced. The Circuit Court of Appeals therefore decided that there was no mechanics' lien in favor of the Pipe Works or any of the intervenors as against Andrews & Whitcomb or the Water Supply Company.

Approaching next the consideration of the correctness of the ruling of the Circuit Court, that Andrews & Whitcomb were privies to the decree against the Water Company in favor of the Pipe Works, because they were stockholders in the company, the court decided that whilst undoubtedly a stockholder was a privy to actions against the corporation in which he was a stockholder, when brought upon money demands asserted against the corporation, yet, as Andrews & Whitcomb held the stock of the Water Company, not as subscribing stockholders, but as contract creditors of the Water Company, the principle upheld by the lower court had been erroneously applied, and therefore Andrews & Whitcomb were not privies to the decree recognizing the mechanics' lien and were in no respect bound thereby. In so far as it had been decided by the court below that the mortgage to Andrews & Whitcomb was subordinate to the mechanics' lien, because recorded subsequently to the placing on record of the affidavit as to such lien, the court said (46 U. S. App. 295): "The lien decrees out of the way all questions concerning the recording of that mortgage and the antecedent contracts disappear."

The grounds upon which the lower court held that Andrews & Whitcomb were liable as stockholders to make payment of unpaid subscriptions were reviewed and held to be unfounded. The validity of their mortgage for the whole amount of their debt and the paramount nature of its lien was recognized, and the court held that it was unnecessary to determine whether the mortgage bonds were valid, because as the mortgage for the

debt to Andrews & Whitcomb, for which the bonds were merely collateral, was recognized and enforced it became unnecessary to consider that subject. In respect to the title of Andrews & Whitcomb, the court for reason stated, said (46 U. S. App. 299): "We are of the opinion that the mortgage of the franchise carried with it the water plant."

The decree of the lower court was reversed and the cause remanded with instructions to dismiss the bill. The opinion of the court is reported in 46 U. S. App. 281, and 76 Fed. Rep. 166.

In an opinion reported in 46 U. S. App. 619, and 77 Fed. Rep. 774, a petition for a rehearing was denied. Among other things the court reiterated its previous ruling that the mortgage to Andrews & Whitcomb of the franchise extended to the waterworks plant, and that Andrews & Whitcomb were not concluded by the mechanics' liens decrees, and hence though purchasing at public auction upon the sale under the foreclosure proceedings, during the pendency of the mechanics' lien foreclosure suit the firm was not, as to the latter proceeding, in the category of a purchaser *pendente lite*, and the doctrine of *lis pendens* did not apply. In the course of the opinion the court said (46 U. S. App. 624):

"The question whether the appellees, as judgment creditors of the Oconto Water Company, have a right to redeem from the sale made to Andrews & Whitcomb upon their foreclosure decree, to which the appellees were not parties, does not, in our opinion, arise upon this record, and will not be prejudiced by our decision."

And, taking notice of this court's own records, it is to be observed that, after the denial by the Circuit Court of Appeals for the Seventh Circuit of the petition for a rehearing in the creditors' suit, application was made to this court for a writ of certiorari, which was refused on April 26, 1897. 166 U. S. 721. Subsequently in the Circuit Court of Appeals, on motion by appellants "that mandate should direct that provision be made in the decree for the conveyance to appellant Oconto Water Supply Company of the legal title to the land holding the pump station and wells of the waterworks plant," the court on May 18, 1897, overruled the motion with leave to the court below to

make necessary and proper orders for the transmission of the legal title to the property.

After receipt of the mandate of the Circuit Court of Appeals, the Circuit Court, on July 29, 1897, entered a decree consisting of eight numbered clauses. The sixth, seventh and eighth embodied a decree against one Sturtevant, (against whom a decree *pro confesso* had been entered,) holding him liable in the sum of ninety-nine thousand dollars for unpaid subscriptions and ordering payment of the sum due the pipe works and the intervening and unsecured creditors and the costs of the action. The decree, so far as it affected the other defendants, is as follows:

"This cause came on to be reheard upon the record herein and upon the mandates of the United States Circuit Court of Appeals for the Seventh Circuit upon the appeals from the decree entered herein on the 17th day of July, 1895, taken by the said defendants, S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company, and The City of Oconto, which said mandates have heretofore been filed herein, and, after argument of counsel, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

"First. That the decree of said court of July 17, 1895, do stand as entered, except that as to said defendants, S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company and city of Oconto, the bill of complaint herein be, and the same is hereby, dismissed for want of equity, with costs in favor of said defendants, taxed at the sum of one thousand eight hundred and twenty $\frac{35}{100}$ dollars, except that the defendant Oconto City Water Supply Company is required to pay the amount adjudged in said decree or judgment in favor of Albert E. Smith, receiver, being the sum of twenty-five hundred dollars ($2500).

"Second. That said bill of complaint be, and the same is hereby, dismissed as to the defendants Charles C. Garland, F. H. Todd, Matt. S. Wheeler, A. J. Elkins and N. S. Todd for want of service of process upon them, but without costs.

"Third. That a decree *pro confesso* having been heretofore entered against the said defendants, Minneapolis Trust Company, Oconto National Bank and S. W. Ford, all of which said

defendants were duly served with process or duly appeared herein, the said bill be, and hereby is, dismissed as to said defendants, but without costs.

"Fourth. That the clerk of this court be, and he is hereby, directed to restore to the defendants S. D. Andrews and W. H. Whitcomb the possession of all the bonds secured by the mortgage or trust deed of the Oconto Water Company dated the 1st day of November, 1890, which were deposited with said clerk by said Andrews and Whitcomb; that such restoration by said clerk to said Andrews and Whitcomb is, and shall be, without adjudging the validity or invalidity of the said bonds in their hands or the issue of the same by said Oconto Water Company.

"Fifth. That the legal title to the land upon which the pumping station and wells of the water works plant are located, which heretofore by deed dated the 31st day of January, A. D. 1894, was conveyed by the order of this court by the city of Oconto to the said defendant, Oconto Water Company, the description of which said land is more fully set out in said deed as follows, to wit: . . . be, and the same is hereby, passed and transferred by virtue of the instruments of mortgage dated September 13, 1890, and March 13, 1891, executed by said defendant, Oconto Water Company, to said defendants, S. D. Andrews and W. H. Whitcomb, and of the sale in the proceedings to foreclose the same to the said defendant, Oconto City Water Supply Company, as the assignee and successor in interest of the said defendants, S. D. Andrews and W. H. Whitcomb, and that the said defendant, Oconto Water Company, and its receiver, Albert E. Smith, by separate instruments duly witnessed and acknowledged so as to entitle the same to record, execute and deliver conveyances thereof to the defendant, Oconto City Water Supply Company, but without prejudice to any rights which said complainant or said R. D. Wood & Company may have under their said mechanics' lien decrees or otherwise to redeem from said instruments of mortgage or either of them, or from the sale under the proceedings to foreclose the same."

Although the decree rendered in favor of the Pipe Works in

its mechanics' lien foreclosure suit authorized a sale of the waterworks plant to enforce the lien found to exist, no sale had taken place up to the time the creditors' suit was decided by the Circuit Court, because of a restraining order preventing such sale. When, however, the Circuit Court entered its decree in favor of complainant in the creditors' suit, the fifth clause thereof was couched in the following language: "Fifth. The complainant and R. D. Wood" (an intervening creditor claiming under an alleged mechanics' lien decree) "are authorized to proceed to the enforcement and satisfaction of their respective liens in accordance with their several decrees." The right thus recognized was suspended by the appeal which was taken to the Circuit Court of Appeals.

When the mandate of the Circuit Court of Appeals in the Pipe Works creditors' suit came to the Circuit Court it would seem some difficulty arose as to the form of the decree, and in consequence the court filed a memorandum opinion which we find printed in the brief of counsel for the plaintiff in error. The sixth clause of that memorandum, which indicates the reasons by which the Circuit Court was led to the conclusion that in executing the mandate of the Circuit Court of Appeals it was unnecessary to insert in the final decree of the Circuit Court a positive inhibition against any further attempt on the part of the Pipe Works to enforce, as against Andrews & Whitcomb and the Water Supply Company, its alleged mechanics' lien, if it possessed any, is as follows:

"Sixth. The order of March 5, 1894, restraining the marshal from proceeding to sell under the mechanics' lien decree, was superseded by the fifth clause of the decree of July 17, 1895. There would seem to be no necessity for further order in respect thereto. If the contention of the complainant that the mechanics' lien decree took precedence of subsequent mortgages was not disposed of by the Court of Appeals, it should be placed in a position to be able to redeem from the sale under the mortgages to Andrews & Whitcomb. If that contention was disposed of by the Court of Appeals, a sale under the mechanics' lien decree can do no harm to Andrews & Whitcomb or their successor in interest, beyond possibly creating

a cloud upon their title. The court would not, however, permit this to be done if it was clear from the several opinions of the Court of Appeals that the contention in that respect had been determined.

"I cannot spell out from the opinions of that court that the precise contention had been considered and determined, unless it must be held to have been so determined by the fact of the reversal of the decree of this court and the dismissal of the bill for want of equity as against Andrews & Whitcomb and their successor in interest."

After the entry in the creditors' suit of the final decree of the Circuit Court, the Pipe Works directed the marshal to execute the order of sale contained in the decree of October 3, 1892, in the mechanics' lien suit. On August 23, 1897, in said suit, sale was made to the Pipe Works of the waterworks plant and all the right, title and interest of the Oconto Water Company in and to the premises upon which the same were located, together with the franchise of maintaining and operating said plant. A day or two afterwards the sale was confirmed by the Circuit Court, and a deed was executed and delivered by the marshal to the Pipe Works, who caused the same to be recorded.

On December 28, 1897, the Pipe Works commenced the present action in a state court in Wisconsin, naming as sole defendant the Oconto City Water Supply Company. The complaint contained averments as to the incorporation of the defendant, the sale and delivery of pipe by the plaintiff to the Oconto Water Company, the decree of October 3, 1892, in the mechanics' lien suit and the sale to and purchase by it in August, 1897, under such decree. The making by the Water Company to Andrews & Whitcomb of the alleged mortgages or pledges heretofore referred to was next averred, as also the proceedings instituted by Andrews & Whitcomb culminating in the foreclosure of said mortgages and the sale thereunder to Andrews & Whitcomb, and the taking possession by virtue of such sale of the plant and its transfer thereafter by Andrews & Whitcomb to the defendant, the Water Supply Company. It was also alleged that Andrews & Whitcomb, prior to the making of the mortgages or pledges in question, had knowledge of the fact that

plaintiff had furnished to the Water Company pipe as aforesaid for use in its plant, and that Andrews & Whitcomb, prior to the commencement of their foreclosure suit, knew that plaintiff had filed its claim for a mechanics' lien upon the plant of the Water Company and had commenced proceedings for the enforcement of such lien. It was also averred that the Water Supply Company, when it took possession of the plant, had knowledge or notice that the pipe furnished had not been paid for and that proceedings were pending to enforce a mechanics' lien therefor. The specific averment was made that the title acquired by the Pipe Works under its mechanics' lien foreclosure proceeding was prior to any lien upon or title to said plant then or at any time held or acquired by the Water Supply Company. The prayer for relief, as amended, was as follows:

"Wherefore said plaintiff demands judgment against said defendant for the value of said pipe and materials furnished to said Oconto Water Company and for the amount of its said lien against the property of said Oconto Water Company; that the possession and use of said plant be given to it, and that said defendant, its officers, servants and agents, may be perpetually enjoined from occupying, possessing or using the same and any of the pipe so furnished by said plaintiff and being a part of the water plant or system now operated by it, or that said defendant, its officers, servants and agents, may be enjoined from occupying, possessing, or using said plant or any of the pipe so furnished by said plaintiff for said plant, unless within such reasonable time as said court may prescribe for that purpose said defendant shall pay to said plaintiff the amount due to it under its mechanics' lien decree, as hereinbefore set forth, and that said defendant be ordered and required to pay the amount of said plaintiff's judgment against said Oconto Water Company and against said defendant herein in such manner as to this court shall seem just and pursuant with its equitable powers and in accordance with the practice in such cases, and said plaintiff prays for such other, further or different relief as to the court shall seem just and proper, and for the costs of this action."

In the answer filed on behalf of the Water Supply Company, the averments of the complaint that the Pipe Works was the

Counsel for Parties.

owner or holder of any right, title or interest in or to the said waterworks plant or any pipe constituting a part of said plant, was traversed. By leave of court an amendment was filed to the answer, in which the defendant set up the plea of *res judicata* arising from the decree of the Circuit Court of Appeals in the creditors' suit. The case was tried by the court without a jury, special findings of fact were made respecting the judgment in the creditors' suit, the conclusions of law being embodied in the following decree:

"It is adjudged that the plaintiff has not and never had any lien on the waterworks plant and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by claim and title paramount to and free and clear of any claim or lien of the plaintiff; that the plaintiff is not entitled to any relief demanded in the complaint, as amended or otherwise.

"It is further adjudged that this action be, and the same is hereby, dismissed for want of equity, and that the defendant do have and recover of and from the plaintiff the sum of sixty-three and $\frac{92}{100}$ dollars, its costs and disbursements in this action."

On appeal, the Supreme Court of Wisconsin affirmed the judgment of the trial court. 105 Wisconsin, 48. A writ of error from this court was allowed by the Chief Justice of the Supreme Court of Wisconsin. It was therein recited that in this suit there "was drawn in question the validity and binding effect of a title, right and privilege claimed by the said National Foundry and Pipe Works, Limited, under authority exercised under the United States, and decrees duly entered in the Circuit Court of the United States for the Eastern District of Wisconsin," and that "the decision of the said Supreme Court of the State of Wisconsin was against the right and privilege specially set up by said National Foundry and Pipe Works, Limited, under said authority and decrees."

Mr. George H. Noyes for plaintiff in error.

Mr. George G. Greene, for defendant in error, submitted on his brief, on which was also *Mr. Jerome R. North.*

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

In order to clearly present the simple issue arising on this record for decision we have been obliged to make the foregoing lengthy statement of the facts which are involved in this unnecessarily protracted litigation.

When the allegations of the complaint by which this action was commenced are ultimately resolved, all the rights which they assert are embraced within the following propositions:

1. A contention that the Water Supply Company, by virtue of its acquisition from Andrews & Whitcomb, was a mere successor corporation of the original Water Company, and became bound for all its indebtedness, including, of course, the debt due the Pipe Works, and this irrespective of the existence of a mechanics' lien;

2. A claim that in virtue of the sale made in the mechanics' lien suit after the decision of the Circuit Court of Appeals in the creditors' suit and the final entry and execution of the mandate, the Pipe Works became the owner of the waterworks plant, entitled to the possession of the same, with a right, however, in the defendant as a junior lienholder to redeem by paying the indebtedness due the Pipe Works; and,

3. An assertion that if the Pipe Works had not become the owner of the waterworks plant in virtue of the sale made as just stated, that corporation, in any event, in virtue of its asserted mechanics' lien, had been vested with a paramount right as against the Water Supply Company, which it was the duty of a court of equity to enforce by compelling payment by the defendant.

In effect, these questions were all concluded adversely to the plaintiff in error by the court below, the rights embraced in the first proposition were decided to be without merit because the facts disclosed the Water Supply Company to be an independent corporation and not bound as a successor company for the indebtedness of the original Water Company. As this proposition does not involve a Federal question, we may not review it. Indeed, the finality of the decision below on the subject is

recognized by the plaintiff in error, since the assignment of error made in this court seeks to raise no question on such subject.

All the rights asserted by the plaintiff in error which are embraced in the second and third propositions were decided adversely below, on the ground that they were not open to inquiry, because concluded by the presumption of the thing adjudged, arising from the final decree in the creditors' suit. And it is upon the asserted erroneous application by the court below of the plea of *res judicata* that all the Federal questions urged must, in effect, depend.

The proposition is that the court below denied due effect to a decree of the Federal court, by maintaining the plea of *res judicata* predicated on a decree of such court. This contention, apparently, is not that due effect was denied to the decrees of a Federal court, but that too great an effect was given. When, however, the proposition is stripped of the seeming confusion which arises from the form in which it is stated, it becomes clear that, ultimately considered, it really involves the assertion that the court below refused to give due effect to the decree of a Federal court. This is so, because the proposition substantially is that the state court, in maintaining the plea of *res judicata* resulting from the decree in the creditors' suit, denied the rights which were vested in the Pipe Works by virtue of the decree in the mechanics' lien suit. The argument in substance is therefore that as the rights under the mechanics' lien decree were not impaired or destroyed by the decree in the creditors' suit, the consequence of erroneously deciding that they were obliterated by the decree in the creditors' suit, was to refuse to give due effect to the rights vested in the Water Company as a result of the decree in its favor in the mechanics' lien suit.

As it is thus demonstrated that the determination whether the court below correctly applied the plea of *res judicata* necessitates our deciding whether due effect was given to the decree in the mechanics' lien suit, a Federal question is presented which it is our duty to determine. *Jacobs* v. *Marks*, 182 U. S. 583, 587; *Hancock National Bank* v. *Farnum*, 176 U. S. 640,

645; *Pittsburg &c. Railway Co.* v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507, and cases cited.

In order to correctly decide what was concluded by the decision of the Circuit Court of Appeals in the creditors' suit and the final decree entered in such cause, it must be ascertained who were the parties to that cause, what were the issues therein presented for adjudication and what was decided thereon. It is elementary that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court in order to throw light upon the subject. *Baker* v. *Cummings*, 181 U. S. 117; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 688.

Conceding for the present that the face of the final decree in the creditors' suit leaves uncertain exactly what was concluded, we will resort to the means of elucidation just referred to, viz., the pleadings and opinions rendered, in order to ascertain who were the opposing parties, what were the issues joined between them and the matters finally determined in the cause. So doing, it appears that the parties to the cause were the Pipe Works on the one side and Andrews & Whitcomb and the Water Supply Company and others on the opposing side. It also appears that the following, among other controversies, were directly at issue in the cause:

1. Had the Pipe Works, as to Andrews & Whitcomb and their privies, a lien upon the plant and franchise of the waterworks, arising from the sale of the pipe, the recording of the claim for a lien and the recognition of such lien in the decree of the Circuit Court of the United States in the mechanics' lien suit, and this although the plant and franchise had come into the possession of Andrews & Whitcomb under the sale in their mortgage foreclosure suit?

2. Was the mortgage referred to a valid instrument? and,

3. Was title vested in Andrews & Whitcomb to the waterworks plant and franchise by reason of the sale to them under the decree in the mortgage foreclosure suit?

Between the parties we have named and upon the issues just stated it is free from doubt that it was decided that Andrews

& Whitcomb were lawfully in possession in virtue of the sale made in the mortgage foreclosure, and that under the law of Wisconsin there was no lien in favor of the Pipe Works as against Andrews & Whitcomb or their assigns upon the franchise and plant in question arising either from the law of that State, the recording of the alleged lien or the decree rendered in the mechanics' lien suit. It hence results that every claim of a Federal right here asserted is without merit and that the court below, in enforcing the principle of the thing adjudged, did not err, and of course did not refuse to give due effect to the mechanics' lien suit decree.

It is insisted, however, that although these conclusions may be inevitable from a consideration together of the pleadings, the opinions and the final decree in the creditors' suit, the contrary result is impelled if merely the final decree entered by the Circuit Court upon the mandate of the Circuit Court of Appeals is taken in view. The argument is that as the decree is unambiguous it is the law of the case, and resort cannot be had to other sources of information. In effect, the contention comes to this, that although it may be patent that the issues between the parties, as above stated, were determined, yet as the decree entered by the Circuit Court failed to express such conclusion, the parties are bound by the decree as entered, as they did not avail themselves of a proper remedy, by mandamus or otherwise, to correct the frustration of the results of the decisions of the Circuit Court of Appeals, which the argument necessarily assumes must have been brought about by the decree made by the Circuit Court.

But the decree of the Circuit Court does not support the contention based upon it. That decree, in express terms, dismissed the creditors' bill as to Andrews & Whitcomb and the Water Supply Company, for want of equity, without any qualification or reservation whatever. It in express terms passed the legal title to the real estate upon which was located the pumping station and wells of the Water Company to the Water Supply Company, as the assignees of Andrews & Whitcomb, such transfer of title being declared to be made by virtue of the mortgage to Andrews & Whitcomb and the sale to them in

their mortgage forclosure suit. It is true that in the clause making this transfer it was declared that it was "without prejudice to any right which said plaintiff . . . may have under their mechanics' lien decree or otherwise to redeem from said instruments of mortgage or either of them or from the sale under the proceedings to foreclose the same." But this was a mere reservation of the right to redeem, if any existed. It left the Pipe Works in the position where, if its right had not been foreclosed as the necessary consequence of the dismissal of the bill for want of equity, it would not be so foreclosed in consequence of the specific direction for the transfer of the legal title to the property. In other words, the Circuit Court, in complying with the positive directions of the Circuit Court of Appeals, but refused to interpret specifically the scope and effect of the mandate of the appellate court, and left that mandate to operate in its own language. At best, the reservation, when considered in connection with the other portions of the decree, can only have the effect of creating an uncertainty as to what was intended, and this being the case, resort to the proper sources of information, to which we have already alluded, dispels the doubt and leaves the matter free from difficulty. And this conclusion is equally made imperative by a consideration of the memorandum opinion of the Circuit Court—set out in our statement of the case—relating to the drawing of the proposed final decree. From that document it is made clear that the Circuit Court simply declined, in drawing the decree, to construe the opinions of the Circuit Court of Appeals, and therefore deemed that it discharged its duty by obeying the mandate to dismiss the bill for want of equity, without adding any provision which might be construed as adding to or taking away from either of the parties to the record any right which had been established in virtue of the judgment of the Circuit Court of Appeals.

Another contention remaining to be considered is that even though the court below correctly applied the principle of *res judicata*, it yet, in granting affirmative relief, declined to give due effect to the decree in the mechanics' lien suit. On this subject the argument is that although as regards Andrews &

Whitcomb and the Water Supply Company, it be recognized that it had been conclusively determined that the Pipe Works had no mechanics' lien whatever, yet as such lien was finally decreed in the creditors' suit as against the water company, because of the thing adjudged arising from the decree in the mechanics' lien suit, therefore a right to redeem from the sale to Andrews & Whitcomb existed, and such right was nullified by the broad grant of affirmative relief made in this cause by the court below. Whether the pleadings in the cause justified a grant of affirmative relief, considered as a mere question of practice, presents no Federal question. The claim that because by the thing adjudged it is indisputable that the Pipe Works had a lien against the water company, it therefore follows that there is still a right to redeem as against Andrews & Whitcomb and the Water Supply Company, even although it was established by the effect of *res judicata* arising from the creditors' suit, that the lien as to the parties named was inoperative and a nullity, is but another form of asserting that the decree in the creditors' suit was not *res judicata* between the Pipe Works and Andrews & Whitcomb and the Water Supply Company.

In conclusion, we need only remark that the observations just made are equally applicable to the elaborate contention, in the brief of counsel, that as the mechanics' lien suit was pending in a Federal court when Andrews & Whitcomb instituted their foreclosure proceedings in the state court, the Federal court had exclusive jurisdiction of the *res*, and the state court was without power in the premises. The validity of the title claimed by Andrews & Whitcomb to have resulted from the sale to them in the mortgage foreclosure suit having been an issue and decided in the creditors' suit, the contention now being noticed and all other grounds supposed to establish the invalidity of such title should have been presented in the creditors' suit, and such as were not must be deemed to have been waived, and were concluded and foreclosed by the judgment rendered in such issue. *Dowell* v. *Applegate*, 152 U. S. 327, 343.

Affirmed.

CAPITAL CITY DAIRY COMPANY *v.* OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 45. Argued April 19, 22, 1901.—Decided January 6, 1902.

The judgment of the state court in this case was based upon the consideration given by it to all the asserted violations of the statutes jointly, and hence no one of the particular violations can be said, when considered independently, to be alone adequate to sustain the conclusions of the court below that a judgment of ouster should be entered.

The contention that the statutes of Ohio in question are repugnant to the commerce clause of the Constitution is without merit. Those statutes were, the act of 1884, the act of 1886, and the act of 1890, all referred to in the opinion, and all relating to the sale of drugs or articles of food, and especially oleomargarine.

The Fifth Amendment to the Constitution operates solely on the National Government, and not on the States.

The legislature of Ohio had the lawful power to enact the statutes in question, and so far as they related to the manufacture and sale of oleomargarine within the State of Ohio by a corporation created by the laws of Ohio, they were not repugnant to the Constitution of the United States.

This court, on error to a state court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been, by adequate specification, called to the attention of the state court, and had not been considered by it, it not being necessarily involved in the determination of the cause.

THE case is stated in the opinion of the court.

Mr. Thomas Ewing Steele for plaintiff in error.

Mr. E. B. Dillon for defendant in error. *Mr. John M. Sheets* was on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

By a law of the State of Ohio, enacted in 1884, it was made the duty of every one manufacturing or exposing for sale any drug or article of food included in the provisions of the act to furnish, on demand, to the person who should apply for and

tender the value of the same a sufficient sample to enable an analysis to be made. This law is compiled in Bates' Annotated Ohio Statutes, sec. 4200–7.

By the provisions of another statute, enacted in 1886, and amended in 1887, it was made unlawful to sell or offer for sale or exchange any substance purporting, appearing or represented to be butter or cheese, or having either the semblance of butter or cheese, not wholly made of pure milk or cream, salt and harmless coloring matter, unless done under its true name, and it was exacted that each package should have distinctly marked upon it, in the manner pointed out in the statute, the true name of the article and its constituent ingredients. And it was further forbidden, in the marking, to use any words or combination of words indicating that the article was either butter, cream or dairy product. This statute is compiled in Bates' Annotated Statutes of Ohio, sec. 4200–30.

In 1890 it was further provided that no person should manufacture within the State, or should offer for sale therein, whether manufactured therein or not, any substance made out of any animal or vegetable oil, not produced from unadulterated milk or cream from the same, in imitation or semblance of natural butter or cheese produced from butter, unadulterated milk or cream. The terms butter and cheese, as defined in the statutes were declared to be articles manufactured exclusively from pure milk or cream, or both, with salt, and with or without any harmless coloring matter.

It was provided, however, in this act that nothing therein contained "shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient causing it to look like or appear to be butter, as above defined." This statute is compiled in Bates' Annotated Statutes of Ohio, sec. 4200–13–14.

On May 16, 1894, it was further enacted that "no person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methly (methyl) orange, butter

yellow, annotto aniline dye, or any other coloring matter." Bates' Annotated Statutes, sec. 4200–16.

On January 27, 1893, the plaintiff in error was incorporated under the general laws of the State of Ohio, "for the purpose of manufacturing, selling and dealing in oleomargarine, and the materials and utensils employed in the manufacture, storage and transportation thereof, and all things incident thereto."

Under this charter the corporation thereafter carried on its business in the State of Ohio.

On April 12, 1898, proceedings in *quo warranto* were begun in the Supreme Court of the State of Ohio by the attorney general of that State to forfeit the franchise of said corporation and for the appointment of trustees to wind up its affairs. The relief demanded was based on the charge: That the corporation had "continuously since about the time of its creation, up to the present day, within this State, . . . offended against the laws of this State, misused its corporate authority, franchise and privileges, and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges and franchises specially inhibited by law" in enumerated particulars. The specifications of the petition are reproduced in the margin.[1]

---

[1] First charge. Said defendant corporation has, during the times and at the places aforesaid, manufactured and sold an article in imitation and semblance of natural butter; which said article was made out of animal and vegetable oils and compounded with milk or cream and both; which said article was not then and there in separate and distinct form and in such a manner as would advise consumers of its real character, and was not free from coloring matter or other ingredients causing it to look like and appear to be butter, and said article was not butter, but was an article made in imitation and semblance thereof.

Second charge. The defendant corporation has, at the times and places above mentioned, manufactured and has offered and exposed for sale and has sold and delivered and had in its possession with the intent to sell and deliver oleomargarine in large quantities—as your relator is informed, in quantities from ten thousand to twenty thousand pounds thereof daily; which said oleomargarine contained coloring matter, to wit, annotto and other coloring matter unknown to relator.

Third charge. The said defendant corporation, during the times and at the places above stated, has manufactured and sold a substance purported

The defendant answered, its defences being reiterated under seven different headings. It suffices for the purposes of the issues now before us to summarize the answer as follows:

It traversed all the facts alleged in the petition except as admitted in the answer. It expressly denied that the corporation had abused or misused its corporate powers. It admitted that the corporation had been engaged under its charter in the manufacture and sale of oleomargarine. It denied that any such product had been offered for sale as an imitation of butter and without being plainly marked in conformity with the laws of the State of Ohio and the laws of the United States. It denied that the corporation had refused to deliver samples of its products to the duly qualified inspector and agent of the State, as alleged in the fourth charge of the petition, and averred that the entire matter alleged in the fourth charge was based upon

---

and appearing to be butter and having the semblance of butter, but which substance was not butter, but was oleomargarine; but the packages, rolls and parcels thereof were not distinctly and durably stamped, or painted, or stenciled, or marked in the true name thereof in the ordinary bold-faced capital letters required by the act of May 17, 1886, entitled "An act to prevent the adulteration of and deception in the sale of dairy products, etc." (83 O. L. 178.)

Fourth charge. Said defendant corporation has refused and still refuses to deliver and furnish to the duly appointed, qualified and acting inspector and agent of the dairy and food commissioner of this State any sample or quantity of the oleomargarine manufactured by it, although duly demanded by him and the value of the same for a ten-pound package thereof or any other reasonable quantity thereof was tendered it for the analysis thereof, contrary to section 4 of the act of March 20, 1884, entitled "An act to provide against the adulteration of food and drugs," (81 O. L. 67,) and said defendant has refused and still refuses to permit said inspector and agent to enter into its factory for any purpose whatsoever, and has refused and still refuses to permit him to examine or cause to be examined any of the products manufactured by it.

Fifth charge. All of said violations of the laws of this State as set forth in the first, second, third and fourth charges have been made and done by said defendant corporation with full knowledge of the said violations of law and for the expressed purpose and intent of violating said laws and evading the same and for the purpose of deceiving the people of this State and other States as to the real character of its said product, contrary to the act of March 7, 1890, entitled, "An act to prevent deception in the sale of dairy products and to preserve public health." (87 O. L. 51.)

a personal difficulty which happened on one isolated occasion between an officer of the corporation and one of the agents of the dairy and food commissioners "who was not an assistant commissioner."

The answer admitted that for a brief period between January 1, 1898, and March 1, 1898, the corporation had manufactured oleomargarine and colored it with a coloring matter known as annotto, which was entirely harmless; that this was done in midwinter; that the effect of such use was to give the oleomargarine a yellow color; that the butter made at that period of the year was not naturally yellow, and that therefore the use of the coloring matter did not cause the oleomargarine to look like natural butter; on the contrary, it was averred that oleomargarine cannot be made so as to look unlike butter unless the manufacturer is allowed to color it; that all the oleomargarine thus manufactured during the period stated was made not for sale in the State of Ohio, but for sale in other States, and was wholly sent out of the State of Ohio to such other States; that the statutes of the State of Ohio enacted in 1890 and 1894, above referred to, did not forbid the use in the manufacture of oleomargarine of a harmless coloring matter, but that if they did they were repugnant to the constitution of the State of Ohio and to section 8 of article I of the Constitution of the United States and section 1 of the Fourteenth Amendment of that Constitution.

The answer additionally alleged that as the statutes which it was alleged had been violated imposed criminal penalties, the proceeding in *quo warranto* to forfeit the charter was unauthorized, at least until a previous criminal conviction for the acts complained of had been obtained. The portion of the answer setting up this defence concluded as follows: "And that this proceeding is in contravention of the Constitution of the United States."

A demurrer was filed to the defences, which asserted the repugnancy to the constitution of the State and of the United States of certain of the statutes charged to have been violated, but no action seems to have been taken upon such demurrer.

A reply was filed in which the State substantially reiterated

the allegations of the petition, taking issue with the claim that the company had used only a harmless coloring matter for a short period and in oleomargarine intended solely for sale outside of the State of Ohio. The reply also took issue with the claim that the natural color of oleomargarine was a light yellow, and it was also denied that oleomargarine "cannot be made to look 'unlike' butter, unless the manufacturer is allowed to color it."

The case was heard "upon the petition and answer, testimony, and arguments of counsel." The Supreme Court of Ohio found the averments of the petition to be true, and entered a decree ousting the corporation from its corporate rights, privileges and franchise, adjudging that it be dissolved, and appointing two trustees for the creditors and stockholders of the corporation to wind up its affairs. 62 Ohio St. 350. The court, on the day this opinion was announced, entered an order, which it declared was made a "part of the record of this case," in which it was stated that at the request of the defendant it was certified that in deciding the case the court had found it necessary to consider whether the Ohio act of 1884 providing for the furnishing of samples, that of 1886 as amended in 1887 requiring all oleomargarine to be marked in a specific manner, the act of 1890 forbidding the manufacture and sale of any oleomargarine colored to look like butter, as well as the act of 1894 forbidding the use of coloring matter in oleomargarine, were not repugnant to the third clause of section 8 of article I of the Constitution of the United States conferring upon Congress the power to regulate commerce and to the Fifth and Fourteenth Amendments of that instrument, and that the court had sustained the validity of the statutes, although their unconstitutionality had been asserted by the defendant. A writ of error was allowed by the Chief Justice of the Supreme Court of Ohio.

Before disposing of the controversies presented by the assignment of errors, it is necessary to notice a motion of the defendant in error to dismiss. It is predicated upon the ground that as the court below found the defendant had violated the statute in refusing to furnish samples as required by the law of

1884, this affords adequate support for the judgment of ouster, irrespective of any substantial Federal question. It is true in the pleadings it was not asserted that the provision of the Ohio law requiring the delivery of samples was repugnant to the Constitution of the United States, but in the certificate made by the Supreme Court of Ohio on the day its opinion was announced, it is certified that for the purposes of the decision of the case it became necessary to determine whether the act of 1884, providing for the delivery of such samples, was repugnant to the Constitution of the United States. Conceding that the certificate can only serve to aid in elucidating whether a Federal question was presented by the record, and that such certificate cannot independently in and of itself import into the record such a question when not otherwise properly inferable from the record, we do not think the motion to dismiss is well taken. We cannot, from an inspection of the opinion of the Supreme Court of the State of Ohio, conclude that the judgment of ouster which that court rendered was predicated alone upon the fact that the defendant had failed to deliver samples as required by the statute. On the contrary, we think the context of the opinion of the court demonstrates that the judgment against the corporation was based upon, not alone the mere failure to deliver the samples, but because of that failure as connected with and explained by the acts of the corporation in continuously, and as declared by the court flagrantly, violating not one but most of the other statutes relied on. In other words, we think that the judgment of the state court was based upon the consideration given by it to all the asserted violations of the statutes jointly, and hence no one of the particular violations can be said, when considered independently, to be alone adequate to sustain the conclusions of the court below that the judgment of ouster should be entered. We come then to the principal contention which the record presents, the asserted repugnancy of the before-mentioned statutes of the State of Ohio to the Constitution of the United States.

At the outset, it is apparent that all the statutes assailed, except the act of May 16, 1894, were on the statute books of the State at the date when the provisions of the general incorpora-

tion law of the State were taken advantage of. The question thus at once arises whether the corporation can be heard to assail the validity of the statutes which were in force when it voluntarily caused itself to be incorporated. We do not, however, pursue this thought further, since it is impossible to separate, for the purposes of the questions here arising, the laws existing at the time of the charter from the act of 1894, which was enacted after the incorporation.

The contention that the statutes in question are repugnant to the commerce clause of the Constitution is manifestly without merit. All the acts of the corporation which were complained of related to oleomargarine manufactured by it in the State of Ohio, in violation of the laws of that State, and therefore operated on the corporation within the State and affected the product manufactured by it before it had become a subject of interstate commerce. *Kidd* v. *Pearson*, 128 U. S. 1; *United States* v. *E. C. Knight Co.*, 156 U. S. 1. It results that the plaintiff in error is not in a position to assail the validity of the statutes, because of their supposed operation upon interstate commerce, and we are not called upon to express an opinion respecting the constitutionality of the statutes upon this assumption.

The contention that the statutes in question violate the Fifth Amendment to the Constitution of the United States need not be dwelt upon, as it is elementary that that amendment operates solely on the National Government and not on the States. *Brown* v. *New Jersey*, 175 U. S. 172, 174, and cases cited.

The inquiry then is this: Do the provisions of the Ohio statutes which, allowing the manufacture and sale of oleomargarine when free from any coloring matter or other ingredient causing it to look like or to appear to be butter as defined in the statute, and which, moreover, expressly forbids the manufacture or sale within the State of any oleomargarine which contains any methyl, orange, butter yellow, annotto, aniline dye or any other coloring matter, contravene the Constitution of the United States?

The proposition is that as by the Ohio statutes harmless coloring matter is permitted to be used in butter, the effect of

prohibiting the use of such harmless ingredients in oleomargarine is to deprive the manufacturer of oleomargarine of the equal protection of the laws and to take from him his property without due process of law.

The Supreme Court of Ohio, however, having before it the evidence introduced upon the issues of fact made in the pleadings, held that oleomargarine was an article which might easily be manufactured so as to be hurtful, and thus result in fraud upon and injury to the public, and that the inhibition of the use of coloring matter in oleomargarine was a reasonable police regulation tending to insure the public against fraud and injury. The purpose of the legislature in permitting the use of harmless coloring matter in butter and requiring that oleomargarine be sold in its natural state, was declared not to be for the purpose of discriminating in favor of butter but to provide a ready means by which the public might know that an article offered for sale was butter and not oleomargarine.

It cannot in reason be said, as a mere matter of judicial inference, that such regulations for such purpose were a mere arbitrary interference with rights of property, denying the equal protection of the laws or that they amounted to a taking of property without due process of law. It follows that the legislature of Ohio had the lawful power to enact the regulations. *Gundling* v. *Chicago*, 177 U. S. 183. Indeed, the controversy is governed by the decisions in *Powell* v. *Pennsylvania*, 127 U. S. 678, and *Plumley* v. *Massachusetts*, 155 U. S. 461. In the *Powell* case a statute absolutely forbidding the manufacture and sale in the State of Pennsylvania of oleomargarine was held valid, because designed to prevent fraud. Speaking of the case in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, this court said (p. 15):

"That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the State, and the only question was one as to the police power of the State acting upon a subject always within its jurisdiction."

In the *Plumley* case, the power of the State, in legislating for the prevention of deception in the manufacture and sale of

imitation butter, was held to extend to the prohibition of the sale of oleomargarine artificially colored so as to look like yellow butter, although brought into Massachusetts from another State.

Applying the principles enunciated in the cases to which we have just referred, it results that the Ohio statutes under consideration, in so far as they relate to the manufacture and sale of oleomargarine within the State of Ohio by a corporation created by the laws of Ohio, were not repugnant to the Constitution of the United States.

We have previously stated that in the answer of the defendant it was asserted that the remedy for the alleged violations of the Ohio statutes whose constitutionality was assailed, was by a criminal proceeding and not by an action in *quo warranto* for the purpose of forfeiting the charter of the defendant, and that in said pleading it was averred in general terms that "this proceeding" was "in violation of the Constitution of the United States." Under the assumption that the general reference to the Constitution just adverted authorizes this court to pass upon them, two Federal questions are elaborately pressed upon our attention. They are:

First. That as the acts done by the corporation which are complained of were by the statutes of Ohio made the subject of criminal penalties, such acts could not be availed of as the basis of civil proceedings in *quo warranto* until in any event prior thereto there had been criminal conviction, without denying to the defendant the equal protection of the laws or taking its property without due process of law contrary to the Fourteenth Amendment.

Second. That the appointment of trustees to wind up the affairs of the corporation as a consequence of the judgment of ouster produced not only like results, but also violated the contract clause of the Constitution of the United States, because amounting to an impairment of the obligations of the contract which the charter of the corporation had engendered. It is conceded that the Ohio statute which authorized the proceedings in *quo warranto* for any abuse or misuse of corporate powers, and which empowered the court, if it decreed against

the defendant, to appoint trustees to liquidate the affairs of the corporation, was a part of the general law of Ohio at the time the defendant corporation was organized. The contentions, then, reduce themselves to this, that the contract rights of the corporation arising from the charter were denied and the Fourteenth Amendment to the Constitution was violated because the corporation was subjected to the general laws of Ohio, which became impliedly a part of the charter. Whilst thus to bring the propositions to their ultimate analysis may be wholly adequate to dispose of them, we do not pass upon them, since they do not properly arise for decision on this record.

It is settled that this court, on error to a state court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause. *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 52, 67; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648, 654, 655, and cases cited. Now, the only possible support to the claim that a Federal question on the subject under consideration was raised below, was the general statement in the answer to which we have already adverted, that, "this proceeding is in violation of the Constitution of the United States." Nowhere does it appear that at any time was any specification made as to the particular clause of the Constitution relied upon to establish that the granting of relief by *quo warranto* would be repugnant to that Constitution, nor is there anything in the record which could give rise even to a remote inference that the mind of the state court was directed to or considered this question. On the contrary, it is apparent from the record that such a contention was not raised in the state court. Thus, although at the request of the defendant below, the plaintiff in error here, the state court certified as to the existence of the Federal questions which had been called to its attention and which it had decided, no reference was made in the certificate to the claim of Federal right we are now considering.

The foregoing considerations are equally applicable to the proposition that the obligations of the contract engendered by

the charter were impaired by the appointment by the court of liquidating trustees. Indeed, though the appointment of such trustees was expressly prayed in the petition, the record does not even suggest that a constitutional question in respect to such appointment was raised or called to the attention of the court below.

Judgment affirmed.

GREENE *v.* HENKEL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued November 26, 27, 1901. — Decided January 6, 1902.

A fair interpretation of the language used by the District Judge in the court below in granting the application for a warrant of removal from New York to Georgia shows that from the evidence he was of opinion that there existed probable cause, and that the defendants should therefore be removed for trial before the court in which the indictment was found.

In proceedings touching the removal of a person indicted in another State from that in which he is found to that in which the indictment is found this court must assume, in the absence of the evidence before the court below, that its finding of probable cause was sustained by competent evidence.

It is not a condition precedent to taking action under Rev. Stat. § 1014 that an indictment for the offence should have been found.

The finding of an indictment does not preclude the Government, under Rev. Stat. § 1014, from giving evidence of a certain and definite character concerning the commission of the offence by the defendants in regard to acts, times, and circumstances which are stated in the indictment itself with less minuteness and detail.

Upon this writ the point to be decided is, whether the judge who made the order for the removal of the defendants had jurisdiction to make it; and if he had the question whether upon the merits he ought to have made it is not one which can be reviewed by means of a writ of *habeas corpus*.

The indictment in this case is *prima facie* good, and when a copy of it is certified by the proper officer, a magistrate acting pursuant to Rev. Stat. § 1014, is justified in treating the instrument as an indictment found by a competent grand jury, and is not authorized to go into evidence which

Statement of the Case.

may show or tend to show violations of the United States statutes in the drawing of the jurors composing the grand jury which found the indictment.

By a removal such as was made in this case the constitutional rights of the defendants were in no way taken from them.

THIS case is brought here by the appellants for the purpose of obtaining a review of the order of the Circuit Court of the United States for the Southern District of New York denying their application for a writ of *habeas corpus*. The proceeding which led up to the application for the writ was commenced under section 1014 of the Revised Statutes, which reads as follows:

"For any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a Supreme or Superior Court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offence is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

The appellants were at the time of the commencement of the proceeding non-residents of the State of Georgia, one of them being a resident of the State of Connecticut, two residing in the State of New York and one in the State of Massachusetts. The proceeding was inaugurated in the Southern District of New York, where one of the assistants of the United States district attorney for that district, on December 13,

1899, made a sworn complaint in writing before United States Commissioner Shields, residing in that district, which complaint in substance charged upon information and belief the commission by the defendants, in the Southern District of Georgia, of the crime of conspiracy to defraud the United States of divers large sums of money, by means of a fraudulent scheme devised by the defendants together with one Oberlin M. Carter, a captain of the corps of engineers, United States Army; that the scheme was first devised and put in operation in the Southern District of Georgia in or about the year 1891, and had been continuously in process of execution there by the defendants from that time until October 1, 1899. The complaint also recites, with some detail, certain acts of the defendants by which the conspiracy was effectuated and accomplished, and it also stated that complainant's belief in regard to the charge made by him was based upon information contained in an indictment found by the grand jury of the United States District Court for the Southern District of Georgia, on December 8, 1899, and he alleged that bench warrants had been issued for the arrest of the defendants from the clerk's office of that court on December 9, 1899, and he was informed and believed that the defendants were then in the Southern District of New York. A certified copy of the indictment was attached and made a part of the complaint before the commissioner, who thereupon issued a warrant reciting the substance of the complaint, and directing the arrest of the defendants and their production before him to be dealt with according to law.

The defendants upon being notified of the issuing of the warrants at once appeared before the commissioner and asked for an examination, pending which they were enlarged upon bail. In the course of the examination, and in addition to the complaint already made, the assistant United States attorney for the Southern District of New York on January 13, 1900, filed a deposition detailing certain acts of one or more of the defendants performed by them in order to effect and further the conspiracy set forth in the indictment referred to in his original complaint.

Upon the examination, the defendants offered evidence tend-

ing to show a want of probable cause for believing them guilty of the charge made by the assistant district attorney. All evidence of this nature was objected to by counsel for the Government and was excluded by the commissioner, who held that the indictment found in the district court in Georgia was conclusive evidence of probable cause, and that the only further evidence necessary was proof identifying the defendants as being the parties mentioned in the indictment, and this proof being given, the commissioner committed them to the custody of the marshal of the Southern District of New York until a warrant for their removal to the Southern District of Georgia should issue by the United States District Judge for the Southern District of New York, or until they should otherwise be dealt with according to law.

Application was thereupon made by the district attorney to the United States District Judge for the Southern District of New York for an order for the removal of the defendants under section 1014 of the Revised Statutes. At the hearing upon such application the defendants maintained that the commissioner should have received the evidence of want of probable cause, which they offered, and thereupon the District Judge made an order that, "after hearing on exceptions and on application for order of removal, ordered that the matter be referred back to the commissioner for taking further competent testimony as offered by either party in accordance with the opinion filed herein."

In the opinion which he filed the District Judge held that the defendants were not concluded by the indictment, but were entitled to introduce evidence before the commissioner to show want of probable cause for believing them guilty of the offence charged.

Pursuant to the order of the District Judge, the defendants again appeared before the commissioner, and a large amount of testimony *pro* and *con* was then taken by him on the question as to probable cause for believing the defendants guilty of the commission of the offence charged, as well as testimony concerning certain alleged irregularities in the drawing and organization of the grand jury which found the indictment upon which

the removal of the defendants is sought. The irregularities consisted of alleged violations of the statute in relation to the drawing of jurors for the courts of the United States, (section 2 of the act of June 30, 1879, 21 Stat. 43,) and were, as the defendants claimed, of such character as to render the organization of the grand jury illegal and to prevent such illegal body from finding any valid indictment. After all the testimony was in that either party desired to produce, the commissioner on March 21, 1901, again committed the defendants to the custody of the marshal by an order, in which he stated that, "after full and fair examination touching the charge in the annexed warrant named, it appears from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained." Application was then made to the District Judge for an order of removal, which application was opposed by the defendants on the ground that the evidence showed that there was no probable cause for believing them guilty of the charge, and also because the indictment spoken of was wholly void on the grounds mentioned. After argument the judge decided that as to the objections of illegality in the drawing of the grand jury, they could be heard before the trial court, and its decision thereon, if erroneous, could be corrected in the regular course of appeal. Upon the subject of the evidence regarding probable cause the judge in the course of his opinion stated as follows:

"The commitment by the commissioner and his finding of probable cause have been made after an extremely full hearing of all the evidence offered on both sides. No evidence reasonably pertinent has been rejected. Objection is made that irrelevant and incompetent evidence offered by the Government was received by him; but, as stated in the former decision, the evidence receivable in such preliminary examinations is not to be strictly limited by the technical rules applicable upon the final trial; and upon a charge of fraud, or of conspiracy to defraud, a somewhat wide latitude in the testimony is always allowed even on the final hearing, for the purpose of showing the intent. The proof of the charges in this case does not consist of any direct and certain testimony of the commission of the

offences charged, but rests upon many facts and circumstances in a long course of dealing, from which it is claimed that the inference of an unlawful intent to defraud the Government must reasonably be inferred; and the bills alleged to be fraudulent in the last counts of the indictment are claimed to be fraudulent, not so much because they were not according to contract, as because the contracts themselves were fraudulent, and procured through a fraudulent conspiracy with Captain Carter, an employé of the Government. Considering the nature of the case, therefore, I find no such objections to the testimony admitted by the commissioner as to vitiate his findings or require reconsideration by him.

"As respects the finding of probable cause, I have carefully considered the very extended briefs and arguments of counsel, and have examined the voluminous evidence with a view to ascertain whether there was competent evidence before the commissioner sufficient in itself to sustain his finding of probable cause. Under the rule above stated, it is not for the judge, on an application for removal, to compare different parts of the testimony in order to determine their relative weight, or to substitute his own judgment for that of the commissioner, even though it might on the whole evidence be different. By this, however, I do not mean to be understood as expressing any opinion whatsoever on the merits of the case. The defendants have given a great deal of evidence tending to show that their contracts were fairly obtained, their work well and honestly done, and that the Government has not been defrauded a dollar.

"The Government, on the other hand, has given evidence tending to a contrary conclusion; and it has shown beyond question that Captain Carter, the employé of the Government and the engineer in immediate charge of the work on the Government's behalf, had for several years immediately preceding the contracts referred to in the indictment received from the contractors continuously, through his father-in-law, in many divisions of profits, one third of the final net proceeds of each contract remaining for division among the chief contractors; and that this one third amounted in the aggregate to over

$700,000. This, it is claimed, gives significance and meaning to many other facts in evidence showing a fraudulent and illegal combination between the defendants and Captain Carter to benefit themselves at the expense of the Government, and to procure the allowance and payment of excessive and fraudulent bills by means of contracts fraudulently procured.

"A case presenting such circumstances is especially one that should be submitted to a jury trial. Nor need there be any apprehension that an impartial court and jury will not reach essential justice, or that while guarding jealously the honor and interests of the Government, they will not also appreciate the legitimate rights of the defendants, the peculiar difficulties, risks and hazards of such contract work, the excellence and merit of that which is well done, and the rights of the defendants by legitimate business methods to lessen competition and to secure as favorable contracts as they can; and determine fairly whether the contracts in question were fraudulent, or obtained by illegal methods, or by a conspiracy with the engineer in charge to abuse the opportunities of his position in order to despoil the Government and obtain exorbitant prices for their common benefit.

"Having found in the previous decision that the ninth and tenth counts of the indictment are good, whatever may be held as to the counts preceding them, the defendants should be ordered to be removed for trial, or to give bail for their due appearance."

An order was thereupon made and the warrant signed by the judge on May 28, 1901, for the removal of the defendants to the Southern District of Georgia. On June 8, 1901, the defendants were surrendered by their bail to the custody of the marshal, and on that day they presented their petition to the Circuit Court of the United States for the Southern District of New York for a writ of *habeas corpus*, setting out the foregoing facts and the order for removal, which they alleged to be illegal and in violation of their constitutional rights. They also alleged in their petition that they were not in the State of Georgia at the time of the filing of the indictment, nor had they been since that time, and that while they were in New York, and during

the pendency of the proceedings before the commissioner to obtain their removal to the State of Georgia, and while they were under bail in such proceedings in the Southern District of New York, the United States district attorney of Georgia on March 5, 1900, in a letter written at Macon, Georgia, notified the attorneys of the defendants that the case would be called in the United States District Court at Savannah on March 12, 1900, in order that the defendants in the indictment might appear and present and interpose any objections which they might desire to urge as to the impannelling of the grand jury which returned a true bill of indictment in their case, and such other objections as they might make to the validity of the indictment. The petition then proceeded as follows:

"That your petitioners are informed and believe, that he now claims and insists that because of your petitioners' failure to appear as above required, that they are barred and estopped in that court from questioning the illegality and validity of said alleged grand jury. If this contention be sustained, then unless this court hears and passes on the said questions these petitioners will be tried on the alleged indictment in said court in Georgia, although the fact is that such indictment was never found by any legally organized grand jury, but was presented and filed in court by a body of men purporting to be a grand jury in whose selection and drawing every statute of the United States relating thereto was disregarded and set at naught."

It was also stated in the petition that the petitioners were held for trial for an infamous crime, without the indictment of a grand jury and in violation of the rights secured to them by the Constitution of the United States; that notwithstanding the invalidity of the indictment and the other facts stated in the petition, the United States marshal for the Southern District of New York detained the petitioners and was about to remove them to the eastern division of the Southern District of Georgia for trial upon the pretended indictment, and in pursuance of the proceedings had before the commissioner, and the warrant of removal issued thereupon by the District Judge; that the detention of the petitioners and their removal in pursuance of said proceedings and warrant were without authority of law,

and that they were restrained of their liberty in violation of the Constitution of the United States, and that any further proceedings in pursuance thereof or the further detention or imprisonment of the petitioners would be unlawful. They therefore asked for a writ of *habeas corpus* to inquire into the lawfulness of their imprisonment. After a hearing upon the petition, the Circuit Court denied the application, and from the order denying the writ the defendants appealed to this court, which appeal was allowed and the defendants admitted to bail pending its decision.

Mr. David B. Hill for appellants. *Mr. L. Laflin Kellogg*, *Mr. Abram J. Rose* and *Mr. Alfred C. Petté* were on his brief.

Mr. Marion Erwin and *Mr. Solicitor General* for appellee.

Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court.

It will be noted that the proceeding leading up to the warrant for the removal of the defendants to Georgia for trial was inaugurated in the Southern District of New York by the sworn deposition of an assistant of the United States district attorney for the Southern District of New York, in which deposition it was alleged that an indictment had been found against the defendants in the United States District Court in Georgia, a certified copy of which indictment was attached to and made a part of the deposition. Upon the written charge thus made, the United States commissioner in New York issued his warrant for the arrest of the defendants, who upon being notified immediately appeared before him and an examination was proceeded with. Upon this examination the commissioner refused to receive evidence offered by the defendants tending to show a want of probable cause, and held that the certified copy of the indictment found in the District Court of Georgia was conclusive evidence of probable cause, and accordingly made an order committing the defendants to the custody of the marshal until a warrant for their removal should issue by the United States District Judge for the Southern District

of New York. Upon application to the District Judge for such warrant he held that the indictment was not conclusive evidence of probable cause, and sent the case back to the commissioner, (*United States* v. *Greene*, 100 Fed. Rep. 941,) to hear evidence on that subject. On subsequent hearings before the commissioner evidence *pro* and *con* as to probable cause was given and also as to the drawing of the grand jury, and that officer decided that "after full and fair examination touching the charges in the annexed warrant named, it appears from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained." And he thereupon for the second time committed the defendants to the marshal's custody to await a warrant of removal to be signed by the District Judge. When the application for the warrant of removal was made to that judge he held that a proper case was made out, and signed the order for removal.

From these facts it is apparent that the question is not before us whether the finding of an indictment is in a proceeding under section 1014 of the Revised Statutes conclusive evidence of the existence of probable cause for believing the defendant in the indictment guilty of the charge therein set forth. The District Judge in this case held that it was not, and sent the case back to the commissioner, before whom evidence was thereafter taken upon the subject, and a decision arrived at after considering all the evidence in the case. We are not, therefore, called upon to express an opinion upon the question. Upon all the evidence taken before the commissioner he has found that probable cause existed. We think that a fair interpretation of the language used by the District Judge in granting the application for the warrant of removal shows beyond question that, from the evidence taken before the commissioner, the judge was of opinion that there existed probable cause, and that the defendants should therefore be removed for trial before the court in which the indictment was found.

When the judge refers to the testimony taken before the commissioner, although he does in terms say that he expresses no opinion upon the merits, yet he states that upon the evidence before him, it is a proper case to be submitted to a jury for

trial. That is in effect a finding of probable cause, which is not necessarily a finding that the persons charged are guilty. The meaning to be gathered from the language of the judge is that while there is evidence on the part of the Government tending to show the guilt of the accused, there is also evidence on the part of the defendants tending to show their innocence, and that the determination of the question in such a complicated case should properly be left to a jury. He says that he has carefully considered the very extended briefs and arguments of counsel and has examined the voluminous evidence with a view of ascertaining whether there was competent evidence before the commissioner sufficient in itself to sustain his finding of probable cause, and he, in substance, finds there was, and grants a warrant for the removal of the defendants. This is perfectly consistent with the further statement made by him that he did not express any opinion whatsoever on the merits of the case. That is, he did not express an opinion whether upon all the evidence the defendants ought to be convicted or acquitted of the charge. He was not called upon to do so. It was sufficient, if all the evidence being taken into account, there existed such probable cause for believing the defendants guilty as to warrant their removal for trial of the offence charged. This is not expressing an opinion upon the merits, although the language of the judge is sufficient as expressing the existence of probable cause against the defendants.

The evidence which was taken before the commissioner and which was before the District Judge upon the question of the existence of probable cause was not annexed to the petition and forms no part of the proceeding before the Circuit Court upon the application for the writ of *habeas corpus*. Whether that evidence was or was not sufficient for the commissioner to base his action upon or for the District Judge to approve, was not a question before the Circuit Judge, and is not before this court. We must assume, in the absence of the evidence taken before the commissioner and approved by the District Judge, that their finding of probable cause was sustained by competent evidence, bearing in mind also that on this proceeding the court

would not in any event look into the weight of evidence on that question.

It is urged, however, that the offence charged, and upon which defendants are to be removed, is that which is contained in the indictment only, and if the indictment be insufficient for any reason, that then there is no offence charged for the trial of which the defendants can properly be removed to another district.

It is not a condition precedent to taking action under section 1014 of the Revised Statutes that an indictment for the offence should have been found. *Price* v. *McCarty*, 89 Fed. Rep. 84; Circuit Court of Appeals, Second Circuit, June, 1898. In this case there was a sworn charge *prima facie* showing the commission of an offence against the United States, cognizable by the District Court of the United States for the Southern District of Georgia. To substantiate the charge a certified copy of an indictment found in the Georgia court was produced, and in addition evidence was given before the commissioner which, as he found, showed probable cause for believing that the defendants were guilty of the offence charged in his warrant. If there were any uncertainty or ambiguity in the indictment, the evidence given upon the hearing before the commissioner may have cleared it up. We cannot assume that it did not, and on the contrary, if such uncertainty in the indictment did exist, we must assume that the evidence did clear up such uncertainty, or otherwise the commissioner would not have granted his warrant for removal, nor would his decision have been approved by the District Judge.

The finding of an indictment does not preclude the Government under section 1014 from giving evidence of a certain and definite character concerning the commission of the offence by the defendants in regard to acts, times and circumstances which are stated in the indictment itself with less minuteness and detail, and the mere fact that in the indictment there may be lacking some technical averment of time or place or circumstance in order to render the indictment free from even technical defects, will not prevent the removal under that section, if evidence be given upon the hearing which supplies such defects

and shows probable cause to believe the defendants guilty of the commission of the offence defectively stated in the indictment. It follows also that a decision granting a removal under the section named, where an indictment has been found, is not to be regarded as adjudging the sufficiency of the indictment in law as against any objection thereto which may subsequently be made by the defendants. That is matter for the tribunal authorized to deal with the subject in the other district. We do not, however, hold that when an indictment charges no offence against the laws of the United States, and the evidence given fails to show any, or if it appear that the offence charged was not committed or triable in the district to which the removal is sought, the court would be justified in ordering the removal, and thus subjecting the defendant to the necessity of making such a defence in the court where the indictment was found. In that case there would be no jurisdiction to commit nor any to order the removal of the prisoner.

Upon this writ the point to be decided is, whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of *habeas corpus*.

Jurisdiction upon that writ in such a proceeding as this does not extend to an examination of the evidence upon the merits. The matter for adjudication is similar to that which obtains in cases of international extradition. In such case, if there is competent legal evidence on which the commissioner might base his decision, it is enough, and the decision cannot be reviewed in this way. *Bryant* v. *United States*, 167 U. S. 104. There must be some competent evidence to show that an offence has been committed over which the court in the other district had jurisdiction and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offence charged.

We do not think that under this statute the commissioner would be warranted in taking evidence in regard to the organization of the grand jury which found the indictment, as claimed by the defendants. The indictment is valid on its face;

purports to have been found by a grand jury acting in fact as such at a regular term of a District Court of the United States, presided over by one of its judges and hearing testimony in the ordinary way. In our opinion, such an indictment is *prima facie* good, and when a copy of it is certified by the proper officer, a magistrate, acting pursuant to section 1014 of the Revised Statutes, is justified in treating the instrument as an indictment found by a competent grand jury, and is not compelled or authorized to go into evidence which may show or tend to show violations of the United States statutes in the drawing of the jurors composing the grand jury which found the indictment.

We agree with the District Judge, that matters of that nature are to be dealt with in the court where the indictment is found, and we intimate no opinion upon the merits of those questions. Whether the defendants have waived the right to raise them, or whether they could waive the same, are also questions that are not before us. They must be raised before and decided by the United States court sitting in the Southern District of Georgia, in the first instance, and we express no opinion as to their validity.

We do not think that by this order of removal the constitutional rights of the defendants are in anywise taken from them. The provision that no person may be held to answer for an infamous crime unless upon the presentment or indictment of a grand jury is not violated or infringed. If this so-called indictment be void for the reasons alleged, the place to set up its invalidity is the court in which it was found. The provision is certainly not violated when, under a proceeding such as this upon a sworn complaint and upon evidence under oath which both magistrates have found to amount to probable cause, an order has been made for removing the defendants to the court within whose jurisdiction the offence is charged to have been committed and where all the defences of the parties may be set forth in due and orderly manner and the judgment of the court obtained thereon.

The order denying the application for the writ, is

Affirmed.

Syllabus.

THE KENSINGTON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 15. Argued January 17, 1901.—Decided January 6, 1902.

"The Kensington," a steamer transporting passengers from Antwerp to New York, took on board at Antwerp, as such passengers, the petitioners in this case, and, in receiving them and their luggage, gave them a ticket containing, among other things, the following: (*c*) The shipowner or agent are not under any circumstances liable for loss, death, injury or delay to the passenger or his baggage arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the seas, rivers or navigation, accidents to or of machinery, boilers or steam, collisions, strikes, arrest or restraint of princes, courts of law, rulers or people, or from any act, neglect or default of the shipowner's servants, whether on board the steamer or not or on board any other vessel belonging to the shipowner, either in matters aforesaid or otherwise howsoever. Neither the shipowner nor the agent is under any circumstances or for any cause whatever or however arising liable to an amount exceeding 250 francs for death, injury or delay of or to any passenger carried under this ticket. The shipowner will use all reasonable means to send the steamer to sea in a seaworthy state and well-found but does not warrant her seaworthiness. (*d*) The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of 250 francs at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor and freight paid in advance on the excess value at the rate of one per cent or its equivalent in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading, in use from the port of departure. There was no proof specially tending to show that at the time the ticket was issued the attention of the travellers was called to the fact that it embodied exceptional stipulations relieving the company from liability, or that such conditions were agreed to. *Held:*

(1) Following the courts below, that the loss must be presumed to have arisen from imperfect stowage:

(2) That testing the exemptions in the ticket by the rule of public policy, they were void:

(3) That the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reason-able proportional payment, was void.

Statement of the Case.

THE libel by which this action was commenced sought to recover the value of passengers' baggage which it was alleged the ship had wrongfully failed to deliver. The facts essential to be borne in mind in order to approach the questions arising for decision are as follows:

The International Navigation Company, a New Jersey corporation, on December 6, 1897, at the office of its Paris agency, issued to Mrs. and Miss Bleecker, the wife and daughter of an officer of the United States Navy, a steamer ticket for a voyage from Antwerp to New York on the Kensington, a steamer in the control of the company, advertised to sail from Antwerp on December the 11th. The ticket was delivered to Mrs. Bleecker, who at the time made part payment of the passage money. The baggage of the two passengers was shipped by rail to Antwerp, to the care of the agent of the company there. Mrs. Bleecker, at Antwerp, on the 10th of December, paid the remainder of the passage money, and it was entered on the ticket. The baggage having in the meanwhile been received, the charges which the agent at Antwerp had advanced were refunded and a receipt was issued. It was stated therein that the value of the baggage was unknown, and that it was shipped subject to the conditions contained in the company's steamer ticket and bill of lading. Mrs. Bleecker and her daughter embarked, and the steamer sailed on the 11th of December. The ticket was subsequently taken up by the purser.

The baggage was stowed in what was known as number 2, upper steerage deck. The voyage was an exceptionally rough one, the ship encountering heavy seas and winds, rolled from thirty-eight to forty-five degrees on either side during the height of the gale, and was obliged to heave to for about fifteen hours. On arrival at New York the baggage was found to be totally destroyed. By constant shifting it had been reduced to an almost unrecognizable mass, was commingled with débris of broken china and straw, and covered with water. The first was occasioned by stowing crates of china in the same compartment. The presence of the water was explained by the fact that an exhaust pipe which passed through the compartment

Statement of the Case.

had been broken by the shifting of the contents of the compartment, and hence the exhaust escaped into the compartment.

There is no possible view which can be taken of the facts by which the loss of the baggage was brought about by which the ship could be held responsible if the steamer ticket was in and of itself a complete contract, and all the conditions or exceptions legibly printed on the face thereof were lawful. The ticket was signed by the agent of the company as Paris, was countersigned by the agent at Antwerp, but was not signed by either Mrs. Bleecker or her daughter. One of the conditions printed on the ticket provided that there should be no liability to each passenger, "under any circumstances," beyond the sum of 250 francs, "at which such baggage is hereby valued," unless an increased value be declared and an additional sum paid as provided by the condition.

There was no proof tending to show that at the time the ticket was issued the attention of Mrs. Bleecker or her daughter was called to the fact that it embodied exceptional stipulations, relieving the company from liability, or that such conditions were agreed to, except in so far as a meeting of minds on the subject may be inferred from the fact of the delivery of the ticket by the company, and its acceptance, and that it contained on its face, in small but legible type, among others, the stipulations which are relied upon. The testimony of Mrs. Bleecker and her daughter was that when the ticket was received it was put aside without reading it, and that it was not subsequently examined before it was delivered to the ship's officer. The District Court held that the loss of the baggage was attributable to bad stowage; that the ticket and the conditions printed on it were a contract binding upon the parties, so far as the conditions were lawful. The conditions generally relieving from liability for negligence were held to be void, but the stipulation as to the value of the baggage was held valid; recovery was allowed only for the equivalent of 250 francs to each. 88 Fed. Rep. 331.

On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment. 94 Fed. Rep. 885.

The case by the allowance of a writ of certiorari is here for review.

Mr. Roger Foster for petitioners.

Mr. Henry Galbraith Ward for respondent.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The District Court held, although the condition of the weather might account for the shifting of the baggage, that result could also have arisen from its bad stowage, and in the absence of all proof by the ship that the baggage had been properly stowed, when such proof was peculiarly within its reach, the loss must be presumed to have arisen from the imperfect stowage. The Circuit Court of Appeals, whilst in effect agreeing to this conclusion, in addition found that there was proof in the record tending to sustain the conclusion that the baggage had been improperly stowed, and that no proof even tending to rebut this testimony had been offered by the company. As in the argument at bar the conclusion of the court below on this subject was not seriously questioned, we content ourselves with saying that as a matter of fact we find them to be sustained, and therefore pass from their further consideration.

The loss of the baggage being then attributable to improper stowage, the question is, Was the vessel relieved from the consequence of its fault by the exceptions contained in the passenger ticket? The District Court decided "that a ticket of the character described for a transatlantic passage is a unilateral contract, and, like a bill of lading, is binding upon the person who receives it, so far as its provisions are reasonable and valid." In other words, the court held, although there was no proof of the meeting of the minds of the parties upon the subject of exceptional limitations to be imposed upon the contract of carriage, the receipt and retention of the ticket implied a unilateral contract embracing the exceptions found in legible characters on the face of the ticket. And being thus a part of the express and written contract, the exceptions would be enforced provided they were just and reasonable. The Circuit Court of Appeals in effect approved these views of the District Court.

Opinion of the Court.

Whilst apparently the question whether there was a unilateral contract necessarily arises first for consideration, such is not the case when the situation of the record is taken into view. For should we, in disposing of this question, determine that the rulings of the court below as to the unilateral contract were correct, we would not thereby be relieved from deciding whether the conditions embodied in the contract were valid. On the other hand, should we conclude that the conditions relied on were void, there will be no occasion to determine the question of contract. We hence invert the logical order of consideration, and first come to determine whether the conditions enumerated in the ticket relieved from the responsibility otherwise resulting from the bad stowage of the baggage. In doing so we shall, of course, assume, for the purpose of this branch of the case only, that the conditions relied upon were a part of a unilateral contract, and were binding as far as they were just and reasonable. It is apparent if the carrier, in transporting the baggage, was governed by the act of February 13, 1893, c. 105, designated as the Harter Act, any provision in the ticket exempting from liability for fault in loading or stowage was void because inhibited by the express provisions of the statute. 27 Stat. 445. As, however, the view which we take of the conditions expressed in the ticket will be equally decisive, whether or not the Harter Act concerns the carriage of passengers and their baggage, it becomes unnecessary to intimate any opinion as to whether the provisions of the act in question apply to such contracts. The exceptions found on the face of the ticket upon which the carrier depends are as follows:

"(*c.*) The shipowner or agent are not under any circumstances liable for loss, death, injury or delay to the passenger or his baggage arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the seas, rivers or navigation, accidents to or of machinery, boilers or steam, collisions, strikes, arrest or restraint of princes, courts of law, rulers or people, or from any act, neglect or default of the shipowner's servants, whether on board the steamer or not, or on board any other vessel belonging to the shipowner, either in matters aforesaid

or otherwise howsoever. Neither the shipowner nor the agent is under any circumstances, or for any cause whatever or however arising, liable to an amount exceeding 250 francs for death, injury or delay of or to any passenger carried under this ticket. The shipowner will use all reasonable means to send the steamer to sea in a seaworthy state and well-found, but does not warrant her seaworthiness.

"(*d.*) The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor and freight paid in advance on the excess value at the rate of one per cent, or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading, in use from the port of departure."

It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the *Baltimore & Ohio &c. Railway* v. *Voigt*, 176 U. S. 498, 505, 507, and *Knott* v. *Botany Mills*, 179 U. S. 69, 71, where the previously adjudged cases are referred to and the principles by them expounded are restated.

True it is that by the act of February 13, 1893, 27 Stat. 445, known as the Harter Act, already adverted to, the general rule just above stated was modified so as to exempt vessels, when engaged in the classes of carriage coming within the terms of the statute, from liability for negligence in certain particulars. But whilst this statute changed the general rule in cases which the act embraced, it left such rule in all other cases unimpaired. Indeed, in view of the well-settled nature of the general rule at the time the statute was adopted, it must result that legis-

lative approval was by clear implication given to the general rule as then existing in all cases where it was not changed.

Testing the exemptions found in the ticket by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel for all neglect in loading or stowing, and indeed for any and every fault of commission or omission on the part of the carrier or his servants. And seeking to accomplish these results, it is equally plain that the conditions were void if their legality be considered solely with reference to the modifications of the general rule created by the act of 1893. *Knott* v. *Botany Mills*, *supra*. As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that "all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made," it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. Story, Conflict of Laws, §§ 38, 244. Whilst as said in *Knott* v. *Botany Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & Great Western Steam Co.* v. *Phœnix Insurance Co.*, 129 U. S. 397, the question arose, whether conditions, exempting a

carrier from responsibility for loss caused by the neglect of himself, or his servants, could be enforced in the courts of the United States, the bill of lading having been issued in New York by a British ship for goods consigned to England. Despite the fact that conditions, exempting from responsibility for loss, arising from negligence, were valid, by the laws of New York, and would have been upheld in the courts of that State, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the States of the Union. Nor is the suggestion that, because there is no statute expressly prohibiting such contracts, and because it is assumed no offence against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion. The precise question has been carefully considered and decided in the District Courts of the United States. In *The Guild Hall*, 58 Fed. Rep. 796, it was held that a stipulation in a bill of lading issued at Rotterdam on goods destined to New York, exempting the carrier from liability for negligence, would not be enforced in the courts of the United States, although such a condition was valid under the law of Holland. In *The Glenmavis*, 69 Fed. Rep. 472, the same rule was applied to a bill of lading issued in Germany by a British ship for goods consigned to Philadelphia. Indeed by implication the question is controlled by statute. We have previously pointed out, under the assumption that the Harter Act does not apply to the carriage of the baggage of a passenger, that such law, in effect, affirms the rule of public policy as previously existing in the cases, where no change was made. But that act expressly prohibits carriers, engaged in the business which it regulates, from contracting,

even in a foreign country, for a shipment to the United States to relieve themselves from negligence in cases where the statute does not do so. *Knott* v. *Botany Mills*, *ub. sup.* The theory then, by which alone the conditions relied on in this case can be enforced despite the public policy which governs, in the courts of the United States, reduces itself to this: Carriers who transact a class of business where they are exempt by law, in many cases, from the consequences of the neglect of themselves, or their servants, may not overthrow public policy by contracts made in a foreign country for a shipment to the United States, but carriers who are in no case exempt by the law from the consequence of their neglect may do so. But this amounts in last analysis to this: The lesser the immunity from negligence the greater the power to avoid the consequences of negligence.

The general exemptions, from responsibility for negligence which the ticket embodies being controlled by the rule enforced in the courts of the United States, and being therefore void, because against public policy, we come to consider the particular provisions contained in the ticket with reference to the value of the baggage and the limit of recovery, if any, arising therefrom.

In *Railroad Company* v. *Fraloff*, 100 U. S. 24, 27, it was said:

"It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage

without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies."

In *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331, the facts were as follows: A bill of lading was issued for a number of horses, and the instrument was signed, not only by the carrier, but also by the shipper. By the express provisions of the bill of lading the right to recover for each horse was limited to a specified sum. The horses were injured while in transit by the neglect of the employés of the company, and recovery was sought for a much larger amount than the value fixed in the bill of lading. The court, in its opinion, stated that it must be assumed that the rate of freight and the declared valuation had a due relation one to the other, and that if a greater value had been declared a higher and not unreasonable charge for the carriage would have been made. It was conceded that the carrier was liable for the value of the horses as stated in the bill of lading, but the controversy was whether the limit affixed in the bill of lading should not be disregarded and a much larger sum, which it was asserted was the actual value of the horses, be awarded on the ground that the loss was begotten through the negligence of the carrier. The court, after reviewing the prior cases and explicitly reaffirming the doctrine that conditions were void, because against public policy, by which a carrier was relieved from the consequences of the negligence of himself or his servants, said (p. 340):

"The limitation as to the value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would

be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

It was decided that the carrier was responsible, but his liability was limited to the value expressly agreed upon in the bill of lading. Did the conditions in the steamer ticket in the case at bar come within the principle announced in either of the foregoing cases?

One of the conditions reiterated in various forms, in the bill of lading, is as follows:

"The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passenger's baggage carried under the ticket, beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor and freight paid in advance on the excess value at the rate of 1 per cent, or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading in use from the port of departure."

The requirement, then, was that the baggage of the passenger must be valued at 250 francs, and no more than that sum could be recovered under any circumstances, unless any excess of amount be declared and a named percentage on the increased value be paid, and unless the passenger agreed to ship his baggage as cargo and take a bill of lading for it. Now the only theory upon which it can be assumed that the law of 1893, the Harter Act, does not apply to the carriage of the baggage of a passenger, is that the statute in question only relates to merchandise shipped as cargo and for which a bill of lading is taken. The requirement, therefore, if the passenger desired to value his baggage at a greater sum than 250 francs, was that he must ship it in such a manner as to bring it within the terms of the Harter Act. This obvious meaning of the condition is stated and insisted on in the brief in behalf of the carrier, where it is said:

"The ticket in this case certainly does not fall within the words 'bill of lading or shipping document,' used in sections 1,

2 and 4 of the Harter Act. These are expressions perfectly well understood in commerce, and apply to bills of lading covering trade shipments, which are almost invariably insured. That Congress meant by the words 'bill of lading or shipping document' but one thing, namely, bill of lading, appears from the refusing to issue on demand 'the bill of lading herein provided for,' and does not mention the words 'shipping document' at all.

"On the other hand, for personal baggage accompanying the passenger no bill of lading or shipping document is, so far as we know, ever given. If the libellants had intended their personal baggage to fall within the provisions of the Harter Act, they could have accomplished it, as provided in the ticket itself, by declaring the value of the baggage over 250 francs, paying freight on the excess and getting a bill of lading."

The passenger then was subjected to the inevitable alternative of having no recourse whatever for his baggage beyond the value of 250 francs, unless he agreed that he would subject it to the Harter Act. But if that law was made applicable its provisions controlled, and therefore the carrier became entitled to all the benefits of the third section of the act, exempting from all loss or damage resulting from faults or errors in navigation or in the management of the vessel, and for other causes which are specified in the section in question. To make this exaction was consequently but in effect to demand that the passenger agree, as a prerequisite to any increased valuation of his baggage, to subject it to a risk of loss brought about by the negligence of the carrier, when otherwise the baggage would not have been submitted to risk arising from such neglect—an obvious requirement exempting the carrier from the consequences of his own negligence. On the other hand, if the assumption be indulged in that the baggage of the passenger was within the purview of the Harter Act, a stipulation embodied in another provision of the ticket, relieving the carrier under any and every circumstance from every conceivable neglect of his servants, "either in matters aforesaid or otherwise howsoever," was a plain violation of the prohibitions contained in the second section of the Harter Act. It follows, if the Harter Act

did not apply to the baggage of a passenger, the stipulation which compelled the passenger, if he wished to value his baggage, to agree to subject it to that act, was an illegal effort on the part of the carrier to relieve himself from liability for his negligence. If this result is escaped by treating the baggage of the passenger as within the scope of the Harter Act, then there are provisions found in the ticket which are void, because they contain stipulations for immunity from negligence which are in direct conflict with the prohibitions of that act. Indeed, the conditions contained in the ticket seem to have been devised —at all events, they lend themselves to the inference that they were devised—to so operate as to keep the baggage of the passenger outside of the scope of the Harter Act, in order to avoid the provisions of that act forbidding the insertion of certain conditions as to negligence, and when this result was obtained to immediately secure the bringing of the passenger's baggage within the influence of the act for the purpose of enabling the carrier to enjoy the immunity from negligence which that act accords in certain cases. We think the conditions were unjust and unreasonable and void because in conflict with public policy. And if the considerations which have led us to this conclusion be for a moment put aside, it is far from clear that other conditions contained in the ticket would not, from another point of view, lead to the same result. In addition to the exaction with which the right to state an excess of value over 250 francs was burdened, the ticket contains a provision to the effect that, whatever be the value of the baggage, under no circumstances will the carrier be liable for the neglect of himself or his servants. Giving effect, then, to all the provisions of the ticket, it may be doubted whether it does not result from them that not only was the baggage when valued at 250 francs, but also when valued at any increased amount, subjected to any and every risk arising from the negligence of the carrier or his servants.

It remains only to consider whether, although the conditions found in the ticket be void because against public policy, recovery for the baggage lost must be limited to the sum of 250 francs because of the statement of that amount in one of the

provisions of the ticket. It is to be doubted whether in reason it can be said that the limit as fixed in the ticket can be separated from the context in which it is found, and be deemed to be an independent valuation fixed by the parties irrespective of the right to name an increased sum stated in the same provision of the ticket which contains the valuation. But if it can be treated as a separate valuation, unaccompanied by the conditions attached to it, and from which it takes its origin, then the question is this: Is it just and reasonable for a transatlantic carrier to put an absolute limit of 250 francs, about the equivalent of $50, as the value of the baggage of a cabin passenger, whether first or second class, and to refuse, except upon illegal conditions, to allow any greater sum to be carried as baggage? In *The Majestic*, 166 U. S. 375, the liability of the ship for baggage was under consideration. No contention was made that the ticket was not a contract, but the question was whether the conditions printed on the back were a part of the assumed contract and, if so, were they valid. One of the conditions limited recovery to £10 for each passenger, unless a greater sum was declared and paid for. The right to declare the larger value was not burdened with the illegal condition found in the ticket now under consideration. Had it been otherwise, the requirement would not have had the same significance, as the ticket considered in *The Majestic* was issued prior to the adoption of the Harter Act, and, therefore, whether the baggage was carried as such, or as cargo, it would have equally enjoyed an immunity from loss, brought about by the negligence of the carrier, or his servants. The ticket considered, in *The Majestic* as does the one now before us, allowed a capacity of "twenty cubical feet of luggage for each person." The court, in *The Majestic*, commenting on the restriction to £10 for each passenger, said it was a (p. 386) "limitation which, we must say, does not strike us as exactly reasonable, in view of the 'twenty cubical feet of luggage which the company had expressly contracted to carry.' . . ." It was decided, in *The Majestic*, that, even on the hypothesis of a contract, evidenced by the ticket, the conditions on the back were not binding. The present case does not require us to decide whether the sum of 250

francs would be a reasonable limit if the right to fix a larger amount was not incumbered with the illegal and arbitrary conditions which are here presented. We express no opinion on such question. Manifestly, what is a reasonable maximum amount when a larger value is allowed to be carried as baggage by paying an additional compensation, is a different question from what is a reasonable amount where the right to declare and pay for a larger sum is refused, or what is equivalent thereto is permitted only upon condition that the passenger subjects himself to conditions which are void as against public policy. Indeed, the Circuit Court of Appeals adverted, in its opinion in this case, to the suggestion made in *The Majestic*, and said that the limit of 250 francs was reasonable, because of the right given the passenger to increase the amount by paying a larger but reasonable compensation. As we hold that no such right was allowed because its enjoyment was burdened with conditions which were void because against public policy the only reason upon which the justness of the limit was sustained ceases to apply.

In view of the nature and duration of the voyage, of the circumstances which may be reasonably deemed to environ transatlantic cabin passengers, and the objects and purposes which it may also be justly assumed the persons who undertake such a voyage have in view, we think the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void. It is therefore unnecessary to decide whether the ticket delivered and received, under circumstances disclosed by the record, gave rise to a contract embracing the exceptions to the carrier's liability, which were stated on the ticket. We intimate no opinion on the subject.

The decree below must be reversed and the cause remanded to the District Court with directions to ascertain the actual damage sustained by the libellants, and to enter a decree in their favor for the amount of such damages, with interest and costs: and it is so ordered.

ORR *v.* GILMAN.

ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK.

No. 351. Argued November 25, 26, 1901.—Decided January 6, 1902.

The provisions of subdivision 5 of the tax law of the State of New York, which became a law April 16, 1897, are not in violation of the Fourteenth Amendment to the Constitution, nor of section 10 of article 1 of the Constitution.

The opinion in *Carpenter* v. *Pennsylvania*, 17 How. 456, although decided before the adoption of the Fourteenth Amendment to the Constitution, correctly defines the limits of jurisdiction between the State and the Federal governments, in respect to the control of the estates of decedents, both as they were regarded before the adoption of the Fourteenth Amendment, and have since been regarded.

The holding of the Court of Appeals of New York, that it was the execution of the power of appointment which subjected grantees under it to the transfer tax, is binding upon this court.

The Court of Appeals did not err when it held that a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege, exercised or enjoyed under the laws of the State, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States.

The view of the Court of Appeals in this case must be accepted by this court as an accurate statement of the law of the State.

David Dows, Senior, a citizen and resident of the city and State of New York, died March 30, 1890, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of New York County on April 14, 1890. The will provided that the legal title to the property mentioned and described in the sixth clause thereof should vest in the executors' names as trustees during the lifetime of testator's son, David Dows, Jr., with power to manage and control the same, and with the duty to pay the net income therefrom to said David Dows, Jr. The will further provided that upon the death of David Dows, Jr., the property should vest absolutely and at once in such of his children him surviving, and the issue of his deceased children as he should by his last will

and testament designate and appoint, and in such manner and upon such terms as he might legally impose. In and by the eighth clause or paragraph of his said will, David Dows, Senior, devised and bequeathed the legal title to his residuary estate to his executors as trustees, to hold and manage the same, one eighth part in trust during the lifetime of testator's widow, and one-eighth part in trust for each of testator's seven children—one of whom was the said David Dows, Jr. It was made the duty of the trustees to pay over the net income to the respective persons named during their respective lives, and it was provided that, upon the death of each of said persons, the said one eighth part of the residuary estate, with any accumulations and profits, should vest absolutely and at once in such of his or her children, or the issue of such children, as he or she might by his or her last will and testament designate and appoint, and in such manner and upon such terms as he or she may legally impose. It was provided, in both the sixth and eighth clauses, that if the legatee for life shall die intestate, then the property should vest absolutely and at once in his or her children surviving, share and share alike.

David Dows, Junior, died January 13, 1899, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of Westchester County, New York, by the third paragraph or clause whereof, in the exercise of the power of appointment given him in his father's will, he provided that the property mentioned and described in the said sixth and eighth clauses of the will of David Dows, Senior, should vest upon his death in his three children, David, Robert and Kemeth, in a manner therein described.

On October 31, 1900, Bird S. Coler, Comptroller of the city of New York, and Theodore P. Gilman, Comptroller of the State of New York, filed a petition in the Surrogate's Court of New York County, in which, after reciting the foregoing facts, they alleged that the transfer of funds and property of which David Dows, Junior, had the life use and over which he had exercised the power of appointment given him in his father's will, was taxable, and they therefore prayed for the appointment of a transfer tax appraiser, in order that the transfer tax

might be duly assessed and imposed. Thereupon Charles K. Lexow was so appointed, and on January 31, 1901, after having given notice to the said Comptrollers and to the executors and trustees of the last will of David Dows, Senior, and to the executors of the last will of David Dows, Junior, and to the guardians of the minor children of David Dows, Junior, the appraiser filed in the Surrogate's office a report of his valuation of the interests of the three sons of David Dows, Junior, under the respective wills of their father and grandfather. Certain exceptions to this report were filed on behalf of the executors and guardians, the nature of which will hereafter appear. Thereafter, on February 15, 1901, the Surrogate, on the basis of the report of the said appraiser, assessed a transfer tax of upwards of $7000 against each of the respective interests of the three sons of David Dows, Junior. The exceptions to the appraiser's report and to the assessment were, on March 6, 1901, after argument by counsel, overruled, and the Surrogate entered the following order and judgment:

"It is ordered, adjudged and decreed that said report and order so appealed from be and they are hereby affirmed, and that the date when the transfers now taxed were affected was January 13, 1899, that date being fixed because it was the date of the death of David Dows, Junior, the donee of the power contained in the will of David Dows, Senior."

An appeal was taken from the order and decree of the Surrogate to the appellate division of the Supreme Court of New York, and by that court, on March 22, 1901, the order of the Surrogate was affirmed. On appeal duly taken, the Court of Appeals of the State of New York, on May 17, 1901, affirmed the order and judgment of the appellate division of the Supreme Court, and the judgment of the said Court of Appeals and the record of the proceedings were remitted into the Surrogate's Court of New York, to be enforced according to law, and the judgment of the Court of Appeals was on May 28, 1901, made the judgment and order of the Surrogate's Court. And on June 13, 1901, a writ of error to that judgment was allowed, and the cause was brought to this court.

Mr. Horace E. Deming for plaintiffs in error. *Mr. Julius Henry Cohen* was on his brief.

Mr. Jabish Holmes, Jr., for defendants in error. *Mr. Edgar J. Levey* was on his brief.

Mr. Justice Shiras delivered the opinion of the court.

This is the case of a so-called transfer tax imposed under the laws of the State of New York. The various contentions of the plaintiffs in error, attacking the validity of the tax, were overruled by the courts of the State, and the cause is now before us on the general proposition that by the proceedings the plaintiffs in error, or those whom they represent as trustees and guardians, have been deprived of the equal protection of the laws of the State of New York, their privileges and immunities as citizens of the United States have been abridged, and their property taken without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and likewise, as to a portion of the property affected, in violation of section 10 of article 1 of the Constitution of the United States.

The first question presented arises out of subdivision 5 of section 220 of the tax law of the State of New York, which reads as follows:

"5. Whenever any person, or corporation, shall exercise a power of appointment, derived from any disposition of property, made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer, taxable, under the provisions of this act, in the same manner as though the property, to which such appointment relates, belonged absolutely to the donee of such power, and had been bequeathed, or devised, by such donee by will; and whenever any person, or corporation, possessing such a power of appointment, so derived, shall omit, or fail, to exercise the same within the time provided therefor, in whole or in part, a transfer, taxable under the provisions of this act, shall be deemed to take place to the extent of such omissions, or failure, in the same manner as

though the persons, or corporations, thereby becoming entitled to the possessions, or enjoyment of the property to which such power related, had succeeded thereto, by a will of the donee, of the power failing to exercise such power, taking effect at the time of such omission, or failure."

This enactment became a law on April 16, 1897. David Dows, Senior, died March 30, 1890, leaving a will containing a power of appointment to his son, David Dows, Junior, which will was duly admitted to probate by the Surrogate's Court on April 14, 1890. David Dows, Junior, died on January 13, 1899, leaving a will, in which he exercised the power of appointment given him in the will of his father, and apportioned the property, which was the subject of the power, among his three sons, who are represented in this litigation by the plaintiff in error.

It is claimed that, under the law of the State of New York as it stood at the time of his death, in 1890, David Dows, Senior, had a legal right to transfer, by will, his property or any interest therein, to his grandchildren, without any diminution, or impairment, then imposed by the law of the State upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred, and that the subsequent law, whose terms have been above transcribed, operates to diminish and impair those vested rights. In other words, it is claimed that it is not competent for the State, by a subsequent enactment, to exact a price or charge for a privilege lawfully exercised in 1890, and to thus take from the grandchildren a portion of the very property the full right to which had vested in them many years before.

We here meet, in the first place, the question of the construction of the will of David Dows, Senior. Under and by virtue of that will, did the property, whose transfer is taxed, pass to and become vested in the grandchildren, or did the property not become vested in them until and by virtue of the will of David Dows, Junior, exercising the power of appointment? The answer to be given to this question must, of course, be that furnished us by the Court of Appeals in this case. *Matter of Dows*, 167 N. Y. 227:

"Whatever be the technical source of title of a grantee under

a power of appointment, it cannot be denied that, in reality and substance, it is the execution of the power that gives the grantee the property passing under it. The will of Dows, Senior, gave his son a power of appointment, to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State, which it may tax or charge for, it follows that the request of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Senior, devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will."

It will be perceived that, in putting this construction upon the will of David Dows, Senior, the Court of Appeals not merely construed the words of the will but, by implication, applied to the case the provisions of the subdivision 5 of section 220, under which the transfer tax in question was imposed, and thus construed that tax law and affirmed its validity.

While it is settled law that this court will follow the construction put by the state courts upon wills devising property situated within the State, and while it is also true that we adopt the construction of its own statutes by the state courts, a question may remain whether the statute, as so construed, imports a violation of any of the rights secured by applicable provisions of the Constitution of the United States. And such is the contention here.

This court has no authority to revise the statutes of New York upon any grounds of justice, policy or consistency to its own constitution. Such questions are concluded by the decision of the legislative and judicial authorities of the State.

In *Carpenter* v. *Pennsylvania*, 17 How. 456, the question arose as to the validity, in its Federal aspect, of a law of the State of Pennsylvania imposing an inheritance tax on personal

property which had passed into the possession of an executor before the passage of the act, and which was held by him for the purpose of distribution among the legatees, who were collateral relatives to the decedent. The act was held valid by the Supreme Court of the State, and was brought up to this court by a writ of error, where it was contended that such an act was in its nature an *ex post facto* law, which took the property of an individual to the use of the State, because of a fact which had occurred prior to the passage of the law, and also that the law, in its retroactive effect, impaired the obligation of a contract, in that it was alleged to absolve the executor from his contract, implied in law, to pay over the legacies to those entitled to them, just to the extent that the law required him to pay to the State. The opinion of the court, delivered by Mr. Justice Campbell, was, in part, as follows:

"The validity of the act, as affecting successions to open after its enactment, is not contested; nor is the authority of the State to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is that the application of the act to a succession already in the course of settlement, and which had been appropriated by the last will of decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of that amount for the uses of the State; that the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were non-residents, and the property taxed was also beyond the State; and that the State has employed its power over the executor and the property within its borders, to accomplish a measure of wrong and injustice; that the act contains the imposition of a forfeiture or penalty, and is *ex post facto*.

"It is, in some sense, true that the rights of donees under a will are vested at the death of the testator; and that the acts of administration which follow are conservatory means, directed by the State to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism, and perhaps censure.

But, until the period for distribution arrives, the law of the decedent's domicil attaches to the property, and all other jurisdictions refer to the place of the domicil as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property, by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it. *Ennis* v. *Smith*, 14 How. 400.

"The act of 1860, in enlarging the operation of the act of 1826, and by extending the language of that act beyond its legal import, is retrospective in its form; but its practical agency is to subject to assessment property liable to taxation, to answer an existing exigency of the State, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And as the Supreme Court of Pennsylvania has well said, 'in establishing its peculiar interpretation, it (the legislature) has only done indirectly what it was competent to do directly.' But if the act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fiscal imposition, this court could not pronounce it to be an *ex post facto* law within the tenth section of the nineteenth article of the Constitution. The debates in the Federal convention upon the Constitution show that the terms '*ex post facto* laws,' were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Mad. Pap. 1399, 1450, 1579.) This signification was adopted in this court shortly after its organization, in opin-

ions carefully prepared, and has been repeatedly announced since that time. *Calder* v. *Bull*, 3 Dall. 386; *Fletcher* v. *Peck*, 6 Cranch, 87; 8 Pet. 88; 11 Pet. 421."

It is true that this case was decided before the adoption of the Fourteenth Amendment, but we think it correctly defines the limits of jurisdiction between the state and Federal governments in respect to the control of the estates of decedents, both as they were regarded before and have been regarded since the adoption of the Fourteenth Amendment. It has never been held that it was the purpose or function of that amendment to change the systems and policies of the States in regard to the devolution of estates, or to the extent of the taxing power over them.

In *In re Kemmler*, 136 U. S. 436, it was stated by the present Chief Justice that—

"The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty, and property rests primarily with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States* v. *Cruikshank*, 92 U. S. 542; *Slaughter Houses Cases*, 16 Wall. 36."

It was said in *De Vaughn* v. *Hutchinson*, 165 U. S. 566, that "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

In *Clarke* v. *Clarke*, 178 U. S. 186, the proposition was again announced, as one requiring only to be stated, that the law of

a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy, and that in this court the local law of a State is the law of that State as announced by its court of last resort.

In *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283, the validity of a law of the State of Illinois imposing a legacy and inheritance tax, the rate progressing by the amount of the beneficial interest acquired, was assailed in the courts of Illinois as being in violation of the constitution of that State, requiring equal and uniform taxation. The state court having decided that the progressive feature did not violate the constitution of that State, the case came to this court upon the contention that the establishment of a progressive rate was a denial both of due process of law and of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution. But these contentions were held by this court to be untenable.

See, likewise, *Knowlton* v. *Moore*, 178 U. S. 41, and *Plummer* v. *Coler*, 178 U. S. 115, wherein were considered the nature of inheritance tax laws and the extent of the powers of the States and of Congress in imposing and regulating them.

In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed by its highest court, any infringement of the salutary provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the State, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation.

But, it is further urged, that the tax law of the State of New York, section 221, expressly exempts from taxation, or charge, all real estate passing to lineal descendants by descent or devise, and all such descendants so taking title to real estate from ancestors, and it is said that under the interpretation of this law by the courts of the State of New York all property which

was real estate at the time of the death of the person owning it continues, as to the lineal descendants, to be real estate, and is therefore exempt from taxation, though such descendants may not enter into possession and enjoyment of the property until years after the death of the ancestor who owned it, and the property in the meantime has been converted into cash or securities.

It is true that the property described in the sixth paragraph of the will of David Dows, Senior, was real estate, but under the powers conferred in the will of David Dows, Senior, the trustees had converted the real estate and held the proceeds as personal property before the death of David Dows, Junior, and it was this personal property which became vested in the grandchildren under the exercise of the power of appointment. The Court of Appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. Nor are we able to perceive that thereby the plaintiffs in error were deprived of any rights under the Federal Constitution. The rule of law laid down by the New York courts is applicable to all alike, and even if the view of the Court of Appeals respecting the question was wrong, it was an error which we have no power to review.

Another objection made to the judgment of the Court of Appeals, affirming the Surrogate's order, is that the tax imposed upon transfers made under a power of appointment is a tax upon property and not on the right of succession, and that, as a portion of the fund was invested in incorporated companies liable to taxation on their own capital, and in certain bonds of the State of New York, and in bonds of the city of New York exempt by statute from taxation, such exemption formed part of the contract under which said securities were purchased, and the tax imposed and the proceedings to enforce it were in violation of section 10 of article 1 of the Constitution of the United States forbidding the States to pass laws impairing the obligation of contracts.

The Court of Appeals overruled the proposition that the

transfer tax in question was a tax upon property and not upon the right of succession, and held that when David Dows, Senior, devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will and that the charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will.

In reaching this conclusion the Court of Appeals cited not only various New York cases but several decisions of this court, the principles of which were thought to be applicable. *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Plummer* v. *Coler*, 178 U. S. 115; *Knowlton* v. *Moore*, 178 U. S. 41; *Murdock* v. *Ward*, 178 U. S. 139.

We think it unnecessary to enter upon another discussion of a subject so recently considered in the cases just cited, and that it is sufficient to say that, in our opinion, the Court of Appeals did not err when it held that a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the State, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States.

A further contention is made that the legatees or devisees of the remainders created by the will of David Dows, Junior, are not legally subject to taxation until the precedent estates terminate and the remainders vest in possession.

The Court of Appeals held that the doctrine invoked had no application to the remainders given to the sons of David Dows, Junior; that they are absolute and not subject to be divested or to fail in any contingency whatever; that by statute they are alienable, devisable, descendible, and if the property were real estate, they could be sold on execution against their owners; that by the aid of the table of annuities, upon the faith of which large sums are constantly distributed by the courts, the present value of these remainders is capable of ready

computation; and that, therefore, they are subject to present taxation.

These views of the Court of Appeals must be accepted by us as accurate statements of the law of the State; and though it is claimed in the brief of counsel for the plaintiffs in error that such a construction of the transfer tax law brings it into conflict with the Fourteenth Amendment of the Constitution of the United States, we are unable to approve such a contention. The subject dealt with is one of state law, expounded by state courts. The laws and the construction put upon them apply equally to all persons in a like suitation, and cannot be regarded as conflicting with the provisions of the Federal Constitution. *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283.

Other contentions made in the brief of counsel for the plaintiffs in error seem, so far as our jurisdiction is concerned, to be phases of those heretofore considered and thereby disposed of.

The judgment of the Court of Appeals of the State of New York affirming the judgment of the Surrogate's Court of New York County is

Affirmed.

MR. JUSTICE HARLAN concurred in the result.

SCHRIMPSCHER *v.* STOCKTON.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 19. Argued November 22, 1901.—Decided January 6, 1902.

The deed of an Indian, who has received a patent of land providing that it should never be sold or conveyed by the patentee or his heirs without the consent of the Secretary of the Interior, is void, and the statutes of limitation do not run against the Indian or his heirs so long as the condition of incompetency remains; but where it appeared that by treaty subsequent to the deed, all restrictions upon the sales of land by incompetent Indians or their heirs, were removed, it was *held* that from this time the statute of limitations began to run against the grantor and his heirs.

Statement of the Case.

Even if Indians while maintaining their tribal relations are not chargeable with laches, or failure to assert their claims within the time prescribed by the statutes, they lose their immunity when their relations with their tribe are dissolved and they are declared to be citizens of the United States.

A deed, valid upon its face, made by one having title to the land, and containing the usual covenants of warranty, when received by one purchasing the land in good faith, with no actual notice of a defect in the title of the grantor, constitutes color of title; and in Kansas, possession without a paper title seems to be sufficient to enable the possessor to set up the statute of limitations.

The fact that the Secretary of the Interior might thereafter declare the deed to be void, does not *ipso facto* prevent the statute from running.

THIS was an action of ejectment brought in the Court of Common Pleas of Wyandotte County, Kansas, by John Schrimpscher and about forty others, heirs of one Carey Rodgers, deceased, a Wyandotte Indian, against John S. Stockton and ten others, to recover a tract of land which had been allotted to certain Wyandotte Indians under the treaty of 1855.

Answers were filed by three of the defendants, containing general denials of the allegations of the petition, and pleas both of a three-year and a fifteen-year state statute of limitations.

To these answers plaintiffs filed a reply to the effect that the ancestor of the plaintiffs, from whom they derived title by descent, was an incompetent Indian, and classed as such under the treaty between the United States and the Wyandotte tribe of Indians, concluded January 31, 1855, and, as such incompetent, was prohibited from alienating any of the lands in controversy, except only the power to lease the same for the term of two years; that defendants and those under whom they claim were bound by the same prohibition, and could have acquired nothing further than such leasehold interest in the land; that defendants occupied such lands in subordination to the rights of plaintiffs' ancestor, and that no notice had ever been brought home to plaintiffs of an adverse claim by defendants.

A jury having been waived and the case submitted to the court, judgment was rendered for the defendants. An appeal was taken to the Supreme Court of the State, which affirmed the judgment of the lower court. 58 Kan. 758. Whereupon plaintiffs sued out a writ of error from this court.

Mr. William M. Springer for plaintiffs in error. *Mr. James M. Mason* and *Mr. Charles H. Nearing* were on his brief.

No appearance for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

This case turns upon the proper construction of article XV of a treaty with a number of tribes of Indians, including "certain Wyandott," concluded February 23, 1867, and proclaimed October 14, 1868. 15 Stat. 513, 517.

The facts of the case are substantially as follows:

On January 31, 1855, 10 Stat. 1159, the United States entered into a treaty with the Wyandott Indians, by the *second* article of which they ceded to the United States certain lands purchased by them of the Delawares, the object of which cession was that "the said lands shall be subdivided, assigned and reconveyed, by a patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation, in severalty." By the *third* article, provision was made for a survey of the lands, the appointment of commissioners to divide the lands among the individuals of the tribe, and to make up lists of all the individuals and members of the tribe, "which lists shall exhibit, separately, first, those families, the heads of which the commissioners, after due inquiry and consideration, shall be satisfied are sufficiently intelligent, competent and prudent to control and manage their affairs and interests, and also all persons without families; second, those families, the heads of which are not competent and proper persons to be entrusted with their shares of the money payable under this agreement; and third, those who are orphans, idiots or insane." Article *four* provided for the issue of unconditional patents in fee simple to those reported by the commissioners to be competent to be intrusted with the control and management of their affairs and interests; "but to those not so competent, the patents shall contain an express condition that the lands are not to be sold or alienated for a period of five years; and not then, without the express consent of the President of the United States first being obtained," etc.

Opinion of the Court.

Margaret C. Cherloe was a Wyandotte Indian of the competent class, and as such she was given, under the treaty of 1855, allotment No. 42, to sixty-four acres of the land originally sued for, and received a patent therefor in fee simple, without restriction as to conveyance. This patent was dated June 1, 1859.

After the issue of such patent, and prior to August 31, 1863, Margaret C. Cherloe died intestate, leaving her grandson, Carey Rodgers, as her only heir at law, and on August 31, 1863, the said Carey Rodgers made a deed in fee simple of the land so inherited to Jesse Cooper and Mary E. Stockton.

Carey Rodgers, being himself a Wyandotte Indian, belonging to the incompetent class by reason of being an orphan, was given allotment No. 278, containing fifty-seven acres, and on September 1, 1859, received a patent for said lands, containing the following condition: "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being, and with the further and express condition, as specified in the fourth article of the treaty with the Wyandottes of the 31st of January, 1855, that the lands are not to be sold or alienated for a period of five years."

On November 15, 1864, the said Carey Rogers executed a deed in fee simple of this last-mentioned land to Jesse Cooper and Mary E. Stockton, covenanting that he was seized in fee simple and had good right to sell the same.

On February 25, 1869, by a partition of that date by Jesse Cooper and his wife, and Mary E. Stockton and her husband, there was conveyed to Mary E. Stockton the lands sued for in this action and described in the petition. Defendants took title from her.

The said Carey Rodgers died intestate in December, 1867, at the age of 21.

Immediately after the execution of the deeds from Carey Rodgers to Jesse Cooper and Mary E. Stockton the grantees took possession of all the land described in said deeds under claim of title and ownership by virtue of said deeds; made permanent improvements thereon, and they and their grantees have

had and held open, undisturbed and adverse possession of all of said lands, claiming title thereto, paid all taxes, cleared the land of timber, and cultivated the same as tenants.

In the years 1891 and 1892 there was a kind of occupancy of part of the land by persons claiming under the plaintiffs, but that does not seem to have been treated as material.

Carey Rodgers thus became possessed of two tracts of land, one of sixty-four acres as the heir at law of his grandmother, Margaret C. Cherloe, and the other of fifty-seven acres as a personal allotment to himself. As plaintiffs state that a settlement of the case has been made so far as relates to the Cherloe tract, we shall dismiss that tract from our opinion. The deed of Carey Rodgers' own allotment of November 15, 1864, was clearly void, since as to this contract, at least, he was incompetent, and took under a patent which provided that the land should never be sold or conveyed by the grantee or his heirs, without the consent of the Secretary of the Interior. If the case stood upon defendants' rights under this deed alone, there could be no doubt whatever that Rodgers' heirs were entitled to the land.

But on February 3, 1867, another treaty was concluded (proclaimed October 14, 1868) with several tribes of Indians, among which were "certain Wyandottes," 15 Stat. 513, the fifteenth article of which was as follows:

"ART. 15. All restrictions upon the sales of lands assigned and patented to 'incompetent Wyandottes' under the fourth article of the treaty of one thousand eight hundred and fifty-five, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetents shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution or order, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of Interior; and whereas, many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of one thousand eight hundred and fifty-five, it is agreed that a thorough examination and report shall be made under directions of the Secretary of the Interior, in order to ascertain the facts relat-

ing to all such cases, and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void, as the very right of the several cases may require."

This article makes the following distinct provisions:

1. It removes all restrictions upon the sales of lands patented to incompetent Wyandottes, which should thereafter be made.

2. It provides that no sales of lands theretofore assigned to incompetents shall be made under any legal proceedings, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of the Interior.

3. That, as to lands theretofore sold by incompetents in violation of the treaty of 1855, a thorough examination and report shall be made under the directions of the Secretary of the Interior, in order to ascertain the facts relating to such cases, and upon examination of such report and a hearing of the parties, the Secretary may confirm such sales, require an additional amount to be paid, or declare the sales void.

No action was ever taken under the third clause to procure a confirmation by the Secretary of the Interior of the deed by Rodgers of November 15, 1864, so that, at the time the treaty of 1868 was ratified, the possession of the lands was in the defendants or their grantors holding adversely to the heirs of Rodgers, but the title still remained in such heirs by reason of the fact that his deed to Cooper and Stockton was void, and no proceeding had been taken under the third clause of Art. XV to confirm or validate it. But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee *or his heirs*, the treaty of 1868, which took effect after his death, removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee Rodgers, or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers and his heirs. *McGannon* v. *Straightlege*, 32 Kan. 524; *Sheldon* v. *Donohue*, 40 Kan. 346.

Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute, (whether the limitation be three or fifteen years,) since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years.

Plaintiffs, however, seek to avoid the effect of the statute by insisting, first, that statutes of limitations do not run against Indians; second, that defendants were not in possession under color of title, and therefore the statute is not available to them; third, that no title by limitation could be acquired as against the right of the Secretary of the Interior to investigate and declare the conveyance in question to be void, and hence the statute would not begin to run until after such action by the Secretary.

1. Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix* v. *Patrick*, 145 U. S. 317, 330; *S. C.*, 36 Fed. Rep. 457, 461; *Swartzel* v. *Rogers*, 3 Kansas, 374; *Blue Jacket* v. *Johnson Co.*, 3 Kansas, 299; *Wiley* v. *Keokuk*, 6 Kansas, 94; *Ingraham* v. *Ward*, 56 Kansas, 550, they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty. Now, the very first article of the treaty of 1855 provides: "Art. 1. The Wyandotte Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated that their organization and relations with the United States, as an Indian tribe, shall be dissolved and terminated on the ratification of this agreement; except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification,

the said Wyandotte Indians, and each and every of them, except as hereinafter provided, shall be deemed, and are hereby declared to be citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges and immunities of such citizens; and shall in all respects be subject to the laws of the United States, and of the Territory of Kansas, in the same manner as other citizens of said Territory; and the jurisdiction of the United States, and of said Territory shall be extended over the Wyandotte country in the same manner as other parts of said Territory." There was an immaterial exception not necessary to be noticed here.

It seems, however, that this provision did not prove entirely satisfactory to some of the Indians, who regretted their emancipation and the loss of the protection of the Government, and in the treaty of 1868 there was incorporated in the preamble a recital that "a portion of the Wyandottes, parties to the treaty of 1855, although taking lands in severalty, have sold said lands, and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization, while others who did become citizens are unfitted for the responsibilities of citizenship; and . . . have just claims against the government, which will enable the portion of their people herein referred to begin anew a tribal existence;" therefore it was agreed by article thirteen that the United States would set apart for the Wyandottes certain land ceded by the Senecas, in order to provide for these Indians, and would make a register of all who declare their desire to be and remain Indians in a tribal condition, who should thereafter constitute the tribe.

It is sufficient to say of this that it could not apply to Carey Rodgers personally, since he died before the treaty was ratified; and there is no evidence that his heirs ever elected to resume their tribal relations and to become again members of the incompetent class. As Article XV removed all restrictions upon the sale of lands by incompetents, if the heirs of Carey Rodgers took the position that the article did not apply to them, they assumed the burden of proving that fact.

2. Plaintiffs' assertion, that defendants were not in possession

under color of title, is untenable. They had taken possession under a deed executed by Rodgers, November 14, 1864, which was valid upon its face, made by one having title to the land, and in which the grantor covenanted that he was seized in fee simple, had good right to sell the same, that it was free from encumbrance, and that he would warrant and defend the title unto the grantees against the claims of all persons. The court finds that the defendants and their grantors acted in good faith in making the purchase of said lands and in taking this deed, by which we understand that they paid a valuable consideration, and had no actual notice of any defect in the title of their grantor. It is true that if the grantees had examined the Rodgers patent they would have discovered the restraint upon his alienation of the land; but it was too much to say that a deed valid upon its face, and taken in good faith for a valuable consideration, without actual notice of the facts, does not give color of title. Color of title was defined by this court in *Wright* v. *Mattison*, 18 How. 50, 56, "to be that which in appearance is title, but which in reality is no title." Said Mr. Justice Daniel: "The courts have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith." See also *Beaver* v. *Taylor*, 1 Wall. 637; *Cameron* v. *United States*, 148 U. S. 301, 307. There was no evidence in this case, except from the patent, that the grantees even knew that Rodgers was an Indian, as was the case in *Taylor* v. *Brown*, 5 Dakota, 344, much less that he belonged to the incompetent class, and they apparently received the deed, as many people do, without a careful examination of the grantor's title. In Kansas possession without paper title seems to be sufficient. *Gilmore* v. *Norton*, 10 Kansas, 491; *Anderson* v. *Burnham*, 52 Kansas, 454.

The cases cited by the plaintiffs in support of their proposition that the deed from Rodgers did not constitute color of title, are those wherein there was an element of fraud, or want of good faith, which are expressly negatived by the finding of

the court in this case. *Livingston* v. *Peru Iron Co.*, 9 Wend. 511.

3. That no title could be acquired against the right of the Secretary to declare the deed void, and hence the statute would not begin to run until after such action by the Secretary of the Interior. The case of *Gibson* v. *Chouteau*, 13 Wall. 92, 99, is relied upon to sustain this proposition. In that case it was held that the occupation of lands derived from the United States under a new Madrid certificate, before the issue of a patent, for the period prescribed by the state statute of limitations, was not a bar to an action in ejectment for the possession of such lands, founded upon the legal title subsequently conveyed by the patent; nor did such occupation constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed. Obviously this case has no application to the one under consideration. Here the United States had issued a patent to Rodgers "and to his heirs and assigns forever," subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The Government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make.

We have considered all the points taken by the plaintiffs, and are of the opinion that they are not sustained; that the judgment of the Supreme Court of Kansas was right, and it is therefore

Affirmed.

Mr. Justice White and Mr. Justice McKenna dissented.

GALLUP *v.* SCHMIDT.

ERROR TO THE CIRCUIT COURT OF MARION COUNTY, INDIANA.

No. 100. Argued October 31, November 1, 1901.—Decided January 6, 1902.

Edward P. Gallup, a resident in the State of New Hampshire, acted as the executor of the will of William P. Gallup, deceased, of the county of Marion in the State of Indiana. He was served with notice, under sections 8560 and 8587 of the Revised Statutes of Indiana, of an intention of the county auditor in that county to add to the list of the taxable personal property in his possession as executor, and was required to appear and show cause why that should not be done. The Supreme Court of Indiana held, against his objection, that he was at the time that the proceeding by the auditor began, an official resident of Marion County, and was therefore within the express terms of the statute. *Held* that this was a construction or application of the statute to the case in hand which was binding on this court.

The method followed by the auditor in assessing the additional taxes was, perhaps, open to criticism, but was approved by the Circuit and Supreme Courts of the State, and presents no question over which this court has jurisdiction.

This was a writ of error to a judgment of the circuit court of Marion County, State of Indiana, entered in pursuance of a final judgment of the Supreme Court of that State, in a case wherein Edward P. Gallup, executor of William P. Gallup, deceased, was plaintiff in error, and William H. Schmidt, treasurer of said Marion County, was defendant in error.

The main facts in the case were thus stated in the opinion of the Supreme Court, 154 Indiana, 196:

"William P. Gallup, having for thirty-one years been a resident therein, died, testate, in the city of Indianapolis, Marion County, in December, 1893, the owner and in possession of a large personal estate in said county. The will was duly admitted to probate in the Marion circuit court, and Edward P. Gallup, a resident of the State of New Hampshire, the principal and residuary legatee, was qualified as executor in January, 1894, and March 5, 1894, filed an inventory showing a personal estate of $492,628.26. Subsequently, in the spring of 1894,

said executor listed to the assessor for taxation for the year 1894 personal property of the estate aggregating $383,906.46. On January 15, 1895, Taggart, then auditor of Marion County, discovered, on what he believed to be credible information, that a large amount of personal property belonging to and in possession of said decedent had not been listed for taxation for the years 1881 to 1893 inclusive; and, upon that day, acting under section 8560, Burns' R. S. 1894, caused to be served by the sheriff upon Edward P. Gallup, as executor, who was at the time in Indianapolis, engaged in the settlement of said estate, notice in writing of his intention to add such omitted property to the tax duplicate, and requiring such executor to appear before him within five days to show cause, if any, why such property should not be so added. The notice specified the property to be added as county, township, town, and other bonds, notes, mortgages, claims, dues, demands and other credits, money on hand and on deposit.

"January 19, 1895, the executor appeared before the auditor and filed written objections to the authority of the auditor to proceed further, which were overruled. The executor then filed an answer to the notice, and on the 21st day of January, 1895, the auditor issued a subpœna for the executor, requiring him to appear forthwith before him and to bring with him all notes, mortgages and bonds in his possession, as such executor, to testify in said proceeding. The executor appeared on the 24th day of January, 1895, and filed further objections to the jurisdiction of the auditor, which were overruled; and thereupon he was examined under oath.

"Upon consideration of the evidence the auditor found that William P. Gallup, in addition to the property returned by him for taxation, was the owner and in possession of other taxable personable property not listed and not taxed during the several years from 1881 to 1893 specifically stated for each year, and on January 25, 1895, placed the same upon the tax duplicates, and computed and extended taxes thereon for the whole of said period, including statutory penalties and interest, the sum of $61,233.59. After the same was placed upon the duplicate in the treasurer's hands he made demand upon the said executor

to pay said additional taxes, but he refused to pay all or any part thereof.

"The executor on the 4th day of January, 1895, filed in the Circuit Court his final settlement report, and gave notice that the same would be finally heard on the 25th day of January, 1895; and upon the day set for hearing of the report, the same being the next day after the additional assessments had been placed upon the duplicate, Holt, as treasurer of Marion County, filed in said court, under sec. 8587, Burns' R. S. 1894, in the term thereof that was then running, his petition for an order upon the executor to show cause why he should not pay the taxes assessed by the auditor. The order was granted, and on February 9, 1895, the executor appeared and filed his motion to dismiss the said proceedings for the reason that the court had no jurisdiction to proceed to hear the cause, for the reason that the county treasurer was not authorized, under the law, to present said claim to the court at the January term, 1895.

"More than two years afterwards, to wit, December 16, 1897, the court overruled the executor's motion to dismiss; and on June 18, 1898, the executor filed his answer in eight paragraphs. A demurrer to the third, fourth and sixth was sustained, and a trial was had before the court upon the issues joined upon the petition, answer of general denial, payment and set-off, and, upon a special finding of facts and conclusions of law favorable to the treasurer, judgment was rendered against the executor that he pay to the treasurer on account of said omitted taxes the sum of $46,996.69."

Appeals were taken by both parties from the decree of the Circuit Court of Marion County to the Supreme Court of the State. That court was of opinion that the executor, as appellant, was not entitled to a reversal, but that, for error of the Circuit Court in allowing the executor a certain credit of $5750 upon the amount recovered, the judgment must be reversed with instructions to restate conclusions of law in accordance with the opinion of the Supreme Court, and render judgment thereon in favor of the treasurer for the sum of $52,746.69, with interest from October 31, 1898; and final judgment for said amount was accordingly so entered by the Circuit Court of

Marion County, to which judgment a writ of error was allowed and the cause brought to this court.

Mr. W. H. H. Miller and *Mr. Wayne MacVeagh* for plaintiff in error. *Mr. John B. Elam*, *Mr. James W. Fesler* and *Mr. Samuel D. Miller* were on their brief.

Mr. William L. Taylor and *Mr. William A. Ketcham* for defendant in error. *Mr. Martin M. Hugg*, *Mr. Frederick A. Joss*, *Mr. Merrill Moores* and *Mr. Cassius C. Hadley* were on their brief.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

To answer the questions presented to us in this record requires an examination of two sections of the Indiana Revised Statutes, which read as follows:

"Sec. 8560. Whenever the county auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has, from any cause, been omitted in whole or in part in the assessment of any year or number of years, from the assessment book, or from the tax duplicate, he shall proceed to correct the tax duplicate, and add such property thereto, with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon, to enable him to do which he is invested with all the powers of assessor under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof, resides in the county and is not present, he shall give such person notice, in writing, of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office at a specified time, within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such

assessment shall not be made, the same shall be made, and the county auditor shall, in all cases, file in his office a statement of the facts or evidence on which he made such correction; but he shall in no case reduce the amount returned by the assessor, without the written consent of the auditor of state, given on the statement of facts submitted by the county auditor."

"SEC. 8587. It shall be the duty of every administrator, executor, guardian, receiver, trustee or person having the property of any decedent, infant, idiot or insane person in charge, to pay the taxes due upon the property of such decedent, ward or party, and, in case of his neglecting to pay any installment of taxes when due, when there is money enough on hand to pay the same, the county treasurer shall present to the circuit or other proper court of the county, at its next term thereafter, a brief statement in writing, signed by him as such county treasurer, setting forth the fact and amount of such delinquency, and such court shall at once issue an order directed to such delinquent, commanding him to show cause within five days thereafter why such tax and penalty and costs should not be paid, and, upon his failing to show good and sufficient cause for such non-payment, the court shall order him to pay such tax out of the assets in his hands belonging to the estate of said decedent, ward or other person; and such delinquent shall not be entitled to any credit, in any settlement of said trust, for the penalty, interest and cost occasioned by such delinquency, or by the order to show cause, but the same shall be a personal charge against him, and he shall be liable, on his official bond, for such penalty, interest and costs."

Having alleged that he was and during all of his life had been a citizen of the United States, and that at no time during the year 1894 or since has he resided in Marion County, Indiana, but that during said year and ever since he has continually been and still was a resident and citizen of Lebanon, in the State of New Hampshire, Edward P. Gallup claimed, in the courts below, that in section 8560, providing for the assessment of omitted property by the county auditor, no provision whatever is made for notice to any person not a resident of the county in which said omitted property is proposed to be as-

sessed, but that the sole provision for such notice is to person or persons resident of such county, and that by reason of the premises said statute is in violation of the Fourteenth Amendment to the Constitution of the United States, in that said statute deprived him of his property without due process of law; denied to him the equal protection of the laws; also denies to him, as a citizen of New Hampshire, the privileges and immunities enjoyed by a citizen of Marion County, Indiana, contrary to the second section of article 4 of the Constitution of the United States; and that said statute is further invalid in that it grants to a class of citizens, namely, residents of the particular county in which the property sought to be assessed is situate, privileges and immunities which, upon the same terms, do not equally belong to all citizens.

This arraignment of the statute is based on the fact that Edward P. Gallup, though acting as executor of William P. Gallup, deceased, in the county of Marion, Indiana, was, at the time he was served with the auditor's notice, not a resident of that county, but was a resident of the State of New Hampshire; and the contention is that, though he received such a notice, yet he was not within the letter of the statute because not a resident of the county in which the property was situated, and therefore the notice actually given him was not a notice in point of law, and the auditor in proceeding with the duties of his office acted without jurisdiction, and that consequently the plaintiff in error has been deprived of his property without due process of law.

The Supreme Court of Indiana disposed of this contention by holding "that Edward P. Gallup was an official resident of Marion County at the time the proceeding by the auditor was begun, and therefore within the express terms of this section."

This construction of the section is criticized by the learned counsel of the plaintiff in error as novel, and unsupported by authority. However this may be, it is a construction or application of the statute to the case in hand and is binding upon us.

It is strongly urged that, whether the view of the Indiana Supreme Court be sound or not, in interpreting the section to

cover the case of an official residence, the result is to deprive the plaintiff in error of rights and privileges secured to him by the Constitution of the United States, and numerous cases are cited to the effect that assessments and special burdens upon taxpayers are void unless the law provides for notice, and that notice in fact is not equivalent to notice in law. It is claimed that the plaintiff in error has been afforded no opportunity to be heard, and that, because the section provides for notice to residents of the county, and for no notice whatever to non-residents of the State and county, a case of discriminative legislation is created whereby non-residents are denied the equal protection of the laws.

To these suggestions the Supreme Court of Indiana replied by saying:

"He, Gallup, was in a situation to avail himself of all the rights and privileges he asserts are unjustly denied to non-residents, and, while himself not aggrieved, he will not be permitted to assail a revenue statute on behalf of others who are making no complaint. The courts are open to those only who are injured. . . . Conceding all that appellant affirms concerning his residence and the absence of any provisions in section 8560 for service of notice on non-residents, still he is not in a condition to complain that he has had no day in court. The assessment by the auditor, right or wrong, was not a final judgment. It was only *prima facie* correct. The courts were open to appellant, even though a non-resident, to challenge it by injunction. Failing to thus seek relief against it, the treasurer appealed to the circuit court for an order against him to show cause why he did not pay the taxes. The jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire. He was ordered by the court to show cause, if he had any, why he did not pay the taxes. In response to the order any defence he had or ever had was open to him.

"It is no longer an open question in this State that if a party against whose property an assessment has been made is, at any time in the course of the proceeding before a conclusive judg-

ment, afforded by law an opportunity to contest its correctness, he is accorded due process of law."

It has frequently been held by this court, when asked to review tax proceedings in state courts, that due process of law is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered. *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Spencer* v. *Merchant*, 125 U. S. 345; *Allen* v. *Georgia*, 166 U. S. 138; *Orr* v. *Gilman*, *ante*, 278.

In the present case the plaintiff in error not only had an opportunity to appear and to set up any defence that he may have had, but actually did appear, and, after his demurrers and motion to dismiss had been overruled, answered and was fully heard in the trial court. His objections to the findings and rulings of that court have been heard and considered by the Supreme Court of the State.

The method followed by the auditor in assessing the additional taxes was, perhaps, open to criticism, but was approved by the Circuit and Supreme Courts, and presents no question over which we have jurisdiction.

Failing to see that any rights or privileges secured to the plaintiff in error by the Constitution of the United States have been denied him, we are of opinion that the judgment of the Supreme Court of Indiana must be

Affirmed.

Syllabus.

NORTHERN ASSURANCE COMPANY *v.* GRAND VIEW BUILDING ASSOCIATION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 60. Argued October 28, 1901.—Decided January 6, 1902.

Over insurance by concurrent policies on the same property tends to cause carelessness and fraud; and a clause in a policy rendering it void in case other insurance had been or should be made upon the property and not consented to by the insurer, is customary and reasonable.

In this case such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the one sued upon in this case was issued; and hence the question in this case is reduced to one of waiver.

It is a fundamental rule in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument, unless in cases where the contracts are vitiated by fraud or mutual mistake.

Where a policy provides that notice shall be given of any prior or subsequent insurance, otherwise the policy to be void, such a provision is reasonable, and constitutes a condition, the breach of which will avoid the policy.

Where the policy provides that notice of prior or subsequent insurance must be given by indorsement upon the policy, or by other writing, such provision is reasonable and one competent for the parties to agree upon, and constitutes a condition, the breach of which will avoid the policy.

Contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot, by the courts at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to cases of insurance contracts.

Provisions contained in fire insurance policies that such a policy shall be void and of no effect if other insurance is placed on the property in other companies without the knowledge and consent of the insuring company, are usual and reasonable.

It is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy, or by other writing.

It is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have

Statement of the Case.

authority to alter or contradict the express terms of the policies as executed and delivered.

Where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power.

Where such limitation is expressed in the policy, the assured is presumed to be aware of such limitation.

Insurance companies may waive forfeiture caused by non-observance of such conditions.

Where waiver is relied upon, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition.

Where the waiver relied on is the act of an agent, it must be shown either that the agent had express authority from the company, to make the waiver, or that the company, subsequently, with knowledge of the facts, ratified the action of the agent.

In September, 1898, the Grand View Building Association, a corporation organized under the laws of Nebraska, in the District Court of Lancaster County of that State, brought an action against the Northern Assurance Company of London, incorporated under the laws of the Kingdom of Great Britain and Ireland, seeking to recover the sum of $2500 as due under the terms of a policy of insurance that had been issued by the assurance company to the plaintiff company on December 31, 1896, on certain property situated in said Lancaster County, and which, on June 1, 1898, had been destroyed by fire.

Thereupon the defendant company filed in the said county court a petition and bond, in due form, and prayed for an order removing the cause to the Circuit Court of the United States for the District of Nebraska; and on September 29, 1898, the county court approved the bond, and entered an order granting the prayer of the petition for removal.

Subsequently the case was put at issue on the petition, answer and reply in the Circuit Court of the United States, and was so proceeded in that, on October 20, 1898, a special verdict was found by the jury empanelled in the case, and on January 14, 1899, a final judgment was entered for the plaintiff and against the defendant company in the sum of $2500, with interest and costs. The cause was then taken to the United States Circuit

Court of Appeals for the Eighth Circuit, and that court, on March 26, 1900, affirmed the judgment of the Circuit Court. 101 Fed. Rep. 27. Thereafter, on petition of the defendant company, a writ of certiorari was allowed, in response to which the record and proceedings in the cause were brought to this court.

Mr. R. W. Breckenridge and *Mr. Charles J. Greene* for the Assurance Company.

Mr. Halleck F. Rose for the Building Association. *Mr. Joseph R. Webster* was on his brief.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

In order that the questions discussed in this case and the grounds of our judgment therein may sufficiently appear, it seems proper to set out, with substantial fulness, the pleadings of the parties and the special verdict of the jury.

The plaintiff's petition, having alleged the making of the policy of insurance and the destruction of the property insured, then proceeded to allege in its fourth paragraph, apparently by way of meeting an expected defence, that "plaintiff, shortly prior to issuance of aforesaid policy by the defendant, had procured a policy of insurance from the Firemen's Fund Insurance Company, incorporated under the laws of California, insuring it against loss by fire of the same property in the sum of $1500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire; that the fact of said subsisting insurance in said company was, by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of said policy, and prior to payment by plaintiff of said premium therefor, and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf and accept and receive the premium therefor, and who in fact accepted said

risk and issued said policy, and accepted and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance, and with the intent knowingly to waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance' on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof, and is bound by said policy notwithstanding said condition; the plaintiff had no insurance on said property except as before stated."

Having stated that plaintiff had rendered and delivered a statement of loss, in compliance with the terms of the policy, the petition further alleged that "on the 26th day of July, 1898, the plaintiff demanded of defendant the payment of said insurance; and defendant, disregarding its undertaking in that behalf, denies liability on the sole ground that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance, the same provision which as aforesaid it had waived at the time of issuing its said policy."

The answer of defendant admitted the making of the policy, the destruction of the insured property by fire, and proof of loss, but denied specifically the allegations of the fourth paragraph of said petition, as follows:

"Further answering, this defendant alleges that the policy of insurance which it issued to the plaintiff on December 31, 1896, contained the following provision:

"'This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.' The defendant further says that its policy in question was issued to the plaintiff with the express statement therein made that it was issued in consideration of the 'stipulations' therein named and a certain amount of premium paid therefor. And said policy, besides the provisions

above quoted, contains the following stipulation and condition: 'This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.' The defendant says that notwithstanding the stipulations, provisions and agreements above set forth and without the consent of the defendant endorsed upon said policy in writing, and without the knowledge of the defendant, the plaintiff obtained a policy of insurance, upon the property covered by the policy issued by this defendant, in the sum of $1500 in the Firemen's Fund Insurance Company.

"Defendant says that the property upon which it issued its policy in the sum of $2500 was represented by the plaintiff to the defendant to be of the value of $3500. The defendant alleges that by reason of the additional insurance upon said property, not consented to in writing endorsed upon the policy of defendant, and not in fact known to the defendant, the policy written by the defendant upon the plaintiff's property was, at the date of the fire which damaged or destroyed the plaintiff's property wholly void, and was and has been void from the date of such additional assurance. Defendant further says that on the 5th day of August, 1898, the defendant tendered to the plaintiff in current fund the sum of $33.75, the amount of the premium paid by the plaintiff upon the policy in question, and now brings into court and tenders to the plaintiff the said sum of $33.75, with interest at the rate of seven per cent from December 31, 1896."

The plaintiff company replied to the answer, denying that

it procured a policy of insurance in the Firemen's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant and without the knowledge of defendant, and made the following allegations:

"The policy referred to in said answer of $1500 in the Firemen's Fund Insurance Company was, on the contrary, subsisting at and prior to the issuance by defendant to the plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy was personally well known to A. D. Borgelt, defendant's recording agent, who wrote said policy, and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to accept fire insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and insurance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt the fact of such subsisting insurance of $1500, and said Borgelt, as such agent, with full knowledge of said fact, accepted the risk, and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided nor affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received, the premium therefor. By all the aforesaid several acts the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by endorsement on the policy; and the defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy."

In support of its side of the issues thus presented, the plain-

tiff company called as witnesses H. J. Walsh, its president, and Bert Richards, the agent of the Firemen's Fund Insurance Company, who testified that Borgelt was informed by them and had knowledge of the subsisting insurance at and before the delivery of the policy in suit. The plaintiff likewise put in evidence the original policy sued on, and a letter from G. H. Lermit, manager of the defendant company at Chicago, Illinois, and who had signed the policy in suit as such agent, in the terms following:

"CHICAGO, *Aug.* 2, 1898.

"To Grand View Building Association, H. J. Walsh, President, Lincoln, Nebraska.

"DEAR SIRS: We have your favor of the 26th ult. enclosing to us what purports to be proof of loss, making claim under our policy No. 310,024, of Lincoln, Nebraska, agency, and issued to you for $2500 on household furniture, &c., while contained in the three-story brick and stone building on lot F in Grand View Residence Park addition, on account of a fire which occurred on the 1st day of June, 1898, and beg to say in reply that your sworn statement therein, advises us that you had other insurance on this same property to the amount of $1500. This additional insurance held by you was without the knowledge or consent of this company, and was not permitted by agreement as provided for in lines Nos. 11, 12 and 13 of the printed conditions of our policy, to which we beg to refer you. We, therefore, regret to have to advise you and do hereby say to you that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310,024 held by you, holding that said policy has been void from the date of its issuance by reason of the said provision in regard to other insurance above referred to.

"Our agents at Lincoln have been instructed to return to you the full premium paid them by you, namely, $33.75, at once."

The plaintiff further offered the original policy in evidence, containing, among other things, the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured

now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or remission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The defendant, to maintain the issues on its part, called as a witness A. D. Borgelt, who testified that he was a member of the firm of Borgelt & Beasley, insurance agents at Lincoln, Nebraska, which firm wrote the policy in the Northern Assurance Company on the Grand View Building Association; that at the time he wrote the policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in suit, and the first time he knew of any other insurance was after the fire; that while Walsh might have mentioned that there was an existing policy, he, the witness, had no recollection of having known anything about the other insurance until after the fire. He further testified that on August 4, 1898, the premium paid for the policy in suit was tendered to the plaintiff company, which declined to take it. The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted.

The jury, under the instructions of the court, found that the defendant company issued to the plaintiff company the policy described in the plaintiff's petition; that the property covered by said policy of insurance was burned on or about June 1,

1898; that the plaintiff, on or about July 26, 1898, furnished the defendant with proofs of the loss of said property by fire; that the policy contained the provision hereinbefore mentioned, providing that the policy should be void if the insured had or should thereafter make or procure any other contract of insurance on the property covered by the policy in suit, and that the policy was made subject to such condition, and that no officer, agent or other representative of the company should have power to waive any provision or condition of the policy except such as by the terms of the policy had been endorsed thereon or added thereto, and that no officer, agent or representative of the company should have power or be deemed or held to have waived such provision or condition unless such waiver was written upon or attached to the policy, and that no privilege or provision affecting the insurance under the policy should exist or be claimed by the insured, unless so written or attached; that there was at the time of the issuance of the policy in suit other insurance upon the insured property in the sum of $1500, in the Fireman's Fund Insurance Company; that Borgelt was recording agent of the Northern Assurance Company, at Lincoln, Nebraska, with authority from the defendant company to countersign and issue its policies and accept fire insurance risks in its behalf, and to collect and receive premiums therefor, and that he had issued the policy sued on as such agent; that Borgelt knew, when the policy in the defendant company was issued and delivered to the plaintiff company, that there was then $1500 subsisting insurance in the Firemen's Fund Insurance Company upon the insured property, issued prior to the date of the policy of the defendant company, and that such knowledge was communicated to said Borgelt by and on behalf of the assured; that the actual cash value of the property covered by the policy in suit and destroyed by fire June 1, 1898, was $4140; that no consent to concurrent insurance of $1500 was endorsed on the policy in suit; and that, on August 4, 1898, the amount of the premium paid for the policy was tendered to and refused by the plaintiff.

Thereafter motions were respectively made by the plaintiff and defendant for judgment upon the findings and special ver-

dict of the jury, and on January 14, 1899, the motion of the defendant was overruled, and exception was taken by the defendant, and the motion of the plaintiff was sustained, and judgment was entered in favor of the plaintiff and exception was taken by the defendant. A writ of error was prayed for by the defendant and allowed, and the cause was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the judgment of the Circuit Court was affirmed, and the cause was then brought to this court by a writ of certiorari.

Over insurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies rendering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable.

In the present case, such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued.

It also was made to appear that no consent to such other insurance was ever endorsed on the policy or added thereto.

Accordingly it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the insured unless the company waived the condition. The question before us is therefore reduced to one of waiver. The policy itself provides the method whereby such a waiver should be made: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions or conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any provision or

permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Before proceeding to a direct consideration of the question before us, it may be well to inquire into the principles established by the authorities as applicable to such cases.

It is a fundamental rule, in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. This rule is thus expressed in Greenleaf on Evidence, vol. 1, sec. 275, 12th ed.:

"When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."

The rule is thus expressed by Starkie, 587, 9th Am. ed.:

"It is likewise a general and most inflexible rule, that whereever written instruments are appointed, either by the requirement of law, or by the compact of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy; of *principle*, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence; of *policy*, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence."

This rule has always been followed and applied by the English courts in the case of policies of insurance in writing.

Thus in *Weston* v. *Eames*, 1 Taunt. 115, it was held that parol evidence of what passed at the time of effecting a policy is not

admissible to restrain the effect of the policy, Mansfield, C. J., observing that "such evidence could not be admitted, without abandoning in the case of policies, the rule of evidence which prevails in all other cases; and that it would be of the worst effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected."

In *Robertson* v. *French*, 4 East, 130, it was held, per Lord Ellenborough, in a suit on a marine policy of insurance, that a parol agreement that the risk should begin at a place different from that inserted in the policy, cannot be received in evidence.

These cases are cited as establishing the rule in cases of insurance in Marshall on Marine Insurance, 278, and in Arnold on Insurance, vol. 1, p. 277.

In *Flinn* v. *Tobin*, 1 Mood. & Malle. 367, Lord Tenderden, C. J., said that "the contract between the parties is the policy which is in writing, and cannot be varied by parol. No defence, therefore, which turns on showing that the contract was different from that contained in the policy, can be admitted; and this is the effect of any defence turning on the mere fact of misrepresentation without fraud."

So, where, in assumpsit for use and occupation, upon a written memorandum of lease, at a certain rent, parol evidence was offered by the plaintiff of an agreement at the same time to pay a further sum, being the ground rent of the premises, to the ground landlord, it was rejected. *Preston* v. *Merceau*, 2 W. Bl. 1249.

And where, in a written contract of sale of a ship, the ship was particularly described, it was held that parol evidence of a further descriptive representation, made prior to the time of sale, was not admissible to charge the vendor without proof of actual fraud; all previous conversations being merged in the written contract. *Pickering* v. *Dowson*, 4 Taunt. 779. See, also, *Powell* v. *Edmunds*, 12 East, 6; *Smith* v. *Jeffreys*, 15 M. & W. 561; *Gale* v. *Lewis*, 9 Q. B. 730; *Executors* v. *Ins. Co.*, 7 M. & W. 151.

The case of *Western Assurance Co.* v. *Doul et al.*, 12 Canada S. Ct. 446, was one where a policy of insurance against loss by fire contained the following condition: "In case of subsequent

insurance, notice thereof must be given in writing at once, and such subsequent insurance endorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof such policy shall forthwith cease and be of no effect."

The insured effected subsequent insurance and verbally notified the agent, but there was no endorsement made on the policy, nor any acknowledgment in writing by the company. A loss having occurred, the damage was adjusted by the inspector of the company, and neither he nor the agent made any objection to the loss on the ground of non-compliance with the above condition. In a suit to recover the amount of the policy the company pleaded breach of the condition, in reply to which the plaintiff set up a waiver of the condition and contended that by the act of the agent and inspector the company was estopped from setting it up. It was *held* by the Supreme Court of Canada that the insured not having complied with the condition, the policy ceased and became of no effect on the subsequent insurance being effected, and that neither the agent nor the inspector had power to waive a compliance with its terms.

In discussing the question of the power of the agent to waive the condition, the court said: "It is not shown that it was within the scope of Greer's authority as a local agent to waive such a condition. The condition itself does not, either by express words or by implication, recognize such an authority, but the reason for requiring the notice obviously points to a directly contrary construction. Moreover, the English case already quoted, (*Gale* v. *Lewis*, 9 Q. B. 730,) which determines that the required notice is to be given to the company itself and not to the local agent, shows, *a fortiori*, that such an agent has, in the absence of express authority, no power to waive the condition. Direct authority is, however, not wanting. In the case of *Shannon* v. *Gore Mutual Insurance Company*, (2 Ont. App. 396,) the facts were the same as in the present case, the subsequent assurance having been effected through the agent who also acted for the defendant in taking the original risk. It was contended that the successive insurances having been thus effected with the same person as the agent of the two companies, the company which granted the first policy had knowledge of the sub-

sequent insurance, and were therefore estopped from setting up a condition vititating the policy for want of a written notice. But the Court of Appeals held otherwise, and determined that 'in such a case notice to the agent was not notice to the company, and that the agent neither had authority to waive the condition nor could by his conduct estop his principals the first insurers.' As regards any direct action of the insurance company through their immediate agents, the directors or principal officers of the company conducting its affairs at the head office, there is no pretence for saying that there is in the present case the slightest evidence of conduct upon which either a defence of waiver of the condition, or by way of estoppel against insisting upon it, can be based, and this for the very plain reason that these directors and officers never had the fact of a subsequent assurance brought to their knowledge, and without proof of such knowledge neither waiver nor estoppel can be made out. The condition in the policy is one which must be complied with or waived. The company, by signing a condition of that kind, reserves to itself the right to withdraw the policy in case of further insurance. That question is one which cannot be decided by a mere local agent. He may receive the notice for transmission, but he cannot act on it; it must be brought to the notice of some person authorized by the company to continue the insurance after notice has been given them. It has been decided in a number of cases in England that a local agent has not such authority, and a mere notice to him, even in a case where he is acting for another company taking the further risk, has been held to be no notice to the company."

Coming to the decisions of our state courts, we find that, while there is some contrariety of decisions, the decided weight of authority is to the effect that a policy of insurance in writing cannot be changed or altered by parol evidence of what was said prior or at the time the insurance was effected; that a condition contained in the policy cannot be waived by an agent, unless he has express authority so to do; and then only in the mode prescribed in the policy; and that mere knowledge by the agent of an existing policy of insurance will not affect the

company unless it is affirmatively shown that such knowledge was communicated to the company.

In *Worcester Bank* v. *Hartford Fire Insurance Company*, 11 Cush. 265, which was a case of additional insurance, and where one Smith testified that he was agent for the defendant company to issue policies, and was in the habit of receiving notices of additional insurance, which he endorsed on the policies, it was held by the Supreme Judicial Court of Massachusetts that as it is provided in the policy on which this action is brought that if the assured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have same endorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect, and as, after the making of this policy, the assured obtained other insurance on the same property, but did not have the same endorsed on the policy or otherwise acknowledged by the defendants in writing, the policy was void, notwithstanding there was parol evidence tending to show that notice had been given to Smith, the company's agent.

The same court held, in *Hale* v. *Mechanics' Mutual Fire Insurance Company*, 6 Gray, 169, that a policy issued by a mutual fire insurance company, whose by-laws provided that any insurance subsequently obtained without the consent in writing of their president should avoid the policy, and that the by-laws should in no case be altered except by a vote of two thirds of the stockholders or directors, was avoided by a subsequent insurance obtained with the mere verbal consent of the president. It was said by Bigelow, J., giving the unanimous opinion of the court:

"Such being the rights of the parties under the contract, it is clear, upon the facts in this case, that the policy was annulled under the fifteenth article of the by-laws, by reason of the subsequent insurance procured by Stone and Pony on the property, without the assent of the president of the corporation in writing; unless the waiver of such written assent by the president, and his verbal assent to such subsequent insurance as found by the jury, operate to set aside this provision in the by-laws as to

this particular policy and render the contract valid, notwithstanding by its express terms, as by the clause in the by-laws, it would be otherwise void. But the difficulty in maintaining the plaintiff's position on this part of the case is, not only that it attempts to substitute for the written agreement of the parties a verbal contract, but that there is an entire absence of any authority on the part of the president to make such waiver or give such verbal assent. He was an agent, with powers strictly defined and limited, and could not act so as to bind the defendant beyond the scope of his authority. Story on Agency, secs. 127, 133; *Salem Bank* v. *Gloucester Bank*, 15 Mass. 29. By article 15 of the by-laws, his power to assent to subsequent insurance was expressly confined to giving such assent in writing. In order to guard against the danger of over insurance, the corporation might well require that any assent to further insurance on property insured by them should be given by the deliberate and well-considered act of their president in writing, and not be left to the vagueness and uncertainty of parol proof. The whole extent and limit of the president's authority in this respect were set forth in the by-laws attached to the policy in the present case, and, as the evidence shows, were fully known to the assured. . . . If the argument of the plaintiff should be carried out to its legitimate result, it would give to the president the right, in any case, to suspend or change the by-laws by his verbal act and at his pleasure. This clearly he had no power to do. We are therefore of opinion that the finding of the jury does not render the policy valid; but that it was annulled by the subsequent insurance obtained by the assured without the written consent of the president."

In *Smith* v. *Niagara Fire Ins. Co.*, 60 Vermont, 682, the Supreme Court of Vermont, in an elaborate opinion; in *Wilson* v. *Ins. Co.*, 4 R. I. 141, the Supreme Court of Rhode Island, and in *Cleaver* v. *Traders' Ins. Co.*, 65 Mich. 527, and same case in 71 Michigan, 414, the Supreme Court of Michigan; *held*, that the fact that the company's agent had authority, in a certain way or manner, to consent to the taking of additional insurance, does not aid the plaintiff; that the agent did not consent, in the cases cited, within the line of his authority or

in the manner prescribed by the policy, wherein the agent is expressly prohibited from waiving or modifying the written contract.

The same view of the law prevails in Connecticut. In *Sheldon* v. *Hartford Fire Insurance Company*, 22 Conn. 235, it was held that where the policy and survey constituted a contract between the parties, and there was no imperfection or ambiguity in the contract, evidence of parol representations made to the agent prior to the issuing of the policy could not be received to explain or qualify the contract. See, also, *Glendale Man. Co.* v. *Protection Ins. Co.*, 21 Conn. 19, 37; *Hough* v. *City Fire Ins. Co.*, 29 Conn. 10.

New York Insurance Co. v. *Thomas*, 3 Johns. Cases, 1, was an action upon a policy of insurance, and where parol evidence was offered to vary the terms of the instrument. The question was thus disposed of by Kent, J.:

"The next point is whether the parol proof be admissible to explain the contract, and, if it be, what is the effect, in the present case, of such proof.

"I know no rule better established than that parol evidence shall not be admitted to disannul or substantially vary or extend a written agreement. The admission of such testimony would be mischievous and inconvenient. Parol evidence is to be received in the case of an *ambiguitas latens*, to ascertain the identity of a person or thing, but before the parol evidence is to be received in such case, the latent ambiguity must be made out and shown to the court. In the present instance there is no ambiguity. The language of the contract, throughout, is consistent and explicit. This general rule of law has been particularly and emphatically applied to policies. (Skinn. 54.) And except in the special instance of explanations resulting from the usage of trade, they have never been allowed to be contradicted by parol agreements."

Jennings v. *Chenango Mut. Ins. Co.*, 2 Denio, 75, has long been a leading case. There it was held that conditions of insurance containing statements of the purpose for which the property insured is to be occupied, and of its situation as to other buildings, are warranties, and if untrue the policy is void,

though the variance be not material to the risk; and that parol evidence that the insured truly informed the agent of the insurer who prepared the application as to these particulars is not admissible. In the opinion, the language of Parker, C. J., in *Higginson* v. *Dall*, 13 Mass. 96, is quoted, that "policies, though not under seal, have nevertheless ever been deemed instruments of a solemn nature and subject to most of the rules of evidence which govern in the case of specialties. The policy is itself considered to be the contract between the parties, and whatever proposals are made or conversations had prior to the subscription, they are considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it."

In *Fowler* v. *Metropolitan Ins. Co.*, 116 N. Y. 389, it was said:

"A long line of authorities has settled the law to be that when it is expressly provided that the premium on a life insurance policy shall be paid on or before a certain day, and in default thereof the policy shall be void, the non-payment of the premium upon the day named works a forfeiture. . . . The claim that such a provision, in a paid-up policy, is unconscionable and oppressive, and presents a case in which a court of equity should relieve from the forfeiture incurred by omission to make prompt payment of premiums, is not a new one. It has frequently been presented to the courts and has recently received very full consideration in this court in *Attorney General* v. *North American Life Insurance Co.*, 82 N. Y. 172, and in *People* v. *Knickerbocker Life Ins. Co.* It was decided in those cases that provisions in paid-up policies, issued in lieu of other policies on which notes had been given for premiums, that they should be void in case the interest on such notes was not paid, are not unconscionable, oppressive or usurious. In the first case cited, Judge Earl said: 'There are doubtless some decided cases which hold that such forfeiture should not be enforced, but I think the better rule is to uphold and enforce such contracts when free from fraud or mistake, just as the parties have made them.' And in *Douglass* v. *Knickerbocker L. Ins. Co.*, 83 N. Y. 492, it was said: 'It has generally been found most conducive to the general welfare to leave parties to make their own contracts,

and then enforce them as made, unless, on the ground of fraud, accident or mistake, ignorance, impossibility or necessity, relief can be granted against them.' . . . It would be impossible to sustain the claim that the statements and representations contained in the pamphlet issued by the company were to be regarded as affecting or modifying the strict terms of the policy without disregarding the established rule of law that a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and that the whole engagement of the parties and the extent and manner of their undertaking are embraced in the writing. This rule is the same in equity as at common law, and although a written agreement may be set aside or reformed, fraud or mistake must be shown to entitle a party to such relief. And it is never competent in an action upon a written contract to show that it was executed on the faith of a preceding parol stipulation not embraced in it."

In *Baumgartel* v. *The Providence Washington Ins. Co.*, 136 N. Y. 547, where defendant had issued to plaintiff a policy of fire insurance which contained a clause to the effect that, unless otherwise provided by agreement endorsed thereon, it should be void in case of other insurance on the property insured; and it also provided that no agent of the company should have power to waive any provision or condition of the policy except such as by its terms might be the subject of agreement endorsed thereon or added thereto, and, as to those, that he should have no such power nor be deemed to have waived them unless in writing so endorsed or attached; and where, in an action upon the policy, it appeared that, during its life, the plaintiff without notice to the defendant and without its knowledge or consent, obtained other insurance upon the property, and that thereafter he informed the agent, who had issued the policy, of this fact, and that the agent had replied, "All right; I will attend to it;" but it did not appear that the plaintiff then had the policy in suit with him or afterwards applied to said agent for written consent to the other insurance; it was *held* that knowledge of the agent of the subsequent insurance did not satisfy the condition of the policy, and that plaintiff having failed to comply

therewith, the policy was forfeited and void; and also *held* that the statements of defendant's agent did not amount to a waiver of the conditions or authorize the application of the doctrine of estoppel. It was said in the opinion:

"The stipulation with respect to further insurance is one of the conditions upon which, by the agreement of the parties, the liability of the defendant depended in the case of a loss during the term of the insurance. The parties have also agreed upon the mode in which the condition could be complied with or waived, namely, by writing endorsed upon the policy in the form of a consent to the other insurance. The agent had power to give this consent only in the manner prescribed by the contract. But there is not in the case any proof, even of verbal consent by the agent, that the plaintiff might procure further and additional insurance. . . . 'The effect of such stipulations in a contract of insurance as well as the manner in which they may be modified or waived by agents of the company have been so thoroughly discussed and so clearly pointed out, that a reference to some of the more recent cases on the subject is all that is needful here. *Allen* v. *German Ins. Co.*, 123 N. Y. 6; *Quinlan* v. *Providence W. Ins. Co.*, 133 Id. 356; *Messelback* v. *Norman*, 122 Id. 583; *Walsh* v. *Hartford Ins. Co.*, 73 Id. 5.'"

It is doubtless true that in several later cases the New York Court of Appeals seems to have departed from the principles of the previous cases, and to have held that the restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums *with full knowledge of the actual situation.* To take the benefit of a contract *with full knowledge of all the facts* and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party. *Robbins* v. *Springfield Fire Ins. Co.*, 149 N. Y. 484; *Wood* v. *American Fire Ins. Co.*, 149 N. Y. 382. But see *Rohrbach* v. *German Fire Ins. Co.*, 62

N. Y. 63, and *Owens* v. *Holland Ins. Co.*, which are irreconcilable.

The fallacy of this view is disclosed in the phrases we have italicized. It was thereby assumed that the agent had full knowledge of all the facts, that such knowledge must be deemed to have been disclosed by the agent to his principal, and that, consequently, it would operate as a fraud upon the assured to plead a breach of the conditions. This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provision that no waiver shall be made by the agent except in writing endorsed on the policy. As we shall hereafter show when we come to consider the meaning and legal purport of the contract in suit, such express provision was intended to protect both parties from the dangers involved in disregarding the rule of evidence. The mischief is the same whether the condition turned upon facts existing at and before the time when the contract was made, or upon facts subsequently taking place.

In *Franklin Fire Ins. Co.* v. *Martin*, 41 New Jersey Law, 568, the facts were as follows: A policy described the property insured as "occupied as a dwelling and boarding house;" in fact, it was occupied as a country tavern, and there was kept for use a billiard table in a room back of the bar room. The property continued to be so used until the fire occurred. In the conditions of insurance, taverns were classified as extra hazardous, and billiard rooms were named as specially hazardous, each being subject to higher premiums than ordinarily hazardous rights. It was *held* by the New Jersey Court of Errors and Appeals that evidence that the application for insurance was prepared by the agent of the insurer, and that he knew, at the time of the application, that the property was occupied as a tavern, and that a billiard table was kept in it for use, could not be received for the purpose of showing that, under the description of a dwelling and boarding house, the parties intended to insure the premises as they were then, in fact, being used; that a written contract of insurance cannot be altered or varied by parol evidence of what occurred between the insured and the agent of the insurer at the time of effecting the insurance;

and that such evidence will not be received to raise an estoppel *in pais*, which shall conclude the insurer from setting up the defence that the policy was forfeited by a breach of the conditions of insurance.

In the opinion of the court, given by Judge Depue, there was a full examination of cases on the subject of the admissibility of parol evidence in actions on policies of insurance, and some of his observations are so weighty, and so applicable to the case before us, that we shall quote from them at some length:

"The leading case in New York is *Jennings* v. *Chenango Insurance Company*, 2 Denio, 75. This case held, in accordance with a series of cases, beginning with *Vandevoort* v. *Columbian Insurance Company*, 2 Caines, 155, that parol evidence that the insured truly informed the agent of the insurer, who prepared the application, as to the situation of the premises, was not competent to vary a warranty on that subject, or save the insured from the consequences of a breach of the contract of insurance. This case was recognized as good law by the courts of that State until the decision in *Plumb* v. *Cattaraugus Insurance Company*, 18 N. Y. 392, where such evidence was held by a divided court to be admissible, not to change the contract, but to produce the same result under the guise of an equitable estoppel. *Plumb* v. *Cattaraugus Insurance Company* was followed in *Rowley* v. *Empire Insurance Company*, 36 N. Y. 550. It was justly criticized and condemned as founded on erroneous views, by the Chief Justice in *Dewees* v. *Manhatten Insurance Company*, as reported in 6 Vroom, 336, and with *Rowley* v. *Empire Insurance Company*, has been greatly shaken by subsequent decisions in the same court, if it was not practically overruled by *Rohrbach* v. *Germania Insurance Company*, 62 N. Y. 47, 63. In *Maher* v. *Hibernia Insurance Company*, 67 N. Y. 283, reformation of the contract of insurance seems to have been regarded as the appropriate method of relief under such circumstances.

"The condition of the law on this important subject in that State is such that it would not be advisable to adopt it, or prudent to endeavor to follow the decisions of its courts. The discordant and irreconcilable decisions which have grown out of

the departure from the law as held in *Jennings* v. *Chenango Co. Ins. Co.* are cited by Judge Folger in *Van Schaick* v. *Niagara Fire Ins. Co.*, 68 N. Y. 438. Some of the conditions of the policy may be controlled by evidence of the knowledge of the parties at the time the insurance was effected, and others not; but no rule or principle has been promulgated for ascertaining, in advance of the litigation, what stipulations in the contract belong to the one class or the other—a condition of the law sure to result from the effort to deal with contracts of this kind in disregard of established rules of law and acknowledged legal principles. . . .

"It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere evasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with. Extrinsic evidence of the kind under consideration must entirely fail in its object, unless its purpose be to show that the contract expressed in the written policy was not, in reality, the contract as made. A defendant cannot be estopped from making the defence that the contract sued on is not his contract, or that his adversary has himself violated it in those particulars which are made conditions to his right under it, on the ground of negotiations and transactions occurring at the time the contract was entered into, unless the plaintiff is permitted to show from such sources that the contract, as put in writing, does not truly express the intention of the parties. The difficulty lies at the very threshold. An estoppel cannot arise except upon proof of a contract different from that contained in the written policy, and an inflexible rule of evidence forbids the introduction of such proof by parol testimony, when offered to vary or affect the terms of the written instrument.

"The cases usually cited for the proposition that a contract of insurance is excepted out of the class of written contracts with respect to the admissibility of parol evidence to vary or

control the written contract, will be found on examination to be, to a large extent, those in which the proof has been received with a view to a reformation of the policy in equity, or to meet the defence that the contract was induced by false and fraudulent representations not embodied in the contract, or are the decisions of courts in which the legal and equitable jurisdictions are so blended that the functions of a court of equity have been transferred to the jury box. . . . 'The powers of agents of every kind of principals, to act for and bind their principals, are determined by the unvarying rule of ascertaining what authority is delegated to them. How the contract was effected, whether directly with the insurer or by the intervention of agents, is of no consequence. The question of the admissibility of the testimony does not relate to the method by which the contract was made. It concerns the rule of evidence by which the contract, however made, shall be interpreted.

"Upon principle, it is impossible to perceive on what ground such testimony should be received. A policy of insurance is a contract in writing, of such a nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. If it be ambiguous in its terms, parol evidence, such as would be competent to remove an ambiguity in other written contracts, may be resorted to for the purpose of explaining its meaning. If it incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity. If strict compliance with the conditions of insurance, with respect to matters to be done by the insured after the contract has been concluded, has been waived, such waiver may, in general, be shown by extrinsic evidence, by parol. Further than this, it is not safe for a court of law to go. To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of the principle that will open the door to the grossest frauds. . . . A court of law can do nothing but enforce

the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without the risk of disastrous consequences to the rights of parties."

Dewees v. *Manhattan Ins. Co.*, 35 N. J. Law, 366, referred to in the case just cited, reports an opinion by Chief Justice Beasly, and from which we shall quote, as it contains, as we think, an able and sound statement of the law on this important subject:

"The contract between these litigants, on the point which I shall discuss, is clear and unambiguous. The defendants agreed to insure a building occupied as a country store, and the stock of goods, consisting of the usual variety of such a store. This, by the plain meaning of the terms, is a warranty on the part of the insured that the building was used, at the date of the agreement, for the purpose specified. It was a representation, on the face of the policy, touching the premises in question, and which affected the risk; and such a representation, according to all the authorities, amounts to a warranty. . . . The cases are numerous and decisive upon the subject—so much so, that it does not appear to me to be necessary to refer to them in detail, as, in my opinion, the character of a representation of this kind is apparent upon its face. It can be intended for no other purpose than to characterize the use of the building at the date of the insurance; for, unless this be done, there can be no restriction on the use of the property by the insured, during the running of the risk. Unless this description has the force thus attributed to it, the premises could have been used for any of the most hazardous purposes. A building described in a policy as a dwelling house could, except for the rule above stated, be converted into a mill or factory. I think it is incontestably clear that the description of the use of the premises in this case was meant to define the character of the risk to be assumed by the defendants.

"But, besides this, it is plain that the written contract was

violated, in a fatal particular, by the assured. By the express terms of one of the stipulations of the insurance, it is declared that, if the premises should be used 'for the purpose of carrying on therein any trade or vocation, or for storing or keeping therein any articles, goods or merchandise denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to this policy, etc., from thenceforth, so long as the same shall be so used, etc., the policy shall be of no force or effect.' Among the extra hazardous risks, that of keeping a 'private stable' is enunciated, and it was shown on the trial, and was not denied, that, at the date of the policy, and at the time of the fire, a part of the building insured was applied by the plaintiff to this use.

"It cannot be denied, then, that if we take into view these conditions of the case alone, the plaintiff's action must fall to the ground. He did an act which, by force of his written agreement, had the effect to suspend, temporarily, his insurance. As this fact, having this destructive effect, could not be disputed, it became necessary, in order to save the plaintiff's action, to avoid the effect of the written contract; and this burden was assumed, on the argument, by the counsel of the plaintiff. The position taken with this view was, that the policy was obtained for the plaintiff by the agents of the defendant, and that they knew that the building in question was, in part, used as a stable.

"The plaintiff's claim appears to be a meritorious one, and on this account, and in the hope that there might be found some legal ground on which to support this action, the case was allowed by me, at the circuit, to go to the jury, and the questions of law were reserved for this court. But the consideration which I have since given the matters involved has excluded the faintest idea that, upon legal principles, this suit can be successfully carried through. In my opinion, that end can be attained only by the sacrifice of legal rules which are settled, and are of the greatest importance. Let us look at the proposition to which we are asked to give our assent.

"The contract of these parties, as it has been committed to writing, is, that if the plaintiff shall keep a stable on the premises insured, for the time being, the policy shall be vacated.

But, it is said, the agents of the defendants who procured this contract were aware that the real contract designed to be made was, that the plaintiff might apply the premises to this use. This knowledge of the agent of the defendants, and which, it is contended, will bind the defendants, is to have the effect to vary the obligations of the written contract. Upon what principle can this be done? There is no pretense of any fraud in the procurement of this policy. The only ground that can be taken is, that the agent, knowing that the premises were to be, in part, used as a stable, should have so described the use in the policy. The assumption is, and must be, that the warranty, in its present form, was a mistake in the agent. But a mistake cannot be corrected, in conformity with our judicial system, in a court of law. No one can doubt that, in a proper case of this kind, an equitable remedy exists. 'There cannot be, at the present day,' says Mr. Justice Story, 'any serious doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake; and a policy of insurance is just as much within the reach of the principle as any other contract. *Andrews* v. *Essex Fire & Marine Ins. Co.*, 3 Mason, 10.'

"It is possible, therefore, that in this case, in equity the present contract might be reformed, so as to permit the plaintiff to keep his stable in this building; but I think it has never before been supposed that this end could be reached in this State, by proof before the jury in a trial at the circuit. The principle would cover a very wide field, for, if this mistake can be there corrected, so can every possible mistake. If the plaintiff can modify the stipulation with respect to the restricted use of the premises, on the plea of a mistake in the stipulation, on similar grounds it would be open to the company to modify the policy with respect to the amount insured. I am at a loss to see how, on the adoption of the principle claimed, we are to keep separate the functions of our legal and equitable tribunals. Nor do I think, if this court should sustain the present action, that it could be practicable to preserve, in any useful form, the great primary rule that written instruments are not to be varied or contradicted by parol evidence. The knowledge of the agent

in the present transaction is important only as showing what the tacit understanding of the contracting parties was. Suppose, instead of proof of such tacit understanding, the plaintiff had offered to make a stronger case by showing that the agent expressly agreed that the building might be used not only as a country store, as the policy stated, but also as a stable, and that the restraining stipulation did not apply to the extent expressed. Can any one doubt that, according to the practice and decisions in this State, such proof would have been rejected? A rule of law admitting such evidence would be a repeal of the principle, giving a controlling efficacy to written agreements. The memory and understanding of those present at the formation of the contract would be quite as potent as the written instrument.

"I have not found that it is anywhere supposed that this general rule which illegalizes parol evidence under the conditions in question has been relaxed with respect to contracts of insurance. Decisions of the utmost authority, both in England and in this country, propound this doctrine as applicable to policies in the clearest terms."

After citing a number of cases, the Chief Justice took notice of the case of *Plumb* v. *Cattaraugus Ins. Co.*, 18 N. Y. 392, in the following terms:

"In the case from New York here referred to, there was, in the application for the policy, a misdescription of the distance of the adjacent buildings from the premises insured, and to this defence the reply was, that the agent of the company had made the measurements, and had obtained the signature of the plaintiff, on the assurance 'that the application was all right and just as it should be.' The court decided that the declaration of the agent could not be offered for the purpose of altering or contradicting the written contract, but that it was admissible as an *estoppel in pais*. Now it is at once obvious that, by force of that view, the agreement in question was enforced, not in the sense of the written terms, but in the sense of the oral evidence, and that the practical result was precisely the same as though the instrument had been reformed in conformity to such evidence at the trial. I think there is no doubt that this appli-

cation of the doctrine of estoppel to written contracts is an entire novelty. In the long line of innumerable cases which have proceeded and been decided on the ground that parol evidence is not admissible as against a written instrument, no judge or counsel ever intimated, as it is believed, that the same result could be substantially attained by a resort to this circuity. It is true that, if there be a substantial ground in legal principle for its introduction, the fact that it is new will not debar from its adoption; but I have not been able to perceive the existence of such substantial ground. In my apprehension the doctrine can be made to appear plausible only by closing the eyes to the reason of the rule which rejects, in the presence of written contracts, evidence by parol. That reason is, that the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected, whose effect is to vary or contradict such expressed understandings. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result; most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties. In the case now criticized, the party insured stipulated against the existence of buildings within a definite number of feet from the insured property; by the admission of parol testimony, this stipulation was restricted and limited in its effect. This result, no doubt, was strictly just, if we assume that the parol evidence was true; but, standing opposed to the written evidence, the law presumes the reverse. The alternative is unavoidable—it is a choice between that which is written and that which is unwritten. In the case cited, the effect of the rule adopted by the court was to give a different effect to the written terms from that which they intrinsically possessed—a result induced by the admission of oral evidence. This, I cannot but think, was a

palpable alteration of the agreement of the parties. The mistake of the court appears to have been in regarding simply the legal effect of the facts which were proved by parol. Receiving that testimony into the case, a clear estoppel was made out; but the error consisted in the circumstance that such oral evidence was, on rules well settled, inadmissible. The question presented was purely one as to a rule of evidence, but it was treated as a problem relating to the application of legal principles to an admitted state of facts. The case was not decided by a unanimous court, three judges dissented, and, in my judgment, that dissent was based on satisfactory grounds. . . . The facts now before us do not present the elements of an estoppel. Such a defence rests on a misconception as to a state of facts, induced by the party against whom it is set up. The person who seeks to take advantage of it must have been misled by the words or conduct of another. Now, in the present case, the agent did not make any statement nor did he do anything which led the plaintiff to alter his condition. The most that can be laid to his charge is that from carelessness he omitted properly to describe the use of the premises described. But this was not a misstatement of a fact on which the plaintiff acted, because the plaintiff was aware of the circumstance that the building was put to another use. The alleged error in the description is plain on the face of the policy, and the law incontestably charges the defendant with knowledge of the meaning and legal effect of his own written contract. To found an estoppel on the ignorance of the plaintiff of the plainly expressed meaning of his own contract would be absurd."

In Pennsylvania, it has always been held that courts of law will not permit the terms of written contracts to be varied or altered by parol evidence of what took place at or before the time the contracts were made, and that policies of insurance are within the protection of the rule.

Thus, when it was stipulated in the conditions of insurance that a false description of the property insured should avoid the policy, it was held that a misdescription defeated the plaintiff's right to recover under it, though the statements were known to be false by the insurer's agent, who prepared the description,

and informed the plaintiff that in that respect the description was immaterial. *Smith* v. *Cash Mut. Ins. Co.*, 24 Penn. St. 320; *Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331.

In *Commonwealth Mutual Fire Insurance Company* v. *Huntzinger*, 98 Penn. St. 41, the subject was examined at length and the previous cases considered, and it was held that mere mutual knowledge by the assured and the agent of the falsity of a fact warranted is entirely inadequate to induce a reformation of the policy so as to make it conform with the truth; that it is rather evidence of guilty collusion between the agent and the assured, from which the latter can derive no advantage. "The conditions of insurance," said the court, "provide that notice of additional insurance, or of any change in existing insurance, shall be given to the company by the insured in writing, and shall be acknowledged in writing by the secretary; and no other notice shall be binding or have any force against the company. In absence of evidence of waiver of the notice required in this stipulation, we do not think the jury would be justified in inferring that the knowledge of the agent will bind the principal of notice of subsequent insurance or surrender of previous insurance. The parties agreed that written notice should be given, and in like manner acknowledged by the secretary; mere knowledge of an agent is not the equivalent of that."

That the law enunciated in these and numerous other cases in Pennsylvania was not overturned by the case of *Kalmutz* v. *Northern Mutual Ins. Co.*, 186 Penn. St. 571, as claimed in the brief of defendant in error, will appear on examining the facts of that case and the reasoning of the court.

The opinion shows that the court refused to hold that what was alleged to have taken place at the time the contract was entered into might be received to change the legal effect of the policy, Sterrett, C. J., saying:

"The policy in suit contains this provision as to other insurance: 'Policies of all other insurance upon property herein described —whether made prior or subsequent to the date hereof—must be indorsed on this policy, otherwise the insurance shall be void.' The existence of such other insurance of which no endorsement was made on the policy, was conceded; and, in order to avoid

the effect of the condition above quoted, the plaintiff undertook to prove that the defendant company, by its own acts, had waived the condition, and was thereby estopped from setting it up as a bar to his recovery. As is usual in such cases, there was more or less conflicting testimony as to what passed between the plaintiff and the company's agent at the inception of the contract. In the court below, as well as here, it was forcibly contended on plaintiff's behalf that the testimony referred to was sufficient to warrant the jury in finding such facts as legally constitute an estoppel; *but, inasmuch as the record discloses other undisputed evidence which necessarily leads to the same conclusion*, it is unnecessary to consider in detail the conflicting testimony that was submitted to the jury on that question. The policy in suit was issued in April, 1894, and the last assessment thereon was made in October following. Defendant company's secretary testified that he had notice of the additional insurance on the first Wednesday of November, 1894. Notwithstanding that notice to the company, the policy was neither recalled nor cancelled; the premiums or assessments collected were not returned, nor was any effort made to return the premium note given by plaintiff, binding him to pay the premiums at such times and in such manner as the company's directors might by law require. These facts were admitted; and if, as the authorities appear to hold, they operated as an estoppel, it will be unnecessary to consume time in the consideration of other questions sought to be raised by several of the specifications of error."

The court then cited *Elliott* v. *Lycoming County Ins. Co.*, 66 Penn. St. 22, 26, where Justice Sharswood said:

"Undoubtedly, if the company, after notice or knowledge of the over insurance, treated the contract as subsisting, by making and collecting assessments under it from the insured, they could not afterwards set up its forfeiture. It would be an estoppel, which is the true ground upon which the doctrine of waiver in such cases rests. . . . Enough has been said to show that upon the undisputed evidence in the case the learned trial judge would have been warranted in holding, as matter of law, that the defendant was estopped from setting up the con-

dition above quoted as a bar to plaintiffs' claim, and in instructing the jury accordingly."

As, therefore, there was no limitation put in the policy upon the powers of the company's secretary, and as the company, after having received notice of the existence of other insurance, declined to avail itself of the right to rescind the contract, but, on the contrary, elected to enforce payments under the terms of the policy as a subsisting contract, and these facts having been made to appear by undisputed evidence, the court would seem to have been justified in applying the doctrine of estoppel.

It must be conceded that it is shown, in the able brief of the defendant in error, that, in several of the States, the courts appear to have departed from well-settled doctrines, in respect both to the incompetency of parol evidence to alter written contracts, and to the binding effect of stipulations in policies restricting the authority of the company's agents. The nature of the reasoning on which such courts have proceeded will receive our consideration when we come to discuss the particular terms of the contract before us.

Leaving, then, the state courts, let us inquire what is the voice of the Federal authorities.

We do not consider it necessary or profitable to examine in detail the decisions of the Circuit Courts or of the Circuit Courts of Appeals. It is sufficient, for our present purpose, to say that the Circuit Court of Appeals for the Seventh Circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally, *United Firemen's Ins. Co.* v. *Thomas*, 82 Fed. Rep. 406, and that the Court of Appeals for the Eighth Circuit, in the present case, has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. 101 Fed. Rep. 77.

Opinion of the Court.

In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari.

As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf.

Policies of fire insurance in writing have always been held by this court to be within the protection of this rule.

The first case to be examined is *Carpenter* v. *Providence-Washington Ins. Co.*, 16 Pet. 495. The importance of this case is great, because, if the conclusion there reached was sound when expressed, and if it has not been overruled by our subsequent decisions, it is decisive of the case before us.

And first, as to the facts of that case, in so far as they resemble those with which we have now to deal. They were thus stated by Mr. Justice Story, who delivered the unanimous opinion of the court:

"This is a writ of error to the Circuit Court for the District of Rhode Island. The original action was brought by Carpenter, the plaintiff in error, against the Providence-Washington Insurance Company, the defendants in error, upon a policy of insurance underwritten by the insurance company of fifteen thousand dollars 'on the Glenco Cotton Factory, in the State of New York,' owned by Carpenter, against loss or damage by fire. The policy was dated on the 27th of September, 1838, and was to endure for one year. Among other clauses in the policy are the following: 'And provided further, that in case the insured *shall have already any other insurance on the property hereby insured, not notified to this corporation and mentioned or endorsed upon this policy, then* this insurance shall be void and of no effect.' 'And if the said insured or his assigns *shall hereafter make* any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy

shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property.' . . . Annexed to the policy are the proposals and conditions on which the policy is asserted to be made, and among them is the following: 'Notice of all *previous* insurances upon property insured by this company shall be given to them, and endorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect.'

"The declaration averred that during the continuances of the policy he, Carpenter, was the owner of the property by the policy insured, and was interested in said property to the whole amount so insured by the company; and that on the 9th of April, 1839, the factory was totally destroyed by fire, of which the company had due notice and proof. The cause came on for trial on the general issue, and a verdict was found for the defendants. The plaintiff took a bill of exception to certain instructions refused, and other instructions given by the court in certain matters of law arising out of the facts in proof at the trial; and judgment having been given upon the verdict for the defendants, the present writ of error has been brought to ascertain the validity of these exceptions. . . .

"From the 17th of October, 1836, to the 6th of December, 1837, Henry M. Wheeler and Samuel G. Wheeler continued to own the factory in equal moieties, and transacted business under the firm of Henry M. Wheeler & Co. On that day Samuel G. Wheeler sold and conveyed his moiety to Carpenter. On the 18th of April, 1838, Henry M. Wheeler sold and conveyed his moiety to Carpenter, who thus became the sole owner of the entire property. The last conveyance declared the property subject to a mortgage on the premises from Henry M. Wheeler and wife, dated in June, 1835, to Epenetus Reed, on which there was then due six thousand dollars, which Carpenter

assumed to pay. There had been a prior policy on the premises in the Washington Insurance office, which, upon Carpenter's becoming the sole owner, the company agreed to continue for account of Carpenter, and in case of loss, the amount to be paid to him. That policy expired on the 27th of September, 1838, the day on which the policy, upon which the present suit is brought, was effected. It is proper further to state that other policies on the same factory had been effected and renewed from time to time, from December 12, 1836, for the benefit of the successive owners thereof, by another insurance company in Providence, called the American Insurance Company; and among these was a policy effected, by way of renewal, on the 14th of December, 1837, in the name of Henry M. Wheeler & Co., for six thousand dollars, for the benefit of Henry M. Wheeler and Carpenter, (who were then the joint owners thereof,) payable in case of loss to Epenetus Reed. The sale by Henry M. Wheeler to Carpenter, on the 18th of April, 1838, of his moiety having been notified to the American Insurance Company, the latter agreed to the assignment; and the policy thenceforth became a policy for Carpenter, payable in case of loss to Epenetus Reed. And on the 23d of May, 1838, Carpenter transferred all his interest in the policy to Epenetus Reed. The policy thus effected on the 14th of December, 1837, in the American Insurance Company was, as the Washington Insurance Company assert, not notified to them at the time of effecting the policy made on the 25th of September following, and declared upon in the present suit; nor was the same ever mentioned in, or endorsed upon the said policy; and upon this account the company insist that the present policy is, pursuant to the stipulations contained therein, utterly void. Subsequently, viz., on the 11th day of December, 1838, the American Insurance Company renewed the policy of the 14th of December, 1837, for Carpenter, and at his request, for one year. This renewed policy was never notified to the Washington Insurance Company, nor acknowledged by them in writing; nor does it appear ever to have been actually assigned to Epenetus Reed, down to the period of the loss of the factory by fire. On this account also, the Washington Insurance Company insist that

their policy of the previous 27th of September, 1838, is, according to the stipulation therein contained, utterly void.

"It seems to have been admitted, although not directly proved, that a suit was brought upon the policy of the 14th of December, 1837, at the American Insurance office, after the loss, by Carpenter, as trustee of or for the benefit of Reed, for the amount of the six thousand dollars insured thereby; and that at the November term, 1839, of the Circuit Court, the company set up as a defence that there was a material misrepresentation of the cost and value of the property in the factory insured made to them at the time of the original insurance; and it being intimated by the court that if such was the fact it would avoid the policy, the plaintiff acquiesced in that decision, and discontinued or withdrew the action before verdict.

"The instructions prayed and refused, and also the instructions actually given by the court, are fully set forth in the record. It does not seem important to the opinion, which we are to pronounce, to recite them at large, *in totidem verbis*, since the points on which they turn admit of a simple and exact exposition."

After disposing of the first instruction, which does not relate to our present inquiries, the court said:

"The second instruction asked proceeds upon the ground that although the policy of the American Insurance Company of the 6th of December, 1836, was good upon its face yet if, in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was deemed to be utterly null and void, and therefore, as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared.

"The court refused to give the instruction; and, on the contrary, instructed the jury that if the policy of the American Insurance Company was, at the time when that at the Washington Insurance office was made, treated by all the parties thereto as a subsisting and valid policy, and had never, in fact, been avoided, but was still held by the assured as valid, then, that notice thereof ought to have been given to the Washing-

ton Insurance Company, and if it was not, the policy declared on was void. We are of opinion that the instruction, as asked, was properly refused, and that given was correct."

After discussing the question, the court added the following observations:

"Indeed, we are not prepared to say that the court might not have gone further, and have held that a policy—existing and in the hands of the insured, and not utterly void upon its very face, without any reference whatever to extrinsic facts—should have been notified to the underwriters, even although by proofs afforded by such extrinsic facts it might be held in its very origin and concoction a nullity.

"And this leads us to say a few words upon the nature and importance and sound policy of the clauses in fire policies, respecting notice of prior and subsequent policies. They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might naturally affect their rights and interests, to judge whether they ought to insure at all, or for what premium; and to ascertain whether there still remains any such substantial interest of the assured in the premises insured as will guaranty on his part vigilance, care and strenuous exertions to preserve the property. To quote the language of this court in the passage already cited, the underwriters do not rely so much upon the principles as upon the interest of the assured. Besides, in these policies there is an express provision that in cases of any prior or subsequent insurances, the underwriters are only to be liable for a ratable proportion of the loss or damage as the amount insured by them bears to the whole amount insured thereon. So that it constitutes a very important ingredient in ascertaining the amount which they are liable to contribute towards any loss; and whether there be any other insurance or not upon the property, is a fact perfectly known to the insured, and not easily or ordinarily within the means of knowledge of the underwriters.

"The public, too, have an interest in maintaining the validity of these clauses, and giving them full operation and effect. They have a tendency to keep premiums down to the lowest rates, and to uphold institutions of this sort, so essential in the

present state of our country for the protection of the vast interests embarked in manufactures and on consignments of goods in warehouses. If these clauses are to be construed with a close and scrutinizing jealousy, when they may be complied with in all cases by ordinary good faith and ordinary diligence on the part of the insured, the effect will be to discourage the establishment of fire insurance companies, or to restrict their operations to cases where the parties and the premises are within the personal observation and knowledge of the underwriters. Such a course would necessarily have a tendency to enhance premiums, and to make it difficult to obtain insurance where the parties live, or the property is situate, at a distance from the place where the insurance is sought. But be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for their stipulations, would not have been entered into.

"We are, then, of opinion that there is no error in the second instruction. On the contrary, there is strong ground to contend that the stipulations in the policy as to notice of any prior and subsequent policies, were designed to apply to all cases of policies then existing in point of fact, without any inquiry into their original validity and effect, or whether they might be void or voidable.

"The third instruction prayed the court to instruct the jury that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that 'was in law a compliance with the terms of the policy.' The court refused to give the instruction as prayed, but instructed the jury that, at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to

comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned or endorsed upon the policy; otherwise the insurance was to be void and of no effect.

"We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or endorsement as it positively requires, and without which it declares the policy shall henceforth be null and of no effect."

Two propositions, then, are clearly established by this decision: (1) That where a policy provides that notice shall be given of any *prior* or *subsequent* insurance, otherwise the policy to be void, such a provision is reasonable and constitutes a condition, the breach of which will avoid the policy; (2) That where the policy provides that notice of *prior* or *subsequent* insurance must be given by endorsement upon the policy or by other writing, such provision is reasonable and one competent for the parties to agree upon, and constitutes a condition, the breach of which will avoid the policy.

We are next to inquire whether this decision has been overruled, or whether it remains as an authoritative declaration of the law.

Shortly after the case was decided at law, it appears, that an effort was made by said Carpenter to invoke the aid of a court of equity to enable him to avoid the effect of his own disregard of the conditions contained in the policy. *Carpenter* v. *Providence-Washington Insurance Company*, 4 How. 185.

This court held, affirming the Circuit Court of the United States for the District of Rhode Island, sitting in equity, that, under the facts disclosed by the pleadings and evidence, the complainant was not entitled to equitable relief.

"It is a matter of regret that so great a loss, which the plaintiff and those under whom the claims intended to guard against by insurance, should happen entirely without indemnity. But it is to be remembered that the defendant gave abundant and

repeated notice to him, in writing and print in the policy itself, as well as other ways, that they would not take any risks on property where it was insured beyond a certain ratio of its full value, unless the circumstances were made known to them, and the additional policy recognized in writing, so as to avoid any mistake, or accident, or want of deliberate attention to the subject. If the plaintiff, after all this, omitted to comply with so substantial a provision in the contract itself, as we are bound to believe on the evidence now offered, we see no way, equitably or legally, to prevent the consequences from falling on himself, rather than others, being the result either of his own neglect, or that of some of the agents he employed. An adherence to such important rule is peculiarly necessary for the protection of absent stockholders, often interested exclusively in insurance companies; and so far from its being unconscientious to enforce them, when their existence is well known, and when the risk has been increased without conforming to them, it is the only and just safeguard of all concerned in such institutions."

Carpenter v. *Providence Insurance Co.*, 16 Pet. 495, has been frequently referred to as an authority in subsequent cases on points collateral to the one we are now considering. *Taylor* v. *Benham*, 5 How. 233, 260; *Russell* v. *Southward*, 12 How. 139, 145; *Oates* v. *National Bank*, 100 U. S. 239, 246; *Burgess* v. *Seligman*, 107 U. S. 20, 34.

In *Phœnix Life Insurance Co.* v. *Raddin*, 120 U. S. 183, 189, we find *Carpenter* v. *Providence Insurance Co.* cited, per Mr. Justice Gray, as an authority for the proposition that "the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract."

It is not pretended in the opinion of the majority in the Circuit Court of Appeals in the present case that the case of *Carpenter* v. *Providence-Washington Insurance Co.* has been

modified or overruled by this court, but the cases relied on by that court are wholly decisions of several state courts and of some of the Circuit Courts. Nor is it claimed by the learned counsel for the defendant in error that the *Carpenter* case has been formally overruled or modified by this court. He, however, does cite three decisions of this court which, as he views them, should be regarded as abandoning the doctrines of that case, viz., *Insurance Co.* v. *Wilkinson*, 13 Wall. 222; *Eames* v. *Home Insurance Co.*, 94 U. S. 621, and *Insurance Co.* v. *Norton*, 96 U. S. 234.

These cases must, therefore, receive our attention. What, then, was the case of *Insurance Co.* v. *Wilkinson?* That was a case where the agent of a life insurance company had inserted in the application a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person and inserted without the assent of the assured. It was held that this untrue statement contained in the application did not invalidate the policy; that permitting verbal testimony to show how this untrue statement found its way into the application did not contradict the written contract sued on, but proceeded on the ground that this statement was not that of the assured. The trial court said to the jury that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries *he* made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defence to the action to show that the agent was mistaken. The case, as reported, does not disclose that the plaintiff's testimony as to the way in which the untrue statement was put in the application was contradicted or denied by the company. It may therefore be presumed that the plaintiff's case, in that respect, was made out by undisputed evidence. And it would seem, such being the state of facts, that this court had reason to hold that the untrue statement was not made by the assured, and that it would operate as a fraud on the plaintiff if he were not permitted to show this fact, which was not a fact or statement contained in

the policy sued on, but an extrinsic fact or statement contained in the application. The defence made upon that statement was, in legal effect, a denial of the execution of the statement—a defence that can always be sustained by parol evidence.

However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so.

That Mr. Justice Miller did not intend, in the case of *Insurance Company* v. *Wilkinson*, to lay down a new rule of evidence in insurance cases, is clearly shown in the subsequent case of *Insurance Co.* v. *Lyman*, 15 Wall. 664, where the opinion was delivered by the same learned justice, who used the following language:

"Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing.

"But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it was in other classes of contract, and must have the same effect in excluding parol testimony in its application to it that other written instruments have.

"Counsel for the defendants in error here relies on two propositions, namely, that the policy, though executed January 5, is really but the expression of a verbal contract, made the 31st day of December previous, and that the loss of the vessel between those two dates does not invalidate the contract, though known to the insured and kept secret from the insurers; and, secondly, that they can abandon the written contract altogether and recover on the parol contract.

"We do not think that either of these propositions is sound. Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company. When the company

came to make this instrument they were entitled to the information which the plaintiff had of the loss of the vessel. If then they had made the policy, it would have bound them, and no question could have been raised of the validity of the instrument or of fraud practiced by the insured. On the other hand, if they had refused to make a policy, no injury would have been done to the plaintiffs, and they would then have stood on their parol contract, if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid.

"To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law.

"We think it equally clear that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement."

Eames v. *Home Insurance Company*, 94 U. S. 621, is another case relied on as showing that the general rule of evidence was not applicable in insurance cases. But that was the case of a bill in equity filed against an insurance company of New York to require said company to issue to the complainants a policy of insurance against loss or damage by fire, in pursuance of a contract for that purpose alleged to have been made with their agents in Illinois. It was made to appear that the terms of a contract for insurance upon property which was destroyed by fire before the policy was received had been agreed upon. This agreement was manifested by an application signed by the

complainant, and in several letters which had passed between the local agent and the general agent of the company, and between the complainant and the local agent. The report of the case states that there was an agreement as to certain facts by the attorneys in the cause, but what those facts were does not distinctly appear in the report. However, all that can be claimed for the case is that this court considered, from the agreement as to facts between the attorneys and from the application and the several letters between the agents and the complainant, that a case was made out justifying a court of equity to decree that complainant was entitled to a policy of insurance to be issued for the amount and at the premium shown by the proofs. What was the scope of the authority of the agents who prepared the application and conducted the correspondence does not appear, but the court seems to have assumed that it sufficiently appeared that the agents had authority to act as they did. It is not preceived that this case has any valid application to the case now before us, beyond apparently holding, with *Insurance Company* v. *Wilkinson*, in 13 Wall., that it may be shown by parol that a statement which purports to have been made by an applicant for insurance was not, in point of fact, his statement, but was really that of the agent.

The next case relied on is *Insurance Co.* v. *Norton*, 96 U. S. 234, in which it was held by a majority of this court that an insurance company may waive any condition of a policy inserted therein for its benefit. As to this proposition there was, and could have been, no disagreement among the judges, but the difference arose over the sufficiency of the evidence to show the waiver. The question really was whether the company's agent had authority to extend the payment of a premium note, notwithstanding a provision in the policy that a failure to pay the note at maturity would incur a failure of the policy, and a declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures. It was held by the majority that a waiver by the company of both these conditions might be shown by admitting evidence as to the practice of the company in allowing its agents to extend the

time for payment of premiums and of notes given for premiums, as indicative of the power given to those agents, and that error was not committed by submitting to the jury, upon such evidence, to find whether the defendants had or had not authorized its agent to make an extension in this case. In speaking for the majority, Mr. Justice Bradley said:

"The written agreement of the parties, as embodied in the policy and the endorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeiture. And those terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but may waive it. . . . That the company did authorize its agents to take notes, instead of money for premiums, is perfectly evident from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf."

Mr. Justice Strong, speaking for the dissenting parties, said:

"The insurance effected by the policy became forfeited by the non-payment *ad diem* of the premium note; the policy then ceased to be a binding contract. It was so expressly stipulated in the instrument. Admitting that the company could afterwards elect to treat the policy as still in force, or, in other words, could waive the forfeiture, the local agent could not, unless he was so authorized by his principals. The policy declared that agents should not have authority to make such waivers. And there is no evidence in this case that the company gave to the agent parol authority to waive a forfeiture after it had occurred. They had ratified his acts extending the time of payment of premium notes, when the extension was made before the notes fell due. But no practice of the company sanctioned any act of

its agent, done after a policy had expired, by which new life was given to a dead contract."

Whatever may be thought of these divergent views, it is clear that the facts of that case are widely different from those here under consideration, where there is no evidence whatever of a waiver by the company, or of authority to the agent, express or implied, from a course of practice by the company. Here, the company "has chosen," in the language of Mr. Justice Bradley, "to insist upon the terms of the written contract."

The subject of waiver by agents was further considered in the case of *Insurance Co.* v. *Wolff*, 95 U. S. 326, when the unanimous opinion of the court was delivered by Mr. Justice Field:

"By the residence of the insured within the prohibited district of country during the period designated in the policy without the previous consent of the company, and the failure to pay the annual premium when it became due, the policy, by its express terms, was forfeited, and the company relieved from liability, unless the forfeiture was waived by the action of the company, or of its agents authorized to represent it in that particular.

"The waiver of the forfeiture for the non-payment of the premium due on the 1st of November, 1872, is alleged on the ground that the premium was subsequently paid to an agent of the company, he delivering its receipt for the same, signed by its secretary and countersigned by the manager of the local office, the plaintiff contending that the company, by its previous general course of dealing with its agents, and its practice with respect to the policy in suit, had authorized the premiums to be paid and the agent to receive the same after they became due, and thus had waived any right to a strict compliance with the terms of the policy as to the payment of premiums.

"The waiver of the forfeiture arising from the residence within the prohibited district between the 1st of July and November, without the previous consent of the company, is also alleged from the subsequent payment of the premiums and its receipt by the local agent, the plaintiff contending that the premium was received with knowledge by the agent of the

previous residence of the insured within the prohibited district. . . .

"The conditions mentioned in the policy could, of course, be waived by the company, either before or after they were broken; they were inserted for its benefit, and it depended on its pleasure whether they should be enforced. The difficulty in this case, and in nearly all cases where a waiver is alleged in the absence of written proof of the fact, arises from a consideration of the effect to be given to the acts of agents of the company in their dealings with the assured. Of course, such agents, if they bind the company, must have authority to waive a compliance with the conditions upon the breach of which the forfeiture is claimed, or to waive the forfeiture when incurred, or their acts waiving such compliance or forfeiture must be subsequently approved by the company. The law of agency is the same, whether it be applied to the act of an agent undertaking to continue a policy of insurance or to any other act for which his principal is sought to be held responsible. . . .

"The company, notwithstanding the provision in the policy that its agents were not authorized to waive the forfeitures, sent to them renewal receipts signed by its secretary, to be used when countersigned by its local manager and cashier, leaving their use subject entirely to the judgment of the local agent. The propriety of their use, in the absence of any fraud in the matter, could not afterwards be questioned by the company. . . . So far, then, as the waiver of the forfeiture incurred for non-payment of the premiums is concerned, it is clear that the company, by its course of dealing, had, notwithstanding the provision of the policy, left the matter to be determined by the local agent, to whom the renewal receipts were entrusted.

"But so far as a forfeiture arose from the residence of the insured within the prohibited district, the case is different. There is nothing in the acts of the company which goes to show that it ever authorized its agents to waive a forfeiture thus incurred, or that it ever knew of any residence of the insured within the prohibited district until informed of his death there. In every case where premiums were received after the day they were payable, the fact that a forfeiture had been incurred was

made known to the company, from the date of its payment, and the retention of the money constituted a waiver of the forfeiture; but no information of a forfeiture on any other ground was imparted by the date of each payment. The agent receiving the premiums, in the case at bar, testified that he knew nothing of the residence of the insured within the prohibited district, and the evidence in conflict with his testimony was slight. He knew that the insured had a place of business there, and that he was permitted to make occasional visits there within that period, and to reside there at other periods. Everything produced as evidence of knowledge of residence within the proscribed district is consistent with these occasional visits and residence at other times than during the excepted period.

"But, even if the agent knew the fact of residence within the excepted period, he could not waive the forfeiture thus incurred without authority from the company. The policy declared that he was not authorized to waive forfeitures; and to that provision effect must be given, except so far as the subsequent acts of the company permitted it to be disregarded. There is no evidence that the company in any way, directly or indirectly, sanctioned a disregard of the provision with respect to any forfeitures, except such as occurred from non-payment of premiums. As soon as it was informed of the residence of the insured within the prohibited district, it directed a return of the premium subsequently paid. It would be against reason to give to the receipt of the premium by the agent, under the circumstances stated, the efficacy claimed. The court, in its instructions, treated the receipt of the premium by the agent, with knowledge of the previous residence of the insured within the prohibited district, if the agent had said knowledge, as itself a sufficient waiver of the forfeiture incurred, without any evidence of the action of the company when informed of such residence; and in this respect we think the court erred. It is essential that the company should have had some knowledge of the forfeiture, before it can be held to have waived it. It is true that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affect-

ing its liability; and if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived. But here there was no ground for any inference of this kind from the subsequent action or silence of the company. There was no evidence of a disregard of the condition as to the residence of the insured in any previous year, and, consequently, there could be no inference of a waiver of its breach from a subsequent retention of the premium paid. This was a case where immediate enforcement of the forfeiture incurred was directed when information was received that the condition of the policy in that respect had been broken.

"Not only should the company have been informed of the forfeiture before it could be held by its action to have waived it, but it should also have been informed of the condition of the health of the insured at the time the premium was tendered, upon the payment of which the waiver is claimed. The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured, if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed, should be apprised of all the facts; of those which created the forfeiture and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the insured being *in extremis*, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policyholder, instead of protecting him against the commission of one by the company."

New York Life Insurance Co. v. *Fletcher*, 117 U. S. 519, is

an instructive case on the points in controversy here. The facts of the case, as stated in the syllabus, were as follows:

"A person applied in St. Louis to an agent of a New York insurance company for insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written down and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading, and by the agent transmitted to the company, and the company thereupon assumed the risk. It was conditioned in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on his principal; and a copy of the answers, conspicuously printed upon it, accompanied the policy. *Held*, that the policy was void."

The unanimous opinion of the court was delivered by Mr. Justice Field, the principal portions of which were as follows:

"It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name was signed; that he truthfully answered those questions; that false answers, written by an agent of the company, were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovery. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of

course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon, and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be cancelled and the premiums returned. As the present action is not for such cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would be entitled by virtue of the statute of the State of Missouri.

"But the case presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty, in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposal, and to enforce it notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his

verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.

"In *Globe Insurance Co.* v. *Wolff*, 95 U. S. 326, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as the subsequent acts of the company permitted it to be disregarded. In *Insurance Co.* v. *Norton*, 96 U. S. 234, the policy contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures, and this court held that the company could have insisted upon those terms had it so chosen. . . . The present case is very different from *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, and from *Insurance Co.* v. *Mahone*, 21 Wall. 152. *In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured.* Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to affect the insurance, 'as the full and complete representative of the company in all that is said or done in making the contract,' and the court held that *prima facie* the power of the agents are co-extensive with the business entrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where said agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which

the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

What, then, are the principles sustained by the authorities, and applicable to the case in hand?

They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.

In the light of these principles, let us examine the contract that was made between the parties to the controversy before us. The contract was in writing, and in clear and unambiguous terms; that contract provided that "this entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured *now has, or shall hereafter* make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," and that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Such being the contract, and the property insured having been destroyed by fire on June 1, 1898, and the insurance company having denied liability because informed that other insurance was held by the insured on the same property, without the knowledge or consent of the company, this action was brought.

It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at the time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In

other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to be insured. It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, it elected to ratify the act of its agent in accepting the premium. On the contrary, all the record discloses is that the jury found that the agent knew, when the policy in the defendant company was issued and delivered to the plaintiff, that there was then subsisting fire insurance to the amount of $1500 in another fire insurance company, and that such knowledge had been communicated to the agent by or on behalf of the assured. There is no finding that the agent communicated to the company or to its general agent at Chicago, at the time he accounted for the premium, the fact that there was existing insurance on the property, and that he had undertaken to waive the applicable condition. Indeed, it appears from the letter of defendant's manager at Chicago, to whom the proofs of loss had been sent, which letter was put in evidence by the plaintiff and is set forth in the bill of exceptions, that the additional insurance held by the plaintiff was without the knowledge or consent of the company; and it further appears, and was found by the jury, that immediately on the company's being informed of the fact, the amount of the premium was tendered by the agents of the company to the insured. So that there is not the slightest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium. The plaintiff's case, at its best, is based on the alleged fact that the agent had been informed, at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defence and escape from the operation of the condition, is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen, entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court.

This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts and by approving the conduct of agents and persons applying for insurance in disregarding the express limitations put upon the agents by the principal to be affected.

It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form, is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations, for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing and to the legal doctrine that protects them when so expressed, and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection.

Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony. Increased importance should be given to the rules involved in this discussion

by the fact that, in latter times and in most, if not all, of the States, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy.

The judgment of the Circuit Court of Appeals is reversed. The judgment of the Circuit Court is likewise reversed, and the cause remitted to that court with directions to proceed in conformity with this opinion.

THE CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM dissented.

STANTON CARTER *v.* McCLAUGHRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 251. Argued December 3, 4, 1901.—Decided January 6, 1902.

The rule reiterated, that civil tribunals will not revise the proceedings of courts martial, except for the purpose of ascertaining whether they had jurisdiction of the person and of the subject matter, and whether though having such jurisdiction, they have exceeded their powers in the sentences pronounced.

Where the punishment on conviction of any military offence is left to the discretion of the court martial, the limit of punishment, in time of peace, prescribed by the President, applies to the punishment of enlisted men only.

Where the jurisdiction of the military court has attached in respect of an officer of the army, this includes not only the power to hear and determine the case, but the power to execute and enforce the sentence.

Where the sentence is rendered on findings of guilty of several charges with specifications thereunder, and the President, as the reviewing authority, has disapproved of the findings of guilty of some of the specifications, but approved the findings of guilty of a specification or specifications under each of the charges, and of the charges, and the President does not think proper to remand the case to the court martial for revision, or to mitigate the sentence, or to pardon the accused, but approves the sentence, the judgment so rendered cannot be disturbed on the ground that the disapproval of some of the specifications vitiated the sentence.

Statement of the Case.

In this case, Charge I was "Conspiring to defraud the United States, in violation of the 60th article of war." Charge II was "Causing false and fraudulent claims to be made against the United States in violation of the 60th article of war." These are separate and distinct offences and the military court was empowered to punish the accused as to one by fine and as to the other by imprisonment.

Charge III was "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war." This is not the same offence as the offences charged under the 60th article of war. But in view of articles 97 and 100, conviction of Charges I and II involves conviction under article 61, and the officer may be dismissed on conviction under either article.

Charge IV was "Embezzlement, as defined in section 5488 of the Revised Statutes, in violation of the 62d article of war." *Held:* (*a*) That the specified crime was not mentioned in the preceding articles. That the offences of which the accused was convicted under the 60th article were distinct from the acts prohibited by section 5488. (*b*) That the crime alleged in this charge was not covered by subdivision 9 of article 60, because the embezzlement charged was not of money "furnished or intended for the military service." (*c*) Nor was the money applied to a purpose prescribed by law, and it was for the court martial to determine whether the crime charged was "to the prejudice of good order and military discipline."

This was a petition for the writ of *habeas corpus* filed on behalf of Oberlin M. Carter in the Circuit Court of the United States for the District of Kansas, October 17, 1900, on which the writ was issued returnable October 26.

The petition alleged that Carter was imprisoned and restrained of his liberty by the warden of the United States prison at Fort Leavenworth, Kansas, by virtue of a sentence imposed upon him by a general court martial of the United States, approved by the Secretary of War, and approved and confirmed by the President of the United States on the 29th day of September, 1899.

That the warrant under which the warden detained petitioner was an order from the headquarters of the army, that is to say, General Orders No. 172, dated September 29, 1899, and set forth at length.

From this it appeared that Captain Oberlin M. Carter, Corps of Engineers, United States Army, was arraigned and tried before a general court martial on four charges with specifications under each.

To the first specification of Charge I; the first, second, third, fourth and fifth specifications of Charge II; the first, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first specifications of Charge III; and the second specification of Charge IV, he pleaded the statute of limitations, the one hundred and third article of war, and the plea was sustained by the court. To the charges and the other specifications he pleaded not guilty, and was found not guilty on the eighth, tenth, twelfth and twenty-third specifications under Charge III.

Omitting the above specifications and abbreviating those disapproved by the President as stated hereafter, the charges and specifications were as follows:

Charge I.—"Conspiring to defraud the United States, in violation of the 60th article of war."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the United States and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims hereinafter described; and in pursuance of the said conspiracy the said Oberlin M. Carter, in the months of June, July, and August, September and October, 1896, being an officer of the United States in charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in the harbor of Savannah, Georgia, in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and award-

ing the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company afterwards, to wit, from about the 8th day of October, 1896, to July 31, 1897, did furnish and put into said work certain mattresses, stone and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6, 1897, cause to be paid, out of the moneys of the United States, $230,749.90 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been.

"And in further pursuance of the said conspiracy the said Captain Carter, about June, July, August, September and October, 1896, did advertise for proposals for a contract for improving Cumberland Sound, Georgia, in said river and harbor district, and so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain mattresses, stone and other material which were different in kind and character from the mattresses, stone and other materials contracted for in said

contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone and other material contracted for; and did, on or about July 6, 1897, cause to be paid, out of the moneys of the United States, $345,000.00 to the said The Atlantic Contracting Company, on account of said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract and at the same rate, cost and price as if they had been.

"This on the 6th day of June, 1896, and thereafter to the 1st day of August, 1897."

Charge II.—"Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

Specification VI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: The claim represented by the following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia:'

"Voucher No. 8, $230,749.90, July, 1897; and the claim represented by the following voucher submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland Sound, Georgia and Florida:'

"Voucher No. 9, $345,000.00, July, 1897; which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into contracts, dated October 8, 1896, to furnish the United States certain mattresses,

stone and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works, mattresses, stone and other material different from, inferior to, cheaper and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished, had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VII.—In that the accused caused to be entered on a government pay roll the names of sundry persons as laborers, and caused to be paid to them certain sums for services as laborers, whereas none of such persons had rendered services as laborers, and the accused knew such claims were false and fraudulent.

Specification VIII.—For fraudulently allowing an account of $121.60 of the Atlantic Contracting Company against the United States for piling in repairing the Garden Bank training wall.

Specification IX.—For fraudulently allowing an account of $384 to the Atlantic Contracting Company for pile work.

Specification X.—For fraudulently allowing an amount of $108.80 to the Atlantic Contracting Company for pile dams.

Charge III.—"Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah River and harbor district, did wilfully and knowingly cause the following amounts to be paid out of the moneys of the United States subject to his order and control as officer in charge of said improvements to the Atlantic Contracting Company, a corporation; the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the said company, or to any

one, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia':

"Voucher No. 8, $230,749.90, July, 1897; and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland Sound, Georgia and Florida':

"Voucher No. 9, $345,000.00, July, 1897; each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

Specification III.—For making a false statement to the Chief of Engineers as to new soundings for work in Savannah harbor, with intent to deceive.

Specification IV.—For falsely entering on the pay roll the names of certain persons as laborers to an amount of $29.50.

Specification V.—For falsely certifying as correct an account of the Atlantic Contracting Company for $121.60.

Specification VI.—For falsely certifying as correct an account of the Atlantic Contracting Company for $384.

Specification VII.—For falsely certifying as correct an account of the Atlantic Contracting Company for $108.80.

Specification IX.—For endorsing a certain false statement on a letter from the Chief of Engineers as to rentals on property proposed to be acquired by the United States at Savannah.

Specification XI.—For failing to account for the sum of $132.10, money of the United States, received by the accused from Alfred Hirt.

Specification XXII.—For making false reports as to his absence from his station.

Charge IV.—"Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62d Article of war."

Statement of the Case.

Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah river and harbor district, and, as such officer, in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did wilfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so entrusted to him, by wilfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control as such officer in charge of said improvements; the accounts on which the same were being paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following voucher (and the entries therein and the endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia:'

"Voucher No. 8 ($230,749.90), July, 1897; and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland Sound, Georgia and Florida:'

"Voucher No. 9 ($345,000.00), July, 1897; each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

The court martial found the accused guilty of the second specification under Charge I, "except the words, 'and other material' and interpolating the word 'and' between the words 'mattresses' and 'stone' wherever those words occur in the specification, of the excepted words not guilty and of the interpolated word guilty;" and guilty of the charge; guilty of the

sixth specification under Charge II, "except of the words 'and other material' where they occur the second and third time and interpolating the word 'and' between the words 'mattresses,' and 'stone' where they occur the second and third time; of the excepted words not guilty; of the interpolated word guilty;" guilty of the seventh, eighth, ninth and tenth specifications, and guilty of the charge; guilty of the second, third, fourth, sixth, seventh, ninth, eleventh and twenty-second specifications under Charge III, of the fifth specification, "except of the words 'the articles have been' and of the excepted words not guilty;" and not guilty of the eighth, tenth, twelfth and twenty-third specifications; and guilty of the charge; guilty of the first specification under Charge IV, and guilty of the charge.

The general order then set forth the sentence and subsequent action as follows:

"*Sentence.*

"And the court does therefore sentence the accused, Captain Oberlin M. Carter, Corps of Engineers, United States Army, 'to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name and place of abode of the accused to be published in the newspapers in and about the station and in the State from which the accused came, or where he usually resides.'

"The record of the proceedings of the general court martial in the foregoing case of Captain Oberlin M. Carter, Corps of Engineers, having been submitted to the President, the following are his orders thereon:

"The findings of the court martial in the matter of the foregoing proceedings against Captain Oberlin M. Carter, Corps of Engineers, U. S. Army, are hereby approved as to all except the following:

"'Charge 2. Specifications seven, eight, nine and ten.

"'Charge 3. Specifications three, four, five, six, seven, nine, eleven and twenty-two, which are disapproved. And the sen-

tence imposed by the court martial upon the defendant, Oberlin M. Carter, is hereby approved.

"'ELIHU ROOT, *Secretary of War.*

"'Executive Mansion,

"'Washington, D. C., September 29, 1899.

"'Approved and confirmed.

"'WILLIAM MCKINLEY.'

"By direction of the Secretary of War, Captain Oberlin M. Carter, Corps of Engineers, ceases to be an officer of the army from this date, and the United States penitentiary, Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent by the commanding general, Department of the East, under proper guard.

"By command of Major General Miles:

"H. C. CORBIN, *Adjutant General.*"

The petition averred that said Carter, in pursuance of the sentence, had been dismissed from the Army of the United States and the order of dismissal served upon him; that the crime, punishment, name and place of abode of said Carter had been published in the newspapers in and about his station and in and about the State whence he came and where he usually resided; and that said Carter had paid to the United States the fine of five thousand dollars imposed by the sentence. And that said Carter, "having been cashiered the Army, having suffered degradation, and having paid the fine imposed, as above set forth, his imprisonment and detention are contrary to law, are in violation of the Constitution of the United States, and are illegal and without warrant of law, for the following reasons, that is to say:"

First. That there was no evidence delivered before the court martial which tended to show that any crime whatever had been committed by said Carter; but, on the contrary, all the evidence taken together affirmatively showed that Carter was wholly innocent of any wrongdoing; "and that in imposing the sentence above set out said court martial acted beyond its jurisdiction, and said sentence was and is wholly void." Petitioner stated that he had no copy of the evidence, but that he

attached a copy of an abstract of all the evidence adduced before the court martial.

Second. That the finding of said Carter guilty of Charge IV, and the specification thereunder, and the imposing of sentence on him as for a violation of the sixty-second article of war, were and each of them was wholly illegal and void, for that; (*a*) It was shown by the evidence, and appeared from the charges and specifications, that the two sums of money alleged to have been paid out by Carter "for a purpose not authorized by law," were paid out by him under and in accordance with the specifications of two certain contracts for the improvement of Savannah harbor and Cumberland Sound, which contracts were entered into pursuant to the act of Congress of June 3, 1896: (*b*) It appeared from the specification that the acts described therein were not in violation of the sixty-second article of war and were not cognizable by a court martial under that article, but if justiciable at all by the court martial, were justiciable under the sixtieth article of war.

Third. That the imprisonment and detention were illegal and contrary to article 102 prohibiting a second trial for the same offence, and contrary to the Fifth Amendment to the Constitution of the United States in this: (*a*) That it appeared from the charges and specifications and also from the evidence, that the payment of the two checks drawn by Carter and described in each of the specifications under which he was convicted, were the only basis of each of the four charges, and that the single act of drawing the two checks had been carved up into four distinct and different crimes, and a punishment assessed on each. (*b*) That the sentence was beyond the powers of the court martial and void, for that under the 60th article of war the court martial was authorized to inflict the punishment of a fine or imprisonment or such other punishment as it might adjudge. (*c*) That under the 61st article of war, the violation of which was laid in Charge III, the court martial had jurisdiction to inflict the judgment of dismissal from the army only. (*d*) That the facts set out in the specifications under Charges I, II and IV, respectively, brought the offence therein described under the 60th article of war, under which the court

martial had jurisdiction only to inflict a fine or an imprisonment or some other punishment, in the alternative, and not cumulatively.

Fourth. That the punishment of fine and imprisonment were and each of them was beyond the power of the court martial to inflict, because the same were imposed after Carter had ceased to be an officer of the Army of the United States, and after he had ceased to be subject to the jurisdiction of the court martial.

Fifth. That the punishment of imprisonment was beyond the powers of the court martial and void in this: That under and by virtue of an act of Congress approved September 27, 1890, the President, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man in the Army of the United States of the 60th article of war, and for the violation by such person of the 62d article of war, by embezzlement of more than one hundred dollars, at a term of four years' confinement at hard labor, under each article; and that thereafter, on October 31, 1895, (prior to these proceedings,) the President, in accordance with the act of Congress, prescribed that said maximum limit should extend to all such violations, whether by officers or enlisted men of the Army.

Sixth. That the sentence was wholly void in this—

"That said court martial found the said Captain Carter guilty of charge one and of specification two thereunder; of charge two and specifications six, seven, eight, nine and ten thereunder; of charge three and specifications two, three, four, five, six, seven, nine, eleven and twenty-two thereunder; and of charge four and specification one thereunder; and thereupon sentenced the said Carter to be punished as hereinabove set forth; but the President of the United States disapproved the findings of said court martial as to specifications seven, eight, nine and ten, under charge two, and specifications three, four, five, six, seven, nine, eleven and twenty-two, under charge three, and approved the said sentence as originally fixed by the said court; the said several specifications so approved and the said several specifications so disapproved, charging several and distinct offences, growing out of several, distinct and disconnected

transactions, said several offences charged not being of the same class of crimes.

"That the sentence thus confirmed by the said President of the United States was not the sentence of said court martial, and was not in mitigation or commutation of such sentence, but was for the offences of which said Carter was finally determined to be guilty, in excess of the sentence imposed by said court martial."

The petition further alleged that October 2, 1899, said Carter, by Abram J. Rose, applied to the United States Circuit Court for the Southern District of New York for a writ of *habeas corpus*, which writ was on October 20, 1899, dismissed; that on January 24, 1900, the decision of the Circuit Court was affirmed by the United States Circuit Court of Appeals for the Second Circuit; that thereafter the petitioner last named prosecuted a writ of error to the Circuit Court and a certiorari out of the Supreme Court of the United States, but the Supreme Court dismissed the appeal and writ of error. Copies of the opinions in each of these courts were attached. Petitioner further averred that this application was made on the same evidence as in the application to the Circuit Court for the Southern District of New York, to wit, the evidence adduced before the court martial.

By amendment, a further allegation was added to the petition to the effect that on December 9, 1899, said Carter and Benjamin D. Green and others were indicted in the United States Circuit Court for the Southern District of Georgia for a conspiracy to defraud the United States, a copy of which indictment was attached; "that said indictment was based on the same facts as set out in the charges and specifications, for the conviction of which by said court martial said Carter is now undergoing imprisonment—that is to say, Charge I, specification 2; Charge II, specification 6; Charge III, specification 2; and Charge IV, specification 1, as set out in the petition filed herein—and that said indictment was found after the Circuit Court of the United States for the Southern District of New York had denied the application for a writ of *habeas corpus* on October 20, 1899."

Statement of the Case.

The respondent, the warden of the United States penitentiary at Fort Leavenworth, Kansas, returned to the writ that he had Oberlin M. Carter in custody, as such warden, and detained him by direction of the Secretary of War, the said Carter being under sentence of a general court martial, sentenced to be imprisoned at said penitentiary for five years, and that Carter was now in custody as aforesaid undergoing said sentence of imprisonment; that the warden was acting in the capacity of custodian of said Carter, in virtue of General Orders No. 172 of September 29, 1899, a duly authenticated copy of which was filed as part of the return; and the respondent contended that said Carter had been lawfully convicted and sentenced by the said general court martial, which had jurisdiction of the person of said Carter and of the various offences for which he was tried.

Respondent further set forth the proceedings by *habeas corpus* in the Southern District of New York, during the pendency of which the said Carter paid the fine imposed, and averred that on hearing the Circuit Court dismissed the writ, and Carter was remanded to custody, *In re Carter*, 97 Fed. Rep. 496; that thereafter the cause was carried to the Circuit Court of Appeals for the Second Circuit, and that court affirmed the final order of the Circuit Court. 99 Fed. Rep. 948. That on February 5, 1900, a petition for certiorari was submitted to the Supreme Court of the United States, which on February 26, 1900, was denied. *Carter* v. *Roberts*, 176 U. S. 684. That on the same day the application for certiorari was denied, an appeal was taken to the Supreme Court, and a writ of error sued out, to review the order of the Circuit Court in dismissing the *habeas corpus* and remanding the said Carter; and that thereafter the Supreme Court on April 23, 1900, dismissed said appeal and writ of error for want of jurisdiction. *Carter* v. *Roberts*, 177 U. S. 496. That on the mandate issuing from the Supreme Court, April 24, 1900, to the Circuit Court, the Circuit Court, on April 25, 1900, entered judgment, and remanded Carter to the custody from which he was produced for the purpose of having the sentence executed. Duly authenticated transcripts of these various proceedings and copies of accompanying briefs were made parts of the return.

Statement of the Case.

That in accordance with the sentence Carter was received at the penitentiary on the 27th day of April, and had been there until the present date, undergoing the same.

Respondent objected in conclusion to the admission by the court of the abstract of the evidence alleged to have been taken before the court martial and made part of petitioner's petition because the record of the whole proceedings of a court martial is required by law to be reduced to writing and deposited in the office of the Judge Advocate of the Army, and this record or a copy thereof duly authenticated is the best evidence; and even if produced, would be inadmissible for the purpose for which it was sought to be introduced, as the courts in *habeas corpus* proceedings cannot examine the evidence for the purpose of determining the guilt or innocence of the party convicted; and this case presented no exception justifying departure from this rule, as General Orders No. 172 afforded all the information necessary to dispose of the case.

The record of the Circuit Court shows that the matter came on to be heard on November 23, 1900, on petitioner's "oral motion to discharge the said Oberlin M. Carter, based upon the averments of respondent's return, no evidence having been offered or considered by the court." On December 10, 1900, it was ordered by the court "that the writ of *habeas corpus* herein be discharged; and it is further ordered that the said Oberlin M. Carter be remanded to the custody of Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas." The opinion of the court was delivered by Hook, J., in which Thayer, Circuit Judge, concurred. 105 Fed. Rep. 614.

This appeal was then prosecuted and errors duly assigned. Errors were also specified in appellant's brief, in substance as follows:

1. That the finding of "guilty" under Charge IV and its specification was void inasmuch as the specification was wrongly laid under Article 62, because, (*a*) the money was applied to a purpose prescribed by law; (*b*) and the crime charged was not "to the prejudice of good order and military discipline;" and inasmuch as the crime charged was "mentioned in the foregoing

articles of war," being covered by paragraphs 1, 4 and 9 of Article 60.

2. The finding under Article 62 being void, that the sentence is in violation of the Fifth Amendment of the Constitution, because it was greater than could be imposed for any alleged crime taken singly, and there were only two separate crimes charged, viz., conspiracy and paying fraudulent claims, while there were three several penalties imposed, viz., dismissal, fine and imprisonment. Dismissal and fine had been discharged, and the third, imprisonment, is illegal.

3. That the entire sentence is illegal and void because the President having disapproved the conviction as to certain offences and having ordered the original sentence to stand, such sentence ceased to be the sentence of the court martial.

4. The imprisonment is illegal because inflicted after Carter ceased to be an officer of the Army.

5. The sentence of imprisonment is void because in excess of the maximum allowed by law.

6. The court martial had no jurisdiction to try Carter "because it stands admitted that no evidence whatever was adduced tending to show his guilt."

Mr. Frank P. Blair and *Mr. H. G. Stone* for appellant.

Mr. John W. Clous and *Mr. Solicitor General* for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court.

In *Carter* v. *Roberts*, 177 U. S. 496, it was said: "The eighth section of article I of the Constitution provides that the Congress shall have power 'to make rules for the government and regulation of the land and naval forces,' and in the exercise of that power Congress has enacted rules for the regulation of the army known as the Articles of War. Rev. Stat. § 1342. Every officer, before he enters on the duties of his office, subscribes to these articles, and places himself within the power of courts martial to pass on any offence which he may have committed in contravention of them. Courts martial are lawful tribunals,

with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced."

Jurisdiction over the person is conceded, but it is argued that there was no jurisdiction over the subject matter because the evidence affirmatively showed that no crime whatever had been committed. Whether the sentence of a military court, approved by the reviewing authority, is open to attack in the civil courts on such a ground, is a question which does not arise on this record. The motion to discharge conceded the return to be true, and if the return showed sufficient cause for detention, the Circuit Court was right in dismissing the writ, and its final order to that effect must be affirmed. No evidence was adduced in or considered by the Circuit Court, and none is before us, nor is any inquiry into the innocence or guilt of the accused permissible.

Was then the sentence void for want of power to pronounce and enforce it?

The particular ground on which the appeal directly to this court may be rested is that the case involved the construction or application of the Constitution in the contention that by the sentence petitioner was twice punished for the same offence.

That question was put forward in the petition and manifestly argued on the return. The Circuit Court states, in its opinion, that "it is contended in behalf of Carter that his imprisonment is in violation of the Constitution of the United States, and is otherwise illegal and without warrant of law." And, indeed, the application of the Constitution would seem to be necessarily involved if the sentence were held invalid on other grounds.

Holding the case to be properly before us, it will be more convenient to examine the constitutional point specially raised, after we have considered some of the other objections to the sentence.

One of these objections is that the sentence exceeded the

maximum punishment fixed by the President, under the act of Congress approved September 27, 1890, (26 Stat. 491, c. 998), because the term of imprisonment imposed was five instead of four years.

That act provides that "whenever by any of the articles of war for the government of the Army the punishment on conviction of any military offence is left to the discretion of the court martial the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe."

February 26, 1891, the President made an executive order in limitation of punishment, which was promulgated to the Army in General Orders No. 21, February 27, 1891, and therein it was said: "In accordance with an act of Congress of September 27, 1890, the following limits to the punishment of enlisted men, together with the accompanying regulations, are established for the government in time of peace for all courts martial and will take effect thirty days after this order." This executive order was amended by the President March 20, 1895, and again amended March 30, 1898, and in 1901. In neither of these executive orders were its provisions extended to commissioned officers, and they solely related to the cases of enlisted men. It is true that clause 938 of the army regulations promulgated October 31, 1895, provides: "Whenever by any of the articles of war punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the Manual for Courts Martial, published by authority of the Secretary of War." But we do not find in the Manual any attempt to extend the limitations to others than enlisted men; and it is evident that a limit on discretion in punishment to be imposed by the President only can only have such operation as he may affirmatively prescribe.

It is further urged that the punishments of fine and imprisonment were illegal because inflicted after Captain Carter had ceased to be an officer of the Army.

The different provisions of the sentence took effect concurrently while the accused was under the control of the military authorities of the United States as a commissioned officer of

the Army. The date of the order of dismissal, of the infliction of the fine and of the beginning of the imprisonment were the same date.

The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having being sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

He was a military prisoner though he had ceased to be a soldier; and for offences committed during his confinement he was liable to trial and punishment by court martial under the rules and articles of war. Rev. Stat. § 1361.

It may be added that the principle that where jurisdiction has attached it cannot be divested by mere subsequent change of status has been applied as justifying the trial and sentence of an enlisted man after expiration of the term of enlistment, *Barrett* v. *Hopkins*, 7 Fed. Rep. 312; and the execution of sentence after the lapse of many years and the severance of all connection with the Army. *Coleman* v. *Tennessee*, 97 U. S. 509.

In the latter case this court held, at October term, 1878, that a soldier who had been convicted of murder and sentenced to death by a general court martial in 1865, but whose sentence had not been executed, might "be delivered up to the military authorities of the United States, to be dealt with as required by law." In this matter it was subsequently advised by Attorney General Devens that the death sentence might legally be carried into effect notwithstanding the fact that the soldier had in the meantime been discharged from the service, under the circumstances detailed, but he recommended that the sentence be commuted, and this recommendation was followed. 16 Op. Att. Gen. 349.

In *Ex parte Mason*, 105 U. S. 696, where the accused was sentenced by a general court martial to dishonorable discharge, forfeiture of pay, and eight years' imprisonment in the Albany penitentiary, an application for release on *habeas corpus* was denied, and the sentence held to be legal.

Another objection strenuously insisted on is that the sentence ceased to be the sentence of the court martial because of the disapproval of certain specifications by the President.

The 65th article of those enacted by Congress, April 10, 1806, (2 Stat. 359, c. 20,) provided: "But no sentence of a court martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being." In the Revised Statutes this part of the 65th article of war was made section 104, and read: "No sentence of a court martial shall be carried into execution until the whole proceedings shall have been approved by the officer ordering the court, or by the officer commanding for the time being." By the act of July 27, 1892 (27 Stat. 277, c. 272,) the 104th section was amended so as to read: "No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being."

The original article required *the whole proceedings to be laid* before the reviewing authority; the Revised Statutes, that *the whole proceedings should be approved;* the act of July 27, 1892, that *the sentence* should not be carried into execution until *it was approved.* From this legislation it appears that the approval of the sentence and not of the whole proceedings is now the prerequisite to carrying the sentence into execution, and this is in harmony with articles 105, 106, 107 and 108.

In *Claassen* v. *United States*, 142 U. S. 140, 146, it was said: "In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' *Peake* v. *Oldham*, Cowper, 275, 276; *Rex* v. *Benfield*, 2 Bur. 980, 985. See also *Grant* v. *Astle*, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the pre-

sumption of law is that the court awarded sentence on the good count only."

In *Ballew* v. *United States*, 160 U. S. 187, where the indictment embraced two counts, each setting up a distinct offence, the court instructed the jury that if they considered the defendant guilty on one count and innocent on the other, they should so find; and that if they found him guilty on both counts, that they should return a general verdict of guilty. A general verdict of guilty was returned, and judgment rendered thereon.

This court held that error had been committed in the conviction as to the first count but none in the conviction upon the other, and as the general verdict covered both, the judgment was reversed under the statute in that behalf and the cause remanded with instructions to enter judgment on the second count.

In *Putnam* v. *United States*, 162 U. S. 687, where there was a conviction on two counts and the sentence imposed was distinct and separate as to each count, but was made concurrent so that the entire amount of punishment imposed would be undergone if the judgment were sustained under either count, error being found in the conviction as to one of them, the judgment was reversed as to that count and affirmed on the other.

We are dealing here with no matter of insufficient counts or of conviction of two offences, sustainable only as to one, but the analogies of the criminal law bear out the procedure under the military law, the rules of which determine the present contention.

That contention, after all, amounts to no more than to say that if the court martial had acquitted on the disapproved findings, it must be assumed that the sentence would have been less severe, and therefore that the President should have sent the case back or mitigated the punishment, and that because he did not, the punishment must be conclusively regarded as increased. This is wholly inadmissible when the powers vested in the ultimate tribunal are considered.

The court martial for the trial of Captain Oberlin M. Carter was convened by orders issued by the President; and he was therefore the reviewing authority, and the court of last resort.

The law governing courts martial is found in the statutory enactments of Congress, particularly the Articles of War; in the Army Regulations; and in the customary military law. According to military usage and practice, the charge is in effect divided into two parts, the first technically called the "charge," and the second, the "specification." The charge proper designates the military offence of which the accused is alleged to be guilty. The specification sets forth the acts or omissions of the accused which form the legal constitutents of the offence. The pleading need not possess the technical nicety of indictments as at common law. "Trials by courts martial are governed by the nature of the service, which demands intelligible precision of language but regards the substance of things rather than their form." 7 Op. Atty. Gen. 604. Not only do military usage and procedure permit of an indefinite number of offences being charged and adjudicated together in one and the same proceeding, but the rule is recognized that whenever an officer has been apparently guilty of several or many offences, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together, and together brought to trial. 1 Winthrop, 219; 22 Op. Atty. Gen. 595. And it has been repeatedly ruled by the Judges Advocate General that "a duly approved finding of guilty on one of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence, although the similar findings on all the other charges are disapproved as not warranted by the testimony." Dig. Op. Judge Advocate General, ed. 1895, p. 696; Id. ed. 1868, pp. 343, 350.

The sentence against Captain Carter was rendered on findings of guilty of four charges and certain specifications thereunder.

It devolved on the President to approve or to disapprove the sentence. Before taking action, he referred the proceedings to the Attorney General, who submitted a careful report thereon, and recommended the disapproval of certain findings. 22 Op. 589. These related to facts of less gravity under Charges I and II than the others set up thereunder, and those under Charge

III though objectionable were not material, as dismissal was the sole punishment under that charge. The President disapproved of the findings of guilty of some of the specifications under two of the charges, and approved findings of guilty of a specification or specifications under each of the charges, and of the findings of guilty of all of the charges, and approved the sentence. He might have referred the proceedings back to the court for revision, but he was not required to do so, if in his opinion this was not necessary, and the sentence was justified by the findings which he did approve. As President he might have exercised his constitutional power to pardon, or as the reviewing authority he might have pardoned or mitigated the punishment adjudged except that of dismissal, although he had no power to add to the punishment. He did not think it proper to remand, to mitigate or to pardon. He clearly acted within his authority whether the Articles of War, the Army Regulations, or the unwritten or customary military law be considered, and the judgment he rendered cannot be disturbed on the ground suggested.

We are brought then to consider the two propositions on which much of the stress of the argument was laid.

First. That the finding of guilty of charge 4 and its specification was beyond the powers of the court martial;

Second. That if that finding were void, then that the sentence was in violation of the Fifth Amendment to the Constitution.

Charge I was: "Conspiring to defraud the United States, in violation of the 60th article of war." Charge II was: "Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

Charge III was: "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war." Charge IV was: "Embezzlement, as defined in section 5488 of the Revised Statutes, in violation of the 62d article of war."

If Charge IV be laid out of view, let us see if the sentence was void because in violation of the Fifth Amendment.

That amendment declares: "Nor shall any person be subjected for the same offence to be twice put in jeopardy of life or limb."

Opinion of the Court.

The Government objects in the outset that the Fifth Amendment is not applicable in proceedings by court martial, and that the question could only be raised under the 102d article of war, which reads: "No person shall be tried a second time for the same offence," and that, moreover, the point was not raised in the court martial that proceeding to judgment under these three charges would be either in violation of the 102d article of war, or of the Fifth Amendment, and comes too late on application for *habeas corpus*. And further, that the question was one within the power of the court martial to decide, and must be held to have been waived, or be assumed to have been ruled against the accused, in which case the decision would be conclusive on *habeas corpus*, since if incorrect it would be merely error, and would not go to the jurisdiction.

In *In re Belt, Petitioner*, 159 U. S. 95, we held that the Supreme Court of the District of Columbia had jurisdiction and authority to determine the validity of an act which authorized the waiver of a jury, and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offence, and that, this being so, this court could not review the action of that court, and the Court of Appeals, in this particular on *habeas corpus*.

The case of *Ex parte Bigelow* was referred to and quoted from thus: "In *Ex parte Bigelow*, 113 U. S. 328, 330, which was a motion for leave to file a petition for *habeas corpus*, the petitioner had been convicted and sentenced in the Supreme Court of the District to imprisonment for five years under an indictment for embezzlement. It appeared that there were pending before that court fourteen indictments against the petitioner for embezzlement, and an order of the court had directed that they be consolidated under the statute and tried together. A jury was empanelled and sworn, and the district attorney had made his opening statement to the jury, when the court took a recess, and upon reconvening a short time afterwards, the court decided that the indictments could not be well tried together, and directed the jury to be discharged from the further consideration of them, and rescinded the order of con-

solidation. The prisoner was thereupon tried before the same jury on one of the indictments and found guilty. All of this was against his protest and without his consent. The judgment on the verdict was taken by appeal to the Supreme Court of the District in general term, where it was affirmed. It was argued here, as it was in the court in general term, that the empanelling and swearing of the jury and the statement of his case by the district attorney put the prisoner in jeopardy in respect of all the offences charged in the consolidated indictment, within the meaning of the Fifth Amendment, so that he could not be again tried for any of these offences, and Mr. Justice Miller, delivering the opinion of the court, after remarking that if the court of the District was without authority in the matter, this court would have power to discharge the prisoner from confinement, said: 'But that court had jurisdiction of the offence described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defences offered by him. The matter now presented was one of those defences. Whether it was a sufficient defence was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury under instructions of the court must pass if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal—a much stronger case than this—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offence, and if the identity of the offence were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea both as matter of law and of fact

cannot be doubted. . . . It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a nullity. But the general rule is that when the court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities.' And the application was denied."

It is difficult to see why the sentences of courts martial, courts authorized by law in the enforcement of a system of government for a separate community recognized by the Constitution, are not within this rule. Its application would seem to be essential to the maintenance of that discipline which renders the Army efficient in war and morally progressive in peace, and which is secured by the military code and the decisions of the military courts.

Reserving, however, the determination of these questions, it is nevertheless clear that the system under which the accused was tried, and his status as an officer of the Army, must be borne in mind in deciding whether the amendment, if applicable, was or was not violated by this sentence.

The contention is that Captain Carter was twice put in jeopardy because the sentence was greater than the court martial had jurisdiction to inflict on conviction of any one of the offences charged, taken singly, and because the offences charged were the same within the meaning of the constitutional provision.

Articles 60 and 61 are as follows:

"ART. 60. Any person in the military service of the United States who makes or causes to be made any claim against the United States, or an officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States, for any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States for any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

"Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

"Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or

"Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other

person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,

"Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court martial may adjudge. And if any person, being guilty of any of the offences aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

"ART. 61. Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

It is said that the punishment must be imposed under either the 60th or the 61st articles, or under both; that the only penalty under the 61st article is dismissal; that the punishment under the 60th article may be "fine *or* imprisonment, or such other punishment as a court martial may adjudge," and that this is in the alternative and cannot be cumulative.

That that is the necessary construction is not to be conceded. Offences under this article may be of greater or less gravity, and the necessity for the exercise of discretion is obvious. Conviction in some cases might deserve the punishment of fine, or of imprisonment, or of both, as well as of dismissal in addition to either or both; in others lesser penalties might suffice. The word "or" was properly used to give play to discretion. This is the view expressed in Winthrop, vol. 2, p. 1101.

The 60th article was taken from sections 1 and 2 of the act of March 2, 1863, (12 Stat. 696, c. 67,) "to prevent and punish frauds upon the Government of the United States," brought forward in the Revised Statutes as § 5438, and that act provided that any person in the military service, if found guilty, "shall be punished by fine *and* imprisonment, or such other punishment as the court martial shall adjudge, save the punishment of

death," while a person in civil life guilty of the offence was punishable under section 3 "by imprisonment not less than one nor more than five years, *or* by fine of not less than one thousand dollars and not more than five thousand dollars;" but when the military offence was transferred to the military code, the word "and" was changed to the word "or." Hence, it is argued, that Congress thereby indicated that it intended to confine the punishment to either fine *or* imprisonment. We do not think this is necessarily so. The punishment of persons not in the military or naval service (in addition to a pecuniary forfeiture and double damages) was fixed at fine or imprisonment, and no other. The punishment of persons in the military service was fixed at fine and imprisonment, or such other punishment as the court martial might adjudge. The change of the word "and" to "or" tended to obviate controversy as to the range of discretion.

But suppose this otherwise, still it does not follow that a fine might not be inflicted for the commission of one of the offences enumerated in Article 60, and imprisonment for the commission of another.

The penalty denounced by Article 60 that the accused, on conviction, "may be punished by fine or imprisonment or such other punishment as a court martial may adjudge," is plainly to be taken distributively, and is applicable on conviction of either of the offences enumerated.

We understand the rule established by military usage to be "that the sentence of a court martial shall be, in every case, an *entirety;* that is to say, that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offences found, and however different may be the punishments called for by the offences." 1 Winthrop, (2d ed.) 614.

Where then there is conviction of several offences, the sentence is warranted to the extent that such offences are punishable.

This was so ruled by the Circuit Court of Appeals for the Second Circuit in *Rose ex rel. Carter* v. *Roberts*, 99 Fed. Rep.

948, and Wallace, J., speaking for the court, said: "As has been stated, the relator was convicted of two of the offences defined by the sixtieth article of war. The record presents the charges and specifications upon which he was found guilty of those offences. The charges describe each offence in the language of the article. Whether the specifications support the charges or the evidence supports the specifications, we are not at liberty to consider. Nor is it open to inquiry whether the two offences were in fact but one and the same criminal act. When properly constituted and convened, a court martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offences created by the articles of war. This jurisdiction necessarily includes the authority to decide, when the charge preferred against the accused is the commission of one or more of these offences, whether the specifications and the evidence sufficiently exhibit the incriminating facts. As was said by the Supreme Court in *Dynes* v. *Hoover*, 20 How. 65, the sentence, when confirmed by the President, 'is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject, it has failed to observe the rules prescribed by statute for its exercise.' Having found the relator to be guilty of two offences, the court was empowered by the statute to punish him as to one by fine and as to the other by imprisonment. The sentence was not in excess of its authority."

Cumulative sentences are not cumulative punishments, and a single sentence for several offences, in excess of that prescribed for one offence, may be authorized by statute. *In re De Bara*, 179 U. S. 316; *In re Henry*, 123 U. S. 372.

The offences charged under this article were not one and the same offence. This is apparent if the test of the identity of offences that the same evidence is required to sustain them be applied. The first charge alleged "a conspiracy to defraud," and the second charge alleged "causing false and fraudulent claims to be made," which were separate and distinct offences, one requiring certain evidence which the other did not. The

fact that both charges related to and grew out of one transaction made no difference.

In *Morey* v. *Commonwealth*, 108 Mass. 433, the Supreme Judicial Court of Massachusetts, speaking through Mr. Justice Gray, then a member of that tribunal, held: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence. A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

The sentence, then, of fine and imprisonment was justified by the convictions of the first and second charges.

Finally, it is contended on this branch of the case that the offence under Charge III is the same offence as those under Charges I and II, called by a different name, and hence that the punishment of dismissal was illegal because a third punishment where but two offences were committed.

As heretofore said, dismissal might have been added to fine and imprisonment as part of the punishment, for either or both of the offences, under the first and second charges.

But the offence of conduct unbecoming an officer and a gentleman is not the same offence as conspiracy to defraud, or the causing of false and fraudulent claims to be made, although to be guilty of the latter involves being guilty of the former.

Article 61 prescribes that "any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," and Article 100, that "when an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name and place of birth of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came, or where he usually resides."

Article 97 is: "No person in the military service shall, under the sentence of a court martial, be punished by confinement in a penitentiary, unless the offence of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offence may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment."

Confinement at hard labor in a penitentiary is prescribed by sections 5438 and 5488 of the Revised Statutes, section 5438 having been brought forward from the act of March 2, 1863, from which the 60th article was taken. (And see § 5442, Rev. Stat.; Act March 31, 1895, 28 Stat. 957.)

Conviction of Charges I and II was conviction of fraud, and Article 100 contemplates that the officer may be dismissed under Article 60 or under Article 61. Conviction of fraud under Article 60 plainly involves conviction under Article 61; and dismissal is as mandatory as degradation.

The contention that an officer convicted of crimes punishable in the penitentiary under Articles 60 and 97 cannot be so punished if he be also dismissed, or cannot be dismissed if he be so punished, is too unreasonable to be countenanced.

The result is that we are of opinion that the sentence cannot be invalidated on any of the grounds so far considered.

The fourth charge was: "Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62d article of war."

Section 5488 reads: "Every disbursing officer of the United States who deposits any public money entrusted to him in any place or in any manner, except as authorized by law, or converts it to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied; and shall be punished by imprisonment with

hard labor for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment."

Article 62 is:

"ART. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court martial, according to the nature and degree of the offence, and punished at the discretion of such court."

The construction would not be unreasonable if it were held that the words "though not mentioned in the foregoing articles of war" meant "notwithstanding they are not mentioned," and that the article was intended to cover *all* crimes, whether previously enumerated or not. The reference is to crimes created or made punishable by the common law or by the statutes of the United States, when directly prejudicial to good order and military discipline. Our attention has not been called to any former adjudication of the particular point by the military courts, but we think it would be going much too far to say that, if a court martial so construed the words, and sentenced for a crime previously mentioned, the sentence, when made his own by the President, would be absolutely void.

Colonel Winthrop says, however, that "the construction of these words has uniformly been that they are words of limitation, restricting the application of the article to offences not named or included in the articles preceding; the policy of the provision being, as it is expressed by Samuel, 'to provide a general remedy for wrongs not elsewhere provided for.'" Vol. 2, p. 1126.

Accepting this construction, we are nevertheless of opinion that the specified crime was not "mentioned in the foregoing articles."

The first and fourth subdivisions of the 60th article of war provide that "any person in the military service of the United States who makes or causes to be made any claim against the United

States, or any officer thereof, knowing such claim to be false or fraudulent," or "who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement," shall, on conviction, be punished.

The specification under Charge IV alleged that the accused, as a disbursing officer of the United States, applied to a purpose not prescribed by law large sums of public money intrusted to him, for river and harbor purposes, by causing them to be paid out by checks on false accounts, the payment being accomplished by the drawing and delivery of the checks directing payment to be made of moneys of the United States, and thus withdrew by means of checks, from the authorized depository, moneys for an unauthorized purpose, and applied them to unlawful purposes. The application, coupled with the payment and withdrawal of the funds by checks, constituted the embezzlement defined in section 5488, while the specific acts set forth in subdivisions one and four of the 60th article were distinct from the acts prohibited by section 5488. By the charge, the particular offence was laid in general terms, and by the specification the facts constituting the offence charged were stated. The specification here set forth abstraction by fraudulent means of $230,749.90, and $345,000, moneys of the United States intrusted to the accused as a disbursing officer of the Government, but it was none the less *malum prohibitum* because it was also *malum in se.*

Nor are we persuaded by the ingenious argument of appellant's counsel that the crime alleged in this charge was covered by subdivision 9 of Article 60, because it was embezzlement of money "furnished or intended for the military service," § 5488, relating to the improper disposition of any public money. That subdivision denounces punishment on any person in the military service of the United States "who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, sub-

sistence stores, money, or other property of the United States, furnished or intended for the military service thereof." Most of these enumerated classes of property are obviously military stores used for military purposes, and on the principle of *noscitur a sociis* all the classes designated fall into the same category. And this seems to be put beyond question by the words "furnished or intended for the military service thereof." The military service as used in this connection means the land forces or the Army. The fact that money appropriated for river and harbor improvements is disbursed by an officer of the Army and the work supervised by the engineer force in the service of the government, does not make the moneys so appropriated moneys "furnished or intended for the military service," as the words are used in paragraph nine. This was the view of Lacombe, J., in holding the sentence supported by the conviction of the fourth charge. 97 Fed. Rep. 496. The Circuit Court of Appeals, without questioning the correctness of that conclusion, did not consider the question, because it sustained the sentence under the conviction of the first and second charges. The Circuit Court for the District of Kansas concurred in the conclusions of each of the other courts. We are of opinion that officers of the Army are in the eye of the law on military duty, although employed as such officers under statutes of the United States in the public service on duties not in themselves pertaining to the Army, and that the moneys disbursed by them when so employed do not because they are such officers become money furnished and intended for the military service.

Illustrations are found in the administration of appropriations for the Indian service, the Light House service, superintending the Washington aqueduct, maintaining the public grounds about the White House, and the like.

The appropriations made for river and harbor improvements are *per se* for the benefit of commerce and navigation, and not for military or naval purposes, and the money is furnished and intended for public works in aid of commerce. In the exercise of the power to regulate commerce, Congress has repeatedly legislated in regard to the construction of river and harbor improvements in the navigable waters of the United States,

and enacted rules in relation thereto. The money made the subject of the embezzlement in this case was appropriated to be expended under the War Department by the act of Congress of June 3, 1896, (29 Stat. 202, c. 314,) entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," and the act of June 4, 1897, (30 Stat. 11, 44, c. 2,) entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes."

The status of Captain Carter was not changed by his detail to the charge of these improvements, and he was still subject to the military jurisdiction.

It is further argued that the specification was wrongly laid under Article sixty-two, because "the money was applied to a purpose prescribed by law," and "the crime charged 'was not to the prejudice of good order and military discipline,'" but the contention is without merit.

The fact that the vouchers purported to be issued as against the appropriations for the improvement of the Savannah River and of Cumberland Sound, if these vouchers were false and falsely certified to, and if the accounts on which the moneys were paid were false, "the moneys not being due or owing from the United States to the parties paid or to any one else, and he, the said Captain Carter, well knowing this to be the case," as stated in the specification, could not make the application of the money by that payment an application to a purpose prescribed by law.

We should suppose that embezzlement would be detrimental to the service within the intent and meaning of the article, but it is enough that it was peculiarly for the court martial to determine whether the crime charged was "to the prejudice of good order and military discipline." *Swaim* v. *United States*, 165 U. S. 553; *Smith* v. *Whitney*, 116 U. S. 178; *United States* v. *Fletcher*, 148 U. S. 84.

In *Swaim* v. *United States*, which involved a sentence under the 62d article of war, Mr. Justice Shiras, delivering the opinion, said: "But, as the authorities heretofore cited show, this is the

very matter that falls within the province of courts martial, and in respect of which their conclusions cannot be controlled or reviewed by the civil courts. As was said in *Smith* v. *Whitney*, 116 U. S. 178, 'of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. . . . Under every system of military law for the government of either land or naval forces, the jurisdiction of courts martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.'"

The case has been argued with zeal and ability, and it has received the consideration which its importance demanded. If these observations have been extended beyond what was strictly required, that should at least serve to show that no material suggestion bearing on the disposal of this appeal has escaped attention.

But we must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of courts martial, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed.

Order affirmed.

MR. JUSTICE HARLAN did not hear the argument and took no part in the consideration and disposition of the case.

GUARANTEE COMPANY OF NORTH AMERICA *v.* MECHANICS' SAVINGS BANK AND TRUST COMPANY.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 48. Argued April 23, 24, 1901. — Decided January 6, 1902.

Where a bond insuring a bank against such pecuniary loss as it might sustain by reason of the fraudulent acts of its teller, contained a provision that the company would notify the insuring company on "becoming aware" of the teller "being engaged in speculation or gambling," it is the duty of the bank to give such notice, when informed that the teller is speculating, although, while confessing the fact of speculating, he asserts that he has ceased to do so.

When the teller is in fact engaged in speculation and the bank is so informed, it cannot recover on such a bond for losses occurring through his fraudulent acts after the information is received, when it has not notified the company of what it has heard, or made any investigation, but has accepted the teller's assurance of present innocence as sufficient, on the mere ground that it had confidence in his integrity.

When at the time the teller's bond was renewed, the books of the bank showed that he was a defaulter in the sum of $19,600 understated liabilities, and of $3765.44 abstracted from bills receivable, both of which could have been detected by the taking of a trial balance or a mere comparison between the books kept by him and the individual ledger kept by another person, and by a correct footing of the notes, the bank is open to the charge of laches, and a certificate that the accounts of the teller had been examined and verified is not truthful.

Where it is known to the president of the bank that the insuring company regards engagement in speculation as unfavorable to an employé's habits, and he is informed that the employé is speculating, a representation by the president that he has not known or heard anything unfavorable to the employé's habits, past or present, or of any matters concerning him, about which the president deems it advisable for the company to make inquiry, is a misrepresentation.

THIS was a bill in equity brought by the Mechanics' Savings Bank and Trust Company for the use of J. J. Pryor, assignee, against the Guarantee Company of North America, for an accounting and for a decree for the amount alleged to be due

complainant on two bonds executed by the Guarantee Company to the bank; one insuring the latter corporation against such pecuniary loss as it might sustain by reason of the fraudulent acts of John Schardt, as teller and collector; and the other insuring the same corporation against pecuniary loss by reason of fraudulent acts committed by him in his office of cashier. On hearing a decree was rendered against the Guarantee Company on both bonds, 68 Fed. Rep. 459, which was affirmed on appeal. 47 U. S. App. 91. The case was then brought to this court by certiorari, and the decree of the Circuit Court of Appeals was reversed and the cause remanded on the ground that the decree of the Circuit Court was not final. 173 U. S. 587.

The Guarantee Company subsequently made an unsuccessful attempt to have the cause reopened for additional evidence alleged to have been discovered since the first decree. A final decree was rendered against the company, which, on appeal to the Circuit Court of Appeals for the Sixth Circuit, was modified and affirmed, 100 Fed. Rep. 559, and the present certiorari was then allowed.

The Mechanics' Savings Bank and Trust Company was a banking institution located at Nashville, Tennessee, with a capital of fifty thousand dollars. John Schardt was its teller from 1888 to January, 1893, when he was elected cashier and remained such until his death on April 17 following. As teller and cashier he embezzled more than one hundred thousand dollars of the funds of the bank, beginning in 1890 and continuing until about the time of his death. In discovering the defalcation the bank ascertained its insolvency, closed its doors, and made a general assignment for the benefit of its creditors.

The Guarantee Company of North America was a company organized under the laws of the Dominion of Canada, and engaged in the business of guaranteeing pecuniary losses by the fradulent acts of persons in positions of trust, and issued to the bank in 1888 a bond for the period of one year on Schardt as teller for ten thousand dollars, which was subsequently re-

newed each year until January, 1893, when it issued a bond on Schardt as cashier for twenty thousand dollars.

The defalcation of more than one hundred thousand dollars was occasioned by losses in speculation, and just prior to Schardt's death he assigned to the bank some property of slight value, and about eighty thousand dollars of life insurance as indemnity. From these collaterals the bank realized the sum of $46,448.86, and for the remainder of the default the company was held liable to the extent of each bond. On the second appeal to the Circuit Court of Appeals, that court found the default under the cashier's bond to have been some six thousand dollars less than as ascertained by the Circuit Court, and modified the decree accordingly.

The teller's bond was dated January 16, 1888, and described Schardt as the employé and the bank as the employer. It provided:

"Whereas, the employé has been appointed in the service of the said employer, and has been assigned to the office or position of teller and collector, by the said employer, and application has been made to the Guarantee Company of North America for the grant by them of this bond;

"And whereas, the employer has delivered to the company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed:

"Now, therefore, in consideration of the sum of one hundred dollars lawful money of the United States of America, to the said company, as a premium for the term of twelve months, ending on the sixteenth day of January, 1889, at twelve o'clock, noon, and in order to effect a continuance of the currency of this bond, a like premium hereafter to be paid to the said company, on or before the sixteenth day of January in each year, as a premium for the ensuing year, so long as the said employer may wish to continue this bond, and the said company shall consent to receive said premiums, it is hereby agreed that the company shall, within three months after proof satisfactory to the directors, make good and reimburse to the employer such pecuniary loss as the employer shall have sustained by the fraudulent acts

of the employé, in connection with the duties of his said office or position, or with any other duties assigned to him, by the employer in the said service, committed by him, and discovered during the continuance of the currency of this bond, and within six months from the employé's ceasing to be in the said service.

"The following provisions are also to be observed and binding as a part of this bond:

"The actual payment of the premium and its acceptance by this company either for the issue or renewal of this bond, is essential to its currency, and a condition precedent, to the right or claim hereunder.

"That this bond is issued and renewed on the express understanding that the employé has not within the knowledge of the said employer at any former period, either in this or other employment, been guilty of any default or serious dereliction of duty.

"That the employer shall observe or cause to be observed all due and customary supervision over the said employé for the prevention of default, and if the employer shall at any time, during the currency of this bond, condone any act or default, on the part of the employé, which would give the employer the right to claim hereunder, and shall continue the employé in his service, without notification to the company, the said company will not be responsible hereunto for any default which may occur subsequent to said act or default of said employé, so condoned.

"That the employer shall at once notify the company on his becoming aware of the said employé being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits.

"That there shall be an inspection or audit of the accounts or books of the employé on behalf of the employer at least once in every twelve months from the date of this bond.

"That the company shall be notified in writing of any act on the part of said employé, which may involve a loss for which the company is responsible hereunder to the employer, immediately or without unreasonable delay, after the occurrence of such act shall have come to the knowledge of the employer; and

upon the making of such a claim, this bond shall wholly cease and determine as regards any liability, for any act of the employé committed subsequent to the making of such claim, and shall be surrendered to the company on the payment of all claims due hereunder.

* * * * * *

"That the company may cancel this bond at any time, by notifying the employer and refunding the premium paid less a *pro rata* part thereof for the time said bond shall have been in force; but said cancellation shall not affect or impair the company's liability hereunder for any acts committed or discovered previous to such cancellation during the currency of this bond, and within three months after said cancellation."

* * * * * *

The statement referred to was signed by the then cashier and delivered to the company before the bond was issued. It commenced with a communication from the managing director of the Guarantee Company, desiring answers to certain accompanying questions. These answers were given by the cashier, who also declared his answers and representations to be true, and that he was "not aware of any matter or thing affecting the character or reputation of the applicant, which should create any doubt as to his reliability or trustworthiness." This bond was renewed each year up to January, 1893, and in each year before the bond was renewed, the company furnished the bank with a blank form, to be filled out, and stating: "It is necessary before the bond can be renewed that you obtain the certificate on the back hereof by your president or cashier and on its return with remittance of the premium, the renewal can be immediately effected."

The certificate on the back was filled up and signed by the cashier, and among other things stated that the accounts of said teller Schardt had been examined and verified by the finance committee of said bank; and the bond was not renewed in any year until this certificate had been made out and delivered to the company.

Before the cashier's bond was issued the company "submitted for reply on behalf of the bank," certain questions, addressed to

the president, which, and the answers thereto by the president as such, are referred to in the bond as "employers' guarantee proposal No. 154,806." Among these questions and answers were the following:

"Q. 2. If a new employé, by whom was the applicant introduced, or how did he become known to you? If hitherto in continuous service, for how long, in what capacities, and has he uniformly performed his duties faithfully and satisfactorily? A. Applicant began service in this bank six years ago as collector —— cl'k, and has since been advanced to bank's teller and now cashier.

"Q. 3. Has he ever been in arrears or default in the bank's service, or, as far as you have heard, in any previous employment? A. No.

"Q. 4. Have you known or heard anything unfavorable as to his habits or associations, past or present? A. No.

"Q. —. Or of any matters concerning him about which you deem it advisable for the company to make inquiry? A. No.

"Q. 5. Is he to your knowledge pecuniarily embarrassed or insolvent? Or is he in any way indebted to the bank? ——

"Q. 6. Is he now or about to be engaged in any other business or employment than in the bank's services? A. No.

"Q. 7. Applicant's position or capacity for which this bond is required? A. Cashier.

"Q. 8. Amount of his salary or other emoluments, if any? A. $2000 per annum.

"Q. 9. Amount or bond hereby required, from what date to commence, and by whom premium will be paid? A. $20,000 to date from Jan. 1, 1893. Premium payable by bank.

"Q. 10. What further security, if any, will be held or required from applicant? A. None.

"Q. 11. Have you hitherto held other security from applicant? If so, why discontinued or changed to this? A. Formerly teller and general bookkeeper in this bank; elected cashier at annual meeting January 1, 1893.

"Q. 12. Has there been any fault in the bank by any employé in applicant's position? A. No.

"Q. 13. When were applicant's books and accounts (includ-

ing cash, securities and vouchers, if any) last examined, and by whom? A. December 31, 1892, by finance committee (were they found correct) of bank and found correct.

"Q. 14. In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts and vouchers, and by whom? A. Not less than quarterly, and often monthly, by finance committee.

"Q. 15. In case of applicant acting as teller: (*a*) Will he be required to balance his cash daily, and report same to president or cashier? (*b*) And will a record of same be kept? A. . . .

"Q. 16. Will applicant handle funds or securities not subject to a routine check, or periodical examination? If so, please describe their nature? A. No."

"The above answers and representations are true to the best of my knowledge and belief."

The cashier's bond was then executed and delivered to the bank, and provided:

"Whereas the said employé has been appointed cashier at Nashville, Tennessee, in the service of the said employer and has been required to furnish security that he shall not be guilty of any fraudulent act in the performance of his duties in the said capacity, by which the said employer shall suffer pecuniary loss, and whereas the said company, in consideration of the sum of one hundred dollars, now therefor paid for the term expiring January 1, 1894, and for the purposes of the renewal of this contract the sum or premiums of one hundred dollars, hereafter to be therefor paid to the said company, on or before the first day of January, 1894, and a like payment for each and every succeeding term of one year, so long as the said company shall consent to receive it—hath agreed upon the terms, and subject to the provisos and conditions hereinafter contained and endorsed thereon, hereby to become such security to the said employer:

"Now, therefore, this bond witnesseth, that the said employé for and on his own behalf and the said company fully relying on the truth of the statement and declaration contained in a certain document distinguished as employer's guarantee proposal No. 154,806, dated the 10th day of Jan., 1893, and signed Lewis T. Baxter, president on behalf of the said employer, and

lodged with the said company at its office in Montreal, and on the strict performance and observance hereafter, by the said employer of the contract thereby created, do hereby, respectively, severally and jointly covenant with the said employer to reimburse unto the said employer or his or their representatives or assigns, the amount of any loss not exceeding in the whole sum of twenty thousand dollars, which, during the currency of this bond, shall be sustained by the said employer by reason of any act of fraud committed by the said employé in connection with the duties of said appointment and constituting embezzlement or larceny—such reimbursement to be made within three calendar months next after proof shall have been given to the satisfaction of the directors of the said company, of the occurrence of such loss, and the proof thereof to include, if the company shall so require, an affidavit to be made or taken by the person, for the time being entitled to the benefit of this guarantee, to the effect that he hath been actually defrauded by the said employé, and that he suffers absolute and ultimate loss thereby to the full amount claimed hereunder, and that the contract created as aforesaid hath been fully performed and observed on the part of the said employer.

"Provided always, that this bond and guarantee hereby granted or undertaken, shall be subject and liable to the terms and conditions hereupon endorsed."

Among the terms and conditions referred to were these:

"This bond is granted upon the following express conditions:

"1. Any misstatement of a material fact, in the declaration within mentioned, or in any claim made under this bond, will render this bond void from the beginning.

"2. That the said employer shall use all due and customary diligence in the supervision of said employé for the prevention of default, and to that end shall cause an inspection or audit of his accounts to be made at least once within twelve months, and if the said employer shall at any time during the currency of this bond, become aware of any act or default on the part of said employé which would constitute a claim hereunder, and shall continue said employé in his service without notification to the said company, the said company will not be responsible

hereunder for any loss or default which may occur subsequent to said act or default of said employé.

"3. That any written answers or statements made by or on behalf of said employer in regard to or in connection with the conduct, duties, accounts or methods of supervision of the said employé delivered to the company either prior to the issue of this bond, or to any renewal thereof, or at any time during its currency, shall be held to be a warranty thereof, and form a basis of this guarantee, or of its continuance.

"4. That the said employé has not, to the knowledge or belief of said employer, been guilty of any serious dereliction of duty, or default in this or any other service, or that his habits have been such as to incur said employer's censure, previous to the issue of this bond.

"5. The said employer shall, immediately, upon it becoming known to him or them, that the said employé has been guilty of any act entitling the said employer to claim under this bond, notify the said company, at its head office; and this bond shall become absolutely void, both as to existing and future liability if the said employer shall neglect or omit to so notify the said company.

* * * * * *

"8. That in addition to the supervision to be exercised by the said employer as mentioned in the statement and declaration within referred to the said company shall be afforded every reasonable facility to examine from time to time as they may desire, for the purposes of this bond, the books, papers and affairs of the said employer entrusted to the keeping and charge of the said employé."

It appeared from the evidence that Schardt defaulted as teller and collector from September 12, 1890, to January 1, 1893, in the sum of $78,819.24, subdivided as follows: From September 1, 1890, to January 16, 1891, $5879.34; from January 16, 1891, to January 1, 1892, $22,290; from January 1, 1892, to January, 1893, $50,649.90; and as cashier, from January 16, 1893, to April 15, $22,964.17.

The principal books of the bank were: A general ledger, showing generally the accounts of the bank, including the ac-

count in totals of the deposits made and checked out daily; a cash book, giving each day's business; a daily balance book, which was a summary of the general ledger; these three books were kept by Schardt; and an individual ledger, which showed in detail the deposit account of each individual depositor, and was kept by a clerk, who had no other duties, and was known as individual bookkeeper. The aggregate of the amounts due each depositor shown on the individual ledger and the totals due depositors on the general ledger and daily balance book should have agreed, but this they did not do because, after the latter part of 1890, the general ledger and daily balance book did not correctly show the amount due to all depositors, although the individual ledger correctly gave the amount due to each depositor. Up to the latter part of 1890 trial balances were taken from the individual ledger every two weeks, or once a month, and entered in a trial balance book, and these balances were compared with the balances on the general ledger and any differences settled and corrected, but at that time Schardt told the individual bookkeeper that it was not necessary to take off trial balances any longer, and thereafter none were taken off. Schardt, as teller, abstracted the funds of the bank and understated on the general ledger the amount due to depositors by the amount he abstracted. The difference in the balances represented the shortage at the respective dates. The individual and general ledger were out of balance January 16, 1891, $2098; January 1, 1892, $19,600, and January 1, 1893, $69,700.

The leading expert accountant testified that he was employed to examine the books on April 15, 1893, and went to the bank on the morning of that day between eight and eight thirty o'clock, and that by four o'clock that afternoon he had discovered that while the daily balance book kept by Schardt showed less than $18,000 due depositors, the individual ledger from "A" to "L," (leaving "M" to "Z" to be examined) showed an indebtedness due depositors of in the neighborhood of $55,000. He reported at once that something was radically wrong; although it required considerable time subsequently to ascertain the exact condition of the bank.

Quarterly examinations of the bank's condition were made

by the finance committee, but the individual bookkeeper was not requested to furnish the total amount shown on the individual ledger to be due depositors. The committee "examined no book except the daily balance sheet, with which we compared the reports as made out by Schardt." "Q. In what way could you tell that the amounts reported by Schardt were correct? A. We only had his word for it and the reports that he made to us and the exhibit on the daily balance book." "Q. In what way did you verify the statement on the book kept by Schardt which would have shown and purported to show the amount due individual depositors? A. We made no verification of it only in the manner in which I have stated. Q. Have you stated any manner in which you verified this particular account? A. We took his word for it, which we had to do or go into an examination of all the books."

Schardt also abstracted proceeds of notes paid to him as teller. This shortage was not concealed on the books. The amount of notes in the bank did not equal the amount called for by the books by the amount abstracted.

January 1, 1892, the books showed a defalcation of $28,169.34, of which $19,600 was abstracted deposits and $3765.44 proceeds of notes collected and not accounted for. January 1, 1893, the books showed a defalcation of $78,819.24, of which $69,700 was abstracted deposits and $4015.44 proceeds of notes collected.

The following evidence was also introduced:

Charles Sykes, who was the cashier of the bank from January, 1890, to January, 1893, testified:

"Q. 6. Did you at any time during that year receive information that John Schardt was speculating; if so, state when, how and all the circumstances? A. Yes, sir; I did receive such information. Some time in the summer or fall of 1892 a gentleman by the name of Kyle came here from New York, representing Myers & Co., of New York. Kyle wanted me to become interested in the brokerage business and represent Myers & Co. at this point. I told him that I did not like the idea because it would be purely a speculative business, and he

then said that that made no difference; that John Schardt, our teller, was a part owner in a similar concern.

"Q. 7. Did you impart this knowledge to any one; if so, whom? A. Yes, sir; I once told Mr. L. T. Baxter, the president of the bank, of the conversation.

"Q. 8. Did you say anything to Schardt about the matter? A. Yes, sir; on the next day, I think I told Mr. Schardt of of what Kyle had said.

"Q. 9. What did Schardt say to you in reply? A. He admitted that he had at one time been interested in such a concern, but had sold his interest; and that he had speculated to some extent, but had made money on every transaction, and had seen the error of his way, and had ceased to do so any more.

"Q. 10. Did you impart this information received from Schardt to any one connected with the bank, if so, whom? A. Yes, sir; I immediately told Mr. Baxter, the president of the bank, what Schardt had said.

"Q. 11. Did you receive any other information at any other time with reference to Schardt's speculating? A. Yes, sir; some time thereafter I received an anonymous letter telling me that Schardt had been speculating.

"Q. 12. What did you do with it and what became of it? A. I showed it to Mr. L. T. Baxter, the president, and he said not to pay any attention to an anonymous letter, and I spoke to Schardt about it, and he said he thought he knew the author, and asked me to let him have the letter, and he would bring the party before me and make him acknowledge it was false.

"Q. 13. Did you give him the letter and did he bring the party before you? A. I gave him the letter, and asked him about it more than once, and he always replied that he was working on it.

"Q. 14. Did you tell Mr. Baxter of this conversation? A. I think I did."

On cross examination the witness said there was litigation pending between him and the bank's assignee; that he signed several applications for the renewal of Schardt's bond as teller,

relying on the fact that the finance committee said his accounts were correct; that he did not remember that he recommended Schardt as his successor to Porter or Duncan, though he might have, and if Mr. Porter said that he did, he supposed he did. Mr. Porter testified that he asked Sykes about Schardt's ability; "there was no question as to his integrity."

J. M. Eatherly testified that he had been a director of the bank from its organization until its assignment; a member of the finance committee for several years prior to being elected president, and president from March 28 to April 17, 1893.

In answer to questions from complainant's counsel in respect of an interview with Schardt on the evening of April 15, 1893, he said:

"I told him that we had come out for the purpose of getting an explanation as to the discrepancies mentioned above. I told him we had found errors in his books. He said, 'Mr. Eatherly, my books are correct.' I told him that I did not see how he could reconcile the two things that we had found the daily balance sheet showing something less than $18,000 due depositors, while the individual ledger, as far as had been examined by Mr. McEwan and Mr. Richardson, showed about $55,000 due depositors. He reiterated that his books were absolutely correct. I said, 'John, I cannot understand it that way.' I was satisfied there was an error somewhere. I asked Mr. Richardson if he wanted to ask him any question. He was silent a moment or two, and said, 'I don't know that I do.' He then turned to Mr. Schardt, and said: 'John, I am bound to say to you that you are a defaulter.' Mr. Schardt broke out into a cry, putting his hands over his face, and said: 'My God! it is true—too true.' I said: 'John, compose yourself; we have come here for facts and want facts.' I then asked him how much was his default and he said about $40,000. I told him if the other individual ledger showed the same proportion of discrepancy that this one did, that he was a defaulter to a much larger amount—I would say to not less than $60,000 or $70,000. He said, 'Mr. Eatherly, you are mistaken. It cannot be that much.' I then asked him how he had lost it, and he said, 'Speculating in New York, and you can get it all back.' He said,

'you' meaning the bank. I said, 'No, John, we can do no such thing; the laws of New York legalize this sort of trading, and we cannot recover it in that way.'"

On cross examination he testified:

"Q. 98. Did you ever hear of Schardt's speculating before January, 1893? A. I think I did.

"Q. 99. Did you see the anonymous letter written with respect to his speculating? A. I saw a letter directed to Judge John Woodward. Judge Woodward brought that letter to the bank and showed it to me, and I asked permission to call Mr. Schardt up and show it to him, and he said that he was perfectly willing that I should do so. I at once called Mr. Schardt to where we were and told him there was a communication I wanted him to read. He did so, and his remarks were: 'It is a lie and I can prove it.' In this letter it was stated that Mr. Schardt was a partner in a bucket shop. I told Mr. Schardt that it devolved on him to prove it false. I at once reported the contents of this letter to the president of the bank, Mr. Baxter. Mr. Schardt asked that I and Judge Woodward remain there for a few minutes. He went out and got Frank Searight and Dr. Barry. Judge Woodward, Mr. Baxter and myself went into the rear of the bank building. Mr. Schardt and the other gentlemen came back, and Mr. Schardt says: 'Here are men who can tell you whether that is so or not.' I asked them if they knew why we had sent for them, and they said that Mr. Schardt had told them. Mr. Searight said some time before that Mr. Schardt, Dr. Barry and himself had agreed to open a brokerage association. They objected very much to the term bucket shop. Each one was to put in a small amount — $200, I think. Mr. Schardt, in a short time, became dissatisfied and sold his interest to Frank Searight at a small loss. Subsequent to that I went to Mr. Schardt's house to see him, having heard again that he was speculating. I told him what I had heard and he said it was not so, that he did not own any stocks at all. I told him if he was he ought to quit that or quit the bank, and he said he had sold everything he had. I again heard that he was speculating, but from sources that I did not attach any importance to, as it all emanated from the same source as

the anonymous letter. I again approached him and he denied it.

"Q. 100. Was this just prior to the resignation of Judge Woodward as a member of the board? A. I think it was.

"Q. 101. Do you know when he resigned? A. His resignation bears date Feb. 17, 1893. Was placed before the board of directors and accepted March 25, 1893.

"Q. 102. Did Mr. Baxter, the president, ever say anything to you about Schardt speculating? A. I don't think he ever did."

The general agent of the company at Nashville testified that Schardt's bond as cashier was cancelled through him on April 15, he having ascertained that Schardt had been speculating in futures; that he had not heard of any defalcation or wrongdoing on the part of any employé of the bank other than this; and that the company did not bond persons holding a fiduciary position, who speculated in futures, as they had found from experience that the risk was not safe.

There was evidence that Schardt had borne a good reputation for honesty, integrity and industry; and of experts that, without trial balances from the individual ledger, the true condition of the bank could not be known; and that to verify accounts meant to apply some other test than the statements of those who kept them.

Mr. William L. Granbery for petitioner.

Mr. Edward H. East for respondent.

Mr. Chief Justice Fuller, after stating the case as above, delivered the opinion of the court.

The teller's bond, as originally given, expired January, 1889, and was renewed from year to year. Before each renewal, the bank was informed by the company that it was necessary that a certain certificate by the president or cashier should be furnished, which was done, and stated, among other things, that the accounts of the teller had been examined and verified by the finance committee of the bank. The bond provided that it

was issued and renewed "on the express understanding that the employé has not within the knowledge of the said employer at any former period either in this or other employment been guilty of any default or serious dereliction of duty;" "that the employer shall observe, or cause to be observed, all due and customary supervision over the said employé for the prevention of default;" and that there shall be "an inspection or audit of the accounts or books of the employé on behalf of the employer at least once in every twelve months from the date of this bond."

The company, not unnaturally, contends that as when the bond was renewed in January, 1892, the bank's books showed that the employé was a defaulter in the sum of $19,600 understated liabilities, and of $3765.44 abstracted from bills receivable, both of which could have been detected by the taking of a trial balance as is customary, or a mere comparison between the books kept by Schardt and the individual ledger, and a correct footing of the notes, the bank had not only not complied with its engagements above referred to, and falsely certified to a verification which in fact had not been had, but was guilty of such laches as in itself to defeat a recovery.

These are matters which, while not controlling our decision, should be considered in connection with that aspect of the case which we regard as decisive.

In addition to the provisions already mentioned, it was agreed "that the employer shall at once notify the company, on his becoming aware of the said employé being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits."

The legislation of Tennessee and the decisions of its courts placed dealing in futures, when either party did not contemplate delivery, in the category of gambling, and aimed to suppress it. *Allen* v. *Dunham*, 92 Tenn. 257; *McGrew* v. *City Produce Exchange*, 85 Tenn. 572; *Palmer* v. *State*, 88 Tenn. 553; act of March 30, 1883, Acts 1883, c. 251, 331.

The evidence showed that in the summer or fall of 1892 the cashier of the bank was told that the teller was part owner in a concern engaged in speculative business; he at once informed

the president of the bank; and also called Schardt's attention to the matter, who admitted that he had once been engaged in such a concern, but said he had sold out, and also that he had speculated to some extent, but had ceased to do so. The cashier further testified that he afterwards received an anonymous letter that Schardt was speculating, and showed it to the president; that he spoke to Schardt about it; that the latter said he thought he knew the author, and asked for the letter, that he might bring the party before the cashier and make him acknowledge that it was false. The letter was given him but nothing came of it, although he was asked about it more than once. This conversation was reported to the president. A leading director and a member of the finance committee was shown by another director an anonymous letter to him, to the same effect, which was reported to the president. The letter stated that Schardt was in partnership in a bucket shop. Schardt said it was a lie, and brought his partners before the president and the two directors, and they said that they had opened a brokerage association with Schardt, but that Schardt had sold out. This director subsequently heard again that Schardt was speculating and went to Schardt's house and interviewed him, and he said he did not own any stocks at all, he had sold everything he had. He heard this again shortly after the cashier's bond was given, and Schardt again denied it. Complainant did not put the president of the bank on the stand.

In these circumstances was it the duty of the bank to notify the company of what it had heard?

In *American Surety Company* v. *Pauly*, 170 U. S. 133, 144, which was an action against the maker of a bond given to insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, the applicable rule was thus laid down:

"If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attor-

neys, officers or agents of the surety company. This is a well established rule in the law of insurance. . . . As said by Lord St. Leonards in *Anderson* v. *Fitzgerald*, 4 H. L. Cas. * 484, * 507, 'it [a life policy] is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank."

But this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon.

Whatever the common law duty on the part of the employer to notify the guarantor of the fraud or dishonesty of the employé, whose fidelity is guaranteed, the parties to this contract undertook to declare the duty of the bank to the company in certain specified particulars. It required that the employé should not have been guilty of previous default or dereliction *within the knowledge* of the employer. It provided for notification of any act of the employé which might involve a loss without unreasonable delay after the occurrence of the act came *to the knowledge* of the employer. And it required immediate notification on the employer *becoming aware* of the employé being engaged in speculation or gambling. The words, "becoming aware," were manifestly used as expressive of a different meaning from having "knowledge."

In *Pauly's* case, where the bond required that the company should be notified in writing "of any act on the part of the employé, which may involve a loss for which the company is

responsible hereunder, as soon as practicable after the occurrence of such act may have come to the knowledge of the employer," it was ruled that it had been properly held "that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty."

But the bond before us not only contained that clause but the clause under consideration, which was a different and additional clause intended to secure the safety of prevention through timely warning.

It seems to us that the obvious meaning of "becoming aware," as used in this bond, is "to be informed of," or, "to be apprised of," or, "to be put on one's guard in respect to," and that no other meaning is equally admissible under the terms of the instrument. These are the definitions of the lexicographers, distinctly deducible from the derivation of the word "aware," and that is the sense in which they are here employed. It is used in the same sense in the cashier's certificate on the renewals of the teller's bond.

To be aware is not the same as to have knowledge. The bond itself distinguishes between the two phrases and uses them as not synonymous with each other. And, in view of the plain object of the clause, we cannot regard the words equivalent to "becoming satisfied," though perhaps they may be to "having reason to believe." Even then these facts would have demanded investigation or notification, for we think the bank cannot be heard to say it did not have reason to believe that Schardt was speculating when it took his professions of repentance as sufficient assurance that he had ceased speculating, and turned its back on any independent inquiry or investigation. Our understanding of the provision is that what the company stipulated for was prompt notification of information by the bank in regard to speculation or gambling on the part of the employé. It was entitled to exercise its own judgment on that information and had not agreed to rely on the bank's belief in that regard. It had the right to investigate for itself whether

the bank did so or not. Notification of the existence of reason for inquiry was exactly what the clause was intended to secure. The bank neither investigated nor gave the company notice of the information it had, and substituted its own judgment as to the value of that information for that of the company. In our view this conduct on its part amounted to a breach of the stipulation.

The Circuit Judge in his opinion said: "The language of the bond is that the employer shall report 'on his becoming aware of the employé being engaged in speculation.' Without now stopping to consider at length the meaning of the terms here used, I am of opinion that, in the absence of fraud or bad faith, the failure to disclose the result of the inquiry made in this instance did not invalidate the bond as to the surety. Certainly, speculation in a reasonable and substantial sense is meant, such in length of time or magnitude as would make it serious. This, when brought to the attention of the bank officials, was a past event, and apparently in itself unimportant. The bank was under no duty by the contract or independently of it to actively institute or prosecute inquiries about Schardt, or to run down loose rumors or anonymous letters." 68 Fed. Rep. 459, 465.

The Circuit Court of Appeals said: "There is not the least evidence of any bad faith on the part of any of these officers of the bank, including Sykes, the old cashier, in not making a disclosure of what was known, but only of bad judgment in not being more considerably affected by their information." 47 U. S. App. 115.

The quotations show that the Circuit Court of Appeals and the Circuit Court concurred in the opinion that if the president and directors had such confidence in Schardt that they did not feel called upon to make any investigation in view of the information that they had received, or to notify the company of that information, and were not guilty of intentional bad faith, then the bank could not be held to have violated the stipulations of the bond on its part.

As will have been seen, we are unable to accept this conclusion. The company's defence did not rest on the duty of diligence growing out of the relation of the parties, but on the

breach of one of the stipulations entered into between them. The question was not merely whether the conduct of the bank was contrary to the nature of the contract, but whether it was not contrary to its terms. Engagement in speculation or gambling was what the company sought to guard against because experience had admonished it of the probability that speculation or gambling would lead to acts involving loss for which it would be responsible. Bad faith in the view of the courts below would not exist if the bank had such confidence in Schardt's integrity that it accepted his bare statement that he was not speculating as overcoming the weight of his admission that he had been. How anything but such a denial could be expected it is not easy to see, nor how careful and prudent men could have been justified in omitting independent inquiry.

The truth is that in spite of strict supervision and the pursuit of the best systems of keeping accounts, there is always a risk of defalcation. The prevention of defaults or their detection at the earliest possible moment are of even more vital importance to financial institutions than to the guarantors of the fidelity of their employés. The provisions intended to protect the company in this case were not in themselves unreasonable and so far as they operated to compel the bank to exercise due supervision and examination, and due vigilance, were consistent with sound public policy. We think it was the duty of this bank to have made prompt investigation, or at all events to have notified the company at once of the information that it had, and we decline to hold that the bank's misplaced confidence in Schardt affords sufficient ground for enforcing the liability of the surety company on the theory of good faith.

Our conclusion is that the failure of the bank in the particulars adverted to defeats a recovery on the teller's bond for defalcation after information of Schardt being engaged in speculation was received.

It also results that there can be no recovery at all on the cashier's bond. If the bank had observed the stipulation in the teller's bond to which we have referred, it is obvious that

there would have been no cashier's bond, and the question would not have arisen. But this it did not do, and the bond was given. The bond provided that the company covenanted with the bank in reliance on the statement and declaration of the president on behalf of the bank, and on the bank's strict observance of the contract; that any misstatement of a material fact in the declaration should invalidate the bond; that the bank should use "all due and customary diligence in the supervision of said employé for the prevention of default;" "that any written answers or statements made by or on behalf of said employer in regard to or in connection with the conduct, duties, accounts or methods of supervision of the said employé delivered to the company either prior to the issue of this bond, or to any renewal thereof, or at any time during its currency, shall be held to be a warranty thereof, and form a basis of this guarantee, or of its continuance."

Two of the questions and answers in the declaration were as follows:

"Q. Have you known or heard anything unfavorable as to his habits or associations, past or present? A. No.

"Q. Or of any matters concerning him about which you deem it advisable for the company to make inquiry? A. No."

In *Pauly's Case*, the president and the cashier were confederates in the dishonesty of the cashier, for the purpose of defrauding the bank; and also it was held no part of the duties of the president under the circumstances there disclosed to certify to the integrity of the cashier as he did. In this case the dishonesty was that of the cashier alone; the statements were required to be and were made on behalf of the bank, and the president acted for the bank in so doing; and the bonds were procured by the bank, and the bank paid the premiums. There can be no doubt that the bank was responsible for the representations of its cashier in the one instance and its president in the other in procuring these contracts of indemnity. The representations made in the declaration on which the cashier's bond was issued were clearly misrepresentations. The teller's bond required notification if the bank were informed of speculation on Schardt's part. The president had heard of such speculation,

and knew that speculating was something unfavorable as to Schardt's habits; and the president of course knew that the matters concerning him, of which he had heard, were such as it was advisable for the company to make inquiry about. True, the second question was if he had heard of matters about which he deemed it advisable for the company to inquire and the word "deem" might be said to give a considerable discretion, but it was not a discretion to be abused. That the company would consider it advisable to make inquiry is too plain for argument. The whole tenor of the bond renders any other conclusion impossible.

We cannot regard the representations of the president as consistent with good faith, and he was not even called as a witness by the bank to explain his conduct, if he could have done so.

The decrees of both courts are reversed, and the cause remanded to the Circuit Court for further proceedings consistent with this opinion.

TUCKER *v.* ALEXANDROFF.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 303. Argued November 15, 18, 1901.—Decided January 6, 1902.

Alexandroff, a conscript in the Russian naval service, was sent as one of a detail of fifty-three men to Philadelphia, to become a part of the crew of a Russian cruiser then under construction at that port. On his arrival at Philadelphia, the vessel was still upon the stocks, but was shortly thereafter launched, and continued for some months in the water still under construction. Alexandroff, who had remained during the winter at Philadelphia in the service and under the pay of the Russian Government, deserted the following spring, went to New York, renounced his allegiance to the Emperor, declared his intention of becoming a citizen of the United States, and obtained employment. Shortly thereafter, he was arrested as a deserter from a Russian ship of war, and committed to prison, subject to the orders of the Russian Vice Consul or commander of the cruiser. On writ of *habeas corpus*, it was *held:*

Statement of the Case.

(1) That although the cruiser was not a ship when Alexandroff arrived at Philadelphia, she became such upon being launched;
(2) That, under the treaty with Russia of 1832, in virtue of which these proceedings were taken, she was a ship of war as distinguished from a merchant vessel, notwithstanding she had not received her equipment or armament, and was still unfinished;
(3) That, under her contract of construction, she was from the beginning, and continued to be, the property of the Russian Government, and was, therefore, a Russian ship of war, notwithstanding she had not received her crew on board, nor been commissioned for active service, and was still in process of completion;
(4) That Alexandroff, having been detailed to her service, was, from the time she became a ship, a part of her crew within the meaning of the treaty;
(5) That the exhibition of official documents, showing that he was a member of her crew, had been waived by his admissions.

While desertion is not a crime provided for in our ordinary extradition treaties with foreign nations, the arrest and return to their ships of deserting seamen is required by our treaty with Russia and by other treaties with foreign nations. Query: Whether in the absence of a treaty, courts have power to order the arrest and return of seamen deserting from foreign ships?

While foreign troops entering or passing through our territory with the permission of the Executive are exempt from territorial jurisdiction, it is doubtful whether in the absence of a treaty or positive legislation to that effect, there is any power to apprehend or return deserters.

The treaty with Russia containing a convention upon that subject, such convention is the only basis upon which the Russian Government can lay a claim for the arrest of deserting seamen. The power contained in the treaty cannot be enlarged upon principles of comity to embrace cases not contemplated by it.

A treaty is to be interpreted liberally and in such manner as to carry out its manifest purpose.

A ship becomes such when she is launched, and continues to be such so long as her identity is preserved: From the moment she takes the water, she becomes the subject of admiralty jurisdiction.

A seaman becomes one of the crew of a merchant vessel from the time he signs the shipping articles, and of a man of war from the time he is detailed to her service.

THIS was a writ of *habeas corpus* issued upon the petition of Alexandroff, to inquire into the cause of his detention by Robert C. Motherwell, keeper of the Philadelphia County Prison, and Captain Vladimir Behr, master of the Russian cruiser Variag.

The petition set forth that the petitioner was illegally de-

tained upon a commissioner's warrant, issued upon the affidavit of Captain Behr, to the effect that he was a duly engaged seaman of the Russian cruiser Variag, whose term of service had not expired; and that he had on or before April 25, 1900, deserted from said vessel, without any intention of returning thereto. Petitioner further averred that on May 24, 1900, he had declared his intention before the proper authorities to become a citizen of the United States, and to renounce his allegiance to the Emperor of Russia, of whom he was then a subject; that he had never deserted the Variag and had "never set his foot on that vessel as a seaman thereof."

In return to the writ the superintendent of the county prison produced the body of Alexandroff, with a copy of the commitment by a United States commissioner, stating that he had been "charged" on oath with desertion from the Variag, and "apprehended" upon a warrant issued by the commissioner at the request of the vice-consul, in accordance with the terms of a treaty between the United States and Russia. There was no statement that an examination had been had before the commissioner, and the warrant did not commit him for examination, but "subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag, or until he shall be discharged by the due course of law." The commitment is reproduced in full in the margin.[1]

---

[1] *Copy of Commitment.*

United States of America, } *sct.*
Eastern District of Pennsylvania, }

The President of the United States of America to the marshal of said district and to the keeper of the criminal apartment of the Philadelphia county prison at Moyamensing:

These are to command you, the said marshal, forthwith to deliver into the custody of the said keeper the body of Leo Alexandroff, charged on oath before Henry R. Edmunds, United States commissioner, with desertion from the Imperial Russian cruiser Variag, and apprehended upon my warrant issued at the request of the vice-consul of Russia at Philadelphia upon the complaint of the captain of said cruiser Variag in accordance with the terms of the treaty between the United States and Russia—with the act of Congress in such case made and provided.

And you, the said keeper of the said prison, are hereby required to receive the said Leo Alexandroff into your custody in the said prison and—

Upon a hearing upon the writ, the return thereto and the evidence, the District Court was of opinion, first, that the Variag was not, at the time the petitioner left the service, a Russian ship of war, but simply an unfinished vessel intended for a Russian cruiser; second, that petitioner had not become a member of her crew; that the vessel had no crew in the sense intended by the treaty, inasmuch as the men assigned to that duty had not yet begun that service and might never be called upon to perform it; third, that no such documentary evidence of petitioner's enlistment as a member of the crew, as was required by the treaty, had been offered.

It was accordingly ordered that the prisoner be discharged from custody. 103 Fed. Rep. 198.

An appeal was taken from this order to the Circuit Court of Appeals, in which court the district attorney entered his appearance and filed a suggestion that, under the facts of the case, the relator should be remanded to the county prison to await the order of Captain Behr, the master of the Variag.

Upon a hearing in the Court of Appeals, the order of the District Court was affirmed. 107 Fed. Rep. 137. Whereupon William R. Tucker, vice-consul of Russia at Philadelphia, applied for and was granted a writ of certiorari from this court.

Mr. John F. Lewis and *Mr. Paul Fuller* for Tucker. *Mr. F. R. Coudert, Jr.*, was on their brief.

Mr. Bernard Harris and *Mr. Isaac Hassler* for Alexandroff.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Upon the facts of this case, the District Court and Court of

---

the same safely keep him subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag, or until he shall be discharged by the due course of law.

Witness the hand and seal of the said commissioner at Philadelphia this first day of June, A. D. 1900, and in the 124th year of the Independence of the United States.

Copy.

[Seal.]

Henry R. Edmunds,
United States Commissioner.

Appeals were agreed in the opinion that neither under terms of the treaty of 1832 with Russia nor upon principles of international comity could the relator be delivered over to the master of the Variag as a deserter.

In committing him to the Philadelphia County Prison, the commissioner acted in pursuance of Rev. Stat. sec. 5280, which provides as follows: "SEC. 5280. On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any Circuit Court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination." The procedure is then set forth.

The facts were, in substance, that Alexandroff entered the Russian naval service as a conscript, in 1896, at the age of seventeen, and was assigned to the duties of an assistant physician. Some time in October, 1899, an officer and a detail of fifty-three men, among whom was Alexandroff, were sent from Russia to Philadelphia to take possession of and man the Variag, then under construction by the firm of Cramp & Sons, in that city. The Variag was still upon the stocks when the men arrived in Philadelphia. She was, however, launched in October or November, 1899, and at the time Alexandroff deserted was lying in the stream still under construction, not yet having been accepted by the Russian government. Alexandroff left Philadelphia without leave April 20, 1899, went to New York, and there renounced his allegiance to the Emperor of Russia, declaring his intentions of becoming a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed upon a mittimus stating that he had been charged with desertion from the Imperial Russian crusier Variag, upon the complaint of the

captain, in accordance with the terms of the treaty between the United States and Russia.

The vice-consul, who prosecutes this appeal on behalf of the Russian government, relies chiefly upon Art. IX of the treaty of December, 1832, which reads as follows (8 Stat. 444): "The said Consuls, Vice-Consuls and Commercial Agents are authorized to require the assistance of the local authorities, for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall in writing demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and, this reclamation being thus substantiated, the surrender shall not be refused." Sections VIII and IX of the treaty, which cover the whole subject of deserting seamen, are reproduced in the margin.[1]

---

[1] TREATY WITH RUSSIA, 1832.

Art. VIII.

The Consuls, Vice-Consuls and Commercial Agents shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order of the tranquility of the country or the said Consuls, Vice-Consuls or Commercial Agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country.

Art. IX.

The said Consuls, Vice-Consuls and Commercial Agents are authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by any other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused.

Such deserters, when arrested, shall be placed at the disposal of the said

While desertion is not a *crime* provided for by any of our numerous extradition treaties with foreign nations, the arrest and return to their ships of deserting seamen is no novelty either in treaties, legislation or general international jurisprudence. The ninth article of the treaty with the government of France, entered into November 14, 1788, before the adoption of the Constitution, contained a stipulation that "the Consuls and Vice-Consuls may cause to be arrested the captains, officers, mariners, sailors and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country," specifying the procedure. 8 Stat. 106, 112. The same provision was contained in subsequent treaties with France, of June 24, 1822, and February 23, 1853, and it was to carry these and similar treaties into effect that the act of 1829, reproduced in Rev. Stat. sec. 5280, was adopted. Similar conventions were entered into with Brazil in 1828, Mexico in 1831, Chili in 1832, Greece in 1837, Bolivia in 1858, Austria in 1870, Belgium in 1880, and at different times with some seventeen or eighteen other powers, and finally by a special treaty with Great Britain, ratified June 3, 1892. In short, it may be said that with the exception of China, the Argentine Republic, and possibly a few others, there is not a maritime nation in the world with which we have not entered into a convention for the arrest and delivery over of deserting seamen. The multitude of these conventions is such as to indicate a pressing necessity that masters of vessels should have some recourse to local laws to prevent their being entirely stripped of their crews in foreign ports.

A like provision for the arrest and delivery over of seamen deserting from domestic vessels, adopted by the first Congress

---

Consuls, Vice-Consuls or Commercial Agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessels to which they belong, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever. But if not sent back within four months from the day of their arrest, they shall be set at liberty, and shall not be again arrested for the same cause.

in 1790, 1 Stat. 131, 134, was sustained by this court in *Robertson* v. *Baldwin*, 165 U. S. 275, and remained upon the statute books for over a hundred years, when it was finally repealed in 1898. 30 Stat. 755, 764.

We are cited to no case holding that courts have the power, in the absence of treaty stipulations, to order the arrest and return of seamen deserting from foreign ships; and it would appear there was no such power in this country, inasmuch as sec. 5280, under which the commissioner is bound to proceed, limits his jurisdiction to applications by a consul or vice-consul of a foreign government "*having a treaty with the United States*" for that purpose.

In Moore on Extradition, (sec. 408,) it is laid down as a general proposition that, in the absence of a treaty, the surrender of deserting seamen cannot be granted by the authorities of the United States; and an opinion of Attorney General Cushing, (6 Op. 148,) is cited upon that point. There is also another to the same effect. (6 Op. 209.) It is believed that in all the instances which arose between the United States and Great Britain prior to the treaty of 1892 for the reclamation of deserting seamen, both powers have taken the position that in the absence of a treaty there can be no reclamation. Several instances of this kind are cited by Mr. Moore in his treatise.

In the case of the *United States* v. *Rauscher*, 119 U. S. 407, it was held that, apart from the provisions of treaties upon the subject, there was no well-defined obligation on the part of one country to deliver up fugitives from justice to another, "and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked, and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law."

The only case in our reports even indirectly considering such a case as one of international comity is that of *The Exchange*, 7 Cranch, 116. This was a libel for possession promoted by the former owners of the Exchange, who alleged that she had been seized under the orders of Napoleon and in violation of the law of nations; that no decree of condemnation had been pro-

nounced against her, but that she remained the property of the libellants.

The district attorney filed a suggestion to the effect that the vessel, whose name had been changed, belonged to the Emperor of the French, and while actually employed in his service was compelled, by stress of weather, to enter the port of Philadelphia for repairs; that if the vessel had ever belonged to the libellants, their title was divested according to the decrees and laws of France in such case provided. The District Judge dismissed the libel upon the ground that a public armed vessel of a foreign sovereign in amity with our government is not subject to the ordinary judicial tribunals of our country, so far as regards the question of title, by which such sovereign holds the vessel.

On appeal, this court, through Mr. Chief Justice Marshall, held that the decree of the District Court should be affirmed; that the "perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." He divided these cases into three classes:

1. The exemption of the person of the sovereign from arrest or detention in a foreign country.

2. The immunity which all civilized nations allow to foreign ministers.

3. Where the sovereign allows the troops of a foreign prince to pass through his dominions.

In respect to this last class he observed: "In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was

applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the goverment of his army may require."

In this connection he held that there was a distinction between a military force which could only enter a foreign territory by permission of the sovereign, and a public armed vessel, which upon principles of international comity is entitled to enter the ports of any foreign country with which her own country is at peace. He further observed: "If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain under the protection of the government of the place." It was upon this ground that the court held the Exchange exempt from seizure.

This case, however, only holds that the public armed vessels of a foreign nation may, upon principles of comity, enter our harbors with the presumed license of the government, and while there are exempt from the jurisdiction of the local courts; and, by parity of reasoning, that, if foreign troops are permitted to enter, or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction.

The case, however, is not authority for the proposition that, if the crews of such vessels, or the members of such military force, actually desert and scatter themselves through the country, their officers are, in the absence of treaty stipulation, authorized to call upon the local authorities for their reclamation. While we have no doubt that, under the case above cited, the foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter *dum fervet opus*, and to that extent this country waives its jurisdiction over the foreign crew or command, yet if a member of that crew actually escapes from the custody of his officers, he

commits no crime against the local government, and it is a grave question whether the local courts can be called upon to enforce what is in reality the law of a foreign sovereign. The principle of comity may imply the surrender of jurisdiction over a foreign force within our territory, but it does not necessarily imply the assumption by our courts of a new jurisdiction, invoked by a foreign power, for the arrest of persons who have committed no offence against our laws, and are perhaps seeking to become citizens of our country. Our attention has been called to no such case. But, however this may be, there can be no doubt that the commissioner, in exercising the powers vested in him by Rev. Stat. sec. 2580, is limited to the arrest of seamen belonging to a country with whom we have a treaty upon that subject.

Instances are by no means rare where foreign troops have been permitted to enter or cross our territory, although in September, 1790, General Washington, on the advice of Mr. Adams, did refuse to permit British troops to march through the territory of the United States from Detroit to the Mississippi, apparently for the reason that the object of such movement was an attack on New Orleans and the Spanish possessions on the Mississippi. The Government might well refuse the passage of foreign troops for the purpose of making an attack upon a power with which we were at peace.

In January, 1862, the Secretary of State gave permission to the British government to land a body of troops at Portland, and to transport them to Canada, the St. Lawrence being closed at that season of the year. The concession was the more significant from the fact that it occurred during our civil war, when our relations with Great Britain were considerably strained, and the object was evidently to strengthen the British garrisons in Canada.

In 1875, permission was granted to the Governor General of Canada to transport through the territory of the United States certain supplies for the use of the Canadian mounted police force.

In 1876, the President permitted Mexico to land in Texas a small body of her troops, supposed to be intended to aid in the

defence of Matamoras, with the proviso that the stay be not unnecessarily long, and that the Mexican government should be liable for any injury inflicted by these troops.

By a reciprocity of courtesy, permission was given in 1881 by the Governor General of Canada for the passage of a company of Buffalo militia, armed and equipped, over the Canada Southern Railway, from Buffalo to Detroit. These and other instances are collected by Dr. Wharton in his Digest of International Law, section 13.

Our attention is also called by counsel to the following instances:

At the Columbian celebration in 1893 marines from every foreign war vessel, except the Spanish, were allowed to land and did land and parade in the public streets of New York under the control of their various commanders.

On the occasion of the Dewey parade, a regiment of Canadian troops was given permission to come into the United States and join in the procession.

This permission was granted as in the present case by the Secretary of the Treasury.

At the Buffalo Exposition, but recently closed, Mexican troops were allowed to go through the United States and be present at Buffalo, and remain there during the exposition.

In none of these cases, however, did a question arise with respect to the immunity of foreign troops from the territorial jurisdiction, or the power of their officers over them, or the right of the latter to call upon the local officers for the arrest of deserters. While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters in the absence of positive legislation to that effect.

If the arrest of Alexandroff were wholly without authority of law, we should not feel it our duty to detain him and deliver him up to the custody of Captain Behr, notwithstanding we

might be of opinion that he had unlawfully escaped from his custody. If Captain Behr by the escape of Alexandroff lost the right to call upon the local authorities for his arrest and surrender, he acquired no new right in that particular by the fact that he was illegally arrested and is still in custody. His detention upon the ground of comity could only be justified by the fact that his original arrest was legal, although if his arrest were authorized by law, the fact that such arrest was irregular might be condoned.

But whatever view might be taken of the question of delivering over foreign seamen in the absence of a treaty, we are of opinion that the treaty with Russia, having contained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge those powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. *Ex parte McCardle*, 7 Wall. 506; Endlich on Stats. secs. 397, 400. As observed by Lord Denham in *Aspdin* v. *Austin*, 5 Ad. & El. (N. S.) 671, 684, "where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." The rule is curtly stated in the familiar legal maxim, *expressio unius est exclusio alterius*. In several recent cases in this court we have held that, where a statute gives a certain remedy for usurious interest paid, that remedy is exclusive, although in the absence of such a remedy the defence might be made by way of set off or credit upon the original demand. *Barnet* v. *National Bank*, 98 U. S. 555; *Driesbach* v. *National Bank*, 104 U. S. 52; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; *Haseltine* v. *Central National Bank*,

ante, 130.) See also *King* v. *Sedgley*, 2 Barn. Ad. 65; *Hare* v. *Horton*, 5 Ibid. 715; *Stafford* v. *Ingersoll*, 3 Hill, 38.

We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. Taylor on International Law, sec. 383. As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries (vol. 1, p. 174): "Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."

What, then, are the stipulations to which we must look for the solution of the question involved in this case? They are found in the ninth article of the treaty, which authorizes the arrest and surrender of "deserters from the ships of war and merchant vessels of their country." It is insisted, however, that this article is no proper foundation for the arrest of Alexandroff for three reasons: First, that the Variag was not a Russian ship of war; second, that Alexandroff was not a deserter from such ship; and, third, that his membership of such crew was not proven by the exhibition of registers of vessels, the rolls of the crew, or by other official documents. The case depends upon the answers to these questions.

1. At the time Alexandroff arrived in Philadelphia, the Variag was still upon the stocks. Whatever be the proper construction

of the word under the treaty, she was not then a *ship* in the ordinary sense of the term, but shortly thereafter and long before Alexandroff deserted, she was launched, and thereby became a ship in its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. *The China*, 7 Wall. 53; *Thorp* v. *Hammond*, 12 Wall. 408; *Workman* v. *New York City*, 179 U. S. 552; *The Little Charles*, 1 Brock. 347, 354; *The John G. Stevens*, 170 U. S. 113, 120; *Homer Ramsdell Co.* v. *Comp. Gen. Trans.*, 182 U. S. 406. She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a *quasi* bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale. We have had frequent occasion to notice the distinction between a vessel before and after she is launched. In *The Jefferson*, *People's Ferry Company* v. *Beers*, 20 How. 393, it was held that the admiralty jurisdiction did not extend to cases where a lien was claimed for work done and materials used in the construction of a vessel; while the cases holding that for repairs or alterations, supplies or materials, furnished after she is launched, suit may be brought in a court of admiralty, are too numerous for citation.

So sharply is the line drawn between a vessel upon the stocks and a vessel in the water, that the former can never be made liable in admiralty, either *in rem* against herself or *in personam* against her owners, upon contracts or for torts, while if, in taking

the water during the process of launching, she escapes from the control of those about her, shoots across the stream and injures another vessel, she is liable to a suit *in rem* for damages. *The Blenheim*, 2 W. Rob. 421; *The Vianna*, Swab. 405; *The Andalusian*, 2 P. D. 231; *The Glengarry*, 2 P. D. 235; *The George Roper*, 8 P. D. 119; *Baker* v. *Power*, 14 Fed. Rep. 483.

Inasmuch as the Variag had been launched and was lying in the stream at the time of Alexandroff's desertion, we think she was a ship within the meaning of the treaty.

It requires no argument to show that if she were a ship of any description, she was a ship of war as distinguished from a merchant vessel. Article IX of the treaty embraces deserters from both classes of vessels. She was clearly not a merchant vessel, and as clearly intended to be and was a ship of war, notwithstanding she had not received her armament. The contract with the Cramps under which she was built was entered into by the Russian Ministry of Marine, and provided for the construction by them for the Russian Imperial Government of "a protected cruiser, built, equipped, armed and fitted," etc. The appearance of a modern ship of war, too, is so wholly distinct from that of a merchant vessel, that there could be no possibility of mistaking one for the other.

We are also of opinion that she was a Russian ship of war within the meaning of the treaty. The contract under which she was built not only provided that she was to be built for the Imperial Russian Government, but should be constantly, during the continuance of the contract, inspected by a board of inspection appointed by the Russian Ministry of Marine, who should have full liberty to enter the premises of the contractors for such purpose; and that speed trials should be made by the contractors in the presence of such board of inspection. The tenth article of the contract reads as follows:

"Art. 10. The contractors agree, that the vessel to be built, as aforesaid, whether finished or unfinished, and all steel, iron, timber and other materials as may be required by the contractors, and be intended for the construction of the said ship, and

which may be brought upon the premises of the contractors, shall immediately thereupon become, and be, the exclusive property of the Russian Ministry of Marine. The flag of the Imperial Russian Government shall be hoisted on the said ship, whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian Ministry of Marine may at any time appoint an officer or officers to take actual possession of the said ship or materials, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid."

Such being her *status* with respect to her title and employment, can it be doubted that, if the contractors had seen fit to institute proceedings under the mechanics' lien law of the State for labor and materials furnished in her construction, or if a materialman had filed a libel in admiralty against her for coal furnished in testing her engines, or if upon her trial trip she had negligently come into collision with another vessel whose owner had instituted a suit against her, the Emperor of Russia might have claimed for her an immunity from local jurisdiction upon the ground that she was the property of a foreign sovereign? In making this defence it would necessarily appear that she was a public vessel; in other words, a ship of war, and upon that ground immune from suit or prosecution in the local courts. In the case of *The Constitution*, 4 P. D. 39, an historical and venerable frigate of the United States, while returning home from the Paris Exposition with a cargo of American exhibits belonging to private parties, was stranded on the south coast of England and received salvage services from an English tug. It was held by the English Court of Admiralty that no warrant for her arrest could issue, either in respect of ship or cargo. In *The Parlement Belge*, 4 P. D. 129, a vessel belonging to the King of the Belgians, manned by officers and men commissioned and paid by him, and regularly employed for the purposes of carrying mails, passengers and cargo, was held by the British Court of Admiralty not to be entitled to the privileges of a man-of-war as to extraterritoriality, and that she was liable to proceedings *in rem* at the suit of the owner of a vessel injured by her in collision. The decision, however, was re-

versed by the Court of Appeals, upon the ground that the exercise of such jurisdiction was incompatible with the absolute independence of the sovereign of every superior authority, and that the property as well as the person of the sovereign was exempt from suit. This general question is too well settled to admit of doubt.

It is true there was a provision that the Variag might be rejected either for deficient speed or for excessive draft, and that she should be during her construction at the risk of the contractors, until she had been actually accepted by the Imperial Russian Government, or they had taken actual possession of her. This, however, did not prevent the property passing to the Russian Government as stipulated by article X of the contract, though with a provision for an ultimate rescission. True, the Russian flag had never been hoisted upon the vessel, but that was immaterial, as the government had not finally accepted or taken possession of her.

Mr. Hall, in his treatise upon International Law, discussing foreign ships as non-territorial property of a State, (section 44,) says that the commission under which a commander acts is conclusive of the public character of a vessel, although such character is usually evidenced by the flag and pendant which she carries, and, if necessary, by firing a gun. "When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimateness of her claim, the statement of the commander on his word of honor that the vessel is public is often accepted, but the admission of such statements as proof is a matter of courtesy," and "though attestation by a government that a ship belongs to it is final, it does not follow that denial of public character is equally final; assumption and repudiation of responsibility stand upon a different footing." It is true he says that the immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed not being capable of separate use for these purposes, and consequently are not exempted from the local jurisdiction. But it is pertinent to notice here that he is speaking of immunities of public vessels from local juris-

diction, and not of the property of a foreign government in such vessels. See also Taylor on International Law, secs. 253, 254, 261. There can be no doubt that the Variag, in the condition in which she was at the time Alexandroff deserted, was a subject of local jurisdiction, and that if any crime had been committed on board of her, such crime would have been cognizable in the local courts, although it would have been otherwise had the Russian government taken possession, put a crew on board of her, and commissioned her for active service. This, however, does not touch the question whether she was not a ship of war within the letter and spirit of the treaty of 1832.

2. Was Alexandroff a deserter from a Russian ship of war within the meaning of the treaty, or was he merely a deserter from the Russian naval service, a fact which of itself would not be sufficient to authorize his arrest under article IX of the treaty? To be a deserter from a particular ship he must have been a member of the crew of such ship, and bound to remain in its service until discharged. It is earnestly insisted that, although he had been detailed to serve thereafter as a member of the crew of the Variag, her crew had never been organized as such, that the detail was merely preliminary to such organization, and that Alexandroff had never set foot upon the vessel. This argument necessarily presupposes that seamen do not become a "crew" until they have actually gone on board the vessel, and entered upon the performance of their duties. We cannot acquiesce in this position. The more reasonable view is that seamen become obligated to merchant vessels from the time they sign the shipping articles, and from that time they may incur the penalties of desertion.

So early as the marine ordinances of Louis XIV—the foundation of all maritime codes—the service of the seaman was treated as beginning from the moment when the contract for such service was entered into. By title three, article III, of this ordinance, "if a seaman leaves a master, without a discharge in writing, *before the voyage is begun*, he may be taken up and imprisoned wherever he can be found," etc. The present Commercial Code of France makes no express provision upon the subject, but by the general mercantile law of Germany, art. 532,

"The master can cause any seaman, who, *after having been engaged*, neglects to enter upon or continues to do his duties, to be forcibly compelled to perform the same." By the Dutch code, art. 402, "The master, or his representative, can call in the public force against those *who refuse to come on board*, who absent themselves from the ship without leave, and refuse to perform to the end of the service for which they were engaged."

The rule is the same in England. By section 243 of the Merchants' Shipping Act of 1854, (17 & 18 Vic. chap. 104,) whenever any seaman, *who has been lawfully engaged*, or any apprentice to the sea service, commits any of the following offences, he shall be liable to be punished summarily, as follows, (that is to say): 2. For *neglecting or refusing*, without reasonable cause, *to join his ship*, or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of the ship's sailing from any port, either at the commencement or during the progress of any voyage, . . . he shall be liable to imprisonment," etc. And by section 246, "Whenever, either at the commencement or during the progress of any voyage, any seaman or apprentice *neglects or refuses to join*, or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve, the master may call upon the local police officers or constables to apprehend him." These provisions have been substantially carried into the new Merchants' Shipping Act. 57 & 58 Vic. chap. 60, sec. 221.

Congress, however, has so often spoken upon this subject that we think it can hardly be open to doubt. By Rev. Stat. sec. 4522, as amended in 1898, (30 Stat. 755,) regulating seamen engaged in interstate commerce, there is a provision that "at the foot of every such contract to ship upon such a vessel . . . there shall be a memorandum in writing of the day and the hour when such seaman who shipped and subscribed shall render himself on board to begin the voyage agreed upon. If any seaman shall neglect *to render himself on board the vessel* for which he has shipped at the time mentioned in such memorandum," and if the master shall make a proper entry in the log book, "then every such seaman shall forfeit for every hour which he shall so neglect to render himself one half of one day's pay."

The rights of the seaman in this connection are protected by section 4527, which declares that "any seaman who has signed an agreement and who is afterwards *discharged before the commencement of the voyage* or before one month's wages are earned," shall be entitled to compensation. By section 4558, as amended, (30 Stat. 757,) if, after judgment, that such vessel is fit to proceed on her intended voyage, . . . the seamen, or either of them, *shall refuse to proceed on the voyage*, he shall forfeit any wages that may be due him. Section 4596 is largely a reproduction of the section above cited from the Merchants' Shipping Act, and provides that "whenever any seaman who has been lawfully engaged . . . commits any of the following offences he shall be punishable as follows: Second. For *neglecting or refusing*, without reasonable cause, *to join his vessel* or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of any voyage," he shall forfeit his wages. By section 4599, "whenever, either at the commencement of or during any voyage any seaman or apprentice *neglects or refuses to join*, or deserts from or refuses to proceed to sea in, any vessel in which he is duly engaged to serve," the master may [in accordance with the English practice] apply for the local assistance of police officers or constables for his arrest and detention. It is true this section has been repealed, together with all other provisions authorizing the arrest and surrender to the vessel of seamen of domestic vessels deserting in this country. But throughout all this legislation there is a recognition of the principle that the obligation of the seaman begins with the signing of the shipping articles, and that he is liable to the penalty of a forfeiture of his wages from that moment.

Upon these authorities we are of opinion that, as applied to merchant vessels, the crews are organized and the service of each sailor begins with the signing of the shipping articles, and that the lien of the seaman upon the ship for his wages, and reciprocally the lien of the ship upon the seaman for his services, where such lien still exists, dates from that time. The difficulty of securing a crew would be greatly enhanced if, after

signing the articles and perhaps drawing advance pay, seamen were at liberty to desert before rendering themselves on board.

The Variag being a ship of war, there was no signing of shipping articles, as required in the merchant service, since the seamen were enlisted or conscribed to serve where ordered. But there was a practical equivalent for the shipping articles in the detail of Alexandroff to this vessel. He entered the Russian naval service in 1896, and his term of service had not expired. He was, of course, subject to the orders of his officers, and was sent as a member of a force of one officer and fifty-three men ordered to take possession of the Variag as soon as she was completed. From the moment of such assignment and until relieved therefrom, he was as much bound to the service of the Variag, and a member of her crew, as if he had signed shipping articles. We express no opinion as to whether, if the Variag had not been launched when he deserted, he could be held as a member of her crew, but when she took the water and became a ship she was competent to receive a crew, and a detail to her service took effect. It will scarcely be disputed that, if the Variag had been in commission and this body of men had gone on board the vessel and rendered some slight service as seamen, and had subsequently gone ashore to remain until she was ready for her final departure from Philadelphia, they would be regarded as a component part of her crew; but this differs in form rather than in substance from what actually took place. The men were in Philadelphia in custody of Captain Behr, and ready to go on board at a moment's notice. They were as much subject to his orders as if they had remained on board the Variag; and as much so as if she had been a regularly commissioned vessel of the Russian Navy, which had put into Philadelphia for repairs and sent her crew ashore as the most convenient method of disposing of them while such repairs were being made.

We do not regard it as material that the Variag had not yet been commissioned as a member of the Russian Navy. The mere commissioning of a ship does not make her a ship of war, but merely indicates that she is assigned to active service. A merchant vessel, built for the purpose of trade and commerce,

is a merchant vessel, though she may not yet have received her register—a formality only necessary to entitle her to the privileges of an American vessel. To hold that the treaty applies only to commissioned vessels of war is to introduce into it a new element and to rob it of a valuable feature. Under the contract with the builders she was clearly Russian property, and while ownership is not always proof of nationality, since a vessel may be owned in one country and registered in another, where the facts are undisputed, and there was no pretence she was an American vessel, her Russian nationality follows as a matter of course. If she went out of commission and her armament were taken out of her for a temporary purpose, she would nevertheless be a ship of war of the Russian Navy. Being, as we have already held, a *ship*, she must be either a ship of war or merchant vessel, and as she was clearly not a merchant vessel, the only other alternative applies. The treaty should be liberally interpreted in this particular to carry out the intent of the parties, since if a foreign government may not send details of men to take possession of vessels built here, without danger of losing their entire command by desertion, we must either cease building them or foreign governments must send special ships of their own with crews ordered to take possession of them. It is true that possession of the Variag had not yet been delivered, but the title had passed, and the very fact that the Russian Government had detailed a crew to take possession of her indicated that it regarded her as a constituent part of the Russian Navy. It is unnecessary to consider whether, if the Variag had been rejected, her crew would have been *eo instanti* at liberty to leave the Russian service and acquire a citizenship here. That probably would have involved the other question, whether they could be treated as a military force entering this country with the permission of the Executive and remaining subject to the orders of their officers.

Holding, as we do, that the rights of the parties must be determined by the treaty, the manner in which this body of men entered the country does not seem to be material, so long as it appears that they were detailed as part of the crew of the Variag. If they were not here as a military force, which had

landed with the permission of the government, they were lawfully here as individual seamen directed to take possession of the Variag, and the purpose of their coming was of no moment to the authorities. It appears, however—and it is not improper to allude to it here—that, as the Variag approached her completion, the naval agent of the Russian Embassy to the United States addressed a letter to the Secretary of the Treasury, requesting that the necessary orders be given for allowing "admittance to the United States, through the port of New York, without examination, the detail of one officer and fifty-three regular sailors, Imperial Russian Navy, detailed to this country for the purpose of partly manning the cruiser," etc. In reply, the Acting Secretary of the Treasury issued instructions to the Commission of Immigration to admit the detail without examination for the purposes named, and to remit the usual head tax of one dollar.

3. The only remaining question is whether there was a compliance with article IX of the treaty, that the vice-consul "shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by any other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused." We have no doubt this provision is obligatory, and that the vice-consul must show either that it was complied with or that a compliance was waived. We are not informed by the record what evidence was laid before the commissioner upon this subject. Alexandroff himself, however, swears that he entered the naval service in 1896 as an assistant physician; that he arrived in the United States October 14, 1899; that he never asked to become a member of the crew, but was simply sent to the United States and lived with the crew of the Russian ship, received his equipment, support and wages; that he left the crew on April 20, 1900, went to New York, declared his intention to become a citizen, and obtained employment. On cross examination he stated that a subject is not required to sign any enlistment or anything of that kind, but is simply sent into the service. After the oral

testimony had been introduced, the Russian vice-consul, to further sustain his case, made the following offer:

"Mr. Adler: I also have here the Russian officer who accompanied these fifty-three sailors to this country, together with the other members of the crew, who has with him the passport issued by his government entitled these men to come here. I understand it is admitted by the other side that this defendant did come here as a portion of the crew of this cruiser, and the passport so states. If that is admitted, I presume it is not necessary to offer the passport in evidence. If your honor cares to have it, I will produce this officer with the passport and offer it. It merely shows that this defendant, with fifty-two other members of a company in the Russian Navy, were admitted to free passage here to become members of the crew of the cruiser Variag, and that he came here in pursuance of that passport accompanied by this officer.

"Mr. Hassler: I should object to the officer, not so much on account of what is in the passport, but my friend made a statement which I do not think is exactly accurate, as to what we stated. We stated this man came here with a company of men, but we do not state that he came here as part of the crew of the Variag.

"The Court: He came here as a member of the Russian Navy, ordered here to become one of the crew of the cruiser Variag, and he came for that express purpose.

"Mr. Hassler: We concede that."

There was here a clear waiver of the production of the passport and an admission that Alexandroff came to this country as a member of the Russian Navy, was ordered here to become one of the crew of the Variag, and came for that express purpose. Under such circumstances, it does not lie in the mouth of the relator to insist that no official documents were produced, since the passport and the admission accompanying its offer show that Alexandroff came here as a member of the proposed crew of the Variag, (and we have discussed the case upon that assumption)—the question being whether under those circumstances he ought to be treated as a deserter from a Russian ship of war.

We are of opinion that this case is within the treaty, and the judgments of both courts below are therefore reversed, and the case remanded to the District Court for the Eastern District of Pennsylvania for further proceedings consistent with this opinion.

MR. JUSTICE PECKHAM concurred in the opinion, but also thought that the men, among whom was the respondent, came into the country with the expressed permission of the Executive as a part of the Russian Navy and as members of the crew of the steamship awaiting completion as a man-of-war; and the Russian government was, therefore, upon the principle of comity, entitled to the aid of the Government of the United States to accomplish the arrest and detention of a deserter from the ranks of those men it had thus expressly authorized to come in.

MR. JUSTICE GRAY, with whom concurred MR. CHIEF JUSTICE FULLER and JUSTICES HARLAN and WHITE, dissenting.

The Chief Justice, Justices Harlan and White and myself are unable to concur in the opinion and judgment of the court. The case presents such an important question of international law as to make it fit that the grounds of our opinion should be stated. It is necessary to a proper determination of the case that its precise facts should be borne in mind, and they will therefore be here recapitulated.

This is a writ of certiorari, granted by this court on the application of William R. Tucker, the Russian Vice-Consul at Philadelphia, to review a judgment of the United States Circuit Court of Appeals for the Third Circuit on February 25, 1901, (107 Fed. Rep. 437,) affirming a judgment of the District Court for the Eastern District of Pennsylvania on July 12, 1900, (103 Fed. Rep. 198,) discharging on writ of *habeas corpus* Leo Alexandroff, held in custody under a warrant of commitment issued by a United States commissioner to Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, subject to the order of the Russian Vice-Consul at Philadelphia, or of the master of the Russian cruiser Variag, under section 5280 of the Revised Statutes, which is as follows:

"On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any Circuit Court, justice or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect."

The treaty of the United States with the Emperor of Russia of December 18, 1832, provides, in article 9, as follows:

"The said consuls, vice-consuls and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall in writing demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused. Such

deserters, when arrested, shall be placed at the disposal of the said consuls, vice-consuls or commercial agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessels to which they belonged, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever. But if not sent back within four months from the day of their arrest, they shall be set at liberty, and shall not be again arrested for the same cause. However, if the deserter should be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which his case shall be depending shall have pronounced its sentence, and such sentence shall have been carried into effect." 8 Stat. 448.

The warrant of commitment in this case was issued by the commissioner on June 1, 1900, on the application of the Vice-Consul of Russia at Philadelphia, upon the affidavit of Captain Vladimir Behr, stating that he was master of the Russian cruiser Variag, then in the port of Philadelphia, and that Alexandroff was a duly engaged seaman of that vessel, and on or before April 25, 1900, had deserted from her without any intention of returning.

The Variag was built under a contract in writing, dated April 23, 1898, between the William Cramp and Sons Ship and Engine Building Company of Philadelphia, Pennsylvania, and the Russian Ministry of Marine, by which the Cramp Company agreed to supply for the Imperial Russian Navy a protected crusier, built, equipped, armed and fitted, (except the ordnance and torpedo outfit,) subject to the approval of a board of inspectors appointed by the Russian Ministry of Marine. That contract contained the following provisions:

"ART. 8. Trials to determine the speed of the vessel shall be made by the contractors, in the presence of the board of inspection, and at the cost of the contractors, who agree to insure the vessel against sea risks and all other risks of every description during the trials, and until such time as the vessel is handed over to the exclusive possession and custody of the Russian Ministry of Marine." And if the mean speed should be less

than twenty-one knots per hour, or the actual draught of water in any part of the ship should exceed the contract draught by one foot, it should be optional with the Russian Ministry of Marine to reject the ship.

"ART. 10. The contractors agree that the vessel to be built as aforesaid, whether finished or unfinished, and all steel, iron, timber and other materials as may be required by the contractors, and be intended for the construction of the said ship, and which may be brought upon the premises of the contractors, shall immediately thereupon become and be the exclusive property of the Russian Ministry of Marine. The flag of the Imperial Russian Government shall be hoisted on the said ship, whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian Ministry of Marine may at any time appoint an officer or officers to take actual possession of the said ship or material, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid."

"ART. 12. The contractors shall insure and keep insured, against all risks usually insured against, the said vessel, its engines and all fittings and materials, at their own cost, but in the name of, and for the benefit of, the Russian Ministry of Marine, in fire insurance companies previously approved by the board of inspection, and in such an amount or amounts as shall be, from time to time, sufficient to cover and recoup to the Imperial Russian Government the sum or sums which said government, for the time being, may have paid, or become bound to pay, to the contractors in respect of such vessel." "Notwithstanding anything herein contained, the ship, together with its engines, machinery and equipment, shall, as between the contractors and the Russian Ministry of Marine, stand, and at all times be, at the risk of the contractors, until the said ship has been accepted by the Imperial Russian Government, or it has taken actual possession thereof."

"ART. 13. The contractors engage, at their own cost and risk, to launch and deliver the vessel safe and uninjured at Philadelphia, Pennsylvania, and equipped for sea, into the charge of the persons appointed by the Imperial Russian Gov-

ernment to receive it, in not more than twenty months after the arrival of the board of inspectors at Philadelphia."

By article 18, the Russian Ministry of Marine agreed to pay the price in ten equal instalments, withholding ten per cent of each instalment until final payment. The instalments were payable at successive periods, the last two being as follows: "9. Ten per cent when steam has been raised in the boilers and the engines turned over under their own steam. 10. Ten per cent when the ship has had a successful trial trip and has been turned over to the Imperial Russian Government, and simultaneously therewith there shall be paid to the contractors the ten per cent of each of the previous instalments which shall have been withheld as aforesaid."

Alexandroff entered the Russian Navy in 1896, at the age of seventeen, for the term of six years, and was an assistant physician. He was one of fifty-three members of the Russian Navy, sent out in a passenger steamship (not a Russian) by the Russian Government, under command of an officer, for the purpose of becoming part of the crew of the cruiser Variag; and arrived in this country October 14, 1899. The ship was then on the stocks, and was launched in October or November, 1899, and made one trial trip. But in June, 1900, she was still in the custody of the contractors, had not been completed by them, or accepted by the Russian government, and a good many of the contractors' men were still working on her; and only about eighty per cent of her price had been paid. Alexandroff was never on the ship, never signed any paper as a member of her crew, and was never ordered on board of her, either as a seaman or as an assistant physician; but from October, 1899, to April, 1900, lived on shore, with the rest of the men who came with him, had his photograph taken with them, received equipment, support and wages from the Russian Government, and performed the duties required of him as an assistant physician. He left his associates, without leave, at Philadelphia on April 20, 1900, went to New York, and there took up his residence, and on May 24, 1900, made in court a primary declaration of his intention to become a citizen of the United States.

There was introduced in evidence, without objection, a copy

of a letter, (the original of which was said to be in the possession of the Russian Ambassador at Washington,) dated "Treasury Department, Office of the Secretary, Washington, D. C., October 4, 1899," signed by the Acting Secretary of the Treasury, and in these terms:

"Sir: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's ship yard in Philadelphia, Pennsylvania. The collector of customs has also been advised that the usual head tax of $1.00 is not to be collected in this case."

This letter was assumed by the courts below to have been addressed to the Russian Ambassador and in answer to a letter from him. But it appears by copies of documents in the Treasury Department, submitted by counsel for the petitioner by leave of this court, that it was in answer to a letter, dated September 24, 1899, No. 557, from the Naval Attaché of the Imperial Russian Embassy at Washington to the Secretary of the Treasury, requesting that the necessary orders to whom it concerned might be given for "allowing admittance to the United States through the port of New York without examination the detail of one officer and fifty-three regular sailors, Imperial Russian Navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's ship yard, in Philadelphia, Pennsylvania."

That correspondence also included similar letters between the Naval Attaché of the Russian Embassy and the Secretary of the Treasury of June 22 and 23, 1899, concerning "a detail of one officer and twenty-nine regular sailors for the purpose of partially manning the crusier" aforesaid.

Together with that correspondence, the petitioner submitted to this court copies of papers from the Department of State showing the following:

GRAY, J., FULLER, C. J., HARLAN and WHITE, JJ., dissenting.

On December 6, 1900, the Russian Ambassador wrote to the Secretary of State, saying that the Russian Minister of the Navy had just informed him that 224 sailors of the Russian Imperial Navy, accompanied by three officers, one doctor and a commissary, had embarked at London on the Rhineland for Philadelphia, and that "211 of them have been sent to complete the crew of the Russian crusier Variag, and the other 13 are under orders for the Retvisan, which is being built by the Cramps of Philadelphia," and requesting the Secretary of State "to notify the Treasury Department of the approaching arrival of these sailors, and to request that they may be allowed to land, and that restitution may be made to the superior officer of the tax imposed on emigrants and paid at the time of their embarkation." On December 15, 1900, the Secretary of State answered that the request had been referred to the Secretary of the Treasury, who had replied that the commissioner of immigration at Philadelphia had been directed to facilitate the landing of the seamen and officers referred to, and the collector of customs to refrain from collecting the *per capita* tax from the steamship company; and that said company should be called upon to refund the amount paid to their Liverpool representative in advance for the head tax. On December 25 and 28, 1900, a like correspondence took place between the Russian Ambassador and the Secretary of State concerning "213 seamen of the Imperial fleet, accompanied by two officers, a monk and a cook," embarked at Liverpool for Philadelphia on the Belgenland, and "sent hither to complete the crew of the Imperial cruiser Variag."

In the Circuit Court of Appeals, on October 1, 1900, the Attorney of the United States for the Eastern District of Pennsylvania, "at the instance of the Executive Department of the Government of the United States," filed by leave of court a suggestion, stating the facts as appearing by the record, and praying that Alexandroff be remanded to the custody of the keeper of the county prison at Philadelphia, to await the order of Captain Vladimir Behr, master of the cruiser Variag.

Such being the facts of the case, we proceed to state the principles by which it appears to us to be governed.

The jurisdiction of every nation within its own territory is absolute and exclusive; by its own consent only can any exception to that jurisdiction exist in favor of a foreign nation; and any authority in its own courts to give effect to such an exception by affirmative action must rest upon express treaty or statute.

In the case of *The Exchange*, decided by this court in 1812, nearly ninety years ago, the point adjudged was that "*The Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country." 7 Cranch, 116, 147. Chief Justice Marshall, in expounding at large the principles upon which the exemption was founded, began by saying: "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." 7 Cranch, 136. He then dealt with the principal exceptions: 1st. The exemption from arrest or detention of a foreign sovereign entering the territory of a nation with the license of its sovereign. 2d. The immunity which all civilized nations allow to foreign ministers. 3d. The cession of a portion of the ter-

ritorial jurisdiction by allowing the troops of a foreign prince to pass through the territory.

The opinion of Chief Justice Marshall in the case of *The Exchange* has ever since been recognized as laying down the principles which govern the subject. His very language has been embodied by Wheaton in his Elements of International Law, pt. 2, c. 2; (8th ed.) §§ 96–101. Phillimore, in his Commentaries on International Law, (3d ed.) 476, 479, says: "Long usage and universal custom entitle every such ship to be considered as a part of the State to which she belongs, and to be exempt from any other jurisdiction." "The privilege is extended, by the reason of the thing, to boats, tenders and all appurtenances of a ship of war, but it does not cover offences against the territorial law committed upon shore." And in 1880, Lord Justice Brett, (since Lord Esher, M. R.,) delivering the judgment of the English Court of Appeal, dealing with "the reason of the exemption of ships of war and some other ships," said, "The first case to be considered is, and always will be, *The Exchange*." *The Parlement Belge*, 5 Prob. Div. 197, 208.

In the *Santissima Trinidad*, Mr. Justice Story, speaking for this court, said: "In the case of *The Exchange*, 7 Cranch, 116, the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction." "It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace

and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights." 7 Wheat. 283, 352–354.

We find no precedent, either in our own decisions, or in the books of international law, for extending the exemption to an uncompleted ship, or to sailors who have never been on board of her, although intended to become part of her crew when she shall have been completed.

On the contrary, Mr. Hall says that where a ship is bought, or is built and fitted out to order, she is only private property until she is commissioned; and, although invested with minor privileges, such as immunity from liens of mechanics, she is far, if she be a ship of war, from enjoying the full advantages of a public character. And again: "The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the State for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew, she is merely property; if members of her crew go outside the ship or her tenders or boats, they are liable in every respect to the territorial jurisdiction." Hall's International Law, (4th ed.) 169, 205. So Mr. T. J. Lawrence says: "The immunities of which we have been speaking do not follow the members of the ship's company when they land. In their ship and in its boats, which are appurtenant to it and share its privileges, they are exempt from the local jurisdiction; but the moment they set foot on shore they come under the authority of the State, and may be arrested and tried like other foreigners if they commit crimes or create disturbances." Principles of International Law, (3d ed.) 229.

In *The Exchange*, as has always been recognized by this court, it was treated as well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government, is exempt from the civil and criminal jurisdiction of the place. *Coleman* v. *Tennessee*, 97 U. S. 509, 515; *Dow* v. *Johnson*, 100 U. S. 158, 165. "The grant of a free passage," said Chief Justice Marshall, "implies

a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments, which the government of his army may require." 7 Cranch, 140. That rule, waiving the jurisdiction of the United States over a body of men, and allowing them to be governed, disciplined and punished by their own officers, applies only to an armed force, segregated from the general population of the country, and lawfully passing through or stopping in the country for some definite purpose connected with military operations.

This is no such case. This was a squad of men intended, indeed, at some time in the future, to become part of the crew of a ship of war. But they were not yet part of that crew, and were, for six months before the desertion, quartered on shore in the midst of a large city, and were as yet engaged in performing no military or naval duty, beyond the fact that Alexandroff attended the others when sick. The suggestion of the majority of the court that Alexandroff and his associates were sent out by the Russian Government "to take possession of the Variag" must be founded on the statement (which is all that the record contains on the subject) that they were sent out "for the purpose of becoming part of her crew."

The permission to a foreign nation to pass troops or munitions of war through the United States has been granted by the Executive Department in a few instances, generally by the Secretary of State. 1 Wharton's International Law Digest, § 13. And there are cases collected by Mr. Cushing, in 7 Opinions of Attorneys General, 453, in which the President of the United States has for various purposes acted through the Department of the Treasury or some other department within its appropriate jurisdiction. It is not necessary in this case to consider the full extent of the power of the President in such matters.

The request of the representative of Russia on September 24, 1899, was simply for the admission into the United States of "one officer and fifty-three regular sailors Imperial Russian Navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian

Government at Cramp's shipyard in Philadelphia, Pennsylvania." And the response of the Secretary of the Treasury, following the terms of the request, stated that instructions had been given to admit them without examination, and not to collect the head tax of one dollar. The other correspondence submitted to this court, and relied on by the petitioner, shows that in June, 1899, the Secretary of the Treasury had given like instructions as to one officer and twenty-nine other sailors; and that, at the request of the Russian Ambassador, in December, 1900, (fourteen months after the arrival of Alexandroff and his associates in this country, and eight months after his desertion,) the Secretary of State and the Secretary of the Treasury gave precisely similar instructions as to a body of two hundred and eleven seamen, and as to another body of two hundred and thirteen seamen, each sent out to complete the crew of the Variag. It thus appears that Alexandroff and his associates, with the previous detail of thirty persons, together constituted less than one sixth of the intended crew of the Variag.

Moreover, all the letters of the Secretary of the Treasury, and of the Secretary of State, show nothing more than an admission into the United States without examination, and an exemption from the head tax, of persons intended to become part of the crew of the cruiser Variag. These persons, coming into the United States for a temporary purpose only, were clearly not immigrants, nor liable to the head tax upon immigrants. A like admission and exemption would apply to any civilians employed by the Russian Government and coming here temporarily in its service.

It is impossible, therefore, to imply such a waiver of the jurisdiction of the United States over them, as in the case of a foreign army marching through or stationed in the United States by consent of the Government. And even permission to march a foreign armed force through the country does not imply a duty to arrest deserters from that force.

The question in this case is not one of the mere exemption of Alexandroff from the jurisdiction of the government and the courts of the United States. The question is whether the

courts and magistrates of the United States are authorized to exercise affirmative jurisdiction to enforce the control of the Russian authorities over him, after he has escaped from their custody, and to restore him to their control, so that he may be returned to Russia and be there subjected to such punishment as the laws of that country impose upon deserters.

Nations do not generally, at the present day, agree to deliver up to each other deserters from a military force. But it is usual, in order to prevent the ships of war or the merchant vessels of one country from being rendered unfit for navigation by the desertion of their seamen in the ports of another country, to provide by treaty or convention that the authorities of the latter country, upon the application of a consul of the former, should afford assistance in the arrest and detention, and the return to their ships, of seamen deserting from a vessel of either class. 1 Ortolan, Diplomatie de la Mer, (4th ed.) 312, 313; 2 Calvo, Droit International, (5th ed.) §§ 1072, 1073; 1 Phillimore on International Law, (3d ed.) 547, 685; Wheaton on International Law, (8th ed.) 178 note; 1 Moore on Extradition, c. 19.

The United States have made from time to time such treaties with many nations, (a list of which is in the margin,[1]) contain-

---

[1] AUSTRIA. May 8, 1848; 9 Stat. 946. July 11, 1870; 17 Stat. 828.
BELGIUM. November 10, 1845; 8 Stat. 612. December 5, 1868; 16 Stat. 761. March 9, 1880; 21 Stat. 781.
BOLIVIA. May 13, 1858; 12 Stat. 1020.
BRAZIL. December 12, 1828; 8 Stat. 397.
CENTRAL AMERICA. December 5, 1825; 8 Stat. 336.
CHILE. May 16, 1832; 8 Stat. 440.
COLOMBIA. October 3, 1824; 8 Stat. 318.
CONGO. January 24, 1891; 27 Stat. 930.
DENMARK. July 11, 1861; 13 Stat. 606.
DOMINICAN REPUBLIC. February 8, 1867; 15 Stat. 488.
ECUADOR. June 13, 1839; 8 Stat. 548.
FRANCE. November 14, 1788; 8 Stat. 112. June 24, 1822; 8 Stat. 280. February 23, 1853; 10 Stat. 997.
GERMAN EMPIRE. December 11, 1871; 17 Stat. 929.
GREAT BRITAIN. June 3, 1892; 27 Stat. 961.
GREECE. December 22, 1837; 8 Stat. 504.
GUATEMALA. March 3, 1849; 10 Stat. 887.

ing provisions in almost every instance substantially like that of the treaty with Russia of 1832, except that some of them apply only to merchant vessels.

By the Consular Convention with France of November 14, 1788, before the adoption of the Constitution, consuls and vice-consuls were authorized to cause the arrest of "the captains, officers, mariners, sailors and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country." 8 Stat. 112. That convention was abrogated by the act of July 7, 1798, c. 67. 1 Stat. 578. But a similar provision was made by the Convention with France of June 24, 1822. 8 Stat. 280. And that

---

HANOVER. May 20, 1840; 8 Stat. 556.
HANSEATIC REPUBLICS. June 4, 1828; 8 Stat. 386.
HAWAIIAN ISLANDS. December 20, 1849; 9 Stat. 980.
HAYTI. November 3, 1864; 13 Stat. 727.
ITALY. February 8, 1868; 15 Stat. 610. May 8, 1878; 20 Stat. 730.
JAPAN. November 22, 1894; 29 Stat. 852.
MADAGASCAR. February 14, 1867; 15 Stat. 493.
MECKLENBURG-SCHWERIN. December 9, 1847; 9 Stat. 917.
MEXICO. April 5, 1831; 8 Stat. 424.
NETHERLANDS. May 23, 1878; 21 Stat. 668.
NEW GRANADA. December 12, 1846; 9 Stat. 896. May 4, 1850; 10 Stat. 904.
OLDENBURG. March 10, 1847; 9 Stat. 868.
PERU-BOLIVIA. November 30, 1836; 8 Stat. 494.
PERU. July 26, 1851; 10 Stat. 944. September 6, 1870; 18 Stat. 714. August 31, 1887; 25 Stat. 1460.
PORTUGAL. August 26, 1840; 8 Stat. 566.
PRUSSIA. May 1, 1828; 8 Stat. 382.
ROUMANIA. June 17, 1881; 23 Stat. 714.
RUSSIA. December 18, 1832; 8 Stat. 448.
SALVADOR. December 6, 1870; 18 Stat. 744.
SAN SALVADOR. January 2, 1850; 10 Stat. 897.
SARDINIA. November 26, 1838; 8 Stat. 518.
SPAIN. February 22, 1819; 8 Stat. 262.
SWEDEN AND NORWAY. July 4, 1827; 8 Stat. 352.
TONGA. October 2, 1886; 25 Stat. 1442.
TWO SICILIES. December 1, 1845; 9 Stat. 838. October 1, 1855; 11 Stat. 651.
VENEZUELA. August 27, 1860; 12 Stat. 1158.

provision was carried into effect by the act of May 4, 1826, c. 36. 4 Stat. 160.

The first general statute on the subject was the act of March 2, 1829, c. 41, (4 Stat. 359,) which, as amended by the act of February 24, 1855, (10 Stat. 614,) by allowing United States commissioners to act in the matter, is embodied in section 5280 of the Revised Statutes, under which the application in this case was made, and which applies only to "any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting."

The Variag, at the time of Alexandroff's desertion, was indeed, in one sense, a ship, because she had been launched and was waterborne. And, by the terms of the contract under which she was being built, the legal title in her, as fast as constructed, had vested in the Russian Government, so that, without regard to the question whether she was a ship of war, she could not have been subjected to private suit *in rem* in admiralty. *The Parlement Belge*, 5 Prob. Div. 197. But she had not been completed, and was in the custody of the contractors, and their men were still at work upon her; by the express terms of the contract, she might still be rejected by the Russian Government, and remained at the risk of the contractors until that government had accepted her or taken actual possession of her; and she had not been fully paid for. She was not equipped for sea, and never had any part of her crew on board, and she had never been accepted, or taken actual possession of, by the Russian Government. Alexandroff and his associates were a squad of men, sent out six months before by the Russian Government for the purpose of becoming part of her crew, and received wages as members of the Russian Navy. But they had never become part of an organized crew, or done any naval or military duty, or been on board of her, or been ordered on board of her; for the whole six months they had lived together on shore; and no regular ship's roll, or other official document, was produced showing that they had actually become part of the crew of the Variag.

The treaty with Russia of 1832 speaks of "deserters from the ships of war and merchant vessels of their country;" and

section 5280 of the Revised Statutes speaks of persons who have "deserted from a vessel of any such government;" each applying only to those who desert from a ship. Both the treaty and the statute require proof to be made by exhibition of the register of the vessel, ship's roll or other official document, that the deserter, at the time of his desertion, belonged to, or formed part of, her crew. And the provision of the treaty for the detention of the deserters until "they shall be restored to the vessels to which they belonged, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever," necessarily implies that they belong to a completed vessel upon which they could remain from day to day, and the departure of which may require them to be sent back by another vessel. The object of both treaty and statute, as of the treaties with other nations upon the same subject, was not to encourage shipbuilding for foreign nations in the ports of the United States, or to cover unfinished ships and preparations for manning them when finished; but it was to secure the continued capacity for navigation of ships already completely built, equipped and manned. Both treaty and statute look to a complete ship, and to an organized crew; and neither can reasonably be applied to a ship which has never been completed, or made ready to receive a crew, or had any roll or list of them, or to men who have never been on board the ship as part of her crew. Moreover, the Russian Government, as is admitted, had never accepted or taken possession of the ship, and, by the terms of the contract under which she was building, still had the right to reject her. So long as they had that right, no body of men could be considered as actually part of her crew, whatever they might have been after her acceptance. The evident intent of the statute, as of the treaty, is to afford a remedy for the common case of sailors deserting their ship, on her coming into port, at the risk of leaving her with no sufficient crew to continue her voyage; and not to the case of a ship which has never been completed, or equipped for sea, or to persons collected together on shore for an indefinite period, doing no naval duty, though intended ultimately to become part of her crew.

The various treaties of the United States with foreign nations

apply in a few instances, as in the treaties with Spain of 1819, and with Great Britain of 1892, to merchant vessels only, but, for the most part, as in the treaty with Russia, to both ships of war and merchant vessels. When they apply to both, (except in the treaties with Peru,) deserters from ships of war are put upon the same footing with deserters from merchant vessels; and no greater authority is given to arrest and surrender in the case of the one than in that of the other. Could it be contended that the authority should be extended to the case of sailors who had been collected together on shore for the purpose of becoming, in the future, part of the crew of a merchantman still in the course of construction, and not yet ready to receive them?

The statutes regulating the contract between the owner of a merchantman and his sailors do not appear to us to have any bearing upon the construction and effect of this treaty. Those statutes relate to seamen who, by their shipping articles, have agreed to render themselves on board at a certain time, and to their right to compensation and liability to punishment, or to forfeiture of wages, after that time. Rev. Stat. §§ 4522, 4524, 4527, 4528, 4558; Act of December 21, 1898, c. 28, §§ 2, 9; 30 Stat. 755, 757. And section 4599 of the Revised Statutes (repealed by section 25 of the act of 1898) provided for the arrest and detention, by police officers, of any seaman, having signed such articles, who "neglects or refuses to join, or deserts from or refuses to proceed to sea in" his vessel. The clause "neglects or refuses to join" would have been superfluous if legally included in the word "deserts." The treaty contains no such clause.

The treaty, as already stated, requires the fact that the deserter was part of the crew of the vessel to be proved by the exhibition of the register of the vessel, the roll of the crew, or other official document. Attorney General Black was of opinion that an exhibition of the original ship's roll, or a corresponding document containing the names of the whole crew, was essential, and could not be supplied by a copy of an extract from the roll, containing the deserter's name; and said: "It might be convenient, in cases like this, to dispense with the production of the original document, and let the rights of the person claimed

as a deserter depend on the mere certificate of a consul; but a written compact between two nations is not to be set aside for a shade or two of convenience more or less." 9 Opinions of Attorneys General, 96. However that may be, in this case there is no pretence that the Variag had, or was in a condition to have, any roll or list of her crew; and at the hearing it was not admitted that there was any such roll or list, or that Alexandroff was a member of her crew, but only that he was a member of the Russian Navy, sent out for the purpose of becoming part of her crew. The treaty cannot be construed as extending to the case of a ship which has never been completed, or ready to receive her crew, or had any roll or list of the crew; or to a small part of the men, ultimately intended to form part of her crew, who have never been such, nor ever been on board, but have remained for six months on shore, doing no naval duty.

Moreover, it being quite clear, and indeed hardly denied, that the Variag, in her existing condition, was not a Russian ship of war exempt from the jurisdiction of the United States and subject to the exclusive jurisdiction of her own country, it would seem necessarily to follow that she was not a ship of war in the sense that the authorities of the United States could take affirmative action to enforce the jurisdiction of that country over her or over the men intended to become part of her crew.

The necessary conclusion is that neither the treaty with Russia of 1832, nor section 5280 of the Revised Statutes, gave any authority to the United States commissioner to issue the warrant of commitment of Alexandroff.

It was argued, however, at the bar, that, if this case did not come within the treaty or the statute, the United States were bound, by the comity of nations, to take active steps for the arrest of Alexandroff, and for his surrender to the Russian authorities. But this position cannot be maintained.

The treaties of the United States with Russia and with most of the nations of the world must be considered as defining and limiting the authority of the government of the United States to take active steps for the arrest and surrender of deserting seamen.

These treaties must be construed so as to carry out, in the

utmost good faith, the stipulations therein made with foreign nations. But neither the executive nor the judiciary of the United States has authority to take affirmative action, beyond the fair scope of the provisions of the treaty, to subject persons within the territory of the United States to the jurisdiction of another nation.

The practice of the Executive Department, from the beginning, shows that such authority does not exist, in the absence of express treaty or statute. The precedents on the subject are collected in 1 Moore on Extradition, §§ 408–411, and we have examined the archives of the Department of State, to which upon such a subject we are at liberty to refer. *Jones* v. *United States*, 137 U. S. 202, 216; *Underhill* v. *Hernandez*, 168 U. S. 250, 253; *The Paquete Habana*, 175 U. S. 677, 696.

In 1802, in the administration of President Jefferson, the British Chargé d'Affaires complained to Mr. Madison, Secretary of State, of the refusal of the collector of customs at Norfolk in Virginia to cause a seaman, who had deserted from a British ship of war, to be surrendered, on an application made by her captain, through the British consul at that port. Mr. Madison answered: "It need not be observed to you, Sir, that a delivery in such cases is not required by the law of nations, and that in the treaty of 1794 the parties have forborne to extend to such cases the stipulated right to demand their respective citizens and subjects. It follows that the effect of applications in such cases must depend on the local laws existing on each side. It is not known that those in Great Britain contain any provisions for the delivery of seamen deserting from American ships. It is rather presumed that the law would there immediately interpose its defence against a compulsive recovery of deserters. In some of the individual States the law is probably similar to that of Great Britain. In others it is understood that the recovery of seamen deserting from foreign vessels can be effected by legal process." And, after stating that there was no law for their recovery in Virginia, he concluded: "This view of the subject necessarily determines that the President cannot interpose the orders which are wished, however sensible he may be of the beneficial influence which friendly and reciprocal resto-

rations of seamen could not fail to have on the commerce and confidence which he wishes to see cherished between the two nations." 14 MSS. Domestic Letters, 89, in Department of State.

In 1815, in the administration of President Madison, the British Minister having requested the interposition of the Government of the United States to cause the delivery of seamen who had deserted from a British ship of war, Mr. Monroe, Secretary of State, answered: "I regret that there is no mode in which this government can interpose to accomplish the object you have in view. Neither the laws of the United States nor the laws of nations have provided for the arrest or detention of deserters from the vessels of a friendly power. It is hoped, however, that this is one of the subjects which may hereafter be satisfactorily arranged by treaty between the two nations." 1 Moore, § 408.

In 1846, in President Polk's administration, the British Minister applied for the surrender of a seaman who had deserted from a British ship of war, and was serving on a war vessel of the United States; and Mr. Buchanan, Secretary of State, replied: "Your communication has been submitted to the President; and I am instructed to express his regret that he cannot comply with your request. The case of deserters from the vessels of war of the respective nations is not embraced by the tenth article of the treaty of Washington providing for extradition in certain cases; and without a treaty stipulation to this effect, the President does not possess the power to deliver up such deserters. The United States have treaties with several nations which confer upon him this power; but none such exists with Great Britain." 7 MSS. Notes to Great Britain, 147, in Department of State.

In September, 1864, in the administration of President Lincoln, while the United States steamship Iroquois was lying in the Downs, three of her seamen deserted. They were arrested on complaint of the United States consular agent, brought before a police magistrate at Dover, and discharged by him, on the ground that, as they had violated no law of England, there was no authority for their arrest and detention. Upon the mat-

ter being brought by Mr. Adams, the American Minister, to the attention of the British Government, Lord Russell replied "that there is no law in force in this country by which these deserters could be given up." 1 Moore, § 409; Dip. Cor. 1864, pt. 2, 336.

In July, 1864, Lord Lyons, the British Minister, submitted to Mr. Seward, Secretary of State, a statement that two apprentices, employed on board the British barque Cuzco, had deserted at Valparaiso and enlisted on a United States ship of war; and asked for an investigation. On December 4, 1864, Mr. Seward communicated the results of the investigation to the British Chargé d'Affaires; and informed him that, owing to the action of the British Government in the case of the deserters from the Iroquois, the United States did not deem themselves under either a legal or a moral obligation to deliver up the deserters from the Cuzco. On February 23, 1865, the British Chargé d'Affaires, by instructions from his government, replied that it was unable to follow the principle or reason of the resolution of the United States Government, and insisted that "it is in the power of the naval officers of the United States (as it would be in that of Her Majesty's naval officers in a like case) to deliver up on the high seas, or in any foreign port, under the instructions of their government, deserters from foreign vessels who may without lawful authority be found on board one of the ships of war of the United States;" but he distinctly admitted and asserted: "But when a foreign deserter is on shore in Great Britain, (and Her Majesty's government presume the case would be the same in the United States,) the power of Her Majesty's naval officers and of Her Majesty's government itself over him is at an end; he can then only be detained or delivered up for some cause authorized by the law of the land." The case was not further pursued. 1 Moore, § 409, and note.

The earliest treaty between the United States and Great Britain on the subject is that of June 2, 1892, which applies only to merchant seamen, being limited to "seamen who may desert from any ship belonging to a citizen or subject of their respective countries." 27 Stat. 961.

The first treaty with Denmark on the subject is that of July 11, 1861, concerning "deserters from the ships of war and merchant

vessels of their country." 13 Stat. 606. In 1853, in the administration of President Pierce, on a question of the arrest of a deserter from a Danish ship and his discharge by the authorities in New York, (the treaties between the United States and Denmark not then containing any stipulation for the restoration of deserting seamen,) Mr. Cushing, as Attorney General, gave an opinion to Mr. Marcy, Secretary of State, that without such a treaty the executive or judicial authorities of the United States had no power to arrest, detain and deliver up a Danish mariner on the demand of the consul or other agents of Denmark, and said: "The summary arrest and delivery up of deserters from the service of other nations, like the surrender of fugitives from their criminal justice, when found in the territory of a country into which they have escaped or fled, is not a duty absolutely enjoined by the law of nations, but a subject of special convention. So also are the authority and jurisdiction of consuls and commercial agents in regard to demanding and superintending the arrest, detention and surrender, either of deserters from service or fugitives from justice." 6 Opinions of Attorneys General, 148, 154.

This uninterrupted course of action of the Executive Department, beginning almost a century ago, must be considered as conclusively establishing that, independently of a treaty, no international obligation exists to surrender foreign seamen who have deserted in this country.

It is hardly necessary to add that the suggestion of the District Attorney can have no effect, other than to call the attention of the court to the facts of the record. The question whether those facts justified the commitment of the prisoner by the United States commissioner is a question to be decided, not by the Executive Department or by any of its officers, but by the courts of justice.

According to our view of the facts, and for the reasons and upon the authorities above stated, we are of opinion that the commissioner had no authority to commit the prisoner, that his imprisonment was unlawful, and that he is entitled to be discharged.

FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY *v.* REYNOLDS.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 183. Argued November 5, 6, 1901.—Decided January 6, 1902.

There is nothing in the Federal Constitution which forbids a State to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provision therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provision for collecting the taxes, for the same years, on other property.

THE constitution of Florida of 1868, art. 16, sec. 24, as amended by art. 11 of the amendments of 1875, is as follows:

"The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such property be held and used exclusively for religious, educational, or charitable purposes."

Sec. 26, chap. 3413, of the Laws of Florida, March 5, 1883, reads:

"If any assessor, when making his assessments, shall discover that any land in his county was omitted in the assessment roll of either or all of the three previous years, and was then liable to taxation, he shall, in addition to the assessment of such land for that year, assess the same separately for such year or years that may have been so omitted, at the just value thereof in such year, noting distinctly the year when such omission occurred; and such assessment shall have the same force and effect as it would have had if made in the year the same was omitted, and taxes shall be levied and collected thereon in like manner and together with the taxes of the year in which the assessment is made; but no lands shall be assessed for more than three years' arrears of taxes, and all lands shall be subject to such taxes omitted to be assessed, into whosoever hands they may come."

In 1885 this statute was passed:

"SEC. 1. That in all cases in which any railroad or the properties thereto belonging or appertaining in this State, in the tax years commencing March 1, 1879, 1880 and 1881, or any of such years, were not assessed for taxes for such years, it shall be the duty of the comptroller to cause the same or so much thereof as were not assessed to be assessed for state and county taxes, and twenty per centum of the taxes so assessed for said years and now unpaid shall be collected at the same time the taxes for the year 1885 shall be assessed and collected, and each year thereafter an additional twenty per centum of said taxes shall be collected at the same time and in the same manner as the taxes for such year are collected, until the whole amount of said unpaid taxes for the years 1879, 1880 and 1881 are paid.

"The taxes to be assessed under this act shall be the same in amount as they would have been had they been assessed in such years or any of them as to which there was a failure to assess." Laws of Florida, February 12, 1885, chap. 3558.

This statute was followed in 1891 by one in these words:

"SEC. 1. That the state and county taxes assessed by the comptroller of the State of Florida, upon any railroads and the properties thereof in said State, for the years 1879, 1880 and 1881, under and in pursuance of 'An act to provide for the assessment and collection of taxes on railroads and the properties thereof for the years 1879, 1880 and 1881, as to which there was no assessment,' but which have not been collected, shall be collected, and the payment thereof enforced at the same times and in the same manner, as is now, or may hereafter be provided by law, for the collection and the enforcement of the payment of taxes assessed upon the railroads and the properties thereof in the State of Florida." Laws of Florida, June 8, 1891, chap. 4073.

The assessment of railroad property in Florida was not made by the county assessors but by the comptroller of the State. Acts, State of Florida, March 7, 1879, chap. 3099, secs. 45, 46.

The plaintiff is a corporation organized under the laws of Florida on November 17, 1888, and was the owner of several lines of railway, which on May 1, 1889, it acquired from the

Florida Railway and Navigation Company, under foreclosure proceedings. The Florida Railway and Navigation Company was organized on February 29, 1884, by the consolidation of several companies, and on July 1 of that year it placed upon its properties a trust deed to secure the payment of $10,000,000 bonds.

This bill was filed November 2, 1892, in the circuit court of the second judicial circuit of Florida, in and for the county of Leon. Its purpose was to restrain the collection of certain taxes and to recover other taxes paid under protest. After three appeals to the Supreme Court of the State (35 Fla. 625, 39 Fla. 243, 28 Southern Rep. 861), the final outcome of the litigation was a decree dismissing the plaintiff's bill *in toto.*

Mr. Frederic D. McKenney and *Mr. Wayne Mac Veagh* for plaintiff in error. *Mr. Thomas L. Clarke* and *Mr. John A. Henderson* were on their brief.

Mr. W. B. Lamar for defendants in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

No question is presented concerning the claim for the taxes paid under protest, counsel for plaintiff stating in their brief that "the sole relief sought in this court is to obtain a reversal of the decree of the state Supreme Court, in so far as it reversed the decree of the circuit court enjoining the sale of complainant's lines of railroad for the taxes assessed for the years 1879, 1880 and 1881, such taxes amounting to $96,181.69," and in respect to this matter they sum up their contention in these words:

"By the law of 1885 the State attempted to authorize the assessment of taxes for 1879–1881, but only upon property belonging to railroad companies, though it appears from the record that other properties of like class, *i. e.*, real estate belonging to individuals and owners, not railroad companies, had not been assessed for taxes for such years.

"It surely cannot be 'due process of law' for the State of Florida in 1885, to arbitrarily impose a burden theretofore unheard of upon security holders who in 1884 had invested their money upon the faith of a title then clear of such burden.

"It surely cannot be less than a denial of the equal protection of the laws for the State of Florida in 1885 to impose burdens theretofore unheard of upon the property of railroad companies, which under the laws of Florida is real estate, while permitting other real estate, otherwise owned, to escape such burdens."

The decision of the Supreme Court of the State establishes that these proceedings are not in conflict with the constitution of Florida. The single question, therefore, to consider is whether there is anything in the Federal Constitution which forbids a State to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law or from neglect of administrative officials, without also making provision for collecting the taxes for the same years on other property. It will be perceived that there was no new levy of taxes. No act of the legislature was passed imposing an additional burden upon the property of the State in general, or upon any particular property, but the case is one in which general levies having been made for the years named certain property which ought to have paid taxes under them—and thus contributed its share of the expenses of the State—failed to do so, and the effort is to compel that property to discharge its obligation. The objection is not that the property ought not during those years to have paid its proportion of the taxes, but that it ought not now to be compelled to pay such proportion because certain other property was similarly situated and no effort is made to compel payment from it.

The fault, if fault there be, is one of omission rather than commission. The act of the legislature is not a mandate to a single officer, charged with the duty of assessing all property, to assess certain property and to omit to assess the rest, but the general legislation having provided that railroad property should be assessed by the comptroller and real estate by county assessors, the act simply directed the comptroller to discharge the

duties of assessment as to the property committed to his care, and omitted any direction to the county assessors. This omission, it is contended, makes the act unconstitutional. In other words, the legislature may not pass an act directing one officer to discharge his duty unless it couples therewith a direction to other officers charged with kindred duty to perform theirs. It would seem to follow that if the legislature had, on the same day, passed another act with like command to the county assessors, the two acts together would be constitutional, though each standing alone would not be; and as the time of its passage is not generally of the essence of a statute, it would also seem to follow that if the legislature should to-day pass an act directing the county assessors to assess delinquent real estate for those years, this late enactment would give constitutional vitality to that passed years ago. How far can this theory of constitutionality be sustained?

It must be remembered that "taxes are not debts in the ordinary sense of that term;" that they are "the enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government, and for all public needs." Cooley on Taxation, 1st ed. pp. 13 and 1. They are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the State may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the State, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation.

No question of *bona fide* purchase arises, for it was held by the Supreme Court that inasmuch as no assessment of this railroad property had been made during the years named, and no lien thereon for taxes established, a *bona fide* purchaser would have taken it free from any liability for such taxes, but it was also held that the present owner was not a *bona fide* purchaser, and this being a local matter the decision is conclusive upon this court.

The question how far the provisions of the Fourteenth Amendment interfere with a state's system of taxation has been more than once before this court. It was very carefully considered in *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, and the general rule thus stated by Mr. Justice Bradley on page 237:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. . . . We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation."

It is well known that the States vary materially in their systems of taxation. Each determines for itself what in its judgment is best for the interests of its people. In some there are general exemptions of particular classes of property, such as property used for religious, educational and benevolent purposes. Some, in order to encourage certain industries, such as manufacturing, make either general or special exemptions. Some think it for their best interest to derive their revenues from personal property, corporations and licenses, and exempt real estate. In some, contracts for exemption are authorized by the state constitution; in others, they are forbidden. Now, considering the great diversity in these systems it would obviously have worked a marked revolution if the first section of the Fourteenth Amendment had been construed as compelling a cast iron rule of equal taxation. It was not intended, as held in the case quoted from, and also in *Barbier* v. *Connolly*, 113 U. S. 27, to restrain the legislature from any proper and legitimate classification both as respects property for taxation and the methods

of assessment and taxation. Doubtless it would prohibit a State from selecting some obnoxious person and casting upon his property the sole burden of taxation, or a burden differing from that cast upon others whose property was similarly situated, but it does not prevent a State from exercising its judgment as to the property to be taxed and the modes of taxation, providing all property similarly situated is treated in the same way.

Besides those just cited, other cases in this court affirm the same propositions. In *The Delaware Railroad Tax*, 18 Wall. 206, a special act of the State of Delaware imposing a tax of three per cent upon the net earnings or income received by railroad and canal companies from all sources was sustained, the court saying (p. 231):

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary and capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

In *Home Insurance Company* v. *New York*, 134 U. S. 594, a tax upon the corporate franchise or business of corporations, graded according to the dividends declared by the corporation, was sustained, the court, on p. 606, referring in these words to the objection that the tax was in conflict with the Fourteenth Amendment:

"But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate —distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special either in the extent to which it operates, or the objects sought to be obtained

by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. *Barbier* v. *Connolly*, 113 U. S. 27, 32; *Soon Hing* v. *Crowley*, 113 U. S. 703, 709; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 523; *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205, 209; *Minneapolis &c. Railway Co.* v. *Beckwith*, 129 U. S. 26, 32."

In *Giozza* v. *Tiernan*, 148 U. S. 657, a difference in the amount of license required from parties carrying on different kinds of business, was the ground of attack upon a state statute, but the statute was sustained, and in respect to the Fourteenth Amendment it was said (p. 662): "Nor in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339. And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper* v. *Texas*, 139 U. S. 462."

In *King* v. *Mullins*, 171 U. S. 404, a discrimination in the laws of West Virginia as to the matter of forfeiture in tax proceedings between the owners of tracts of less than one thousand acres and those owning larger tracts, was challenged, but the court overruled the contention, saying (p. 435):

"Another point made by the plaintiff in error is, that the

provision of the constitution of Virginia, exempting tracts of less than one thousand acres from forfeiture is a discrimination against the owners of tracts containing one thousand acres or more, which amounts to a denial to citizens or landowners of the latter class of the equal protection of the laws. We do not concur in this view. The evil intended to be remedied by the constitution and laws of West Virginia was the persistent failure of those who owned or claimed to own large tracts of land, patented in the last century, or early in the present century, to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the tract was a small one, the probability was that it was actually occupied by some one, and its extent or boundary could be readily ascertained for purposes of assessment and taxation. We can well understand why one policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be prescribed as to small tracts. The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the Fourteenth Amendment forbidding a denial of the equal protection of the laws."

See also *Pacific Express Company* v. *Seibert*, 142 U. S. 339; *Thomas* v. *Gay*, 169 U. S. 264. Text-books affirm the same doctrine. Burroughs on Taxation, sec. 56, says: "The rule is, that the legislature may select the subjects of taxation in their discretion;" and in Cooley on Taxation, chap. 6, p. 124, it is said: "There is no imperative requirement that taxation shall be equal. . . . The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation. This is legislative, and the legislative conclusion in the premises must be accepted as proper and final."

Gilman v. *Sheboygan City*, 2 Black, 510, is not in conflict

with these views. True, in that case a tax levied for a special purpose by the city was adjudged void on the ground that it was levied exclusively on real property, but the decision was placed upon a conflict with the constitution of the State as interpreted by its Supreme Court. In other words, the Supreme Court of the State having in several cases held that such a discrimination avoided a tax, this court simply followed those decisions, saying, p. 518, that it considered itself "bound in cases like this to follow the settled adjudications of the highest state court giving constructions to the constitution and laws of the State."

In the light of these decisions if the State of Florida had deemed it for the best interests of its people to encourage the building of railroads by exempting their property from taxation, such exemption could not have been adjudged in conflict with the Fourteenth Amendment, even though thereby the burden of taxation upon other property in the State was largely increased. Indeed, that was the policy of the State prior to the constitution of 1868. And, conversely, if the State had subjected railroads to taxation, while exempting some other class of property, it would be difficult to find anything in the Fourteenth Amendment to overthrow its action. The mere fact that such legislation may operate with harshness is not of itself sufficient to justify the court in declaring it unconstitutional. These matters of classification are of state policy, to be determined by the State, and the Federal government is not charged with the duty of supervising its action.

If the State, as has been seen, has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation. We must assume that the legislature acts according to its judgment for the best interests of the State. A wrong intent cannot be imputed to it. It may have found that the railroad delinquent tax was large, and the delinquent tax on other property was small and not worth the trouble of special provision therefor. If taxes are to be regarded as mere debts, then the effort of the State to collect from one debtor is not

prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution. In *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, legislation of Minnesota for the collection of delinquent taxes on real estate was challenged because of a lack of similar legislation in respect to personal property, but the challenge was overruled, the court saying (p. 539):

"This statute rests on the assumption that, generally speaking, all property subject to taxation has been reached and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the legislature in view of the probabilities of changes in the title or situs of personal property might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the Supreme Court of the State."

Our conclusion is that, so far as the Federal Constitution is concerned, the legislature of Florida had the power to compel the collection of delinquent taxes from the railroad companies for the years 1879, 1880 and 1881, even though it made no provision for the collection of delinquent taxes for those years on other property. The judgment, therefore, of the Supreme Court of Florida is

Affirmed.

MR. JUSTICE BROWN, dissenting.

I have no doubt whatever of the validity of the act of the legislature of Florida of 1883, requiring the assessor, upon discovering that any land in his county was omitted from the assessment roll of the three previous years, to assess the same

for such years, since this was a provision applicable to all real estate in his county omitted from the assessment rolls for such years. But the act of 1885 did not proceed upon this basis. It arbitrarily selects railroad properties from all other species of property, and requires their assessment for another three years prior to the three covered by the act of 1883, and thereby, as it seems to me, denies them the equal protection of the laws. Under the act of 1883 *all* owners of real property omitted from the assessment rolls of the three previous years were put upon an equality, and made debtors to the State for the taxes of those years; but to segregate railroads from all other delinquent property, and tax them for another three years, as is done by the act of 1885, seems to me to open the statutes to the criticism of the court, wherein it is said: "Doubtless it" (the Fourteenth Amendment) "would prohibit a State from selecting some obnoxious person and casting upon his property the sole burden of taxation, or a burden differing from that cast upon others whose property was similarly situated."

It appears quite immaterial that under the act of 1883 the property was to be assessed by the county assessors, and in the act of 1885 by the State Comptroller. The wrong done to the railway company is not in the selection of an agent to collect the taxes, but in the selection of a specially odious tax, namely, for antecedent years, and imposing it upon one class of delinquents alone. If, for instance, a license tax, varying in amount, were imposed upon a dozen different occupations, and by another act, subsequently passed, were made retroactive for three years, could the legislature by still another act, made applicable only to those employed in one out of these twelve occupations, make such act retroactive for another three years, without denying to those engaged in that occupation the equal protection of the laws?

I do not wish to be understood as saying that the State may not impose a specific and even a discriminating tax upon railways, but after the liability to the State of all real property owners has once been established, and all placed upon the same footing, I do not think a particular species of property can be arbitrarily taken and subjected to a discriminating tax for a

series of years, during which, and upon the ground that, the state officers had neglected their duty. If state railway taxes may be made retroactive for three years, and again for another three years, I see no reason why this method of taxation may not be continued indefinitely so long as any property remains from which it may be collected. This kind of discrimination seems to be measurable only by the rapacity of the legislature.

McCHORD *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

McCHORD *v.* LOUISVILLE, HENDERSON AND ST. LOUIS RAILWAY COMPANY.

McCHORD *v.* CHESAPEAKE AND OHIO RAILWAY COMPANY.

McCHORD *v.* SOUTHERN RAILWAY COMPANY IN KENTUCKY.

McCHORD *v.* CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 141, 142, 143, 144, 145. Argued January 7, 8, 1901.—Decided January 6, 1902.

By the decrees in these cases, the Railroad Commission of the Commonwealth of Kentucky was enjoined from proceeding to fix rates under a certain act of the General Assembly charged to be unconstitutional, the ground of equity jurisdiction being threatened multiplicity of suits, and irreparable injury.

This court, being of opinion that under the Kentucky statutes the duty of enforcing the rates it might fix vested in the Railroad Commission, *held* that none of the alleged consequences could be availed of as threatened before the rates were fixed at all.

THESE are appeals from the final decrees of the Circuit Court of the United States for the District of Kentucky, perpetually

enjoining Charles C. McChord and others, railroad commissioners of the State of Kentucky, from doing any of the things required by, or from taking any action whatever against complainants under a certain act of the general assembly of the Commonwealth of Kentucky, approved March 10, 1900, c. 2, which is entitled and reads as follows:

"An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"SEC. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof

mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employé thereof charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offence in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

"SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offence against the railroad company or corporation offending, and the circuit court of the county where such offence may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

"SEC. 3. Prosecutions under this act shall be by indictment.

"SEC. 4. All prosecutions under this act shall be commenced within two years after the offence shall have been committed.

"SEC. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fees shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

All the bills sought the same relief, and their averments, excepting those in respect of alleged contracts with the State in relation to rates set up in the bills of the Louisville and Nashville Railroad Company and of the Cincinnati, New Orleans and Texas Pacific Railway Company, were in substance the same.

Statement of the Case.

The act of March 10, 1900, was set out in full; its provisions recapitulated; and complainants' view of the legal effect thereof given. The third paragraph was: "All of your orator's rates charged, collected or received within the State of Kentucky are just and reasonable and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skillful manner."

It was then averred that it was the duty of the railroad commission to see that the laws relating to all railroads, except street, were faithfully executed, and to exercise a general supervision over the railroads of the State; that its functions were administrative; that it was not established as a court; and that under the state constitution it could not be permitted to exercise judicial powers. That all common carriers were subject only to the requirement that their rates should be just and reasonable, and they were in case of controversy entitled to have the judgment of the courts on that question, but that the act referred to singled out railroad corporations and deprived them of any opportunity to have a judicial determination of the reasonableness of their rates when disputed; substituted the non-judicial determination of the railroad commission; and subjected them to penalties, there being no infliction of penalties provided as to other common carriers. That if defendants be permitted to proceed under the act, each complainant "will be compelled to charge the rates fixed by them without any opportunity for a judicial investigation and determination as to their reasonableness, and it will thus be deprived of the lawful use of its property and in substance and effect of its property itself without due process of law, and will also be denied the equal protection of the laws, in violation of section 1 of article 14 of the amendments to the Constitution of the United States."

It was further averred that the act was in conflict with clause 3 of section 8 of article I of the Constitution of the United States, giving Congress the exclusive power to regulate commerce among the States, and with the acts of Congress in that behalf.

The bills then continued:

"And defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroads in the State of Kentucky for the purpose of considering whether or not they shall be altered and reduced in accordance with the terms of said act, and are giving it out in speeches and interviews that they intend to proceed at once under said act, and unless restrained by the order of this court defendants will proceed at once to hear and determine complaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove set out, and is therefore null and void, and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter at pleasure modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the State of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offence and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted, and heavily fined, to the great demoralization of the public service which your orator is bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's contract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great and irreparable wrong and injury and to a vast multiplicity of prosecutions and actions in the courts of said State."

The cases were disposed of on demurrer.

The constitution of the State of Kentucky provided:

"§ 209. Railroad commission—Number—Qualifications—

Powers—Election—Term of office—Removal of.—A commission is hereby established, to be known as 'The Railroad Commission,' which shall be composed of three commissioners. During the session of the general assembly which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the governor shall appoint, by and with the advice and consent of the senate, said three commissioners, one from each superior court district as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The commissioners so appointed shall continue in office during the term of the present governor, and until their successors are elected and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the commissioners shall be elected, one in each superior court district, by the qualified voters thereof, at the same time and for the same term as the governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this constitution. The general assembly may, from time to time, change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the commissioners be all elected by the qualified voters of the State at large. And if so required, one commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in anywise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the railroad commissioners shall be regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing railroad com-

missioners. The general assembly may, for cause, address any of said commissioners out of office by similar proceedings as in the case of judges of the Court of Appeals; and the general assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said commissioners, and to impose proper penalties therefor."

"§ 218. Penalty for charging more for short than long haul—Power of commission.—It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this State, may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers, or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operations of this section."

The following are sections of the General Laws of Kentucky of 1894:

"§ 816. Extortion—what is.—If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion.

"§ 817. Discrimination—what is.—If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback or other device,

charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

"§ 818. Preference or advantage forbidden—Rules defining same quantity of freight.—It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. . . .

"§ 819. Penalty in damages for extortion, discrimination, preference—Jurisdiction—Duty of commission—Limitation.—Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offence in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court, shall have jurisdiction of the offence, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the board of railroad commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the railroad commission, filed in the court having jurisdiction of the offence;

and all prosecutions and actions under this law shall be commenced within two years after the offence shall have been committed, or the cause of action shall have accrued.

"§ 820. Long and short haul over same road—Penalty—Jurisdiction of courts—Duty of commission.—If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offence, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant, and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offence; and the commission

shall use proper efforts to see that such company or carrier is indicted and prosecuted.

"§ 821. Three commissioners—Duties.—There is established a department in the state government to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. Each of said commissioners is authorized to administer oaths, and two of them shall constitute a quorum."

"§ 826. Rates from foreign points to be examined by commission—Duty of commission.—Said commission shall examine all through freight rates from points out of this State to points into this State; and whenever they find that a through rate charge into or out of this State is excessive or unreasonable, or discriminating in its nature, they shall call the attention of the railroad officials in this State to the fact, and to urge them of the propriety of changing such freight. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission and appeal to it for relief, and they shall receive upon application the services of the attorney general of this State and into the condition, management, and all other matters concerning the business of railroads in this State, so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporations, their officers and employés, comply with the laws of the State; and whenever it shall come to their knowledge, or they shall have reason to believe, that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violation.

"§ 827. Examination of officers and employés by commission—Penalty for contempt.—They shall have the power to examine, under oath, any person, or the directors, officers, agents and employés of any railroad corporation doing business in this State, concerning the management of its affairs, and to obtain information pursuant to this law; and shall have power to issue

subpœnas for the attendance of witnesses, and to administer oaths; and any person who shall neglect or refuse to obey the process of subpœnas issued by said commission, or who, being in attendance, shall refuse to testify, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished for each offence by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment not less than ten nor more than fifty days, or both, in the discretion of the jury.

"§ 828. Penalty for failing to make required reports or obstructing commission—Jurisdiction of courts.—Each officer, agent or employé failing or refusing to make, under oath, any report required by the commission within the time required, or failing or refusing to answer fully, under oath, if required, any inquiry propounded by the commission, or who shall, in any way, hinder or obstruct the commission in the discharge of its duty, shall be guilty of a misdemeanor, and shall be fined for each offence not less than five hundred nor more than one thousand dollars; and it shall be the duty of the commission to prosecute the person offending; and the Franklin circuit court, or the circuit court of any county through which the railroad runs, the officer, agent or employé of which has violated the provisions of this section, shall have jurisdiction of such prosecution; and it shall be the duty of the Commonwealth's attorney to prosecute all indictments, actions and proceedings under this law.

"§ 829. Complaints against companies—Award of commission—Proceedings upon.—The commission shall hear and determine complaints under sections eight hundred and sixteen, eight hundred and seventeen and eight hundred and eighteen. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all the evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have ju-

risdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be the same as in other ordinary cases."

Mr. Robert J. Breckenridge, *Mr. David W. Baird* and *Mr. Lewis McQuown* for appellants. *Mr. Aaron Kohn* and *Mr. Zach. Phelps* were on their brief.

Mr. Alexander Pope Humphrey, *Mr. Walker D. Hines* and *Mr. James P. Helm* for appellees. *Mr. Edward Colston*, *Mr. H. W. Bruce*, *Mr. Helm Bruce*, *Mr. Thomas Kennedy Helm*, *Mr. W. H. Wadsworth* and *Mr. A. M. T. Cochran* were on their brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

By the decrees the Railroad Commission of the Commonwealth of Kentucky was permanently restrained from proceeding under the act of March 10, 1900, which was alleged and held to be unconstitutional.

Conceding that the mere fact that a duly enacted law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, it is contended that ground of equity jurisdiction existed here in the want of

adequate remedy by the ordinary processes of law for the threatened consequences of the exercise of the power to fix rates in multiplicity of suits and irreparable injury.

It is insisted that, according to the terms of the act, the order of the Commission fixing the rate, toll or compensation which the railroad companies may charge, is self-executing, and that no duty to enforce it is imposed on the Commission; that the companies are shut up by the act, to the final determination of the Commission that they have charged more than a just and reasonable rate, and that on the trial of indictments for failure to observe the rates made by the Commission, the courts cannot entertain any inquiry as to the reasonableness of the rates so fixed because such inquiry is unwarranted by the statute, and because such an investigation would be illusory and worthless. And that even if the question of constitutionality could be raised in defence, yet that if such order be permitted to be entered of record, and notified as provided, the companies, if they do not comply, will be at once exposed to innumerable prosecutions, and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute is upheld.

However all this may be, we think it is not to be doubted that these bills cannot be maintained if it appear that the Commission is charged with the duty of enforcing the orders it may enter fixing rates. The objection that before this is done, the Commission is required to exercise judicial functions in determining that the companies have charged or received more than a just and reasonable rate, goes to the validity of the act. The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction.

It is true that in *Stone* v. *Farmers' Loan & Trust Company*, 116 U. S. 307, the suit was brought to enjoin the railroad commission of Mississippi from proceeding under the provisions of a certain statute therein mentioned against a railroad company, but the question of jurisdiction does not seem to have been raised. The case was considered on its merits and the bill di-

rected to be dismissed. Mr. Chief Justice Waite, speaking for the court, among other things, said: "As yet the commissioners have done nothing. There is, certainly, much they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

In *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 471, 472, the general rule was stated and applied, and Mr. Justice Harlan, who delivered the opinion of the court, said: "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the State, it will be time enough for equity to interfere, and, by injunction to prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks."

The rule was also applied by Mr. Justice Field in *Alpers* v. *San Francisco*, 32 Fed. Rep. 503, where complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the city. Mr. Justice Field said: "This no one will question as applied to the power of the legislature of the State. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. . . . The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the State or of the munici-

pality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

In *Southern Pacific Company* v. *Board of Railroad Commissioners*, 78 Fed. Rep. 236, the law of California provided that the commissioners might "enforce their decisions and correct abuses through the medium of the courts;" and, in substance, that after the rate was made by the commission, a copy of the order should be served on the corporation affected thereby, and that twenty days thereafter the rate should take effect. A bill was filed before the twenty days had expired, and Mr. Justice McKenna, then Circuit Judge, held, that it was the duty of the commissioners to enforce the rate, and that an injunction would lie. The railroad commission had made an order reducing the grain rates of the company eight per cent, and had passed a resolution declaring that its general charges were twenty-five per cent too high, and that "this board proceed at once to adopt a revised schedule of rates in accordance herewith in order that the same may be in force before January 1, 1896." The court enjoined the enforcement of the eight per cent reduction, which had already been made, but declined to restrain the twenty-five per cent reduction, because no decisive action had been taken.

Reading the various sections of the General Statutes of Kentucky, set forth in the statement preceding this opinion, as *in pari materia* with the act of March 10, 1900, which should be done since they are parts of one system, having the same general objects in view, we think it apparent that the duty devolves on the Commission to enforce the rates it may fix under the latter act. By section 816, extortion was defined to be charging more than a just and reasonable rate. Section 817 defined unjust discrimination, and section 818 forbade undue or unreasonable preference.

Section 819 denounced the same penalties on conviction of

the offence of extortion, or of unjust discrimination, or of unreasonable preference, and provided for prosecution by indictment, or by action in the name of the Commonwealth, on information filed by the board of railroad commissioners; that the railroad companies should be liable in damages to the party aggrieved; and also that prosecution by indictment should only be had on the recommendation or request of the railroad commission.

By section 829 the Commission was empowered to hear and determine complaints under sections eight hundred and sixteen, eight hundred and seventeen and eight hundred and eighteen, and to enforce their awards in the courts.

The duty was imposed on the Commission to initiate indictments under section 820 for charging greater compensation, in the aggregate, for a shorter than for a longer haul.

Section 821 made it the duty of the Commission to see that the laws relating to railroads should be faithfully executed, and to exercise a general supervision over the railroads of the State.

So that unless the act of March 10, 1900, operated to repeal the provisions of the prior law, by withdrawing from the Commission the duty of enforcing the rates it might fix, it was its duty so to do, and indictments were to be found at its instance.

Section 816 read thus: "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion."

In *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132, this section was considered. The court held that the section could not be enforced as a penal statute for want of certainty, and said:

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation,' cannot be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offence has been committed, must also be conceded.

"The *criminality* of the carriers act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

"That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offence. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

The court referred to and quoted from *Chicago, Burlington &c. Railroad* v. *Jones*, 149 Illinois, 361, and *Chicago &c. Railroad* v. *The People*, 77 Illinois, 443, in which it was held under a similar statute that the want of certainty in lack of reference to a standard under its first section was obviated by its eighth section providing for the making by the railroad and warehouse commissioners of schedules of reasonable and maximum rates, which, being done, the Supreme Court of Illinois said, "there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed."

Such being the state of the law, the act of March 10, 1900, was passed.

The mischief to be cured in respect of extortion as defined by section 816 was the want of certainty, and the remedy provided was the fixing of the rates by the railroad commission.

In so providing, the act, while repeating many of the provisions of section 819, did, indeed, omit reference to an action by way of information, and to liability in damages, and it also

omitted the provision that indictments should be made only on the recommendation or request of the railroad commission, but it does not, therefore, follow that it was the legislative intention, without any expression thereof in terms, to repeal so important a provision.

Was the provision repealed by necessary implication? "We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it (the prior law); for they may be merely affirmative, or cumulative, or auxiliary." Story, J., *Wood* v. *United States*, 16 Pet. 342, 362.

Repeals by implication are not favored, and are only allowed to the extent that repugnancy exists, and in order to give an act not clearly intended as a substitute for an earlier one, the effect of repealing it, the implication of the intention to do so must necessarily flow from the language used, bearing in mind the necessity and occasion of the law. And where it is plain that the new law is in aid of the purposes of the old law, the latter will not be held to be abrogated except so far as there is palpable inconsistency.

We do not think that it was intended to repeal the provision of section 819 requiring indictments to be found only on the recommendation or request of the Commission, and still less that it was intended to circumscribe in this particular the general duty of the Commission to see that the laws relating to railroads should be faithfully executed.

Dealing, as we are, with the statutes of Kentucky, we are gratified to find these views confirmed by the Court of Appeals of that Commonwealth in *Illinois Central Railroad Company* v. *Commonwealth*, decided October 25, 1901, its opinion having been furnished us at the close of the argument, and since reported in 64 S. W. Rep. 975.

In that case the railroad company was indicted under section 820, and fined for charging more for a shorter than a longer haul. The indictment was returned before the railroad commission had determined whether the company should be exonerated as provided by that section. The judgment was reversed, and Hobson, J., speaking for the court, said:

"In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offence, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the offence and providing for its punishment, for by the next section (821) it is made the duty of the Commission 'to see that the laws relating to all railroads, except street, are faithfully executed;' and under this provision it would be the duty of the Commission to see to violations of the preceding section. . . . From the section as a whole it is clear that the legislature had in mind providing for the exoneration of the railroad from its provisions in proper cases and exempting the carrier from criminal liability to this extent. It therefore provided for an investigation by the railroad commission, a determination by it whether it deemed it proper to exonerate the railroad and for the enforcement of its decision by indictment by the grand jury in case the railroad was not exonerated. To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The legislature had no such result in mind, but clearly aimed to secure to the carrier a hearing on this question.

"The long and short haul matter is only another form of undue discrimination and preference, which are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882, (see General Statutes, 1021,) which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the State should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the State should find indictments."

The fourth section of the act of the general assembly of

Kentucky of April 6, 1882, (Acts, 1881, p. 66, c. 790,) entitled "An act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a board of railroad commissioners, and define its powers and duties," set forth in the edition of the Kentucky statutes of 1887, p. 1021, and referred to by the court, provided for the infliction of penalties on railroad companies convicted of extortion or unlawful discrimination, and that the offender should be "prosecuted by indictment or or by action in the name of the Commonwealth, upon information filed by the board of railroad commissioners;" and also that the companies should be liable in damages to the parties aggrieved. The act of March 10, 1900, does not appear to have been intended to change the settled legislative policy that indictments should be found on the recommendation of the Commission.

The result of these considerations is that the duty of enforcing its rates rests on the Commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at all. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record, and we are not called on to dispose of other contentions of grave importance, which were pressed in argument, as if now requiring adjudication.

Decrees reversed and cases remanded to the Circuit Court with a direction to sustain the demurrers and dismiss the bills.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 7. Argued November 9, 1900. — Decided January 6, 1902.

The question of the validity of the constitution and laws of Kentucky, under which these proceedings were had, is properly before the court, whose consideration of it must, however, be restricted to its Federal aspect.

This court must accept the meaning of the State enactments to be that found in them by the state courts.

A state railroad corporation, voluntarily formed, cannot exempt itself from the control reserved to the State by its constitution, and, if not protected by a valid contract, cannot successfully invoke the interposition of Federal courts, in respect to long haul and short haul clauses in a state constitution, simply on the ground that the railroad is property.

A contract of exemption from future general legislation unless it is given expressly or follows by implication equally clear with express words, cannot be deemed to exist.

A railroad charter is taken and held subject to the power of the State to regulate and control the grant in the interest of the public.

Interference with the commercial power of the general government to be unlawful must be direct.

At the January term, 1895, of the Marion County circuit court of the State of Kentucky, an indictment was found against the Louisville and Nashville Railroad Company, a corporation of the State of Kentucky, for an alleged violation of section 218 of the constitution of the State, and section 820 of the Kentucky statutes, in charging more for the transportation of coal from Altamont, Kentucky, to Lebanon, Kentucky, than to Louisville and Elizabethtown, Kentucky, over railroads which the company were operating under its charter. The indictment alleged that it was filed upon the recommendation of the state railroad commission. The trial resulted in a judgment of conviction and a fine of $300, which, on appeal, was, on May 20, 1899, affirmed by the Court of Appeals. From that judgment of the Court of Appeals a writ of error was allowed by the Chief Justice of that court on June 28, 1899, and the case was brought to this court.

Mr. William Lindsay for plaintiff in error. *Mr. Walker D. Hines* and *Mr. H. W. Bruce* were on his brief.

Mr. H. W. Rives filed a brief for defendant in error.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

This case is here on a writ of error to a judgment of the Court of Appeals of the State of Kentucky, affirming a judgment of the circuit court of Marion County, Kentucky, sentencing the Louisville and Nashville Railroad Company to a fine of $300 for an alleged violation of a statute of that State, which declares, among other things, that it shall be unlawful for any person or corporation owning or operating a railroad in the State to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for longer distance, over the same line, in the same direction, the shorter being included in the longer distance.

This statute is based upon section 218 of the constitution of the State of Kentucky, adopted in 1891. The statute which is section 820 of the Kentucky statutes and section 218 of the constitution are set forth in full in the report of the case of *McChord and others* v. *Louisville & Nashville Railroad*, and cognate cases, *ante* 483, and need not be here copied at length.

Those cases were here on appeal from final decrees of the Circuit Court of the United States for the District of Kentucky, enjoining the railroad commission of the State from enforcing against the complainants, of which the Louisville and Nashville Railroad Company, the plaintiff in error in the present case, was one, the provisions of an act of the Commonwealth of Kentucky, approved March 10, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employés, from charging, collecting, or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the railroad commission in ref-

erence thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions."

The occasion of the passage of this act of March 10, 1900, was a decision of the Court of Appeals of Kentucky holding that section 816, which declared that any railroad company which should charge and collect more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in that State, was guilty of extortion, could not be enforced as a penal statute for want of certainty. *Louisville & Nashville Railroad* v. *Commonwealth*, 99 Ky. 132.

The effort was made in the Circuit Court of the United States, and successfully, to have it held that by the said act of March 10, 1900, section 819, in so far as it provided an action by way of information, and for liability in damages, and that indictments should be made only on the recommendation or request of the railroad commission, was repealed by necessary implication; and that accordingly the order of the commission, fixing the rate, toll or compensation they may charge, was self-executing, and that no duty to enforce it was imposed on the commission; that the railroad companies were shut up by the act to the final determination of the commission that they have charged more than a just and reasonable rate; that on the trial indictments for failure to observe the rates made by the commission, the courts cannot entertain any inquiry as to the reasonableness of rates so fixed, because such inquiry is unwarranted by the statute, and therefore illusory and worthless; and that even if the question of constitutionality could be raised in defence, yet that if the order of the commission were permitted to be entered of record, the companies, if they did not comply, would be at once exposed to innumerable prosecutions and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute was upheld.

It was, however, held by this court that it was not the intent or effect of the act of March 10, 1900, to repeal those provisions of section 819, requiring indictments to be found only on the recommendation of the commission, nor to circumscribe,

in this particular, the general duty of the commission to see that the law relating to railroads should be faithfully executed. This view of the meaning and effect of the legislation was that taken by the Court of Appeals of Kentucky in the case of *Illinois Central Railroad Company* v. *Commonwealth*, decided while the appeals from the decrees of the Circuit Court of the United States were pending in this court. In that case the railroad company was indicted under section 820, and fined for charging more for a shorter than a longer haul. The indictment was returned before the railroad commission had determined whether the railroad company should be exonerated as provided in that section, and the Court of Appeals held that "to allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The long and short haul matter is only another form of undue discrimination and preference, which are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882, (see General Statutes, 1021,) which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the State should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the State should find indictments."

The conclusion reached by this court, therefore, was that the duty of enforcing its rates rests on the commission, and that there was no basis for interposition by a court of equity before the rates were fixed at all; and that whether, after the rates have been determined by the commission, their enforcement could be restrained, was a question not necessarily presented for decision in those cases; and, accordingly, the decrees of the Circuit Court were reversed with a direction to sustain the demurrer and dismiss the bills.

In the case now in hand, the indictment was found, not in advance of any action by the railroad commission, but on its

recommendation. Hence, the question of the validity of the provisions of the constitution and laws of the State of Kentucky under which these proceedings were had, is properly before us. Of course, our consideration of it must be restricted to its Federal aspect; in other words, we are to inquire whether the state enactments, constitutional and statutory, in the particulars involved in this controversy, and under the construction given them by the Court of Appeals, are in conflict with the Fourteenth Amendment of the Constitution of the United States.

At the trial of the indictment it was not seriously disputed that the defendant company had, at the time and place alleged, charged and received, for the carriage and transportation of coal over its line of road, a greater compensation for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, without having been authorized by the railroad commission so to charge, and after the commission, upon investigation, had refused so to do.

But certain facts, which were alleged to show that the circumstances and conditions, under which the charges in question were made and received, were not substantially similar with those ordinarily obtaining, and thus to show that the charges objected to were just and reasonable, were offered in evidence by the railroad company, and excluded from the jury by the trial court, which gave to the jury what amounted, in legal effect, to a peremptory instruction to find the defendant company guilty as indicted. The jury accordingly returned a verdict of guilty, fixing the fine at $300, for which judgment was rendered, and an appeal was taken by the defendant company from that judgment to the Court of Appeals.

It was contended, in the courts below and here, that as section 218 of the constitution of the State of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the interstate commerce act, it should be assumed that it was the intention of the constitutional convention of Kentucky to adopt the construction put upon that provision in the interstate commerce

law by the Federal courts, and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions, entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside of the State.

Such contention might seem reasonably to have been urged in the state courts, but as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments to be that found in them by the state courts. The prevailing view in the Court of Appeals was thus expressed by Judge Hobson:

"Appellant transported coal from Altamont to Louisville at $1.00 per ton, and to Elizabethtown at $1.30 per ton, while it charged $1.55 per ton from Altamont to Lebanon, an intermediate station on the line of its road. Complaint being made to the railroad commission, it investigated the matter, and made an order in writing declining to exonerate appellant from the operation of the provisions of section 820, and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court, as provided in the statute. The case was tried, and appellant having been adjudged guilty, it prosecutes this appeal to reverse the judgment imposing a fine upon it of $300.

"Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio River on boats, and that at Elizabethtown, it came in competition with western Kentucky coal brought there by the Illinois Central Railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to non-competitive points like Lebanon were reasonable, and were unaffected by the reduction referred to, which were necessary for the coal to be handled in those markets at all. The evidence offered by it to

sustain this contention was excluded by the court below on the trial, on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of section 218 of the constitution. It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not at another, and we are referred to numerous decisions of the Federal courts so holding. On the other hand, it is contended for the State that to adopt this construction is to emasculate the section and deprive it of all practical operation and effect.

"The precise question thus presented was determined by this court in the case of *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 20 Ky. Law Reporter, 1380, where the construction adopted by appellee was sustained. We are urged to overrule that case; but it was fully considered and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation."

In order to fully understand the position of the Court of Appeals it may be well to quote a portion of the opinion of that court in the case of *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 20 Ky. Law Rep. 1380, referred to in the court's opinion in the present case:

"The railroad commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from the operation of the section. In our opinion the court has not jurisdiction to either compel the railroad commission, upon application of the common carrier or those interested in particular industries or callings, to suspend or relax operation of section 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit suspension or relaxation in special cases. While the commission is thus, and to that extent, free from judicial interposition, it cannot of course nullify or, except in special cases, at all suspend operation of section 218;

and though the railroad commission be invested with this unusual power, it must be treated as a constitutional power with which the court cannot interfere."

With the meaning thus attributed to section 218 of the constitution, it is strenuously contended on behalf of the plaintiff in error "that said section has no reasonable relation to securing for the public reasonable rates or the prevention of extortion or undercharges, or the promotion of the safety, health, convenience or proper protection to the public; but that it amounts to an arbitrary and wholly unreasonable interference with perfectly legitimate business, and is, therefore, in conflict with the Fourteenth Amendment of the Constitution of the United States; and since the railroad company has built its railroads in the State of Kentucky, upon the faith of a charter granted it by the State authorizing it to operate those railroads, it has a contract right to engage in such legitimate railroad business, and any such arbitrary interference therewith as results from such a construction of section 218 would impair the obligation of that contract."

To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretence of regulating fares and freights, a State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and that in so far as it is thus deprived, while other

persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307; *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Lake Shore & Michigan Southern Railway Co.* v. *Smith*, 173 U. S. 684.

We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared, in the present case, that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor, yet, are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the Federal courts to interfere with the legislative department of the state government, when acting within the scope of its admitted powers, is always the exercise of a delicate power, one that should not be resorted to unless the reason for doing so is clear and unmistakable.

As we understand the condition of the statutes of Kentucky, there was at the time when this case was tried in the circuit court of Marion County, and when the Court of Appeals disposed of it, no power in the railroad commission to fix or establish rates or tolls which the railroad companies were bound to accept. Such power, however, was given to the commission by the act of March 10, 1900, and it was to restrain the railroad commission from taking action under that act that bills in equity were filed by the Louisville and Nashville Railroad Company and other railroad companies in the Circuit Court of the United States. But in the present case, we have only to do with the question of the validity of the action of the railroad commission's proceeding under section 218 of the constitution and section 820 of the statutes, which prescribe uniformity of rates for all distances, long or short, and make penal disregard of such uniformity by railroad companies, except when

authorized by the commission to charge less for longer than for shorter distances. As we have seen, this court held, on the appeals from the Circuit Court of the United States, that it was not competent for courts of equity to interfere with the action of the commission in respect to fixing rates before the rates were fixed at all, and when it could not appear whether the companies would have any reason to complain of them.

Our present duty is to consider only the objections to the validity of the long and short haul clauses in the constitution and the statutes.

It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of Federal courts when they are asked to interpose in a controversy between a State and its citizens.

This court then is not concerned with the wisdom of the people of Kentucky when they declared in their constitution that it should be unlawful for any person or corporation, owning or operating a railroad in that State, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. Nor, as we have already seen, is it for us to say that the Court of Appeals of Kentucky erred in so construing that enactment as to forbid a railroad company from justifying a voluntary disregard of its command by claiming that competition between its road and other modes of transportation created substantially dissimilar circumstances and conditions.

It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the constitution and statutes,

deprives the plaintiff in error of its property without due process of law and denies to it the equal protection of the laws.

When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. It may be that, in a given case, a railroad company may be able to show that the State has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the States. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. But, apart from such contentions, and looking only at the case of a company voluntarily formed to carry on business wholly within a State, we are unable to see how such company can successfully contend that it can be exempted by the courts from the operation of the constitution of the State.

It is said that, while it is true that railroad companies receive their rights to exist and to maintain their roads from the State, yet that their ownership of such roads is *property*, and, as such, is protected from arbitrary interference by the State. But, though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the State. We do not wish to be understood as intimating that if, hereafter, the railroad commission should fix and establish rates of a confiscatory character the company would be without the protection which courts of equity have heretofore given in cases of that description. What we now say is, that a state corporation voluntarily formed cannot exempt itself from the control reserved to itself by the State by its constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal courts, in respect to the long and short haul clause in the state constitution, on the ground simply that the railroad is property. Nor is there any foundation for the ob-

jection that the provision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another, and the remedy adopted by the State was to declare such preferences illegal, and to prohibit any person, corporation or common carrier from resorting to them. That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the State desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged on behalf of the plaintiff in error; but, however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands.

It is further contended that the indictment and proceedings in this case were void, because of the nature of the proviso in section 218 of the constitution. That proviso is in the following words: "Provided, that upon application to the railroad commission, such common carrier, or person, or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

The argument is that "even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet where the law does not do so, but recognizes that there may be legitimate traffic which could thereby be interfered with, it is unconstitutional to entrust the dispensation of the right to en-

gage in such legitimate traffic to a mere administrative tribunal, without any rules by which it may be guided, without specifying any conditions upon which the carriers shall be entitled to enjoy such legitimate traffic, and absolutely free to give or withhold its consent at its own pleasure or will, in any and all cases, without judicial review or control."

But if it be competent for the State, as this argument supposes, to wholly forbid, in every case, and by every carrier, the charging of more for a short than a long haul, it is not easy to see why the State may not permit such charges through the action of a tribunal authorized to investigate the subject and to afford relief in cases deemed proper. Such a provision is *ex gratia*, and in the direction of exonerating the carrier from what the argument concedes to be a lawful limitation. Such an exercise of discretion by the railroad commission would be no more arbitrary than if the constitution had authorized the legislature to allow in special cases a greater charge for the shorter than for the longer distance, and to prescribe the extent of such excess. We are not prepared to accept the view that the railroad commission, in acting under section 218, is merely an administrative body, and as such subject to judicial review. It is rather a constitutional tribunal, empowered, *upon the application of the carrier*, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition. If he elects to resort to the commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judg-

ment upon which the appraisers have proceeded. If there are charges of fraud or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void. *Shoemaker* v. *United States*, 147 U. S. 282, 305.

The plaintiff in error did not choose to avail itself of the right to apply for relief to the railroad commission, perhaps for the reason that doing so might be regarded as an acquiescence in or waiver of the right to object to the validity of the proviso.

However this may be, it is difficult to see how a Federal question is presented by the apprehensions which the plaintiff may entertain that a resort to the commission might be futile. As already said, the railroad company must be deemed to have accepted its grant, subject to the provisions of the constitution, and this presumption is as applicable to the method provided for exoneration from the prohibition as to the prohibition itself.

We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the State in its constitution. *Munn* v. *Illinois*, 94 U. S. 113; *Davidson* v. *New Orleans*, 96 U. S. 97; *Railroad Commission Cases*, 116 U. S. 307.

We are next to inquire whether the plaintiff in error has been exonerated from these constitutional conditions and regulations by a valid contract subsisting between it and the State.

We do not understand that the counsel for the plaintiff in error claims that, by any provision of its charter, power was given to the company to fix its own rates of charge, or to discriminate in its rates between different places on its line of railroad, and that the constitutional prohibition as to the long and short haul, subsequently enacted, operates, if enforced, as a withdrawal or defeat of that power.

No right, in express terms or by necessary implication, is pointed in the company's charter, granting to the Louisville and Nashville Railroad Company the privilege of discriminating in its tariff of tolls or charges in favor of longer over shorter dis-

tance points. On February 14, 1856, there was passed a general act reserving to the State an unlimited power to amend all charters and amendments thereafter granted. Laws of Kentucky, 1855–6, c. 148. It is true that an amendment to plaintiff in error's charter was granted by an act passed February 28, 1860, by section 1 of which the board of directors were granted authority "in their adjustment of a tariff for freight and passengers, to make discrimination in favor of freights and passage for long over short distances." But it does not seem to be contended that by this amendment of 1860 an irrevocable contract was effected between the State and the company, which could not be affected by a subsequent constitutional enactment. It is scarcely necessary to argue or to cite authority for the proposition that a contract of exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be deemed to exist unless it is given expressly, or unless it follows by an implication equally clear with express words.

But what is claimed is that a railroad company, by mere force of its legal organization and the construction of its road, has a necessarily implied power to fix reasonable rates, and especially has the right to differ rates when competition exists from rates applicable where there is no competition. Such rights, it is said, are essential to enable the company to engage in perfectly legitimate business, and hence that an interference therewith, even by a constitutional enactment, not only deprives the company of its property, or the reasonable use of it, but also impairs the obligation of the contract implied in the grant of its charter.

So far as the question of an implied contract is concerned, we perceive no distinction between the case of a railroad company incorporated before and that of one incorporated after the constitutional enactment in question. As it has been said of the one so it may be said of the other, that the charter is taken and held subject to the power of the State to regulate and control the grant in the interest of the public.

In *Pennsylvania Railroad* v. *Miller*, 132 U. S. 75, it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted

such a contract between the State and the company as exempted the latter from the operation of the subsequently adopted constitution of Pennsylvania; that a constitutional provision, as applied to the company, in respect to cases afterwards arising, did not impair the obligation of any contract between it and the State; and that the company took its charter subject to the general law of the State and to such changes as might be made in such general law, and subject to future constitutional provision and future general legislation, since there was no prior contract with it exempting it from such enactments.

The same principle was announced in *Louisville Water Co.* v. *Clark*, 143 U. S. 1, and in *Louisville & Nashville Railroad*, v. *Kentucky*, 161 U. S. 677.

In the absence, then, of any express prior contract between the State and the company, exempting the latter from future constitutional enactments, and without conceding that even such a contract would avail to relieve the company from constitutional changes in the exercise of the general police power of the State, it is sufficient to say that we do not find in section 218 of the constitution of Kentucky any impairment of an existing contract between the State and the plaintiff in error.

The final contention, that section 218 of the constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long.

It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.

It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference

with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State. *New York, Lake Erie and Western Railroad* v. *Pennsylvania*, 158 U. S. 431, 439; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150.

A discussion of this subject will be found in the opinion of this court in *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, 701, where the same conclusion was reached.

The judgment of the Court of Appeals is

Affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

UNITED STATES *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

CROSS APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 18 and 24. Argued January 29, 30, 1901.—Decided January 6, 1902.

The title of the Southern Pacific Railroad Company to the lands in controversy in this suit was acquired by virtue of the act of July 27, 1866, 14 Stat. 292, and the construction of the road was made under such circumstances as entitle the company to the benefit of the grant made by the eighteenth section of that act.

The settled rule of construction is that where by the same act, or by acts of the same date, grants of land are made to two separate companies, in so far as the limits of their grants conflict by crossing or lapping, each company takes an equal undivided moiety of the lands within the conflict, and neither acquires all by priority of location or priority of construction.

It is well settled that Congress has power to grant to a corporation created by a State additional franchises, at least of a similar nature.

The grant to the Southern Pacific and that to the Atlantic and Pacific both took effect, and both being *in præsenti*, when maps were filed and approved they took effect by relation as of the date of the act.

The United States having by the forfeiture act of July 6, 1886, become possessed of all the rights and interests of the Atlantic and Pacific Com-

pany in this grant within the limits of California, had an equal undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to the Atlantic and Pacific Company and of that made to the Southern Pacific Company by the act of July 27, 1866, and the Southern Pacific Company holds the other equal undivided moiety thereof.

THE case is stated in the opinion of the court.

Mr. Joseph H. Call for the United States.

Mr. Maxwell Evarts and *Mr. L. E. Payson* for appellants.

MR. JUSTICE BREWER delivered the opinion of the court.

On May 14, 1894, the United States filed in the Circuit Court for the Southern District of California a bill of complaint against the Southern Pacific Railroad Company, (hereinafter called the Southern Pacific,) and others, seeking to have certain patents canceled and their title quieted to a large body of land, including those described in said patents. Upon pleading and proofs a decree was entered in favor of the United States on June 6, 1898, quieting their title to most of the lands described in the bill. 86 Fed. Rep. 962. Cross appeals were taken from such decree to the Circuit Court of Appeals for the Ninth Circuit, by which court the decree was affirmed on October 2, 1899. 98 Fed. Rep. 27. From such decree of affirmance both parties have appealed to this court.

The lands in controversy were within the grant made July 27, 1866, c. 278, 14 Stat. 292, to the Atlantic and Pacific Railroad Company, (hereinafter called the Atlantic and Pacific,) in aid of its projected line from Springfield, Missouri, to the Pacific Ocean, and were situated along that line between the eastern boundary of California and the Pacific Ocean. The Southern Pacific claims title to these lands by virtue of the eighteenth section of that act and its proceedings thereunder, had with the express approval of Congress.

Litigation has heretofore been had between the United States and the Southern Pacific in reference to lands along the line of

the Atlantic and Pacific, the result of which litigation will be found in the following decisions of this court: *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570; *United States* v. *Colton Marble & Lime Company*, and *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 615, and *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1. Those decisions are claimed by the Government to be controlling of this case on the principle of *res judicata.*

There are, therefore, two distinct questions presented for our consideration: First, whether the Southern Pacific took any title to these lands by virtue of the act of 1866 or subsequent legislation? and, second, do the prior decisions of this court control the determination of this case?

With reference to the first question, a further statement of facts is necessary. The act of 1866 chartered the Atlantic and Pacific, empowered it to build a railroad from Springfield in Missouri to the Pacific Ocean, the description of the latter part of the route being in these words:

"Thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

By the third section a grant of lands was made to said company in these words:

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line

of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers."

The company filed its map of definite location in 1872, but never did any work in the way of constructing that part of its road from the Colorado River, that being the eastern boundary of California, to the Pacific Ocean. On July 6, 1886, Congress passed an act forfeiting the lands granted to the Atlantic and Pacific, so far as they were adjacent to and coterminous with the uncompleted portions of the road. 24 Stat. 123, c. 637. By this act the interest of the Atlantic and Pacific in public lands in the State of California was divested and restored to the United States.

On December 2, 1865, the Southern Pacific was incorporated under the laws of California, "for the purpose of constructing, owning and maintaining a railroad from some point on the Bay of San Francisco in the State of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the town of San Diego in said State, thence eastward through the said county of San Diego to the eastern line of the State of California, there to connect with a contemplated railroad from said eastern line of the State of California to the Mississippi River."

Section 18 of the act of 1866 reads as follows:

"*And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said

road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

On January 3, 1867, the Southern Pacific filed in the Interior Department a map of a route from San Francisco via Mojave to Needles, on the Colorado River. This line from Mojave to Needles is on the same general course and contiguous to that adopted by the Atlantic and Pacific. The Secretary of the Interior refused to accept or approve the map on the ground that this particular part of the line was not authorized by the charter of the Southern Pacific. On April 4, 1870, the legislature of California passed the following act:

"Whereas, by the provisions of a certain act of Congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the State of California,' approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers and authority were vested in and conferred upon the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the State of California, therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions and conditions of the said act of Congress, and all other acts of Congress now in force, or which may hereafter be enacted, the State of California hereby consents to said act; and the said company, its successors and assigns, are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the State of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power and privileges hereby granted to, conferred upon and vested in them, to construct, maintain and operate, by steam or other power, the said railroad and telegraph line mentioned in said act of Congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges, franchises, power and authority

conferred upon, granted to or vested in said company by the said acts of Congress and any act of Congress which may be hereafter enacted." Statutes, California, 1869–70, p. 883.

And on June 28, 1870, Congress passed the following joint resolution, 16 Stat. 382:

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

Along this general line the Southern Pacific constructed its road. As California said, in reference to the grant made to the Southern Pacific by section 18 of the act of Congress of July 27, 1866, that it "hereby consents to said act," and as Congress, by its resolution, approved the route selected by the Southern Pacific as a route authorized by that act, no one can question that the construction of the road was under such circumstances as entitle the company to the benefit of the grant made by said eighteenth section of the act of 1866.

By the act of 1866, Congress made grants of land to two different companies; by the third section to the Atlantic and Pacific, and by the eighteenth section to the Southern Pacific. The settled rule of construction is that where by the same act, or by acts of the same date, grants of land are made to two separate companies, in so far as the limits of their grants conflict by crossing or lapping, each company takes an equal, undivided moiety of the lands within the conflict. Neither acquires all by priority of location or priority of construction. *St. Paul & Sioux City Railroad* v. *Winona & St. Paul Railroad*, 112 U. S. 720; *Sioux City Railroad* v. *Chicago Railroad*, 117 U. S. 406; *Donahue* v. *Lake Superior Canal &c.*, 155 U. S. 386; *Sioux City &c. Railroad* v. *United States*, 159 U. S. 349.

The question as to the two grants under this act of 1866 was presented to Mr. Justice Lamar, at that time Secretary of the Interior, and his ruling to the same effect appears in a letter of instructions to the acting Commissioner of the General Land Office on November 25, 1887. 6 Land Dec. 349. In that letter he said:

"The Southern Pacific Company located its main line January 3, 1867, and by the terms of the grant its right immediately attached to every odd section of land, not of the character excepted by the grant, and within the ten-mile limit, subject, however, to be divested to the extent of a half interest in every such odd section that might fall within the common limits of both roads, after the filing of the map of definite location by the Atlantic and Pacific Company.

"The Atlantic and Pacific Company filed its map of definite location April 11, 1872, and April 16, 1874, showing that the primary or granted limits of said road overlapped and conflicted with the primary or granted limits of a portion of the Southern Pacific road. As to the lands falling within the granted limits of both roads, the filing of the map of definite location by the Atlantic and Pacific Company, showing such conflict, immediately divested the Southern Pacific Company of the right and title to a half interest in all such odd sections, and from that moment and by that act the two companies became entitled to equal, undivided moieties in such sections, without regard to

the priority of location of the line of the road, or priority of construction; the right of each company relating back to the date of the grant. *St. Paul & Sioux City Railroad* v. *Winona & St. Paul Railroad*, 112 U. S. 720; *Sioux City Railroad* v. *Chicago Railroad*, 117 U. S. 406."

As against this, it is contended that Congress could not have intended a road running from the western to the eastern border of California, parallel and contiguous to the Atlantic and Pacific road; that it must have intended a connection between the two roads on the western boundary or border of the State —especially in view of the fact that the charter of the Southern Pacific contemplated only a line along the western part of the State from San Francisco to San Diego. Whatever doubts there might be in respect to this matter are removed by the action taken by the Southern Pacific and the resolution of June 28, 1870. The railroad company assumed that it had a right under the act of 1866 to locate a line to the eastern boundary of California, and did locate such a line, and filed a map thereof with the Secretary of the Interior, and Congress by the joint resolution of June 28 in effect accepted and approved that line, and declared that the railroad company might construct its road on the route indicated on that map.

Neither is the date of this resolution the time at which the rights of the railroad company arose, as is contended by counsel. No new land grant was contemplated; no substitution of one grant for another, or of one line for another. The obvious purpose was to accept the line proffered by the road as the line intended by the act of 1866, and the grant made by the act of 1866 was recognized as rightfully to be used in aid of the construction of a road along the line suggested by the company.

Neither is it material whether the line indicated on the map filed is to be taken as a line of general route or of definite location, for in fact the road was constructed along that line, "as near as may be," in the language of the resolution, and the road has been accepted by the Government.

Neither does the fact that the line of road contemplated by the Southern Pacific's charter, at the time of the passage of the act of 1866, was along the western border of the State, prevent

the operation of the grant. It is well settled that Congress has power to grant to a corporation created by a State additional franchises—at least franchises of a similar nature. *Sinking Fund Cases*, 99 U. S. 700, 727; *Pacific Railroad Removal Cases*, 115 U. S. 1, 15; *California* v. *Central Pacific Railroad*, 127 U. S. 1; *United States* v. *Stanford*, 161 U. S. 412, 431; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 118, 123.

In *California* v. *Pacific Railroad Company*, *supra*, this very grant was before the court, and Mr. Justice Bradley, on page 44, having theretofore narrated the facts in reference to various charters and grants, said:

"An examination of the acts referred to in these findings shows that Congress authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad, at such point near the boundary line of the State of California, as it should deem most suitable for a railroad line to San Franciso; and, to aid in the construction of such a railroad line, Congress declared that the company should have similar grants of land, and should be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific. Like powers were also given to the Southern Pacific Railroad Company to construct a line of railroad from Tehachapa Pass, by way of Los Angeles, to the Texas Pacific road at the Colorado River (Fort Yuma). The Southern Pacific Company was not authorized by its original charter to extend its railroad to the Colorado River, as we already know by other cases brought before us, and as appears by the act of the state legislature passed April 4, 1870, which assumed to authorize the company to change the line of its railroad so as to reach the eastern boundary line of the State; thus duplicating the power given to it by the act of Congress. (See the state act quoted in 118 U. S. 399.) This state legislation was probably procured to remove all doubts with regard to the company's power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by Congress, and that franchise was accepted, and the roads have been constructed in conformity thereto."

We are of the opinion, therefore, that Mr. Secretary Lamar

was right in his conclusion that both the grant to the Southern Pacific and that to the Atlantic and Pacific took effect, and being by the same act, so far as there was a conflict, the two companies took equal, undivided moieties of the land.

We pass, therefore, to a consideration of the second question: Do prior decisions of this court control the determination of this case? *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570; *United States* v. *Colton Marble & Lime Co.*, and *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 615, and *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, are referred to. Those cases were brought by the United States against the Southern Pacific to quiet title to certain lands (but not the lands in controversy here) along the line of the Atlantic and Pacific within the State of California. In the last of these three cases the principle of *res judicata* was invoked and held applicable; and the title of the Government to the lands involved was sustained on the ground that the question in controversy had been finally determined in the prior suits. In the opinion filed there was much discussion in respect to *res judicata*, and it was said, on page 48:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified."

See also *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396, in which the rule was thus stated:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies."

It becomes, therefore, important to determine what was decided in the prior cases, and in order to a clear understanding these additional facts must be borne in mind: On March 3, 1871, Congress passed an act, 16 Stat. 573, to incorporate the Texas and Pacific Railroad Company, the twenty-third section of which reads:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however*, That this section shall, in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

On April 3, 1871, the Southern Pacific filed a map of a route from Tehachapa Pass southward by way of Los Angeles to connect with the Texas and Pacific Railroad at the Colorado River, and subsequently constructed a road on such line. This line crossed that of the Atlantic and Pacific, the general course of the former being north and south and of the latter east and west. The grants, therefore, to the Atlantic and Pacific by the act of July 27, 1866, and that to the Southern Pacific by the act of March 3, 1871, came in conflict at or near the place of intersection of their lines. The lands in controversy in those suits were lands within the granted limits of both companies at the place of conflict. It was so distinctly stated in the opening of the opinion in the first case referred to:

"The question to be considered is not as to validity of the grant to the Southern Pacific Company, but only as to its extent. It may be conceded that the company took title to lands generally along its line, from Tehachapa Pass to its junction with the Texas and Pacific; and the contention of the Government is here limited to those lands only which lie within

the granted limits of both the Atlantic and Pacific and the Southern Pacific Companies, at the crossing of their lines, as definitely located." p. 592.

Both grants were grants *in præsenti*, and when the maps of definite location were filed and approved the grants took effect by relation as of the dates of the acts. Hence, if each company filed a map of definite location the title of the Atlantic and Pacific, relating back to the year 1866, was anterior and superior to that of the Southern Pacific, of date 1871, and all the lands within the conflict passed to the Atlantic and Pacific rather than to the Southern Pacific. To avoid the effect of this conclusion—a conclusion resting upon well-settled principles of public land law—the Southern Pacific contended that no map of definite location was ever filed by the Atlantic and Pacific, or approved by the Secretary of the Interior, but after a full examination of the facts this court held otherwise, summing up its conclusions in these words:

"Our conclusions, therefore, are, that a valid and sufficient map of definite location of its route from the Colorado River to the Pacific Ocean was filed by the Atlantic and Pacific Company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic and Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic and Pacific was retaken by the General Government, and retaken for its own benefit, and not that of the Southern Pacific Company; and that the latter company has no title of any kind to these lands." p. 607.

So, in the opinion in the last of the three cases, is this statement of the facts and question.

"The principal contention of the United States is that the lands in dispute are in the same category in every respect with those in controversy in *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, and *United States* v. *Colton Marble & Lime Co.*, and *United States* v. *Southern Pacific Railroad*, 146 U. S. 615; and that, so far as the question of title is concerned, the judgments in those cases have conclusively determined, as

between the United States and the Southern Pacific Railroad Company and its privies, the essential facts upon which the Government rests its present claim.

"Stated in another form, the United States insists that in the former cases the controlling matter in issue was, whether certain maps filed by the Atlantic and Pacific Railroad Company in 1872, and which were accepted by the Land Department as sufficiently designating that company's line of road under the act of Congress of July 27, 1866, c. 278, 14 Stat. 292, were valid maps of *definite location;* the United States contending in those cases that they were, and the Southern Pacific Railroad Company contending that they were not, maps of that character; that that issue was determined in favor of the United States; and that as the lands now in dispute are within the limits of the line of road so designated, it is not open to the Southern Pacific Railroad Company, in this proceeding, to question the former determination that such maps sufficiently identified the lands granted to the Atlantic and Pacific Railroad Company by the act of 1866, and were therefore valid maps of definite location." p. 25.

And again, on page 29, after a quotation of the twenty-third section of the act of March 3, 1871, is this declaration:

"The Southern Pacific Railroad Company constructed the road thus contemplated, and claims that the lands here in dispute passed to it under the above act of 1871."

So also on page 46:

"The lands now in controversy are situated opposite to and are coterminous with the first, second and fourth sections of the Southern Pacific Railroad as constructed between 1873 and 1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the twenty-third section of the Texas and Pacific act of March 3, 1871."

And on page 61 the conclusion was summed up in these words:

"For the reasons stated, we are of opinion that it must be taken in this case to have been conclusively adjudicated in the former cases, as between the United States and the Southern Pacific Railroad Company—

"1. That the maps filed by the Atlantic and Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866;

"2. That upon the acceptance of those maps by the Land Department the rights of that company in the lands so granted, attached, by relation as of the date of the act of 1866; and

"3. That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain without the Southern Pacific Railroad Company having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain.

"These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; for, as all the lands here in controversy are embraced by the maps of 1872, and therefore appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below."

Obviously the fact settled by the decisions in those cases was the filing by the Atlantic and Pacific of an approved map of definite location. Upon that the controversy hinged. Such a map having been filed the title of the Atlantic and Pacific vested as of the date of the act of July 27, 1866, and inasmuch as the Southern Pacific claimed only by a grant of date March 3, 1871, it took no title. This which is apparent from the foregoing quotations is emphasized by the full discussions in the opinions, as well as by the allegations in the pleadings upon which the cases were tried. That fact having been determined must be taken in the present suit as not open to dispute. The Atlantic and Pacific did file a sufficient map of definite location of its line from the Colorado River to the Pacific Ocean, and such map was approved by the Secretary of the Interior. Its title, therefore, to the land within the limits of the grant in California took effect as of date July 27, 1866. No claim of right

or title arising only in 1871 and created by an act of that date could affect its title.

But it was not adjudged in those cases either that the Southern Pacific had no title to any real estate by virtue of the act of 1866, or that if there was any real estate to which it had any claim or right by virtue of that act, such claim was not of equal force with that of the Atlantic and Pacific. The general statement at the close of the quotation from 146 U. S. 607, "that the latter company has no title of any kind to these lands," and the similar statement in paragraph 3 of the quotation from 168 U. S. 61, are to be taken as applicable only to the facts presented, and cannot be construed as announcing any determination as to matters and questions not appearing in the records. Of course, the decrees that were rendered in those cases are conclusive of the title to the property involved in them, no matter what claims or rights either party may have had and failed to produce, but as to property which was not involved in those suits they are conclusive only as to the matters which were actually litigated and determined. "On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action." *Cromwell* v. *County of Sac*, 94 U. S. 351, 356. "The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided." *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 687. The question here presented was not determined in the prior cases, and is whether the Southern Pacific acquired any title to lands other than those involved in those suits by virtue of the act of 1866, and that question, as we have seen, must be answered in the affirmative. Nor is this a mere technical difference between those cases and this. Counsel for the railroad company call the line from Mojave southward via Los Angeles to connect with the Texas and Pacific a "branch line," and that eastward from Mojave to Needles to connect with the Atlantic and Pacific a "main

line;" but by whatever names these two lines are called, they were built under the authority of two different statutes; the line from Mojave southward via Los Angeles under the authority of the act of Congress of March 3, 1871, an act which in terms authorized the building of a road from a point at or near Tehachapa Pass, which is in the vicinity of Mojave, southward by way of Los Angeles to connect with the Texas and Pacific, and gave no authority to build a line eastward from Mojave to connect with the Atlantic and Pacific; the line from Mojave eastward, under the act of 1866, which authorized the Southern Pacific to connect with the Atlantic and Pacific at or near the boundary of the State. The route which was selected by the company for this line was approved by Congress as authorized by the act of 1866. Hence the one line was built under the authority of the act of 1871, and the other under the authority of the act of 1866.

Our conclusions, therefore, are that the United States, having become by the forfeiture act of July 6, 1886, repossessed of all the rights and interests of the Atlantic and Pacific in this grant within the limits of California, hold an equal, undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to the Atlantic and Pacific and of that made to the Southern Pacific by the act of July 27, 1866; and that the Southern Pacific holds the other equal, undivided moiety therein. The United States and the Southern Pacific being, therefore, tenants in common of a large body of lands, a partition is necessary. It was suggested by Secretary Lamar, in the letter heretofore referred to, that the Southern Pacific take only every other alternate odd-numbered section. We see no impropriety in such mode of partition, though, under the case as it stands, we can make no order to that effect. In whatever way partition may be made, equity requires that the lands which the Southern Pacific has assumed to sell and which were excepted by the Circuit Court from the decree in favor of the United States, and in respect to which they took their cross appeal, must be among those set off to the Southern Pacific, and thus the title of the purchasers be perfected. It is needless, therefore, to consider the merits of the cross appeal of the United States.

Syllabus.

It is also unnecessary to determine the rights of the Southern Pacific to lands outside the limits of conflict. It having been adjudged that the Southern Pacific, by the construction of its road eastward from Mojave to Needles, became entitled to the benefit of the grant made by the eighteenth section of the act of 1866, the adjustment of the grant is properly to be had in the Land Department, subject, of course, if necessary, to further contests in the courts.

The decree of the Circuit Court of Appeals of the Ninth Circuit, affirming the decree of the Circuit Court for the Southern District of California will be reversed and the case remanded to the Circuit Court with instructions to enter a decree quieting the title of the United States to an equal, undivided moiety in all alternate sections within the place or granted limits of the Atlantic and Pacific in California, so far as those limits conflict with the like limits of the Southern Pacific, excepting therefrom those lands in respect to which there has been some prior adjudication, and to dismiss the bill as to all other lands without prejudice to any future suit or action.

UNITED STATES TRUST COMPANY *v.* NEW MEXICO. NEW MEXICO *v.* UNITED STATES TRUST COMPANY.

CROSS APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Nos. 181, 182. Argued October 30, 31, 1901.—Decided January 6, 1902.

An agreed statement of facts may be the equivalent of a special verdict, or a finding of facts upon which a reviewing court may declare the applicable law if said agreed statement is of the ultimate facts, but if it be merely a recital of testimony, or evidential fact, it brings nothing before an appellate court for consideration.

The certified statement of facts is insufficient, and presents nothing for examination.

There was no invalidity in the facts of additional assessments.

Statement of the Case.

The filing of the intervening petition and the final adjudication thereon were in time.

That the receiver had been discharged before final proceedings were had, is immaterial.

The Santa Fé Company cannot claim that it was misled, in any way, as to its liability for these taxes.

No order was necessary for retaking possession.

The property was sufficiently described in the decree, and it must be assumed that the testimony warranted the description.

Until there was an identification of the property subject to taxation, and a determination of the amount of taxes due, it would be inequitable to charge penalties for non-payment.

There was no error in refusing interest prior to the decree.

On July 16, 1895, the United States Trust Company of New York filed its bill in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, praying foreclosure of a mortgage given by the Atlantic and Pacific Railroad Company. On January 10, 1896, Charles W. Smith was appointed receiver. On April 10, 1896, a decree of foreclosure was entered. The decree provided that the purchaser or purchasers, and his or their successors or assigns, should, as part consideration and purchase price of the property purchased and in addition to the sum bid, pay "any indebtedness and obligations or liabilities which shall have been legally contracted or incurred by the receiver before delivery or possession of the property sold, including the receiver's notes or certificates hereinbefore mentioned, and also any indebtedness and liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to said first mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof, provided that suit be brought for the enforcement of such indebtedness, obligation or liability within the period allowed by any statute of limitations applicable thereto.

* * * * * *

"Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver

or filed with the clerk of this court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance. The receiver shall publish such notice at least once a week for the period of six weeks in one or more newspapers published in Albuquerque, New Mexico; Prescott, Arizona, and Los Angeles, California, upon the request of any purchaser or purchasers after delivery of the possession of the property to them, and any such claims, which shall not be so presented or filed within the period of six months after the first publication of such notice, shall not be enforceable against said receiver nor against the property sold nor against the purchaser or purchasers, his or their successors or assigns."

On May 3, 1897, a sale was made under the decree to A. F. Walker, R. Somers Hayes and Victor Morawetz. On May 4 the sale was confirmed. The order of confirmation contained substantially the same provisions respecting payment of obligations as the decree, and added "including also any taxes which may finally be adjudged to be a lien upon the property sold under the decree aforesaid."

According to an affidavit filed in the case this clause was entered at the suggestion of counsel for the Territory, and upon notice in open court of his intention to present a claim for the taxes hereinafter referred to. On June 22, 1897, the purchasers conveyed the property to the Santa Fé Pacific Railroad Company, and on July 1, 1897, the receiver delivered possession of the property. On October 4, 1898, he was by order of the court discharged as receiver. He failed to give the notice required by the decree for the purpose of cutting off claims against the property, and on application of the Santa Fé Pacific Railroad Company, the grantee of the purchasers, on December 19, 1898, an order was entered directing the clerk of the court to publish the notice, and a notice was published that on or before October 23, 1899, all claims against the receiver must be presented or they would be barred. On June 10, 1897, after the confirmation of the sale but while the property was in pos-

session of the receiver, the Territory of New Mexico, by leave, filed an intervening petition, claiming a lien for and payment by the receiver of certain taxes upon part of the railroad property in the county of Valencia. To this petition the trust company and receiver, on June 23, 1897, filed joint and several pleas. On the same day, without passing upon the sufficiency of the pleas, the court ordered the intervening petition dismissed on the ground that the "matters and things therein set up" were "not sufficient to entitle the said intervening petitioner to the relief sought by its petition." On appeal to the Supreme Court of the Territory this order of dismissal was affirmed. From such decision the Territory appealed to this court, which upon the first hearing affirmed the rulings below, 172 U. S. 171, 186, but on a petition for rehearing reversed the order and remanded the case for further proceedings. 174 U. S. 545.

The mandate having been returned and presented to the trial court on August 4, 1899, proceedings were there had which culminated on October 5, 1899, in a finding that the Territory was entitled to a tax lien upon a portion of the railroad property for $74,168.70, and a decree establishing such lien. From this decree both parties appealed to the Supreme Court of the Territory, which, on August 23, 1900, modified the decree by reducing the amount to $61,922.73, and awarding interest at the rate of six per cent per annum from October 5, 1899, the date of the decree in the district court. 62 Pac. Rep. 987. From this decision both parties have appealed to this court.

A statement of facts agreed to by the parties was filed in the district court, and upon this statement the decree was founded. This agreed statement contains a narrative of facts, transcripts of records and the testimony which certain witnesses would have given if they had been produced and sworn. This statement of facts was incorporated in the record transmitted to the Supreme Court of the Territory, and is the only portion of the record showing the facts presented on the hearing in the District Court. After the decision by the Supreme Court of the Territory, both parties having signified an intention to appeal to this court, the Territory applied for a statement of facts in

accordance with the act of Congress, of date April 7, 1874, in reference to practice in territorial courts and appeals therefrom, 18 Stat. 27, c. 80, which application was resisted by the counsel for the trust company and the receiver on the ground that the case had been tried in the court below upon an agreed statement of facts, whereupon the Supreme Court made this entry of record:

"Being willing and desirous that the respective parties be allowed to get their appeals before the Supreme Court of the United States in such shape as their counsel deem proper, the court hereby certifies for use upon the appeal of the said The United States Trust Company of New York and C. W. Smith, receiver, that this case was tried in the court below upon an agreed statement of facts, which agreed statement of facts was made part of the record in the district court and part of the record upon appeal to this court, and is to be a part of the record on appeal to the Supreme Court of the United States; that the said agreed statement sets out the facts of this case which were heard or considered by this court upon said appeal, and the same is hereby adopted by this court as its statement of such facts for use upon the appeal aforesaid without here repeating the same.

"And the court further certifies for use upon the appeal of the said Territory of New Mexico, in accordance with the prayer of the said appellant, the following statement of facts."

Following this was a special statement of facts, certified to under the hand of the Chief Justice.

Mr. C. N. Sterry for appellants. *Mr. E. D. Kenna* and *Mr. Robert Dunlap* were on his brief.

Mr. F. W. Clancy for appellee.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The district court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this court of such order is an adjudi-

cation that upon the face of the petition a valid claim was presented, and is conclusive of such *prima facie* validity, not merely against objections which were in fact made but also against those which might have been made. *Cromwell* v. *Sac County*, 94 U. S. 351, 352; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610, 618. We start in this inquiry then with the adjudicated fact that upon the face of the intervening petition was presented a valid claim for the taxes therein specified.

The case was heard in the district court upon an agreed statement of facts, which was thereafter certified by the Supreme Court of the Territory as a statement of facts under the act of April 7, 1874. We have had several occasions to consider the effect of an agreement of the parties as to the facts. See *Wilson, Receiver &c.* v. *The Merchants' Loan & Trust Co. ante*, 121, and cases cited in the opinion. An agreed statement of facts may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law if such agreed statement is of the ultimate facts, but if it be merely a recital of testimony or evidential facts, it brings nothing before an appellate court for consideration. The same rule obtains in cases of appeals from territorial courts under the act of 1874. That act in terms provides that—

"On appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below." *Stringfellow* v. *Cain*, 99 U. S. 610; *Idaho & Oregon Land Company* v. *Bradbury*, 132 U. S. 509.

Tested by the various authorities just cited the certified statement of facts is insufficient, and presents nothing for our examination. This disposes of most of the questions discussed by counsel.

When the mandate from this court was filed in the district court, a motion to dismiss and also pleas in abatement and in bar were successively filed, argued and overruled. We shall not attempt to notice in detail the various matters presented in the motion and pleas. It will be sufficient to state our conclusions upon the important questions.

There was no invalidity in the fact of additional assessments. Indeed, the claim in the petition was wholly for taxes based upon additional assessments for prior years, and when this court adjudged that that petition upon its face showed a tax claim against the property, it was an adjudication in favor of the validity of such additional assessments.

The filing of the intervening petition and the final adjudication thereon were in time. It is true the petition was not filed until after the sale had been confirmed and the master's deed executed, and that by the decree of confirmation the receiver was directed to then turn over the property to the purchasers. It may be also conceded as generally true that a retention by a receiver, after the time for the delivery of the property in his hands, is as agent of the purchasers. *Very* v. *Watkins*, 23 How. 469, 474. But the filing of the petition, as well as the mandate from this court, was within the time expressly named in the decree, as follows:

"Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver or filed with the clerk of this court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance."

Indeed, the petition was filed while the property was still in the hands of the receiver, and that would seem to bring the action of the intervenor within the terms of the first clause of the quotation just made. At any rate everything in the district court, even its final adjudication, was before October 23, 1899, the time fixed in the notice for the cutting off of claims against the property given at the instance of the grantee of the purchasers, to wit, the Santa Fé Pacific Railroad Company. That the receiver had been discharged before such mandate was filed, or final proceedings had, is immaterial, as the grantee of the purchaser (the present owner of the property) had made itself a party to the record by coming in and praying for the publication of a notice to cut off claims.

Neither can the Santa Fé Company claim that it was misled

in any way as to its liability for these taxes, for not only by the terms of the decree was the sale to be made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgages foreclosed, but also on the confirmation of the sale and before it took title from the purchasers at such sale the order specifically included within the obligations which must be assumed any taxes which might "finally be adjudged to be a lien upon the property."

No order was necessary for retaking possession. By the terms of the decree the court, although the actual possession was surrendered, retained a constructive control which it could enforce whenever its orders were not complied with, and the present proceeding was to establish that the property was subject to these taxes. The proceeding was initiated not only when there was a qualified control, but also an actual possession of the property, and no subsequent orders of the court put an end to its jurisdiction to proceed to an inquiry as to the validity of the tax lien. The reversal of the order of dismissal by this court reinstated the proceeding in the trial court as of the date of the order of dismissal. If the decree is not complied with by the present owners of the property, it may then become necessary to order a retaking of possession.

While the description in the intervening petition of the property sought to be subjected to the taxes may be indefinite, the property is sufficiently described in the decree, and it must be assumed that the testimony warranted the description.

These are all the matters we deem it necessary to notice, and we are of opinion that in the record, so far as we are at liberty to examine it, is disclosed no error prejudicial to the rights of the appellants.

On its cross appeal the Territory, which had obtained a properly certified statement of facts sufficient for the questions it presents, contends that it was entitled to recover the amount of the tax upon 60.7 miles of road, as fixed by the assessments, whereas the court found that there were only 55.5 miles subject to taxation, and made the award upon the basis of assessments upon that extent of road. It insists that the assessments were conclusive of the amount due because no appeals to correct

them were taken, as permitted by law. It further says that in any event the statement made in the pleas and sworn to by the solicitor for the trust company and the receiver, "that about 58 miles of said right of way in said county and Territory was and is through land which was not government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress," should be held conclusive as to the number of miles subject to taxation. The trial court found, as stated, that there were 55.5 miles so subject. This finding was approved by the Supreme Court and is conclusive upon us as to the fact; and if in truth there were only so many miles of road subject to taxation, it would be inequitable to adjudge a greater liability, for that would be enforcing taxes upon property which was not subject to taxation.

Again, it is contended that the Territory was entitled to a 25 per cent penalty under section 4035 of the Compiled Laws of New Mexico, 1897, which reads:

"If any person, liable to taxation, shall fail to render a true list of his property, as required by the preceding three sections, the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of twenty-five per cent thereof, which shall be assessed and collected as a part of the taxes of such person."

It is enough to say that no such penalty was claimed in the intervening petition. Penalties are not favored in equity, and seldom will a chancellor enforce penalties in favor of a party who does not ask for them. Again, by the terms of the section, the penalty is to be "assessed and collected as a part of the taxes," and the record shows no assessment of the penalty.

A final contention is in respect to interest. Section 4066 of the Compiled Laws provides:

"On the first day of January in each year half of the unpaid taxes for the year last past, and on the first day of July in each year, the remaining half of the unpaid taxes for the year last past, shall become delinquent and shall draw interest at the

rate of twenty-five per cent per annum, but the collector shall continue to receive payments of the same after the first day of January and July until the day of the sale."

The district court ignored the provisions of this section, and allowed interest at the rate of 6 per cent per annum from the times the taxes became delinquent in the several years. The Supreme Court modified this, and allowed interest only from October 5, 1899, the date of the decision in the district court. In 1899 the legislature passed a new statute in reference to taxes. Chap. 22, p. 47, Laws of New Mexico, 1899. By section 10 of that act section 4066 of the Compiled Laws was in terms amended, and in lieu of the 25 per cent different and graded penalties were enforced. By section 34 of that act "the time for the payment of all taxes now delinquent is hereby extended to May 1, 1899, and when the same may be in litigation at the date of the passage of this act until such litigation be determined." Other provisions of this section, taken in connection with a statute passed at the same session of the legislature, (chap. 52, p. 106, Laws, 1899,) referred to by the Supreme Court of the Territory in its opinion, may render it doubtful whether the legislature intended to remove the penalty of 25 per cent interest in respect to this property; for such interest in tax proceedings is in the nature of a penalty. Yet, irrespective of this statutory question, we are of opinion that there was no error in refusing to enforce this charge against the property. The assessment was made in gross upon 60.7 miles of road, without specification of the particular miles other than that they were "embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company." The finding of the court shows that no such length of railroad was subject to taxation, but only 55.5 miles, and those were specified and described. The owners of the road were, therefore, justified in contesting their liability to such assessment and taxation in gross, and until there was an identification of the property subject to taxation, and a determination of the amount of taxes due, it would be inequitable to charge penalties for non-payment. *Lake Shore & Michigan Southern Railway Co.*

v. *People*, 46 Mich. 193, 211; *County of Redwood* v. *Winona and St. Peter Land Co.*, 40 Minn. 512, 522. This is not a suit brought by a property holder to restrain the collection of taxes, in which case it would be incumbent upon him to pay, or tender, the amount conceded to be due, but one in which the authorities are the moving party seeking to collect taxes, and in which the liability *in toto* is denied, and the property subject to taxation not fully identified or the amount of taxes determined until the final judgment. Viewing the proceedings from an equitable standpoint, we see no error in refusing interest prior to the decree.

The decree of the Supreme Court of New Mexico is affirmed, each party to pay the costs of its appeal to this court.

Ex parte WILDER'S STEAMSHIP COMPANY.

PETITION FOR WRIT OF MANDAMUS.

No. 9. Original. Submitted May 13, 1901. — Decided January 6, 1902.

A decree in admiralty in the Supreme Court of the Territory of Hawaii, in a case pending in the courts of the Republic of Hawaii at the time of its annexation to the United States, is not subject to an appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

THIS was a petition by the Wilder's Steamship Company, a corporation organized and existing under the laws of the Territory of Hawaii, for a writ of mandamus to the United States Circuit Court of Appeals for the Ninth Circuit to entertain an appeal from the Supreme Court of the Territory of Hawaii.

On December 27, 1899, the steamer Claudine, one of the petitioner's steamships, came into collision with the barkentine William Carson. On February 5, 1900, the owners of the William Carson and of her cargo filed a libel in admiralty against the steamship company in the circuit court of the first judicial circuit of the Republic of Hawaii. On May 7, 1900, that court

rendered a decree against the steamship company in the sum of $55,000, upon the ground that the collision was caused by the fault of the steamship company, with no fault or negligence on the part of those in charge of the William Carson. From that decree an appeal was taken to the Supreme Court of the Republic of Hawaii, as provided by the then existing law of the Republic. On November 9, 1900, the cause having come on regularly to be heard before the Supreme Court of the Territory of Hawaii, the decree was affirmed by that court. On the same day, an appeal was claimed from that court to the United States Circuit Court of Appeals for the Ninth Circuit, but was denied, for want of jurisdiction, by the Supreme Court of the Territory on November 7, 1900, and by the Circuit Court of Appeals on April 1, 1901. 13 Hawaii, 174; 108 Fed. Rep. 113.

On March 5, 1901, the steamship company presented to this court a petition praying that an order, under section 15 of the act of March 3, 1891, c. 517, assigning the Territory of Hawaii to the Ninth Circuit, might be made *nunc pro tunc* as of June 15, 1900, the date at which the act of Congress of April 30, 1900, c. 339, entitled "An Act to provide a government for the Territory of Hawaii," took effect.

On April 12, 1901, the petitioner filed in this court a petition praying for a similar order, and further praying that a writ of mandamus might issue to the United States Circuit Court of Appeals for the Ninth Circuit to set aside its order denying the appeal, and to entertain the cause.

On April 15, 1901, this court "ordered that the Territory of Hawaii be, and it is hereby, assigned to the Ninth Judicial Circuit under section 15 of the Judiciary Act of March 3, 1891;" gave leave to file this petition for a writ of mandamus; and awarded a rule to show cause, returnable on May 13.

On May 3, after that order, the petitioner presented to the Circuit Court of Appeals for the Ninth Circuit another petition for the allowance of an appeal from the decree of the Supreme Court of the Territory of Hawaii; and that petition was denied.

On May 13, the Circuit Court of Appeals for the Ninth Cir-

cuit made a return, that upon the facts stated in the petition it had not jurisdiction of the appeal; that the question whether it had such jurisdiction came before it for adjudication and was judicially determined; and that its decision in the matter constituted a final judgment, properly subject to review in this court by writ of certiorari.

The case was submitted to this court upon the petition for a mandamus, the return thereto, and a motion of the petitioner to file in evidence its petition of May 3 to the Circuit Court of Appeals and the disallowance thereof.

The Republic of Hawaii, before its annexation to the United States, had a fully organized government. The judicial system consisted of courts of original and appellate jurisdiction, whose powers were defined by the constitution and statutes of the Republic. The circuit courts were the courts of general original jurisdiction, and had power to determine all civil causes in admiralty. In such causes, as well as in other cases, the Supreme Court had appellate jurisdiction, and its decrees, by express provision of the constitution, were made "final and conclusive." Constitution of Hawaii, arts. 82–86. Ballou's Civil Laws of Hawaii, 1897, §§ 1105, 1136, 1144, 1145, 1164, 1430, 1433, 1434.

By the Joint Resolution of the Congress of the United States of July 7, 1898, c. 55, the Hawaiian Islands were annexed to the United States, and it was provided that "until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies thus occasioned;" and that "the municipal legislation of the Hawaiian Islands," "not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." 30 Stat. 750.

On July 8, 1898, "in the exercise of the power thus conferred

upon him by the Joint Resolution, the President hereby directs that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies." Letter of Secretary of State to Minister Sewall; Report 305, H. R. 56th Congr. 1st Sess. p. 3.

On August 12, 1898, the sovereignty of the Hawaiian Islands was transferred to the United States. The act of Congress of April 30, 1900, c. 339, entitled "An Act to provide a government for the Territory of Hawaii," which by its terms took effect June 15, 1890, declared in § 1 that the phrase "the laws of Hawaii," as therein used, should mean the constitution and laws of the Republic of Hawaii in force at the date of the transfer; and in § 2 that the islands so acquired should be known as the Territory of Hawaii; and contained the following provisions:

"SEC. 5. The Constitution and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within the new Territory as elsewhere in the United States."

"SEC. 6. The laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall remain in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

Section 7 repealed the constitution and various laws of the Republic of Hawaii, including those on maritime matters. 31 Stat. 141, 142.

"SEC. 10. All rights of action, suits at law and in equity, prosecutions and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed." "All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings, then pending in the courts of the Republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the Territory of

Hawaii; and all process issued and sentences imposed before this act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii." 31 Stat. 143.

"SEC. 81. The judicial powers of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the local courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided."

"SEC. 83. The laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature." 31 Stat. 157.

"SEC. 86. There shall be established in said Territory a District Court to consist of one judge, who shall reside therein and be called the District Judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney and a marshal of the United States for the said district, and said judge, attorney and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizable in a Circuit Court of the United States, and shall proceed therein in the same manner as a Circuit Court; and said judge, district attorney and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys and marshals of District and Circuit Courts of the United States. Writs of error and appeals from said District Court shall be had and allowed to the Circuit Court of Appeals in the Ninth Judicial Circuit in the same manner as writs of error and appeals are allowed from Circuit Courts to Circuit Courts of Appeals as provided by law; and the laws of the United States relating to juries and jury trials shall be applicable to said District Court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United

States and the courts of the several States, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." 31 Stat. 158.

Mr. Duane E. Fox for Wilder's Steamship Co.

Mr. Charles Page and others, opposing.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

We are of opinion that the appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit was rightly disallowed.

The libel in admiralty was originally brought, and a decree made, in a court of the Republic of Hawaii having jurisdiction of the cause, and an appeal from that decree was duly taken to the Supreme Court of Hawaii, as provided by the then existing law of the Republic. While the appeal was lawfully pending in the courts of Hawaii, Congress, by the act of April 30, 1900, c. 339, provided a government for the Territory of Hawaii, establishing therein a Supreme Court and other courts, and enacting, in section 10, that "all actions at law, suits in equity, and other proceedings, then pending in the courts of the Republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." This appeal in admiralty was one of the "other proceedings" then pending in the courts of the Republic of Hawaii, which were "to be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." On November 9, 1900, the cause having come on regularly to be heard before the Supreme Court of the Territory, in accordance with the act of Congress, the decree below was affirmed; and on the same day an appeal from the decree of affirmance was claimed to the United States Circuit Court of Appeals for the Ninth Circuit.

The act of Congress of 1900 contains no provision authorizing

such an appeal. The petitioner refers to section 86 of that act, which established in the Territory a District Court of the United States with the powers of a Circuit Court of the United States. But that court is given no appellate jurisdiction. The provision allowing writs of error and appeals from that court to the Circuit Court of Appeals for the Ninth Judicial Circuit does not touch appeals from the Supreme Court of the Territory of Hawaii. And the remaining clause as to appeals, writs of error, removals of causes and other matters and proceedings between the courts of the United States and the courts of the Territory of Hawaii provides that they shall be governed, not by the laws applicable to other Territories, but by the laws of the United States as to such matters and proceedings "as between the courts of the United States and the courts of the several States." Congress may have considered that, owing to the great distance of the Territory of Hawaii from the continent, the appellate jurisdiction over that Territory should be more restricted than over other Territories, and should extend only, as in the case of the several States, to judgments against a right claimed under the Constitution, laws or treaties of the United States. But whatever may have been the reasons which influenced Congress, its language is too plain to be misunderstood. Cases in admiralty, brought after the act of 1900 took effect, must of course be brought in the District Court of the United States, and subject to the right of appeal therein provided to the Circuit Court of Appeals for the Ninth Circuit. But as to cases in admiralty pending in the courts of Hawaii when the act took effect, there is no special provision, and they therefore remain, like other civil cases, to be finally determined in the courts of the Territory of Hawaii, under the general provision of section 10. In cases in admiralty, as in all other cases pending in the courts of Hawaii at that time, it was within the discretionary power of Congress to provide that they should remain within the jurisdiction and determination of the courts of the Territory; and it has clearly so provided as to pending suits of all classes. The fact that in a State cases in admiralty cannot be brought in its courts, but only in the courts of the United States, affords no reason for implying that Congress, without any language ex-

pressing such an intention, meant to vest in any court of the United States either original or appellate jurisdiction in cases in admiralty pending in the courts of Hawaii when this act of Congress took effect.

Reliance is placed by the petitioner on section 15 of the act of March 3, 1891, c. 517, (long before the annexation of Hawaii,) establishing Circuit Courts of Appeals, which provides that "the Circuit Court of Appeal, in cases in which the judgments of the Circuit Courts of Appeal are made final by this act," (which include cases in admiralty,) "shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders and decrees of the District Court and Circuit Courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits." 26 Stat. 830. But on November 9, 1900, when this appeal to the Circuit Court of Appeals for the Ninth Circuit was claimed from the Supreme Court of the Territory of Hawaii, as well as on April 12, 1901, when this petition for a writ of mandamus was filed, this court had made no order assigning the Territory of Hawaii to any judicial circuit. The order made by this court on April 15, 1901, assigning the Territory of Hawaii to the Ninth Judicial Circuit, was not, as this petitioner requested, made as of a former day, but took effect only from its date. And no order of this court, assigning the Territory of Hawaii to a judicial circuit under the act of 1891, can give a right of appeal inconsistent with the provision of section 86 of the later act of 1900 restricting such appeals to cases in which by the laws of the United States they are allowable to the courts of the United States from the courts of the several States.

Petition dismissed.

NUTTING *v.* MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 32. Argued November 20, 21, 1901.—Decided January 13, 1902.

The statute of Massachusetts of 1894, c. 522, § 98, imposing a fine on "any person who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth," is not contrary to the Constitution of the United States, as applied to an insurance broker who, in Massachusetts, solicits from a resident thereof the business of procuring insurance on his vessel therein, and as agent of a firm in New York, having an office in Massachusetts, secures the authority of such resident to the placing of a contract of insurance for a certain sum in pounds sterling upon the vessel, and transmits an order for that insurance to the New York firm; whereupon that firm, acting according to the usual course of business of the broker, of itself, and of its agents in Liverpool, obtains from an insurance company in London, which has not been admitted to do business in Massachusetts, a policy of insurance for that sum upon the vessel; and the broker afterwards, in Massachusetts, receives that policy from the New York firm, and sends it by mail to the owner of the vessel in Massachusetts.

This was an indictment on the statute of Massachusetts of 1894, c. 522, § 98, for negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in Massachusetts.

Section 98 of that act is as follows: "Any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine of not less than one hundred nor more than five hundred dollars for each offence."

The act, in section 3, provides that "it shall be unlawful for any company to make any contract of insurance upon or con-

cerning any property or interests or lives in this Commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act;" and that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein." And in sections 77–82 it prescribes the conditions with which foreign insurance companies must comply before they can do business in Massachusetts, requiring each company, among other things, to appoint the insurance commissioner its attorney, upon whom process in any suit against it may be served; to appoint some resident of Massachusetts as its agent; to obtain from the insurance commissioner a certificate that it has complied with the laws of Massachusetts and is authorized to make contracts of insurance; and, if incorporated or associated under the laws of any government other than the United States or one of the States, to deposit with the treasurer of Massachusetts or the financial officer of some other State a sum equal to the capital required of like companies, to be held in trust for the benefit of all the company's policy-holders and creditors in the United States.

At the trial in the Superior Court, the parties agreed upon the following facts: The defendant was a citizen of Massachusetts and a licensed insurance broker in Boston, and at some time prior to November 18, 1898, solicited from one William McKie, a shipbuilder in Boston, and likewise a citizen of Massachusetts, the business of procuring insurance upon a vessel then in process of construction in his Boston shipyard; and, as agent for Johnson & Higgins, average adjusters and insurance brokers, having an office in Boston in charge of the defendant, and their principal place of business in New York, secured the authority of McKie to the placing of a contract of insurance for £4124 upon the vessel. Thereupon the defendant transmitted an order for the insurance to Johnson & Higgins in New York, and they at once wrote to their Liverpool agents, John D. Tyson & Co., to procure the aforesaid insurance. Accordingly, Tyson & Co. procured a policy from the London Lloyds, to be delivered

to Tyson & Co. in Liverpool, dated November 18, 1898, for a year from November 16, 1898, on the aforesaid vessel, for the sum of £4124, the policy running in favor of Johnson & Higgins "on account of whom it may concern, as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain." Tyson & Co., at the time of receiving the policy, paid the premiums thereon for account of Johnson & Higgins, and received a commission upon the insurance from Lloyds for themselves and for Johnson & Higgins. Tyson & Co. sent the policy to Johnson & Higgins in New York; they, after endorsing it, forwarded it by mail to the defendant in Boston; and he, on November 18, 1898, sent it by mail to McKie. The policy was procured from the London Lloyds in the usual course of the business of the defendant, of Johnson & Higgins and of Tyson & Co. None of them were agents of the London Lloyds, except in so far as the facts agreed constituted them agents. The London Lloyds were individual insurers, citizens of England, associated as principals in the business of insurance, under and by authority of the government of the United Kingdom of Great Britain and Ireland, and carrying on the business in England on the Lloyds' plan, by which each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. The London Lloyds had not complied with any of the requirements imposed by the laws of Massachusetts upon foreign insurance companies, and had not been admitted to do insurance business in the Commonwealth, according to law.

The defendant requested the court to instruct the jury that so much of the Massachusetts statute as purported to make illegal such acts as were done by the defendant was contrary to the Fourteenth Amendment of the Constitution of the United States, and as such was unconstitutional and void. The request was refused; and the court instructed the jury that upon the facts above stated they would be warranted in finding the defendant guilty. To all of this the defendant duly excepted, and being found guilty, his exceptions were overruled by the Supreme Judicial Court of Massachusetts. 175 Mass. 154. He

was thereupon sentenced in the Supreior Court, and sued out this writ of error.

Mr. J. Hubley Ashton for plaintiff in error.

Mr. H. M. Knowlton for defendant in error.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the State may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse. The State, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties. *Hooper* v. *California*, 155 U. S. 648; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

The statute of Massachusetts of 1894, c. 522, on which this indictment is founded, besides requiring foreign insurance companies, as conditions precedent to doing business in the State, to appoint agents within the State, and to deposit a certain sum in trust for their policy-holders and creditors, provides, in section 3, that "it shall be unlawful" "for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of" insurance on or concerning any property, interest or lives in Massachusetts, except as authorized by the act; and, in section 98, that any person "who shall act in any manner in the negotiation or transaction of unlawful insurance" (evidently intending insurance declared unlawful by section 3) "with a foreign insurance company not admitted to do business in this Commonwealth," shall be punished by fine.

The acts of negotiation or transaction by the defendant in Massachusetts, admitted in the facts agreed by the parties, are

that he solicited from McKie the business of procuring insurance upon his vessel in Boston, and, as agent of Johnson & Higgins of New York, having an office in Boston, secured the authority of McKie to the placing of a contract of insurance for a certain sum in pounds sterling upon the vessel, and transmitted an order for that insurance to Johnson & Higgins in New York; whereupon they, acting according to the usual course of business of the defendant, of themselves and of their agents in Liverpool, obtained from the London Lloyds, who had not been admitted to do business in Massachusetts, a policy of insurance for that amount on the vessel; and the defendant afterwards, in Massachusetts, received from Johnson & Higgins that policy, and sent it by mail to McKie, which tends to show that the policy obtained from the foreign insurance company was the insurance which he had originally solicited. These facts clearly convict the defendant of negotiating and transacting in Massachusetts unlawful insurance with a foreign insurance company in violation of the statute, if that statute is constitutional.

In *Hooper* v. *California*, 155 U. S. 648, Hooper, the agent in California of the same Johnson & Higgins of New York, obtained from them a policy of marine insurance of a Massachusetts insurance company on a vessel in California, owned by a citizen of California, to whom he delivered the policy in California. It was held that a statute of California, by which Hooper was guilty of procuring insurance for a resident of California from a foreign insurance company which had not given bond as required by the laws of California, was constitutional.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, the insurance was not obtained through an agent or broker, but by the assured himself; and the point decided was that a statute of a State punishing the owner of property for obtaining insurance thereon in another State was unconstitutional. In that case the decision in *Hooper's case* was expressly recognized and distinguished; and Mr. Justice Peckham, speaking for the court, and repeating the words of Mr. Justice White in *Hooper's case*, observed: "It is said that the right of a citizen to contract for

insurance for himself is guaranteed by the Fourteenth Amendment, and that, therefore, he cannot be deprived by the State of the capacity to so contract through an agent. The Fourteenth Amendment, however, does not guarantee the citizen the right to make within his State, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a State's jurisdiction." 155 U. S. 658, 659; 165 U. S. 587, 588.

As was well said by the Supreme Judicial Court of Massachusetts, "While the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons." 175 Mass. 156.

We are of opinion that the case at bar comes within *Hooper* v. *California*, and not within *Allgeyer* v. *Louisiana*; and that section 98 of the statute of Massachusetts, under which the plaintiff in error has been convicted, is not contrary to the Constitution of the United States.

The effect of the other provision of the Massachusetts statute, declaring that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein," need not be considered; because the defendant has been convicted, not of the making of the contract, but of negotiating and transacting that contract in Massachusetts.

Judgment affirmed.

Mr. Justice Harlan, dissenting.

In my opinion this case does not differ in principle from *Allgeyer* v. *Louisiana*, 165 U. S. 578; and so thinking I cannot concur in the opinion and judgment in this case.

MINDER *v.* GEORGIA.

ERROR TO THE SUPERIOR COURT OF BIBB COUNTY, STATE OF GEORGIA.

No. 417. Argued December 3, 1901.—Decided January 6, 1902.

This court cannot interfere with the administration of justice in the State of Georgia because it is not within the power of the courts of that State to compel the attendance of witnesses who are beyond the limits of the State, or because the taking or use of depositions of witnesses so situated in criminal cases on behalf of defendants is not provided for by statute and may not be recognized in Georgia.

THE case is stated in the opinion of the court.

Mr. John R. Cooper for plaintiff in error. *Mr. Herman Brasch* and *Mr. Marion W. Harris* were on his brief.

Mr. J. M. Terrell for defendant in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

At the November term, 1900, of the superior court of Bibb County, Georgia, Isadore Minder was tried on an indictment for murder, convicted, and sentenced to death. A motion for new trial was made upon the ground, among other things, that the court erred in refusing to continue the case on account of the absence of material witnesses residing in Alabama, whose names were given. The defence was insanity, and the motion for continuance set forth that the witnesses would testify that the accused was insane; "that all the powers of the court have been exhausted to procure the attendance of said witnesses;" that they had refused to attend; and that the court had no authority under the constitution and laws of the State of Georgia to procure their attendance, or their testimony, and that their depositions would not be admissible in evidence if obtained. The motion further stated that if he were tried "without being

afforded process by which either to compel the attendance or to procure the depositions of said witnesses, that defendant, who is a citizen of the United States and a resident of Georgia, would be deprived of his life, liberty, and property without due process of law, and would be denied his right and privilege and immunities as a citizen of the United States in violation of the Constitution of the United States, and particularly the 1st paragraph of the 14th Amendment thereto; and in violation of said amendment would be denied the equal protection of the laws with American citizens of other States of this Union where the state and Federal process affords the defendant means to secure the depositions of non-resident witnesses in capital cases, and the State allows the introduction of such depositions in evidence in behalf of the defendant in such other States." It was further stated that "unless the State will consent to the introduction of depositions from said non-resident witnesses and will afford him a reasonable opportunity to secure the same, petitioner will be denied the equal protection of the laws and will be deprived of his life and liberty without due process of law." The motion for new trial was overruled by the superior court, and defendant sentenced, whereupon an appeal was taken to the Supreme Court which affirmed the judgment. 113 Georgia, 772.

This writ of error was then sued out, and the errors assigned were in substance that the Supreme Court erred in not reversing the judgment of the court below for error in denying the motion for continuance, which denial it was contended was a denial of due process of law and the equal protection of the laws secured by the Fourteenth Amendment. This point was made in the Supreme Court and the matter of the ruling on the motion to continue was disposed of thus:

"The application for a continuance was made upon the ground of the absence of certain witnesses whose testimony it is claimed was very material to the defence of insanity set up by the accused. It appeared that these witnesses resided in the State of Alabama, that the court had caused subpœnas to be issued directed to these witnesses, that they had been transmitted by mail to the witnesses, that the subpœnas had been received by

them, and that they had refused to attend court upon the advice of their counsel in Alabama that there was no law requiring them to leave their State to attend as witnesses a court of another State. It distinctly appeared that the witnesses had refused to attend, and there is nothing in the record to indicate that there were any reasonable grounds for hoping that they might be induced to attend at a subsequent term of the court if the case had been continued. Under such circumstances it does not seem to us that the court erred in refusing to postpone the case. In a case of this character, where the life of the accused is at stake, and the court has at its command no compulsory process which could be used to enforce the attendance of the witnesses from beyond its jurisdiction, a promise by the witnesses to attend at a subsequent term of the court might address itself very strongly to the discretion of the trial judge and authorize him to continue the case; but certainly there is no abuse of discretion when the witnesses are beyond the jurisdiction of the court and beyond the power of its process, and not only refuse to attend voluntarily, but give no indication that they will at any time in the future be willing to attend upon the sessions of the court. It was argued here that the court should have sent an officer into the State of Alabama and served each of the witnesses personally with subpœnas. We do not think the court had any authority to do this, even if there were no impropriety in an officer of this State going into the State of Alabama and making personal service of a paper. The courts of this State are under no obligations to litigants to send their officers beyond the limits of the State to do acts which would be purely voluntary on the part of such officers; and certainly the court should not use one of its officers in this way when the sole purpose in so doing would be to produce a species of moral coercion upon a citizen of another State to come into this State, when he is not required by law to do so, and would have a right to ignore the command of the court thus transmitted to him. The point was made in the court below, and was argued here, that the failure of the law of this State to provide a method for compelling the attendance of witnesses from beyond the jurisdiction of the State, or for obtaining the depositions of

such witnesses and allowing them to be introduced in evidence in behalf of a person charged with crime, was a denial to such person of the equal protection of the laws, and his conviction under such circumstances would be depriving him of life or liberty, as the case may be, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. We do not see how a person on trial could be so said to be denied the equal protection of the laws when he is tried under laws of procedure applicable to every person charged with crime. Nor can we see how a person is deprived of life or liberty without due process of law, on account of not having the benefit of the testimony of witnesses who are beyond the jurisdiction of the court, when the law-making power of the State is powerless to make any provision which would result in the compulsory attendance of the witnesses, and the use of depositions in such cases is directly contrary to the usages, customs, and principles of the common law."

The requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government. Because it not within the power of the Georgia courts to compel the attendance of witnesses who are beyond the limits of the State, or because the taking or use of depositions of witnesses so situated in criminal cases on behalf of defendants, is not provided for, and may not be recognized in Georgia, we cannot interfere with the administration of justice in that State on the ground of a violation of the Fourteenth Amendment in these particulars.

Judgment affirmed.

McKINLEY CREEK MINING CO. *v.* ALASKA UNITED MINING CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

No. 37. Argued April 15, 16, 1901.—Decided January 6, 1902.

There is no prejudicial error in the ruling of the court below on the admission of testimony.

Assignments of error cannot be based upon instructions given or refused in an equity suit.

The locations are valid so far as they depend upon the discovery of gold.

The notices as set forth in the opinion of the court constituted a sufficient location.

Grantees of public land take by purchase.

In *Manuel* v. *Wolff*, 152 U. S. 505, it was decided that a location by an alien was voidable, not void, and was free from attack by any one except the Government.

THIS is a bill in equity brought by the appellee company, who was plaintiff below, to establish title to two placer mining claims, against a like claim of appellant company to the same ground.

The bill alleged that "Peter Hall, William A. Chisholm, James Hanson, John Dalton and Dan. Sutherland, partners under the firm name and style of the Alaska United Mining Company, bring this their bill of complaint against C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Chas. P. Leitch, and C. P. Cahoon, partners under the firm name of the McKinley Creek Mining Company, and show to the court that the said parties, both plaintiffs and defendants, are citizens of the United States and residents of the District of Alaska."

The bill also alleged ownership of the claims by reason of location, exploration and discovery of precious metals, and the compliance with the local rules and regulations of the mining district. Also possession of the claims and the erection of val-

uable improvements thereon, and forcible entry upon that possession by defendants (appellants) with an attempt and avowed purpose to drive plaintiffs (appellees) therefrom, and unless restrained they would proceed to the execution of said threats. An injunction was prayed for.

The defendants admitted their citizenship, but denied the citizenship of plaintiffs on the ground that the defendants had not sufficient knowledge to form a belief thereto, and traversed in like manner or absolutely the other allegations of the bill, and alleged title by reason of prior discovery by members of the company. The answer also alleged prior possession by members of the company from which they were dispossessed by the plaintiff, and claimed that as to the controversies thus arising "defendants are under the law and practice of this court entitled to a jury trial for the trial of the title to said claims and each of them, and to that end and purpose have commenced in this honorable court a suit in ejectment for the trial and determination of the title to said property in an action at law and according to the usage and practice of this court, and until the trial and determination of such trial at law by this honorable court the defendants are entitled to a restraining order against said plaintiff company and its individual members restraining them and each of them from the commission of the wrongful acts herein complained of."

A temporary injunction was prayed against plaintiffs (appellees).

There was a reply filed to the new matter of the answer and to the cross complaint.

A jury was impanelled to try the case on motion of plaintiffs, no objection being made by defendants, and after hearing the evidence and receiving instructions from the court the jury rendered a verdict for plaintiffs, as follows: "We, the jury in the above-entitled and numbered cause, find for the plaintiffs, Peter Hall, Wm. A. Chisholm, Dan. Sutherland, James Hanson, and John Dalton, partners under the firm name and style of the Alaska United Mining Co., the claims in controversy."

The defendants in due time moved for judgment, notwithstanding the verdict, upon the ground that on the evidence the

Statement of the Case.

defendants were entitled "to a judgment in their favor for the possession of the mines and property in controversy." The motion was denied.

Subsequently defendants moved for a new trial (1) upon the testimony in the cause, the rulings therein and exceptions taken, and upon the pleadings and proceedings in cause No. 967; (2) the insufficiency of the evidence to justify the verdict; (3) error in refusing to give certain instructions requested by defendants (appellants).

The motion was denied and the following judgment was entered:

"This cause came on to be heard at this term upon the bill, the answer and cross bill of defendants and the replication thereto of plaintiffs and the proofs in the case and upon the request of defendants, duly made by their counsel, Messrs. Winn & Weldon, the issues arising upon said pleadings and proofs were submitted to a jury of good and lawful men, duly selected, impanelled and sworn, to wit, J. Montgomery Davis and eleven others, who, having heard the said proofs adduced in the case and having been instructed by the court as to the law, and having heard the argument of counsel, retired in charge of the bailiff to consider of their verdict and after due deliberation had returned into open court the following verdict, to wit:

* * * * * *

"We, the jury in the above-entitled and numbered cause, find for the plaintiffs, Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hanson and John Dalton, partners under the firm name and style of the Alaska United Mining Company, the claims in controversy.

(Signed) "J. Montgomery Davis, *Foreman.*

"Which said verdict was by the court received and ordered recorded, and the finding therein contained upon the issues in said cause were by the court approved and adopted.

"Now, therefore, upon consideration of the said bill, the answer thereto and the cross complaint of said defendants, the replication of plaintiffs, and the said proofs, and by reason of the verdict of the jury thereon, approved and adopted by the

court, it is, upon consideration thereof, ordered, adjudged and decreed as follows, to wit:

"That the said defendants, C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch and C. P. Cahoon, a mining copartnership under the name and style of the McKinley Creek Mining Co., have not nor have any of them any right, estate, title or interest whatever in or to those two certain mining claims, lands and premises described in the said bill of complaint and in the said answer and cross complaint of defendant and hereinafter more particularly described; that the title of the plaintiff, The Alaska United Mining Company, a corporation composed of Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen and John Dalton, thereto is good and valid, and that the said defendants and each of them be, and they and each of them are hereby, forever enjoined and restrained from asserting any claim whatsoever in or to said mining claims, lands and premises adverse to said plaintiffs, and that the said plaintiffs be, and they are hereby, quieted in their possession, use and enjoyment of the same."

A description of the claims followed.

Objection was made to the judgment, and the defendants claimed that the only judgment which could be entered was one "restraining the defendants from the acts complained of in the bill of complaint pending the trial of cause No. 967, *The McKinley Creek Mining Co.* v. *The Alaska United Mining Co.*, which is a suit in ejectment now pending in this court and at issue, the record and files of which are hereby referred to and made a part of this objection."

From the judgment entered the case is here on appeal.

Mr. S. M. Stockslager for appellants. *Mr. George C. Heard* was on his brief.

Mr. L. T. Michener for appellees. *Mr. W. W. Dudley*, *Mr. J. F. Maloney* and *Mr. J. H. Cobb* were on his brief.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

The assignments of error present for review the rulings of

the court upon the admission of testimony, the correctness of the court's instructions to the jury and the sufficiency of the evidence to justify the judgment.

We may dispose of the rulings on the admission of testimony summarily. They are not precisely indicated by counsel in their brief, and to review them with a detail of the evidence would unduly extend this opinion. It is enough to say that we have examined the evidence and considered the rulings, and do not discover any prejudicial error in the latter. Besides, it is questionable if such rulings are reviewable in an appellate court. *Wilson* v. *Riddle*, 123 U. S. 608; *Huse* v. *Washburn* 59 Wis. 414; *Peabody* v. *Kendall*, 145 Ill. 519.

For an understanding and consideration of the other contentions of appellants it is only necessary to indicate the propositions which the evidence of the parties tended to establish. On the part of the plaintiffs (appellees) the evidence tended to show that Dan. Sutherland, James Hanson, William Chisholm and Jack Dalton, who compose the appellee company, and Peter Hall and one Hawes and C. P. Cahoon, were working at Pleasant camp in Alaska for William Chisholm on and prior to October, 1898. Prospecting on the river Porcupine was resolved on to be done by Hanson, Sutherland and Cahoon, and the following power of attorney was given to Cahoon:

"Know all men by these presents that Peter Hall, William Chisholm, William S. Hawes, of Pleasant camp, British Columbia, have made, constituted and appointed, and by these presents do make, constitute and appoint, C. P. Cahoon, of Pleasant camp, British Columbia, our true and lawful attorney, for us and in our names, place and stead to locate a mining claim in the Territory of Alaska.

"In testimony whereof we have hereunto set our hands and seal this 4th day of Oct., A. D. 1898.

"PETER HALL. [SEAL.]
"WM. A. CHISHOLM. [SEAL.]
"WM. S. HAWES. [SEAL.]

"Signed, sealed, and delivered in the presence of—
"DAN. SUTHERLAND.
"J. HANSON."

Provisions were furnished the party, and they started out on the 4th of October, 1898, and met on the creek (subsequently given the name of McKinley) certain members of the appellant company. Gold was discovered, and Cahoon wrote notices of location for Chisholm and Hall upon a snag or stump in the creek, making their claims contiguous, and afterward reported that he had done so, saying that he had staked Chisholm first and Hall next. Chisholm and Hall went to the claims about the 20th of October, and cut trails to them, and did other work upon them; and at that time copied the notices of location and had them recorded. The notices with their endorsements were introduced in evidence.

The testimony was given by several witnesses and in great detail, and it was opposed at about all points by testimony of several witnesses, including Cahoon; and as to who first discovered gold there was a decided conflict whether Sutherland did, who is one of the appellee company, or whether Hackley did, under a location by whom the appellant company claims. Also a conflict as to whether Hackley protested when Cahoon wrote the notices of location for Chisholm and Hall, and whether Cahoon promised to take them down and authorized Hackley to do so, and upon his declining authorized Lewis, one of the appellant company, to take them down and relocate Chisholm and Hall further up the creek, and whether Lewis did so.

1. It will be observed that the main controversy of fact between the parties was as to who made the first discovery of gold—Hackley or Sutherland. On this testimony appellants base three contentions, to which they claim, the instructions asked by them at the trial court were addressed:

(1) That the discovery of mineral is a precedent condition to the making of a valid location, and that Hackley was the first to discover gold.

(2) That the locations relied on by appellees were invalid because they were not "distinctly marked on the ground, or otherwise designated as required by law."

(3) That the citizenship of Chisholm and Hall was put at issue by the pleadings, and no evidence was offered to establish

it, but on the contrary the power of attorney under which Cahoon acted represents them to be citizens of British Columbia.

Without now questioning the soundness of either of these contentions, it is enough to say that the assignments of error based upon the refusal of instructions cannot be entertained. This is undoubtedly a suit in equity, and if it may be regarded as entertained under the general powers conferred by the act of May 17, 1884, 23 Stat. 24, error cannot be predicated upon the giving or the refusing of instructions. The verdict was but advisory to the court, to be adopted or disregarded at the court's discretion. This we regarded as indisputable, but in order that counsel might be heard upon the effect of the Oregon Code, if regarded as applicable to Alaska, we requested briefs of counsel "as to what errors, in respect of giving or refusing instructions or other rulings on trial by a jury in a cause of this character, are open for consideration on appeal from the District Court of Alaska."

In response to that request, counsel for appellant urge that by section 7 of the act of May 17, 1884, *supra*, the final judgments of a District Court of Alaska are reviewable by this court "as in other cases," and that the terms, other cases, "necessarily refer to the procedure for review provided by sections 691 and 692, Revised Statutes, governing District and Circuit Courts having like jurisdiction." But the procedure there prescribed is for the purpose of reviewing error, and error, as we have already said, cannot be based on instructions given or refused in an equity case. Nor is the rule different in the State of Oregon. *De Lashmutt* v. *Everson*, 7 Oregon, 212; *Swegle* v. *Wells*, 7 Oregon, 222.

2. There was no finding of facts by the court, and, assuming that we may look into the evidence, we find it conflicting as to who first discovered gold, Hackley or Sutherland. The court below evidently determined that Sutherland did, and, having no test of the credibility of the witnesses, we cannot pronounce that determination unsound. Sutherland seems to have been acting with and coöperating with Cahoon. At any rate, Sutherland is not contesting the locations made by Cahoon

for Chisholm and Hall, but on the contrary asserts their validity and claims title under them. The locations, therefore, are valid so far as they depend upon the discovery of gold.

The second contention is that they are invalid because they were not "distinctly marked on the ground." The appellants base this contention on Cahoon's testimony. His testimony is that he wrote the notices of locations upon a stump or snag in the creek, and they were as follows: "I, the undersigned, claim 1500 feet running down this creek and 300 feet on each side."

But the notices produced by other witnesses, and which were testified to be copies, as near as could be made out, of those on the stump, were respectively as follows:

"Notice is hereby given that I, the undersigned, have this 6th day of October, 1898, located a placer mining claim 1500 feet running with the creek and 300 feet on each side from center of creek known as McKinley Creek, in Porcupine mining district, running into Porcupine River. This claim is the east extension of W. A. Chisholm claim on about 1800 feet from the first falls above the Porcupine River, in the district of Alaska.

"PETER HALL, *Locator.*

"Witness: J. HANSON.
"D. SUTHERLAND.

"Notice is hereby given that I, the undersigned, have, this sixth day of Oct. 1898, located a placer mining claim 1500 ft. along creek bottom and 300 ft. from center of creek each way on creek known as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim and about 300 feet above first falls on said creek, in the district of Alaska.

"WM. A. CHISHOLM, *Locator.*

"Witnesses: D. SUTHERLAND.
"JAMES HANSON."

These notices constituted a sufficient location; the creek was identified and between it and the stump there was a definite relation which, combined with the measurements, enabled the boundaries of the claim to be readily traced. *Hawes* v. *Victoria Copper Mining Company*, 160 U. S. 303.

3. Conceding, appellants say, a proper discovery and a proper description of the location, nevertheless as the citizenship of the locators was put in issue, it was necessary to be proved to justify a judgment for the appellees because under section 2319, Rev. Stat., the public lands of the United States are only open to exploration, occupation and purchase by citizens of the United States, and those who have declared their intention to become such.

In *Manuel* v. *Wulff*, 152 U. S. 505, this court sustained the validity of a conveyance of a mining location to an alien, reversing a decision of the Supreme Court of Montana to the contrary. The decision was based upon the difference between a title by purchase and title by descent, and the doctrine expressed that an alien can take title by purchase and can only be divested of it by office found. The case of *Governeur* v. *Robertson*, 11 Wheat. 332, was cited and approved, and the remarks of Mr. Justice Johnson in that case become apposite:

"That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. Hence it is usually said, that it has regard to the solemnity of the livery of seisin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which, from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural born subject that is a resident in the kingdom and that owes a local allegiance to the king, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold."

That grantees of the public land take by purchase this court, in *Manuel* v. *Wulff*, left no doubt. It was said that when a

location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. *Forbes* v. *Grady*, 94 U. S. 762; *Belk* v. *Meagher*, 104 U. S. 279; *Gwillim* v. *Donnellan*, 115 U. S. 45; *Noyes* v. *Mantel*, 127 U. S. 348.

The appellants, however, deny the application of *Manuel* v. *Wulff*, and contend that this suit having been brought under section 500 of the Oregon Code, in order to maintain the suit the appellees must show a right to the exclusive possession of the ground in dispute. This is in effect to say that while the validity of the location may not be disputed by appellants, the right to the possession, which is but an incident of the location, may be. We do not concur in this view. The meaning of *Manuel* v. *Wulff*, is that the location by an alien and all the rights following from such location are voidable, not void, and are free from attack by any one except the government.

It is not necessary to notice other points made by appellants and, discovering no error in the record,

Judgment is affirmed.

MAESE *v.* HERMAN.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 226. Argued November 6, 7, 1901.—Decided January 6, 1902.

The sole authority to the General Land Office to issue the patent for the land in dispute in this case was the act of March 3, 1869, 15 Stat. 342; the patent was issued under that authority, and it does not admit of controversy that it must issue to the confirmee of Congress, viz.: the town of Las Vegas.

This court cannot assume that Congress approved the report of the Surveyor General unadvisedly, used the name of the town of Las Vegas unadvisedly, or intended primarily some other confirmee.

The town and its inhabitants having been recognized by Congress as having rights, and such rights having been ordered to be authenticated by a patent of the United States, it is the duty of the Land Office to issue that patent, to give the town and its inhabitants the benefit of that authentication, and to remit all controversies about it to other tribunals.

Statement of the Case.

THIS is a bill in equity brought in the Supreme Court of the District of Columbia, praying for an injunction against respondents from issuing a patent to the town of Las Vegas, New Mexico, of the lands in the Las Vegas private land grant, or, if a patent has issued, to declare it to be void, or if a patent has not issued, to direct one to issue "to all of said lands, to the heirs, legal representatives and assigns of the said Juan de Dios Maese, Manuel Duran, Miguel Archuleta, José Antonio Cassaos, and those who were associated with them as the original grantees and as representatives of said original grantees, and that their title in and to said lands may be quieted, and said plaintiffs pray for such other and further and general relief as they may show themselves entitled to under the law and the facts."

There was a demurrer to the bill, which was sustained, and the complainants declining to amend their bill, it was dismissed.

An appeal was taken to the Court of Appeals, and the action of the Supreme Court of the District was affirmed. 17 D. C. App. 52.

The suit was brought by the complainants as heirs of the original grantees for themselves and others, who, it is alleged, are too numerous to be made parties. The defendants are sued in their official character. The facts as they appear from the bill are that on the 20th of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran and José Antonio Cassaos, for themselves and on behalf of twenty-five men, presented a petition to the corporation of El Bado, in the Territory of New Mexico, Mexico, for the grant and possession of the tract of land "commonly known as Las Vegas, on the Galenas River, which was desired for the cultivation of moderate crops and for pasture and watering places." The land was under the jurisdiction of El Bado, and was bounded as follows: "On the north by the Sappello River, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel del Bado."

The tract contains 496,446.96 acres of land, and was afterwards surveyed in 1860, which survey was approved by the surveyor general of New Mexico.

The petition was presented to the territorial deputation, approved by that body on the 23d of March, 1835, and the grant made as asked for with the provision, "that persons who owned no land were to be allowed the same privilege of settling upon the grant as those who petitioned for it, and that 'the pasture and watering places are free to all.'"

On the 24th of March, 1835, the acting governor and political chief of the territory approved the action of the territorial deputation, and directed the constitutional justice of El Bado to place the parties in possession of the lands prayed for. This was done on the 6th of April, 1835.

The heirship or legal succession of the parties to the original grantees is alleged, and that the complainants "are now the true and real owners of undivided interests in said land, the separate interest therein of each being of the full value of not less than ten thousand dollars." The total value of the land is two million dollars.

The treaty and protocol of Guadalupe Hidalgo are invoked, and it is alleged that the surveyor general of New Mexico, under the provisions of the act of Congress of July 22, 1854, 10 Stat. 308, c. 103, and acting under the instructions of the Secretary of the Interior and Commissioner of the General Land Office, gave notice to parties claiming grants from Mexico to present their claims, and thereupon Francisco Lopez, Henry Connelly and Hilario Gonzalez, on behalf of themselves and a large number of citizens of the United States, residents of San Miguel County, presented their petition claiming the Las Vegas grant. The surveyor general investigated the claim, found, and reported its validity. His report was approved by Congress and the grant confirmed, "thereby confirming in and to the original grantees named and designated in said Las Vegas grant, their heirs and assigns, their absolute right and title to all of the lands embraced within the aforesaid boundaries and limits, free of all right, title, claim or control upon the part of the United States."

It is the duty of the Commissioner of the General Land Office to issue patents in "all such confirmed private land grants to the grantees named in the original grant, their heirs or assigns,

and in the discharge and performance of his duty therein he has no judicial or discretionary powers, but acts ministerially alone in the issuing of such patents."

It is further alleged in the bill that—

"December 17, 1898, upon a petition filed in the Interior Department of the United States, praying that a patent be ordered to be issued to the town of Las Vegas to all the land included in said Las Vegas grant, the Honorable Thomas Ryan, the then acting Secretary of the Interior Department, addressed a letter to the Commissioner of the General Land Office, wherein and whereby the said Interior Department ordered and directed the honorable Commissioner of the General Land Office to issue a patent to said lands to the town of Las Vegas, which order of the Interior Department now remains and continues in full force and effect, not having been set aside, vacated or omitted.

"Said plaintiffs are informed and believe, and upon their information and belief they charge the fact to be, that at the date of the making of said Las Vegas grant, as aforesaid, there was no place of collection of people having any legal existence under the laws, customs or usages of the Republic of Mexico or the Territory of New Mexico known or designated as the town of Las Vegas, nor was there any town by name of Las Vegas on said grant or elsewhere at that time which under the laws in force at that time in the Territory of New Mexico had any legal or corporate existence or which under or by virtue of any law, custom or usage in force in New Mexico could take or acquire title to lands.

"And said plaintiffs allege and charge further that said land grant was not made to any town by name of Las Vegas or by any other name; that the town of Las Vegas nor any other town ever petitioned the surveyor general of New Mexico to investigate the nature, character, extent or validity of said grant, and that the only petition ever preferred to any surveyor general for such an investigation touching said grant was preferred by individuals representing the original grantees, Juan Dios Maese et al., their heirs and assigns, the same hereinbefore referred to. They aver further that said surveyor general reported that said grant was made in due form to Juan Dios Maese and

Counsel for Parties.

his associates, and was to them a valid grant, and plaintiffs aver that said grant was duly and legally confirmed by Congress to the original grantees, the said Juan Dios Maese and his associates, and that it was not confirmed to a town by the name of Las Vegas or to any other town. Said plaintiffs further show that they are informed and believe, and upon their information and belief they charge the fact to be, that there was not on December 17, 1898, any town by name of Las Vegas anywhere in the United States having any legal or corporate existence or any defined boundaries, or that could take or acquire title, either equitable or legal, to any lands whatsoever; and, further, that there was not at the time of the cession of the country included in the Territory of New Mexico to the United States by the Republic of Mexico, or at the time of the confirmation by Congress of the United States of said Las Vegas grant, any such town having any legal or corporate existence or having any defined boundaries, or any place by that name capable in the law of acquiring, having or holding title, either legal or equitable, to the lands included within the Las Vegas grant or any other real estate."

It is further alleged that such patent if issued will be a cloud upon the title of plaintiffs and that they have presented their claim to said grant and have requested a patent to be issued to the heirs and assigns of the original grantees, and that their request has been ignored, "and said Commissioner of the General Land Office is now about to issue the patent to said grant to a nonentity called the town of Las Vegas, in violation of law and in violation of the rights of plaintiffs and to their great and irreparable injury, and will do so unless restrained from so doing by this court."

The demurrer to the bill was general, charging want of equity, no jurisdiction of the court over the subject-matter, and a defect of parties.

The other facts stated in the opinion are taken from H. Ex. Doc. 14, 30th Cong., p. 36, quoted in the brief of counsel for appellants.

Mr. Fred. Beall and *Mr. H. C. Burnett* for appellants.

Mr. Assistant Attorney General Van Devanter for appellees.

Mr. Justice McKenna, after making the above statement, delivered the opinion of the court.

The first and second grounds of demurrer are substantially the same, or depend upon the same arguments. Of the second ground the courts below took different views, the Supreme Court holding that the town of Las Vegas was not and the Court of Appeals holding that the town was a necessary party.

As stated in the bill, the act of July 22, 1854, in execution of the treaty of Guadalupe Hidalgo, required the surveyor general of New Mexico, under the instruction of the Secretary of the Interior, to investigate and report upon the validity of grants of land from the Mexican government. On September 11, 1855, a petition was presented to the surveyor general for the examination of the grant of Juan de Dios Maese et al., which stated that it was presented by "Francisco Lopez and Henry Connelly and Hilario Gonzales, on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, Territory of New Mexico, represent to your honor that they, and the citizens they represent, are the claimants and legal owners of a certain tract of land lying and being situate in the county of San Miguel, in the Territory of New Mexico."

It also stated the fact of a grant, the boundaries of the grant, and concluded as follows:

"The said claimants cannot show the quantity of land embraced in said grant, except as the same are set forth in the boundaries of said grant, nor can they furnish a plat of survey of said grant, as no survey of said land has ever been executed.

"Your petitioners, the claimants, are also informed and believe that Thomas Cabeza de Baca, for himself and others, are claimants also for the lands embraced in said grant and now claimed by your petitioners. Your petitioners pray that their claim and title to said lands be examined as required by law,

and that said grant be confirmed to them; and, as in duty bound will ever pray," etc.

The surveyor general made report of the claim, stating—

"The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows is made in strict conformity with the laws and usages of the country at the time.

"Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant, and that they went upon the land knowing the existence of a prior grant, but as these matters are not deemed to be pertinent to the case so far as this office is concerned, it is not necessary to comment upon them.

"It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises."

The claims and thirty-two others which the surveyor general had investigated were submitted to Congress with his report thereon. The claims were designated by numerals from one to thirty-eight, number twenty being the "town of Las Vegas and Thomas Baca et al." H. Ex. Doc. 14, pp. 42, 45.

The claims were confirmed by the act of June 21, 1860. 12 Stat. 71–2. Section 6 of the act is as follows:

"And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs

of Baca when thereunto required by them: Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer." Approved, June 21, 1860. 12 Stat. 71–2.

Notice of the confirmation was sent by the Land Office to the surveyor general of New Mexico, and his attention was particularly directed to the sixth section of the act of Congress as follows:

"In this connection I have to draw your special attention to the sixth section of said act of June 21, 1860. . . . This law gives the land to the Vegas town claim, and allows the Baca heirs to take an equal quantity of vacant land, not mineral, in New Mexico, to be located by them in square bodies not exceeding five in number. To give this law timely effect you will give priority, in surveying private land claims, to this claim, particularly as it is in the vicinity—about four miles from the outside of the public surveys. You will proceed to have the exteriors of the Las Vegas town claim properly run and connected with the line of the public surveys. The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimant to locate a quantity equal to the area of the town tract elsewhere in New Mexico as vacant land, not mineral, in square bodies not exceeding five in number."

The grant was surveyed and a plat was made showing its area to be 496,446.96 acres. A certificate was issued to the Baca heirs for a like quantity of land, which entitled them to locate, and they did afterwards locate that quantity, and the location was sustained by this court. *Shaw* v. *Kellogg*, 170 U. S. 317.

On May 4, 1861, the surveyor general reported his action to the General Land Office, and transmitted the survey, field notes and plat. The papers were received and filed in the Land Office and the grant was treated as confirmed for 496,446.96 acres. In the reports of the General Land Office, subsequently made, the tract was named "town of Las Vegas," and the claimants the "inhabitants of the town."

On March 3, 1869, Congress passed an act which provided for the issue of patents for private land claims in New Mexico

which had theretofore been confirmed by Congress. Section 2 of the act is as follows:

"And be it further enacted, That the Commissioner of the General Land Office shall, without unreasonable delay, cause the lands embraced in said several claims to be surveyed and platted, at the proper expense of the claimants thereof, and upon the filing of said surveys and plats in his office he shall issue patents for said land in said Territory which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid, but for which no patents have heretofore been issued." 15 Stat. 342, c. 152.

It is stated by counsel for appellants that prior to the act of March 3, 1869, the General Land Office was without authority to issue a patent for the lands in controversy. See also *Shaw* v. *Kellogg*, 170 U. S. 342. That act therefore is the sole authority to the General Land Office to issue the patent, and it would seem not to admit of controversy that the patent must issue to the confirmee of Congress. We think that the town of Las Vegas was that confirmee, and this conclusion relieves us from considering some of the interesting questions discussed by counsel.

The grant originally was as much to a community as to individuals, and a town was contemplated. The decree of the governor directed the selection of "a site for a town to be built by the inhabitants," and the constitutional justice, in executing the decree, informed those to whom he made "the distribution" of the land "that the water and pasture were free to all, and that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all, which, being done, that they notify the justice, in order that he may mark out to each one equally the portion he is entitled to." A town was started and grew and had attained substantial proportions at the time the confirmatory act was passed.

The petition of the surveyor general of New Mexico describes the petitioners as "residents of the town of Las Vegas and its vicinity," and he manifestly regarded it a claim on behalf of the town, stated it from that standpoint and reported it to Congress

as a claim by the town of Las Vegas. The claim was confirmed by reference to the report, and the town was especially designated the claimant in section 6 of the confirmatory act. That it received confirmation at all may be because it was a claim by a town. Its legality might have been questioned. The claimants in their petition stated that their claim was disputed by Thomas Cabeza de Baca, and reporting on that dispute the surveyor general said that testimony was introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the grant to Juan de Dios Maese, and that the claimants "went upon the land, knowing the existence of a prior grant"—the Baca grant. The surveyor general, however, did not assume to decide the dispute between the parties, but referred it to "the proper tribunals of the country" and to Congress. Congress accommodated the dispute by a magnificent donation of lands to the heirs of Baca, and confirmed the original land to the town; and we can easily see that Congress might have exercised its bounty to adjust a controversy to which a town was a party, when, if the contestants were individuals, they would have been remitted to the courts to litigate their rights and priorities. But however this may be, we cannot assume that Congress approved the report of the surveyor general unadvisedly, used the name of the town unadvisedly, or intended primarily some other confirmee.

This interpretation of the act of Congress cannot be changed even if Las Vegas had or has "no legal or corporate existence." If the designated confirmee cannot take, another cannot be substituted in its stead. Nor do we think the capacity of the town to take a patent is open to dispute in the Land Office. Of that capacity Congress was satisfied, and it is not for the Land Department to conceive and urge doubts about it raised upon disputable legal propositions. The town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States. It is the duty of the Land Office to issue that patent, to give the town and its inhabitants the benefit of that authentication, and to remit all controversies about it to other tribunals and proceedings. It

will be observed from this view that the question in the case is narrower than appellants conceive it. It is not what rights they had before confirmation of the grant nor what rights they may assert under or against the patent, but what Congress has done and what it has directed the Land Department to do. It is strictly this and nothing more, and on this only we express an opinion.

Decree affirmed.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* ZERNECKE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 58. Argued October 25, 1901.—Decided January 6, 1902.

Section 3 of the Compiled Laws of Nebraska of 1889, c. 72, providing for the incorporation of railroad companies, is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." *Held* that the plaintiff in error, being a domestic corporation of Nebraska, accepted with its incorporation the liability so imposed by the laws of that State, and cannot now complain of it.

THE case is stated in the opinion of the court.

Mr. W. F. Evans for plaintiff in error. *Mr. M. A. Low* was on his brief.

Mr. Thomas C. Munger for defendant in error. *Mr. John M. Stewart* and *Mr. A. E. Harvey* were on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought in the district court of Lancaster

County, Nebraska, by the defendant in error as the administratrix of the estate of Ernest H. Zernecke, deceased, against the plaintiff in error, for damages, under a statute of the State, for the death of Zernecke, caused by the derailment of the train of plaintiff in error upon which Zernecke was a passenger.

The plaintiff alleged negligence in the railroad company and its servants. The answer of the company denied negligence, and alleged that the derailment was caused by some person or persons unknown to the company, and not in its employment or under its control, who willfully, maliciously and feloniously removed and displaced from the track certain spikes, nuts, anglebars, fishplates, bolts and rails, and otherwise tore up and destroyed the track. The company also alleged care in the maintenance of its track and the management of its trains.

The petition alleged that the plaintiff in error "was a corporation, duly incorporated under the laws of the State of Nebraska," and the admission of the answer was that defendant in error, "at all times mentioned in said petition, was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a domestic corporation of the State of Nebraska."

The case was tried before a jury. The evidence of defendant in error (petitioner) was that at the time Zernecke was killed he was being transported as a passenger over the railway of plaintiff in error, and that the train upon which he was riding was thrown from the track, resulting in his death and the death of ten other persons. The plaintiff in error then offered witnesses and depositions to sustain the allegations of its answer. The testimony, upon the objection of defendant in error, was rejected, and at the close of the evidence, on motion of defendant in error, the court instructed the jury as follows:

"1. The jury are instructed that if you find from the evidence that Ernest H. Zernecke was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is administratrix, and she and her children had a pecuniary interest in his life and suffered loss by his death, then you should find for the plaintiff."

The jury returned a verdict for defendant in error for $4500, upon which judgment was entered. The judgment was affirmed by the Supreme Court of the State, (59 Neb. 689,) and the case was then brought here.

The assignments of error are based upon the contention that the action of the district court and the decision of the Supreme Court in affirming the judgment of the district court were based upon section 3 of the act providing for the incorporation of railroad companies, and it is contended that the section contravenes the Fourteenth Amendment to the Constitution of the United States, in that said section deprives plaintiff in error of its property without due process of law. The section is as follows:

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Compiled Laws of Nebraska, 1889, c. 72, art. 1, sec. 3, p. 628.

The court, interpreting the statute, said:

"It gives or creates a right of action in favor of the injured passenger, p. 645; and when it is established that a person is injured while a passenger of the railroad company, a conclusive presumption of negligence arises in every case except where it is disclosed that the injury was one caused by his own criminal negligence, or by his violation of some rule of the company brought to his actual notice. . . . In other words, a conclusive presumption of negligence arises when the case does not fall within the exceptions of the law, and he has his right of action. . . . Now it is indisputable that, if Zernecke had been injured merely, and not killed, he would have recovered against the railway company under said section 3, article 1, of chapter 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect or default of the said railway company in failing to carry such passenger safely. Hence this case falls within the scope of said

chapter 21, and the fact of negligence or defendant's wrongful acts or default is established when the evidence discloses the facts specified in said section 3 of chapter 72."

In other cases the Supreme Court has passed upon the statute, the titles of which cases are inserted in the margin.[1]

In *McClary* v. *Sioux City & Pacific R. R. Co.*, 3 Neb. 44 (1873), railroad companies were held not to be insurers of their passengers. In that case the injury was caused by the upsetting of the train by a gust of wind. The negligence of the company consisted in being behind time. If the train had been on time it would have escaped the tempest. The negligence, it was decided, was too remote as a cause, and the company was held not liable.

Subsequently, *Chicago, Burlington & Quincy Railroad* v. *Landauer*, 39 Neb. 803, railroad companies were held to be insurers of their passengers. The company escaped liability, however, by reason of the gross negligence of the person injured.

In *Omaha & R. V. R. Co.* v. *Chollette*, 33 Neb. 143, the words of the statute exempting railroad companies from liability, "where the injury done arose from the criminal negligence of the persons injured," were defined to mean "gross negligence," "such negligence as would amount to a flagrant and reckless disregard" by the passenger of his own safety, and "amount to a willful indifference to the injury liable to follow." This definition was approved in subsequent cases. It was also approved in the case at bar, and the plaintiff in error, it was in effect declared, was precluded from any defence but that of

---

[1] *Chollette* v. *Omaha & Republican Valley Railroad Company*, 26 Neb. 159; *Omaha & Republican Valley Railroad Company* v. *Chollette*, 33 Neb. 143; *Missouri Pacific Railway Company* v. *Baier*, 37 Neb. 235; *Union Pacific Railway Company* v. *Porter*, 38 Neb. 226; *Chicago, Burlington & Quincy Railroad Company* v. *Hague*, 48 Neb. 97; *Chicago, Burlington & Quincy Railroad Company* v. *Landauer*, 39 Neb. 803; *Omaha & Republican Valley Railway Company* v. *Chollette*, 41 Neb. 578; *St. Joseph & Grand Island Railroad Company* v. *Hedge*, 44 Neb. 448; *Fremont, Elkhorn & Missouri Valley Railroad Company* v. *French*, 48 Neb. 638; *Chicago, Rock Island & Pacific Railway Company* v. *Young*, 58 Neb. 678; *Chicago, Burlington & Quincy Railroad Company* v. *Wolfe*, 86 N. W. Rep. 441, decided March 21, 1901.

negligence as defined, or that the injury resulted from the violation of some rule of the company by the passenger brought to his actual notice, and the company, as we have said, was not permitted to introduce evidence that the derailment of its train was caused by the felonious act of a third person. The statute, thus interpreted and enforced, it is asserted, impairs the constitutional rights of plaintiff in error. The specific contention is that the company is deprived of its defence, and not only declared guilty of negligence and wrongdoing without a hearing, but, adjudged to suffer without wrongdoing, indeed even for the crimes of others, which the company could not have foreseen or have prevented.

Thus described, the statute seems objectionable. Regarded as extending the rule of liability for injury to persons which the common law makes for the loss of or injury to things, the statute seems defensible. And it was upon this ground that the Supreme Court of the State defended and vindicated the statute. The court said:

"The legislation is justifiable under the police power of the State, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers as they were of baggage and freight; and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight."

Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of a master for the acts of his servants.

In *Missouri Railway Co.* v. *Mackey*, 127 U. S. 205, a statute of Kansas abrogating the common law rule exempting a master from liability to a servant for the negligence of a fellow-servant, was sustained against the contention that such statute violated the Fourteenth Amendment of the Constitu-

tion of the United States. And in *Minneapolis &c. Railway Co.* v. *Herrick*, 127 U. S. 210, a statute of Iowa which extended liability for the "*wilful wrongs, whether of commission or omission*," of the "agents, engineers or other employees" of railroad companies, was vindicated against the double attack of being an unjust discrimination against railroad corporations and the deprivation of property without due process of law. See also *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348.

It seemed to the able judges who decided *Coggs* v. *Bernard*, that on account of the conditions which then surrounded common carriers public policy required responsibility on their part for all injuries to and losses of goods entrusted to them, except such injuries and losses which occurred from the acts of God or public enemies, and many years afterwards Chancellor Kent praised the decision of cases which declined to relax the rule to excuse carriers for losses by fire. That rule was not and has not been extended by the courts to passengers, and Chief Justice Marshall, in speaking for this court in *Boyce* v. *Anderson*, 2 Pet. 150, refused to apply the rule to slaves, saying: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases in which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them."

But because courts have not extended the doctrine to carriers of passengers, it does not follow that a state legislature is precluded from doing so. The common law doctrine was declared by Chief Justice Holt in *Coggs* v. *Bernard* to be "a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."

That reason may not apply to passengers but other reasons do, which arise from the conditions which exist in and surround modern railroad transportation, and which may be considered as strongly justifying a rule of responsibility for injury to passengers which makes sure, as the common law rule does, that responsibility be not avoided by excuses which do not exist, or the disproof of which might be impossible.

We might extend the discussion and illustrate it by other cases, but however interesting such discussion might be we do not think it is necessarily demanded by this record. We think plaintiff in error is precluded from objecting to the rule of liability expressed in section 3. That rule of liability was accepted by plaintiff in error as a part and as a condition of its charter. "It was incorporated under the laws of the State of Nebraska," is the allegation of the petitioner. "It is . . . a domestic corporation of the State of Nebraska," is the allegation of the answer. It was incorporated, therefore, under the railroad incorporation act of 1867, and the liability which has been enforced upon it by the decision of the Supreme Court of the State is the liability declared by section 3 of that act. That liability, we repeat, plaintiff in error accepted with its incorporation, and cannot now complain of it. *Waters Pierce Oil Co.* v. *Texas*, 177 U. S. 28. We need not repeat the reasoning of *Waters Pierce Oil Co.* v. *Texas*. The case followed and applied the doctrine of many prior cases.

Judgment affirmed.

Mr. Justice Gray did not hear the argument and took no part in the decision.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO. *v.* EATON.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 57. Argued October 25, 1901.—Decided January 9, 1802.

Chicago, Rock Island and Pacific Railway Co. v. *Zernecke, ante*, 582, affirmed and followed.

THE case is stated in the opinion of the court.

Mr. W. F. Evans for plaintiff in error. *Mr. M. A. Low* was on his brief.

Mr. Thomas C. Munger for defendant in error. *Mr. John M. Stewart* and *Mr. A. E. Harvey* were on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought in the district court of Thayer County, Nebraska, by the defendant in error as the administrator of the estate of John R. Mathews, deceased, against the plaintiff in error, for damages, under a statute of the State, for the death of Mathews, caused by the derailment of the train of plaintiff in error upon which Mathews was a passenger.

The record presents the same questions which were presented and passed on in the case of the plaintiff in error herein against *Zernecke, Administratrix*, No. 58 of this term, just decided. As in the latter case the ground of action in the case at bar was negligence in the railroad company and its servants. The answer of the company denied negligence, and alleged that the derailment was caused by some person or persons unknown to the company, and not in its employment or under its control, who willfully, maliciously and feloniously removed and displaced from the track certain spikes, nuts, angle-bars, fishplates, bolts and rails, and otherwise tore up and destroyed the track.

The company also alleged care in the maintenance of its track and the management of its train.

The petition alleged that the plaintiff in error "was a corporation, duly incorporated under the laws of the State of Nebraska," and the admission of the answer was that defendant in error, "at all times mentioned in said petition, was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a domestic corporation of the State of Nebraska."

The case was tried before a jury. The evidence of defendant in error (petitioner) was that at the time Mathews was killed he was being transported as a passenger over the railway of plaintiff in error, and that the train upon which he was riding was thrown from the track, resulting in his death and the death of ten other persons. The plaintiff in error then offered witnesses and depositions to sustain the allegations of its answer. The testimony, upon the objection of defendant in error, was rejected, and at the close of the evidence, on motion of defendant in error, the court instructed the jury as follows:

"The jury is instructed that if you find from the evidence that John R. Mathews was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Mathews, and that plaintiff is the administrator of the estate of said Mathews, then you should find for the plaintiff if you find a pecuniary loss from such death has resulted to the next of kin, in this case the father."

The jury returned a verdict for defendant in error for $1500, upon which judgment was entered. The judgment was affirmed by the Supreme Court of the State, upon the decision in *Chicago, Rock Island & Pacific Railway Company* v. *Zernecke, Administratrix*, 59 Neb. 689, and this writ of error was then allowed.

The facts, contentions and questions being the same as those presented in the *Zernecke* case, *supra*, for the reasons stated in the opinion in that case the judgment is

Affirmed.

UNITED STATES REPAIR AND GUARANTEE COMPANY *v.* ASSYRIAN ASPHALT COMPANY.

CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 61. Argued October 28, 29, 1901.—Decided January 6, 1902.

Patent No. 501,537, for an improved method of repairing asphalt pavements, which forms the subject of controversy in this suit in this court, was anticipated in invention, by a patent issued in France to Paul Crochet June 11, 1880.

THE case is stated in the opinion of the court.

Mr. Lysander Hill for petitioner. *Mr. Ernest Wilkinson* and *Mr. William R. Omohundro* were on his brief.

No appearance for the Asphalt Company.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit was originally brought for the infringements of three letters patent issued to the petitioner as assignee of Amos Perkins. The patents were respectively numbered 501,537, 542,349 and 560,599, and were dated respectively 18th July, 1893, 9th July, 1895, and the 19th of May, 1896. The first, 501,537, was for an improved "Method of repairing asphalt pavements;" the other numbers were for "Improvement in apparatus for repairing asphalt pavements."

The bill contained the usual allegations of invention and infringement, and prayed an injunction.

The answer admitted the issue of the patents, but denied that Perkins was the original and first inventor of the subject matter or that the improvements therein disclosed constituted new and useful inventions within the meaning of the patent laws, or that said improvements were not known or used in this country, or had not been patented or described in any printed publication in this or in foreign countries before the alleged invention thereof by Perkins.

The petitioner dismissed the bill as to patent number 542,349. Upon the hearing the Circuit Court sustained the apparatus patent number 560,599, finding that the Assyrian Asphalt Company had infringed upon that apparatus, and ordered an injunction and a reference for an accounting. The Method patent number 501,537 was adjudged invalid, and the court said:

"From the evidence in this suit regarding the prior state of the art, and the argument before me, I find that the term 'asphalt' is not limited in its meaning to the Trinidad deposit, or the so-called 'American mixture,' but includes as well the bituminous paving material used in France and elsewhere, comprising natural rock asphalt and compositions of bitumen and lime or sand particles, and that the claims of the Perkins Method patent are so broad with reference to the application of heat to the repair of asphalt pavements, that they are anticipated by the Crochet patent, and are invalid."

The petitioner took an appeal to the Court of Appeals, and that court affirmed the judgment of the Circuit Court. The case was then brought here by a certiorari.

The proceedings here are only concerned with the Method patent number 501,537. The letters patent describe the invention as follows:

"My invention is designed to produce a method whereby the repairing of asphalt pavements may be quickly and cheaply accomplished and a neater appearing pavement be obtained after repairing than has heretofore been the case.

"Heretofore in the repairing it has been customary to dig out with a pick or other instrument the surface material around the spot to be repaired, sometimes applying heat to the spot to soften the material so that it may be more easily removed. When the material has been removed the depression thus made is thoroughly cleaned and given a coat or dressing of tar. New material in a heated state has then been placed in the depression and been ironed down and smoothed off in the usual manner of finishing, the tar acting as a solder to hold the new material in place. When completed, however, the line or joint between the old hardened material and the new material has been plainly discernible and more often there has been more or less of

a ridge. Again this new block of material, by reason of frost or from other causes, is frequently torn loose from its soldered connection with the old material, thus necessitating new repairs. In practicing my invention, however, I subject the spot to be repaired and the surrounding edges to such a degree of heat that the surface asphalt, not only the exact spot to be repaired but the surrounding portion, to a greater or less degree, is reduced to the soft pliable state in which it is originally laid. With a rake or other suitable instrument it is then agitated and mixed with enough new material to fill up the spot to be repaired. It is then subjected to the usual finishing operation of ironing and burnishing. The heating of the surface may be accomplished in various ways and by means of various forms of apparatus, and while I have herein shown but one form for accomplishing the result, yet I would have it understood that I do not limit myself to any particular form of apparatus for carrying out my invention."

The apparatus described consists of a suitable tank mounted on a wheel for carrying gasoline. The tank is connected with a series of horizontal pipes which carry a series of burners, and "project a flame downward against the pavement."

"In carrying out the invention A represents a suitable tank for carrying gasoline mounted on the wheeled frame B and connected by the pipe C with a series of horizontal pipes, D. These pipes D carry a series of burners, E, which pass through a hood or shield, F, and project a flame downward against the pavement. Pressure is thus obtained upon the gasoline to force it to the burners and to produce a blast by means of an air pump, G, mounted upon the tank."

The letters patent further say:

"The apparatus is also provided with a handle, H, whereby the operator may readily move it to the desired spot. Now as would be seen by turning on as many of the burners as are desired, a strong blast of heat is projected against the surface of the asphalt and readily melts it. As explained above, when it is desired to repair a spot the apparatus is moved adjacent thereto with the burners directly above the spot. These soon reduce the surface asphalt, both at the spot and at the surrounding

edges, to a pliable state, the strong blast causing not only the immediate surface, but the particles deep down, to be melted and yet not burned. With a rake or other suitable instrument the operator then agitates or stirs up the softened material, and by adding new material of substantially the same degree of softness the spot or depression to be repaired is filled up and subjected to the usual smoothing and finishing operation as in the case of a new pavement. This, as will be seen, is done without the use of the tar for the purpose of uniting the parts or sections of material, and is done without any distinct dividing line between the old and new material. In fact, there is no dividing line, because the new material has been mixed with and becomes a part of the old material. As stated above, while heating the spot to be repaired the surrounding edges or portions must be heated to a greater or less degree, and the new material is worked into these edges as well as in the spot to be repaired, so that when hardened it is practically impossible to tell where the pavement has been repaired.

"What I claim is—

"1. The method of repairing asphalt pavements, which consists in subjecting the spot to be repaired to heat, adding new material and smoothing and burnishing it, substantially as described.

"2. The method of repairing asphalt pavements, which consists in subjecting the spot to be repaired to heat until the material is softened, agitating it and mixing with it new material, and finally smoothing and burnishing it, substantially as described."

Infringement is only asserted of the first claim, and, considering the language of the claim and of the specifications, it seems impossible to escape the conclusion that the invention claimed is for the application of heat to the spot to be repaired. And the patentee did not confine himself to the particular apparatus he described. That, he said, was "one form of accomplishing the result." He would have it understood, he said, that he did not confine himself "to any particular form of apparatus for carrying out" his invention, and the independence of his method from any form of apparatus is brought out by

contrast of what had been done and what he proposed to do as an improvement. What had been done was to take out with a pick or other instrument the surface material around the spot to be repaired, sometimes applying heat to the spot to soften the material, so that it might more easily be removed. And the new method he proposed was to subject the spot to be repaired and surrounding edges to such a degree of heat that the surface asphalt, not only the exact spot to be repaired, but the surrounding material, to a greater or less degree, will be reduced to the soft, pliable state in which it was originally laid. Here we have the comparison of the two methods. The old was to take out the surface material around the spot to be repaired, sometimes applying heat to soften such material. The new method was to apply heat, not only to the exact spot to be repaired, but the surrounding edges. What, then, was the advantage of the new method? The patent tells us. In the old method the depression made by the removal of material was "thoroughly cleaned and given a coat or dressing of tar." The tar acted as a solder, but the joint between the old and the new material was discernible, and often a ridge was formed, and the adhesion of the materials yielded to frost and other causes. The new method dispenses with the tar and its consequences. It substituted the melting of the surrounding edges, producing a union and coalescing of the old and new material, making a better appearing and more lasting repair. If the method and effect of the patent be different from this, we are unable to discern it from the patent or from the testimony. Indeed, there is no other difference established by the testimony. One of the expert witnesses of the petitioner testified as follows:

"It is further evident that in such use of defendants' device and in the repair of pavements in part by the use of said device by defendants, the use of tar or any other cement or 'solder' is obviated, that the union between the patch of new material and the old pavement is direct, immediate and complete without the intervention of an interposed body of tar or like material, and that the joint need, therefore, present none of the disadvantages, objections or defects in respect either of appear-

ance or of effectiveness, which distinguished the old tar joint and which are obviated by the method here in controversy.

* * * * * * * *

"There are three steps or process elements enumerated in this claim, to wit: First, 'subjecting the spot to be repaired to heat;' second, 'adding new material;' and third, 'smoothing and burnishing.' These are all performed in the same order by the defendants. The separate steps, are, moreover, essentially the same in kind in defendant's practice, as set forth in the patent. The heat is applied to the spot to be repaired with a flame blast. The new material added is the same in condition and character; it is not tar or any part tar, but is solely the asphalt composition like that of the old pavement, and in the soft condition and heated state in which said composition is and was originally applied. The smoothing and burnishing is the same step in both cases, being the old and familiar operation performed by means of heated metal tamping and smoothing irons long before used in leveling and smoothing original asphalt pavement surfaces."

And he further testified:

"It appears to me to be a feature of the patented method, or a characteristic of the steps of applying the new material, that the new material is placed into direct contact with the old, as if the claim read 'adding new material in direct contact with the old material and smoothing and burnishing it.'"

In other words, the mixing of the old and new material around the edges of the excavation and "adding of new material in direct contact with the old material, smoothing and burnishing it," is the essence of the invention, and so unqualifiedly is this true that a witness of petitioner testified that if the heat which was applied not only melted, but burned the immediate surface and as well "the particles deep down," and the material thus burned raked away clean before new material was applied, the method of the patent would be followed.

As thus described, was there anything in the art which preceded the Perkins method and took from it the claim of originality and invention? The Circuit Court and the Circuit Court of Appeals found that a patent issued to Paul Crochet,

June 11, 1880, in France, had that effect, and we concur in the finding. The process described in the Crochet patent is for the "Preparation and Recharging of Compressed Asphalt Roadways." The following is the specification of the patent:

"When it was designed to repair or recharge a roadway in asphalt with the means which are now at command, the operator generally delimits with a pick the part which is to be replaced and takes therefrom the asphalt; but it is rare that this operation has not for consequence the starting of the adjacent portions which are sound, swelling them up in such wise that at the end of a little while it is necessary to repair them in their turn.

"To avoid this I have designed a process for repairing and recharging asphalt roads which suppresses such inconveniences. It consists in reheating the part to be mended by means of a movable furnace which the operator shifts about at the surface of the roadway until such portion decrepitates and becomes friable. The upper part of the layer of asphalt and that which has been damaged are taken off by means of an iron scraper armed with small teeth, which perform the office of a rake; said scraper in raising the material forms at the same time upon the part remaining numerous striæ which render the surface wrinkled and augment the adherence of the additional over-thickness which constitutes the recharge.

"The repeated passage of the movable furnace thereon has equally for its effect to vaporize the water and the humidity which are found in the asphalt pavement at the portion to be repaired or recharged.

"After this preparatory operation, the workman spreads a convenient depth of asphalt in powder-like state and stamps it by the ordinary means; because of the softening of the subjacent layer, said layer solders itself perfectly to the new coat, and forms with it a thickness without break in continuity. Such repair and such recharging do not at all impair the neighboring portions.

"It is clearly evident, besides, that the same work of recharging can be done over the whole surface of a street instead of being done in spots, and that it is independent of the depth of the asphalt layer.

"The heating apparatus which I have arranged for thus effecting the softening the surface of the asphalt roadways is represented on the drawing annexed, in longitudinal and transverse sections, Figs. 1 and 2. It is composed of a box body, the sides A, A, B, B, of which are perforated throughout, and the bottom C, whereof is formed a grating, below which there is a metal plate, D, to radiate the heat over the surface of the asphalt. Said plate D is movable to allow for the withdrawal of cinders. The box is mounted upon the wheels E, the axes *o* whereof are adjustable upon supports *a*, the elevation of which in guides *b* can be varied to augment or diminish the distance of the box to the roadway. A handle, F, serves to manœuver the car over the pavement. This system, especially applicable for streets of compressed asphalt, can be equally employed to repair and recharge streets of bitumen.

"Resumé:

"I claim as my invention my system for reparation and recharge of asphalt roadways, presenting as distinctive characteristics the points following:

"1st. The softening of the upper surface of the asphalt layer at the part to be repaired, and the removal of such upper surface by means of a toothed scraper which striates the part remaining.

"2d. Recharging, by the addition upon the surface thus softened, of an asphalt layer of convenient thickness, which is stamped by the usual means.

"3d. The movable furnace which I have combined to such end, according to the conditions described and represented."

The similarity, if not identity, of the patents is manifest, and it would seem unnecessary to enlarge upon their resemblance. They are both methods of repairing asphalt roadways; they both apply heat to the spot to be repaired; the old material is removed in the Crochet patent; in the Perkins patent it is reduced to the state in which it was originally laid, then agitated and mixed with new material. But this agitation and mixing of old and new material is not necessary to the method. It may be advisable to do, or not to do, a witness testified. But further, the Perkins patent calls for a heating of the surround-

ing edges of the spot to be repaired, to make continuity between the spot repaired and the surrounding pavement. The Crochet patent has not this detail in words, but it is clearly implied. Describing the prior art, the Crochet patent says: ". . . the operator generally delimits with a pick the part which is to be replaced and takes therefrom the asphalt; but it is rare that this operation has not for consequence the starting of the adjacent portions which are sound, swelling them up in such wise that at the end of a little while it is necessary to repair them in their turn." His method, he says, "suppresses such inconveniences," and the repeated passing of the heating apparatus over the pavement has the effect that the new coat forms with the old "a thickness without break in continuity, and it does not at all impair the neighboring portions." Surely, considering the method of this patent alone, it did not require the exercise of invention to pass to or conceive the Perkins method. Besides, that conception had the aid of other publications. In some of them the application of heat is mentioned as necessary in the original construction of asphalt pavements and also in their repair. In a work entitled "Asphalt, its Origin, its Preparation and its Application," by Leon Malo, published in Paris in 1888, the repair of pavements after excavations and deteriorations was described. In making excavations two precautions were recommended, and the second consisted, the author said—

"In heating the edge rims of the asphalted bed which limit (*i. e.*, define) the whole trench before pouring in the hot powder destined to repair the part lacking."

And again, as to deteriorations:

"The wheels of vehicles encounter the disintegrated parts, digging there a hole which—if it be not promptly repaired—finishes by deepening itself as far as the beton. The sole remedy for this evil is to remove all the bad part and replace it by new asphalt, taking care therein to heat the edges of the sound portion so as to obtain a perfect soldering, as we have explained a little further back."

The counsel claim, however, that the Perkins "method is characterized by a new and useful way of applying heat to the

pavement, to wit, by sending a flame blast into direct contact with the pavement surface," and that the Crochet patent had no suggestion of that, and besides the Crochet process applied to *compressed asphalt roadways*, which was a different asphalt roadway than that to which the Perkins method was intended to apply. And upon the difference in the asphalt, counsel has dwelt long and interestingly, but the argument finally comes to a dependence upon the fact that the compressed asphalt of the Crochet patent disintegrates and crumbles, and if overheated becomes as inert as sand; whereas the asphalt of the Perkins patent melts under the action of heat and has "a peculiar property or 'susceptibility,' namely, that when its surface is subjected constantly to a lively heat, the exposed material automatically covers itself with a thin, protecting shield, and merely melts and softens beneath that shield." The answer to the contentions is that given by the Circuit Court of Appeals; the patent does not support them. Before the time of either patent the world knew that heat disintegrated some things and melted others, and we cannot concede invention to the thought that that might be true of different kinds of asphalt. Indeed, even in the face of the grave testimony contained in this record given by unquestionably expert men, we find it also difficult to concede that it was an exertion of invention to apply heat to the edges of an excavation to make a bond between the old and the new material. To devise an instrument to do that well and quickly might be invention, and that Perkins achieved by his apparatus patent. To allow him more under the facts of this record would be to give him a monopoly of the machine and of that which the machine can do. And this is an answer to the contention based upon the peculiar property of American asphalt to interpose a shield against a blasting heat to protect itself from destruction, a virtue in American asphalt, no doubt. If it is a virtue resulting from a peculiar application of heat, there is nothing in the record to show that Perkins was aware of it. He certainly did not reveal it in the specifications of his patent nor describe it as part of his method. His apparatus, it is true, is provided with burners by which blasts of heat may be projected against the pavement. But his method is independ-

ent of his apparatus. He says in his patent: "The heating of the surface may be accomplished in various ways and by means of various forms of apparatus, and while I have herein shown but one form for accomplishing the result, yet I would have it understood that I do not limit myself to any particular form of apparatus for carrying out my invention."

And what is claimed is, as we have seen, "the subjecting the spot to be repaired to heat."

In further answer to the contention we may quote the Circuit Court of Appeals as follows:

"Another objection to the proposed limitation of the claim by making it read 'a blast of heat,' or 'a strong blast of heat,' in lieu of the unqualified word 'heat,' is in the fact that the third claim, which contained the additional words, was withdrawn by the patentee upon a ruling or declaration of the Patent Office that the first and third claims were the same in substance and could not both be permitted to remain in the case. That was not merely a casual expression of opinion by an examiner, but was in effect a requirement that one or the other of the claims be withdrawn, and no reason is perceived for not applying the ordinary rule. Having voluntarily abandoned the claim for a method limited to the use of 'a blast of heat,' the patentee or his assignee may not now insist that a broad claim, containing no suggestion of such intention, shall nevertheless be subjected by construction to the same restriction. This point, in view of the reservation already considered, is unimportant and might be passed, but it is to be observed that if the third claim was withdrawn by mistake, a correction should have been sought in the Patent Office, either by a surrender and reissue, or possibly by a new application. It is not within the rightful power of the courts to enlarge or restrict the scope of patents which by mistake were issued in terms too narrow or too broad to cover the invention, however manifest the fact and extent of the mistake may be shown to have been."

Decree affirmed.

MIDWAY COMPANY *v.* EATON.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 80. Argued December 4, 5, 1901.—Decided January 13, 1902.

Under the act of July 17, 1854, c. 83, 10 Stat. 304, Sioux half-breed certificates were issued to Orillie Stram, a female half-breed, authorizing her to select and take one hundred and sixty acres of the public lands of the United States, of the classes mentioned in said act. In June, 1883, she, through Eaton, her attorney in fact, applied at the local land office to locate the same on public lands of the United States, in that district, then unsurveyed, and filed a diagram of the desired lands sufficient to designate them. Those lands were not reserved by the Government. Subsequently they were surveyed, and the scrip was located upon them, and the locations were allowed, and certificates of entry were issued. In 1886, Orillie Stram and her husband conveyed seven ninths of the land to Eaton, the defendant in error. In 1889, an opposing claim to the land having been set up, the Secretary of the Interior held, for reasons stated in the opinion of this court in this case, that the opposing claimants had no valid claim to the lands; that the improvements made upon the land when it was unsurveyed, not having been made under the personal supervision of Orillie Stram, she had not had the personal contact with the land required by law; that the power given to Eaton to locate the land, and the power given to sell it, as they operated as an assignment of the scrip, were in violation of the act of July 17, 1854, and that it followed that the entry of the lands was not for the benefit of Orillie Stram; that the location and adjustment of the scrip to the lands were ineffectual; that Orillie Stram had no power to alienate or contract for the alienation of the lands, before location of the scrip, and that the lands were still public lands and open to entry. This was an action to quiet the title, the plaintiff in error claiming adversely to Eaton. The scrip locations were adjudged by the district court and by the Supreme Court of the State of Minnesota to be valid. This court sustains that judgment.

THIS is an action to quiet title, and was brought in the district court in the eleventh judicial district, county of St. Louis, State of Minnesota.

The plaintiff in error claims title under a United States patent issued to its grantor, one Frank Hicks, upon a homestead settlement. The defendants in error claim under locations of what is commonly known as "Sioux half-breed scrip," issued under

the act of July 17, 1854, c. 83, 10 Stat. 304. These locations, it is alleged, were prior in time and right to the claim of Hicks, and therefore the patent was illegally issued to Hicks. It was prayed that the title represented by the patent be adjudged to be held in trust for the defendants in error, and that the plaintiff in error be required to convey such title to them in proportion to their interests set forth in their cross bill.

The controversy turns upon the validity of the scrip locations. Their validity was adjudged by the district court, and by the Supreme Court of the State. 79 Minnesota, 442. This writ of error was then sued out.

The facts as found by the court are: That under the act of July 17, 1854, and in pursuance of said act, there were issued to Orillie Moreau certificates commonly known as Sioux half-breed scrip numbered 19E and 19D, which entitled her to select and take one hundred and sixty acres of the public lands of the United States of the classes mentioned in said act; "that thereafter, and on the 16th day of June, A. D. 1883, the said Orillie Moreau, then Orillie Stram, never having theretofore made use of the said certificates of scrip, and the same never having been in any manner extinguished or satisfied, through the defendant Frank W. Eaton, who had theretofore been by her duly empowered as her attorney in fact for that purpose, presented said scrip at the local land office in Duluth, Minnesota, and then and there made application to locate the same on certain then unsurveyed lands of the United States in said district in which said land office was located, and did then and there enter and file upon by virtue of said scrip the lands for which said application was made as aforesaid, and filed therewith a diagram or plat of said land embracing a sufficient description thereof to properly designate the same, which lands were in said application described by metes and bounds;" and that the same were "lands not reserved by the Government of the United States for any purpose whatsoever;" and also that "prior to the location of said scrip upon said land as above found improvements had been made thereon, consisting of a house 14 by 16 feet, by and under the authority of the said Frank W. Eaton."

On the 20th of July, 1885, the lands having been duly sur-

veyed, a plat and survey of the township in which the lands were situated were "duly filed in the local land office at the city of Duluth, Minnesota, and thereupon and on the 21st day of July, 1885, upon application of the said Orillie Stram, acting by and through her said attorney in fact, said certificate of Sioux half-breed scrip number 19D was adjusted to and upon the lands in controversy," (they were specifically described,) and the scrip was then and there duly located upon said lands as surveyed lands, and the locations were allowed by the officers of the local land office at Duluth, there not being at that time nor at the time the scrip was located upon the lands when unsurveyed, nor at any other time, any valid adverse claim to said lands; and on the 21st of July, 1885, receiver's final receipts and certificates of entry were duly and regularly issued to said Orillie Stram, and duly and regularly recorded in the counties of Lake and St. Louis, Minnesota, within a few days thereafter.

The "rights and interests" of Orillie Stram, by sundry mesne conveyances, were conveyed to the defendants in the proportions respectively as follows: "Frank W. Eaton, the undivided 13–36; Merrill M. Clark, the undivided 9–36; Margaretha Lonstorf, the undivided 8–36, and Richard H. Fagan, the undivided 6–36, and the said defendants are still the owners of the said lands in said proportions."

That on the 20th of July, 1885, one Thomas Hyde and one Angus McDonald respectively made application to make preemption filings on portions of the lands in controversy, which applications were denied both on the ground of the prior locations of the scrip and that the applications were not made in good faith, but in fraud, and in violation of the preëmption laws. And it was determined by the local land office and sustained by the Commissioner of the General Land Office, and by the Secretary of the Interior, that neither Hyde nor McDonald ever had or obtained any rights whatsoever by reason of their application or any subsequent proceedings; but, notwithstanding, said Hyde and said McDonald "made an attack upon the said decisions of the Land Department some time in November, 1885, and upon the location of the said certificates

of scrip and the entry of lands thereunder." A hearing was had on the 6th of April, 1886, and the local land officers sustained the scrip locations. An appeal was taken to the Commissioner of the General Land Office, and he held "adversely to the scrip locations." An appeal was then taken to the Secretary of the Interior. A hearing was had before the Secretary, February 18, 1889, and he held and determined that neither Hyde nor McDonald had any interest or valid claim to the lands, but, notwithstanding, also held that the scrip locations were illegal and invalid, and that neither Orillie Stram nor those claiming under her were entitled to the lands for the following reasons: (1) that the improvements made upon the land when it was unsurveyed were not made under the personal supervision of Orillie Stram, and that she had not had personal contact with the land; (2) that the power of attorney to Eaton to locate the scrip, and the power of attorney executed at the same time to Leonidas Merritt to sell the lands which should be located, operated as an assignment of the scrip, and were in violation of the act of July 17, 1854, and the entry of the lands therefore was not for the benefit of said Orillie Stram; (3) that the subsequent location and adjustment of the scrip to the lands after the latter were surveyed were ineffectual in view of the previous attempt to locate the scrip, and in view of his (the Secretary's) decision relative to the question of improvements; (4) that Orillie Stram had no power to alienate the lands before location of the scrip or to contract for the sale of them, or to grant a power of attorney to sell the same for her after they should be located, but held that she had the right to sell immediately after location of the scrip. As a deduction from these conclusions, the Secretary held that the lands were still public lands and open to entry. The decision of the Secretary was attached to the findings as an exhibit.

That on the 31st day of March, 1886, and prior to the hearing had before the local land office at Duluth, the said Orillie Stram and her husband Roman Stram made and executed a deed for seven ninths of the land in controversy to Frank W. Eaton, with warranty of title. The deed was subsequently recorded in St. Louis and Lake counties.

Statement of the Case.

The deed recited the location of the scrip in the land office at Duluth, June 16, 1883, by Eaton, as the constituted and appointed attorney in fact of the Strams, and that the title thereby vested in Orillie Stram. It also recited the survey of the lands and the adjustment of the scrip and entry to such lands, and "thereby the aforesaid scrip and entry were adjusted July 21, A. D. 1885, thereby specifically and perfectly describing the land filed upon for me, the said Orillie Stram, by the said Frank W. Eaton, and intended to be entered on June 15, A. D. 1883, in the name of the said Orillie Stram, by our attorney in fact, the said Frank W. Eaton." It also recited the power of attorney given to Leonidas Merritt, acknowledged it, and ratified and confirmed the conveyance by him to Eaton.

It was further found that in pursuance of the decision of the Secretary of the Interior the lands were attempted to be thrown open to public entry, and a patent was subsequently issued to Frank Hicks, and that Frank Hicks and his wife conveyed the same to The Midway Company, the plaintiff in error, "who now holds whatever title thereto enured to the said Frank Hicks." That neither Orillie Stram nor her husband, nor any of the defendants, "were in any manner parties to the proceedings to the decision of the Secretary of the Interior rendered on the 18th of February, 1889, and that said Hicks had at all times full knowledge of all rights and claims of the defendants." That the findings of fact of the Secretary of the Interior were fully sustained by the evidence in the cause presented to him, "except that it is found as a fact by this court, that the improvements caused to be erected by Frank W. Eaton upon the said premises consisted of a house about 14 by 16 feet in size; and it is further found as a fact that from the evidence before the Secretary of the Interior in said cause, presented to him by the record upon said appeal, it did not appear that the scrip referred to in the decision of said Secretary had passed through many hands or through any hands before coming into the hands of the said Frank W. Eaton, nor did it appear that the powers of attorney to locate said scrip and to convey the land located therewith had been executed by the said Orillie Stram years before the location thereof by the said Frank W. Eaton, but that

on the contrary it appeared from the evidence before the Secretary that said powers of attorney were executed by the said Orillie Stram about one week before the location of the said scrip by the said Frank W. Eaton, and that the said powers did not contain the names of the grantees. It is further found as a fact that it did not appear from the evidence before the said Secretary that the said Orillie Stram never saw the said lands; it did not appear from the evidence before the said Secretary that she had sold the said scrip long prior to the location thereof; it did not appear from the evidence before the said Secretary that for a long time she directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatsoever."

Mr. Walter Ayers for plaintiff in error. *Mr. P. H. Seymour* was on his brief.

Mr. Jed. L. Washburn and *Mr. Luther C. Harris* for defendants in error. *Mr. C. A. Towne* and *Mr. William D. Bailey* were on their briefs.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

The decision of the controversies in this case depends upon the validity or invalidity of the scrip locations, either originally when the land was unsurveyed, or subsequently when the location was adjusted to the land as surveyed.

The act of Congress of July 17, 1854, c. 83, 10 Stat. 304, authorized the issue of scrip to the half-breeds of the Sioux Nation of Indians in exchange for certain lands, which scrip might be located (1) upon any land within the Sioux half-breed reservation; or (2) "upon any other unoccupied lands subject to preemption or private sale;" or (3) "upon any other unsurveyed lands not reserved by the Government, upon which they (the half-breeds) have respectively made improvements. It is provided in said act, "That no transfer or conveyance of any of said certificates or scrip issued shall be valid."

On the latter provision of the act the plaintiff in error bases the contention that the scrip is not assignable, and that the power of location is strictly personal to the Indian, and must be made whether on surveyed or unsurveyed land, either by him or for his benefit, and that the improvements on unsurveyed land must be made under his personal supervision and direction; that he must come in personal contact with the land. And it is hence asserted that the powers of attorney given to Eaton and Merritt were virtual assignments of the scrip and frauds upon the act of Congress; that the improvements were made not by Orillie Stram, the half-breed, or for her benefit, but by Eaton and for his benefit; and that the subsequent adjustment of the locations of the land after its survey was made for him, not for her; for his benefit, not for hers. On the other hand, the defendants in error contend that the prohibition against the assignment of the scrip is strictly of the scrip as such, not of the rights or powers conferred by it: that the provision of the statute is not a prohibition upon the alienation of the land, but is intended to protect the Government against controversies about the transfer of the scrip, and to require and secure all of the steps and proceedings to be in the name of the Indian and the title to be issued in his name. It is claimed, therefore, that the requirements of the statute have been observed; that the locations were made in the name of the Indian, and for her benefit. And it is also claimed that if there was any defect in the location upon the land when unsurveyed, by reason of the insufficiency of the improvements or by whom erected, that defect was supplied by the location of the scrip after the land was surveyed, and the acceptance of the location of the scrip by the local land office, there being then no adverse rights to the land. And further, that the power of Eaton to make the location for the Indian was ratified by her (if it needed ratification), and all rights which enured to her were conveyed by her warranty deed to Eaton.

These contentions exhibit the controversy between the parties and present the only questions upon which we think it is necessary to pass, and the questions are certainly close ones. The Interior Department has not always given the same answer to

them, and the latest decision of that Department is opposed in the case at bar by the courts of Minnesota.

It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning. One of the reasons is that the officers of the Land Department may have recommended the statute—indeed, may have written its words or, at any rate, were familiar with the circumstances which induced the legislation. We have not, however, in the case at bar, an exactly contemporaneous construction of the act of 1854 by the Land Department. The first circular of instructions was not issued until March 21, 1857. It is, however, not without value, and it tends to the support of the contentions of the defendants in error. The circular stated that the scrip "must be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian." And further: "You will observe that this scrip is *not assignable*, transfers of the same being held void; consequently, each certificate, as hereinbefore stated, can only be located in the name of the half-breed; and such certificate or scrip are not to be treated as money, but located acre for acre."

In the circular issued February 22, 1864, those instructions were repeated, and the following added: "When not located by the reservee in proper person, the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee." Prior to the issuance of the circular of February 22, 1864, to wit, in 1863, a contest came on appeal to the Land Department, between a location made by Sioux scrip which was issued to one Sophia Felix, and a claim under a preemption settlement. The Commissioner of the Land Department decided against the scrip location on two grounds, one of which was: "That 'the location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent, for her use and benefit, but by

an unauthorized person, and for the use and benefit of a person having no legal interest therein.'"

The decision was reversed by the Secretary of the Interior, who stated, through Otto, Assistant Secretary:

"As to your second objection, I remark that this kind of scrip is by the law declared to be not assignable. In this case Sophia Felix has signed the application to locate her own scrip. The signature must be treated by us as genuine, when there is no proof to the contrary; and when she has made no complaint against this use of her scrip. The fact that the scrip was carried to the land office and the business transacted by another person, does not affect the validity of her entry of the land.

"As the certificate of location issued in her name, and the patent will issue to her, neither the register's report nor the affidavits of third parties can be admitted to establish the interest of any other person in the location.

"We could not recognize such interest if an assignment in writing was produced and duly proven to have been executed by the half-breed—whether she could sell or did sell the land after the location of her scrip we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrament of the courts of law. The location is valid on its face, and the owner of the scrip, so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto."

In 1872 a special circular was issued (1 C. L. L. 723), which contained the following direction:

"That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made by or under the personal supervision or direction of said Indian, giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application."

In 1878 a new circular was issued which repeated the pro-

visions of the circulars of 1864 and 1872, above quoted. (2 C. L. L. 1355; 5 C. L. O. 126.)

Then came the decision of the Secretary of the Interior, Vilas, in *Allen et al.* v. *Merrill et al.*, 8 L. D. 207, and in *Hyde and McDonald* and *Eaton and Stram*. They were affirmed on review by Secretary Noble. Those cases laid down the propositions upon which plaintiff in error relies in the case at bar. Between the decision in those cases and that in the *Felix* case there was an interval of thirty years, and pending that interval there were decisions of the courts which took the same view as Secretary Otto expressed in the *Felix* case.

In *Gilbert* v. *Thompson*, 14 Minnesota, 544, a conflict of titles was presented based upon deeds from one Amelia Monette, a Sioux half-breed. The action was ejectment, and the deed, which plaintiff relied on, was executed by Amelia in person May 29, 1867; the deed upon which defendant depended was executed by her attorney in fact, Benjamin Lawrence, July 18, 1857, under a power of attorney dated May 27, 1857. The power of attorney authorized Lawrence to act for Amelia as follows:

"For me and in my name to enter into and take possession of all the real estate belonging to me, or of which I may hereafter become seized, situated in the county of Wabasha, in the Territory of Minnesota; and for me to lease, bargain, sell, grant and confirm the whole or any part thereof; . . . and for me and in my name to make, acknowledge and deliver unto the purchaser, or purchasers, good and sufficient conveyances."

Affirming the judgment which passed for defendant, the Supreme Court of the State said by Chief Justice Gilfillan:

"The act of Congress of 1854, under which Sioux half-breed scrip was issued, provides 'that no transfer or conveyance of any of said certificates or scrip shall be valid.'

"It was the intention of Congress that the right to acquire public lands by means of this scrip should be a personal right, in the one to whom the scrip issued, and not property in the sense of being assignable; but no restraint is imposed upon the right of property in the land after it is acquired by location of the scrip. In the scrip itself, the half-breed had nothing which

he could transfer to another; but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows, therefore, that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him, and the title to the land acquired by it would vest in him, just as though no such attempt had been made. Such attempt to transfer would not involve any moral turpitude nor the breach of any legal duty, as is the case with an attempt to transfer a preëmptive right. It would be simply ineffectual, because the scrip is not transferable.

"A power of attorney, so far as it intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and land would remain the same; it could not be made irrevocable, nor create any interest in the attorney. Should the attorney sell under it, he would be accountable to his principal, precisely as in the case of any power to sell; but a simple power to sell, executed by a half-breed, is good till revoked, and would extend to lands subsequently acquired by means of scrip, if such lands came within its terms. We think such a power could not be varied by parol proof that the parties had an intention not expressed in it, even to defeat the power, except on the same grounds as would admit such proof in other cases. The intent to transfer the scrip not being illegal, but only ineffectual, could not affect the power where not expressed in the same instrument, or in one equal in degree, as evidence. Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide."

Gilbert v. *Thompson* was affirmed and applied in *Thompson* v. *Myrick*, 20 Minnesota, 205. The latter case came to this court, 99 U. S. 291, and its doctrine was approved. The suit was for specific performance. Thompson, who was plaintiff in the court below, was in occupation of the land to which he was desirous of obtaining title. Myrick was "attorney in fact (duly constituted) of Francis Longie and Joseph Longie, his son, then a minor under the age of fourteen years, and of Francis Roi and Henry Roi, his son, then a minor under the age of fourteen

years, and was duly authorized to locate certain half-breed scrip issued to said Joseph and Henry in accordance with the provisions of the act of Congress approved July 17, 1854."

With a view to the location of the scrip for the benefit of the beneficiaries, Myrick placed the same with powers of attorney in the hands of Thompson, and at the same time entered into a written agreement with Thompson, in which he agreed that upon the location of the scrip he would secure the title to the land located to be lawfully vested in Thompson. The consideration was $2800, evidenced by a note payable in one year from its date, and to be secured upon the land as soon as Thompson should acquire title. Thompson located the scrip and demanded a conveyance of the title. Myrick refused, and conveyed the land to his wife, who was also a defendant in the suit. Specific performance was decreed by the trial court, and the decree was affirmed by the Supreme Court of the State. Among other defences it was urged that the agreement between Myrick and Thompson was void as contravening the act of Congress of July 17, 1854. To the contention the Supreme Court of the State replied: "As to the point that the real object of the contract was to accomplish a transfer of the scrip, we see nothing to distinguish this case in any important respect from *Gilbert* v. *Thompson*, 14 Minnesota, 544."

And further, in answer to the contention that the agreement was void on common law grounds by reason of the relations of Myrick to the grantees of the scrip, the court said: "As the scrip was made non-assignable by the act of Congress, (10 Stat. 304,) and therefore no valid transfer or conveyance of the same could be made, Myrick's relation to the scripees was that of an attorney in fact, duly authorized to locate the scrip for them. . . . As this relation was to end upon such location, we can conceive of no reason why Myrick was not at liberty, either before or after the location was made, to enter into an agreement to secure the title (enuring from the location) to the plaintiff upon payment of an agreed consideration. Such an agreement did not, so far as this case shows, tend to produce a conflict between Myrick's private interest and his duty to *locate* the scrip to the best advantage of his principals."

These defences were reviewed by this court, and, commenting on them, it was said by Mr. Justice Clifford:

"Attempt it seems was made in the argument of the case in the Supreme Court of the State to show that the terms of the agreement were in conflict with the provisions of the act of Congress; but the answer which that court made to the proposition, though brief, is satisfactory and decisive."

And further:

"Holders of such certificates or scrip were forbidden to transfer the same, and the defendants contended that the real object of the agreement was to effect a transfer of the same; but the state Supreme Court overruled the defence, and referred to one of their former decisions, assigning the reasons for their conclusion that the defence was not well founded. *Gilbert et al.* v. *Thompson*, 14 Minnesota, 544.

"Since the case was submitted, the opinion of the court in the case has been carefully examined, and the court here concurs with the state court that the case is applicable to the present case, and that the reasons given for the conclusion are satisfactory and conclusive. For these reasons the court is of the opinion that the Federal questions involved in the record as set forth in the assignment of errors were decided correctly by the state Supreme Court."

Secretary Vilas, in passing on the validity of the location in the present litigation, in effect disagreed with the decision in *Gilbert* v. *Thompson*, and expressed the view that "all the documents, *besides* any parol additions [the italics are ours], are to be taken together to ascertain what in effect the agreement was, and it will be judged according to its nature as so ascertained;" and applying this rule, he considered that the transaction between Stram and Eaton was tantamount to a direct sale and transfer of the scrip, accompanied by the declaration that "to circumvent the statutory prohibition" two letters of attorney have been executed in blank, the one to locate the scrip and the other to convey the land when the scrip shall be located, and an agreement that by whomsoever the letters of attorney may be executed no claim will be made by the Indian to the scrip or land. And he concluded that if letters of at-

torney accompanying such a document would be invalid, the powers of attorney to Eaton and Merrill constituted "a part of a transaction which cannot be supported in law." Secretary Noble considered the case more at length, and said: "The controlling points in the case, as decided by the court, plainly were (1) that a simple power to sell, executed by a half-breed, such as the one there considered, would extend to lands subsequently acquired by means of scrip if within its terms; and (2) that parol proof of an intent coincident with the creation of the power to transfer the scrip, could not be received to defeat the power."

The first point was not controverted, and of the second it was said that, as a rule of evidence, it might properly be enforced in controversies between individual claimants, but that it did not apply "against the Government, whose interest it is, before it parts with its title, to see that the law has been faithfully complied with."

The learned Secretary regarded *Gilbert* v. *Thompson* as turning upon a rule of evidence, and that the court did not pass upon the question which he was considering, and this, he said, was "clearly shown by their statement that 'we do not decide' whether a power to sell contained in an instrument, on its face a transfer, the power being merely incidental to the transfer, would be upheld. That is the question here—the only difference being the manner of its presentation. It properly arises here on the record; in *Gilbert* v. *Thompson* it did not, the evidence of the transfer being excluded on technical grounds, and therefore it was not decided." And he observed that *Thompson* v. *Myrick* went no further, and was "in fact ruled on in *Gilbert* v. *Thompson* by the state court, and that rule was affirmed by the Supreme Court (this court) on appeal."

We do not think those cases were as confined as represented. It is very evident that the courts did not think that "parol additions" could unite and make single the documents, or, when thus united, they constituted a violation of the statute. And it is a deduction from the opinions that it was not the manner of proof but the substance of what was proved or to be proved, that was passed upon. If evidence was excluded in *Gilbert* v. *Thompson*, it was admitted and considered in *Thompson* v.

Myrick, and in both cases the delivery of scrip and its location under letters of attorney were decided to be valid, forming in one case a good title and in the other constituting a ground for a compulsory conveyance from the half-breed. The moral and legal effect of the transfer of scrip was declared by the court in *Gilbert* v. *Thompson*. The first involved, the court said, no "turpitude nor the breach of any legal duty, as in the case of an attempt to transfer a preëmption right;" of the second, it was said, it would be of no effect as a transfer; that "the title to the scrip would remain in him (the half-breed), and the title to the land covered by it would vest in him (the half-breed) just as though no such attempt had been made." The power of attorney, however, was given full legal effect as authority to sell the land located. It is true the court excluded parol evidence of an intention to transfer the scrip. But why? Manifestly because the transactions did not constitute a transfer of the scrip as such, and their legal character could not be destroyed by parol proof that they were intended to be something else. In other words, the court decided that the transactions were intended as a conveyance of the land and represented that intention, and could not be shown to be a transfer of the scrip. And in *Thompson* v. *Myrick* the court observed: "We can conceive of no reason why Myrick was not at liberty, either before or after location was made, to enter into an agreement to secure the title (enuring from the location) to the plaintiff upon the payment of an agreed consideration." The reasoning and the conclusions of the Supreme Court of Minnesota were approved by this court, as we have seen.

The consideration of the location of scrip under the act of 1854 came before this court again in *Felix* v. *Patrick*, 145 U. S. 317. It is a good complement to the other cases. It recognized, as they did, the difference between the transfer of the scrip itself and its location by or in the name of the half-breed as a means of conveying the land located upon. There are expressions in the opinion that seem to go further, but they must be considered in reference to the facts. It was said: "The device of a blank power of attorney and quitclaim deed was doubtless resorted to for the purpose of evading the provision

of the act of Congress that no transfer or conveyance of the scrip issued under such act should be valid. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued, but from the moment the scrip was located and the title in the land vested in Sophia Felix, it became subject to her disposition precisely as any other land would be. In order, therefore, for the purchaser of this scrip from Sophia Felix to make the same available, it became necessary to secure a power of attorney or a deed of the land, and as the scrip had not then been located, and the person who should locate it was unknown, the name of the grantee and the description of the land must necessarily be left in blank."

And again: "As the bill alleges that Patrick obtained possession of these instruments while still in blank, he is clearly chargeable with notice that they were intended as a device to evade the law against the assignment of scrip."

Felix was a half-breed to whom scrip had been regularly issued. It was obtained from her by some person unknown, "by wicked devices and fraudulent means;" the power of attorney omitted the name of the attorney, the number of the scrip and the description of the land. The quitclaim deed also omitted the name of the grantee and the description of the land; otherwise the instruments were in legal form. The transaction was held to be a fraud upon Felix, and Patrick was adjudged to hold the title he obtained by the location of her scrip and the deed to him, as trustee for her. The court made no question of the validity of the location. Indeed, it was necessarily assumed, and the half-breed given the benefit of it. It may be said that neither of the litigants was concerned to dispute the location or to assert the provision of the act of Congress prohibiting the transfer of the scrip. If so, that provision from the point of view of the case at bar was not in judgment, and the expression in regard to it must therefore be strictly confined to the facts and the issue which was presented.

This brings us to the consideration of the amount and kind of improvements required by the act of 1854 to be erected up-

on unsurveyed land. The act is not explicit. It does not define the extent or kind of improvements. It permits a location to be made upon "unoccupied land . . . upon which they (half-breeds) have respectively made improvements." Residence is not required, either initial or subsequent, temporary or continuous. The purpose of the provision of the statute would seem, therefore, necessarily to be identification, notice of appropriation, and the kind and extent of improvements only to be necessary for that. But we may concede, as held by Secretary Noble, "that the requirement of improvements must have some substantial significance," and "it is not satisfied by doing something which is a betterment of the land, but of too slight a character to mark anything more than a pretext of compliance." The improvements erected on the land in controversy satisfied the rule whether they were as, it is claimed, Secretary Vilas found, or were as the trial court found in the present case.

It is further urged that the improvements were not erected for the benefit of the Indian nor did she have "a direct connection with the land," and that those requirements are made conditions precedent to a valid location by the circulars of the land office issued in 1872 and subsequently.

1. It was decided in *Thompson* v. *Myrick*, *supra*, that a valid location could be made by an attorney in fact of the Indian, and that he could, "either before or after the location was made," enter into an agreement to secure or convey the title. That case was affirmed by this court, and the facts of the case at bar bring it within the ruling.

2. To consider the act of 1854 as requiring its beneficiaries to have "a direct connection with the land and claim the same for his personal use," would lead to great embarrassment, if not to discrimination, between the beneficiaries. The effect of that construction was expressed by the Supreme Court of the State as follows:

"Under the law the President was authorized to do what was actually done, issue to each person entitled several pieces of scrip of different sizes or acreage. Was it expected that each of these persons should be personally connected with the sev-

Counsel for Parties.

eral and separate improvements required to be made if all of the pieces were located on unsurveyed lands, and would have to claim the same for personal use? Surely not. This law contemplated and there were actually issued several pieces of scrip to each of a large number of minors. Babes in arms were held to be entitled and to them scrip was issued, and in many cases located before the minors reached majority, as might reasonably be expected. With these facts before us can it be held that Congress thought or intended that these minors would be required by a construction of the law to personally supervise the selection of from three to five tracts of land on which to locate their pieces of scrip, or that they would have to be directly connected with each of these locations, or in case unsurveyed lands were desired they would have to claim the necessary improvements as their own?"

It is impossible to escape the force of these observations and to accept a construction of the statute which has the consequences expressed. Upon the other points discussed by counsel we do not consider it necessary to pass.

Judgment affirmed.

MIDWAY COMPANY *v.* EATON.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 81. Argued December 4, 5, 1901.—Decided January 13, 1902.

This case is affirmed on the authority of *Midway Company* v. *Eaton*, *ante*, 602.

THE case is stated in the opinion of the court.

Mr. Walter Ayers for plaintiff in error. *Mr. P. H. Seymour* was on his brief.

Mr. Jed. L. Washburn and *Mr. Luther C. Harris* for de-

fendants in error. *Mr. C. A. Towne* and *Mr. William D. Bailey* were on their briefs.

Mr. Justice McKenna delivered the opinion of the court.

This action was brought by the Germania Iron Company against the defendants in error in the district court of St. Louis County, State of Minnesota, to determine adverse claims to the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 30, T. 63 N., of range 11 W., of the fourth principal meridian, according to the government survey in said St. Louis County.

Pending the action the land was conveyed to The Midway Company, and the latter company was substituted as plaintiff for the Germania Company.

Plaintiff in error claims title under a patent issued by the United States to Emil Hartman, dated October 21, 1895, by whom the land was conveyed to the Germania Company, and by the latter to the plaintiff in error.

The defendants claim title under a certain location of Sioux half-breed scrip issued under the act of July 17, 1854. (10 Stat. 304, c. 83.)

The trial court rendered judgment for defendants, which was affirmed by the Supreme Court of the State, and this writ of error was then allowed by the Chief Justice of that court.

The facts of this case are the same and are presented upon exactly the same record, the same assignments of error and contentions, as in *The Midway Company* v. *Eaton et al.*, *ante*, 602, just decided. On the authority of that case the judgment of the Supreme Court is

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* REISS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 77. Argued November 27, December 2, 1901.—Decided January 13, 1902.

Where goods are carried by connecting railways, as between intermediate carriers, the duty of the one in possession at the end of his route is to deliver the goods to the succeeding carrier, or notify him of their arrival, and the former is not relieved of responsibility by unloading the goods at the end of his route and storing them in his warehouse without delivery or notice to or any attempt to deliver to his successor.

In this case it cannot be claimed that the defendant had either actually or constructively delivered the cotton to the steamship company at the time of the fire.

If there be any doubt from the language used in a bill of lading, as to its proper meaning or construction, the words should be construed most strongly against the issuer of the bill.

In such a bill if there be any doubt arising from the language used as to its proper meaning and construction, the words should be construed most strongly against the companies.

It cannot reasonably be said that within the meaning of this contract the property awaits further conveyance the moment it has been unloaded from the cars.

The defendant at the time of the fire was under obligation as a common carrier, and was liable for the destruction of the cotton.

This action was brought in the Circuit Court of the United States for the Southern District of New York by the plaintiffs, who are defendants in error here, and are residents of Liverpool, England, to recover the value of some two hundred bales of cotton destroyed by fire at Westwego, Louisiana, opposite the city of New Orleans, November 12, 1894, at a pier on the west bank of the Mississippi River, owned by the plaintiff in error. This is the same fire which is mentioned in *Texas & Pacific Railway Company* v. *Clayton*, 173 U. S. 348. Upon the first trial the court directed a verdict in favor of the defendant, but the judgment entered thereon was reversed by the Circuit Court of Appeals, 98 Fed. Rep. 533, and a new trial

granted. Upon the second trial the court, following the opinion of the Circuit Court of Appeals, directed a verdict for the plaintiffs for the value of the cotton, and the judgment entered upon that verdict having been affirmed by the Circuit Court of Appeals on the authority of its former opinion, 99 Fed. Rep. 1006, the railway company brings the case here by writ of error. The defence of the company is based upon a clause in the bill of lading which will be set out hereafter.

The cotton had been shipped at Temple, in the State of Texas, on the Missouri, Kansas and Texas Railway, to be carried over its road and the defendant's road to New Orleans, and from that port to Bremen. It arrived at New Orleans at the pier of the railway company November 6, 1894. One hundred and sixty bales were unloaded on November 7, and the balance soon thereafter, but on what day is not certain. One hundred and twenty bales were unloaded and placed at one point, and two different lots of forty bales each were deposited at other points, thus leaving the cotton at three different points on the pier of the railway company. At this time the pier was quite full, there being over twenty thousand bales deposited upon it and some eight thousand bales in cars waiting to be unloaded. The pier was built, owned and in the exclusive possession of the railway company. The bill of lading which was issued at Temple, in the State of Texas, by the Missouri, Kansas and Texas Railway, expressed on its face to be on behalf of that company and also the defendant company and the steamship company. It was an elaborate document, and purported to be "an export bill of lading approved by the permanent committee on uniform bill of lading." It acknowledged the receipt of the cotton consigned as marked and to be carried to the port of New Orleans, Louisiana, and thence by the Elder, Dempster & Company's steamship line to the port of Bremen, Germany. It had conditions which are stated to be:

"(1) With respect to the service until delivery at the port of New Orleans, Louisiana."

"(2) With respect to the service after delivery at the port of New Orleans, Louisiana."

There are twelve clauses relating to the service until delivery

and fifteen clauses relating specifically to the service after delivery at the port of New Orleans. Those clauses which are specifically referred to in this case are numbered 3, 11 and 12 in the bill of lading. They read as follows:

"3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . ."

"11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer, of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"12. This contract is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company."

The usual method of handling cotton upon its arrival at the pier of the company at Westwego, Louisiana, is stated, as both counsel in this case agree, with substantial accuracy in *Texas & Pacific Railway Company* v. *Clayton*, 173 U. S. 348, 352, as follows:

"The mode in which the railway company and the steamship company transacted business was as follows: Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular way bill, the marks of the cotton, the weight, rate, freights, amount prepaid, etc., would be given to

the conductor of the train bringing the car to Westwego. Upon the receipt of the way bill and car at Westwego, a 'skeleton' would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the way bill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, it would be taken by a clerk known as a 'check clerk,' and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened; and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items on the skeleton, and the same were then checked. The cotton thus taken from the car was deposited at a place on the wharf designated by the check clerk, and it would remain there until the steamship company came and took it away. After the checking of the cotton in this way to ascertain that the amounts, marks and general information of the way bill were correct, the skeleton would be transmitted to the general office of the Texas and Pacific Railway Company in New Orleans, which thereupon would make out what was designated as a 'transfer sheet' that contained substantially the information contained in the way bill, and which being at once transmitted to the steamship company or its agents was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or mate of the vessel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton

and put it on board the ship. In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take cotton from the wharf was entirely in the control of the steamship company. They sent for it as soon as they were ready."

At the time of the fire it is conceded that no transfer or skeleton sheets had been sent to the steamship company or notice given it of the arrival of this cotton at the pier of the railway company.

Mr. Rush Taggart and *Mr. Arthur H. Masten* for plaintiff in error.

Mr. George Richards for defendants in error. *Mr. Frederic E. Mygatt* and *Mr. Treadwell Cleveland* were on his brief.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court.

In this case there had been no delivery of the cotton by the railway company prior to its destruction by fire. The cotton had arrived at the pier of the railway company but no notification of its arrival had been given to the steamship company, nor was it in fact in the possession of nor had it been delivered to the latter company. It was still under the absolute control and in the possession of the railway company, and nothing had been done to terminate its common law liability at the time the fire occurred.

In *Myrick* v. *Michigan Central Railroad Company*, 107 U. S. 102, Mr. Justice Field, delivering the opinion of the court and speaking of the duty of a connecting carrier, at page 106 said:

"If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier, that of a forwarder by the connecting line; that is, to

deliver safely the goods to such line,—the next carrier on the route beyond."

As between intermediate carriers, the duty of the one in possession at the end of his route is to deliver the goods to the succeeding carrier or notify him of their arrival, and the former is not relieved of responsibility by unloading the goods at the end of his route and storing them in his warehouse without delivery or notice to or any attempt to deliver to his successor. *McDonald* v. *Western Railroad Company*, 34 N. Y. 497; *Congdon* v. *Marquette H. & O. Railroad Company*, 55 Mich. 218. In the latter case it is held that the duty of the connecting carrier is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is delivery of the goods, or at least until there is such a notification to the succeeding carrier as according to the course of business is equivalent to a tender of delivery.

Within these cases it cannot be claimed that this defendant had either actually or constructively delivered the cotton to the steamship company at the time of the fire. The defendant is compelled, therefore, to have recourse to the clauses in the bill of lading in its attempt to rid itself of liability consequent upon the destruction of the cotton by a fire while at its pier and in its possession. The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in *National Bank* v. *Insurance Company*, 95 U. S. 673, 679: "Both reasonable and just that its own words should be construed most strongly against itself." To the same effect is *London Assurance &c.* v. *Companhia &c.*, 167 U. S. 149, 159, and *Queen of the Pacific*, 180 U. S. 49, 52.

Opinion of the Court.

We come then to an examination of the bill of lading for the purpose of determining whether the railway company has been exempted from liability by any of its provisions.

We do not understand it is contended that either clause 3 or 12 applies, because, as is conceded, there was never any notification given the steamship company of the arrival of this cotton. Without that notification counsel does not contend that either of those clauses applies. The argument at the bar was devoted to maintaining the proposition that the railway company was exempted under clause 11, and the other clauses in the bill of lading were referred to for the purpose of giving point to that contention. It was urged at the bar that under the eleventh clause the question of notification was immaterial, because, although a notification had not been given, yet the cotton, upon its arrival at the pier and after it had been unloaded from the cars, "awaited further conveyance," within the meaning of the eleventh clause, and while awaiting further conveyance the carrier was by the express terms of that clause relieved from liability otherwise than as warehouseman. In other words, that the carrier upon the arrival of the cotton and unloading it at the pier, and without giving any notification of its arrival, ceased to be a carrier and became liable only for negligence which might cause the loss of the property, and there being no negligence proved in this case, the carrier was not liable.

It was argued that clauses 3 and 12 were intended to cover such a case as would have existed in the one now before us had notice been given to the steamship company of the arrival of the cotton at Westwego, such notice being understood by the steamship company as a request to come and take away the cotton, and in holding, as the court below did, that notification was necessary before the eleventh clause could apply, that clause was thereby deprived of any separate effect, because after notification the third or the twelfth clause would exempt the carrier, and therefore some further or other meaning must be given the eleventh clause, so that it may operate in a case where no other clause would be available.

Upon this subject Circuit Judge Shipman, in the court below, said:

"It is not claimed that the facts bring the carrier's liability within clause 3 of the bill of lading, which says that the liability shall end after the property 'is ready for delivery' to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier. *McKinney* v. *Jewett*, 90 N. Y. 267. It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at Westwego has been accomplished, and it has been stacked on the wharf, and 'is awaiting further action in the way of notification and advice to the succeeding carrier,' it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of a warehouseman for the liability imposed by the common law, and doubtless they were at liberty to make a contract of limitation which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract. The clause, 'no carrier shall be liable for delay,' when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and, while the term 'awaiting further conveyance' literally means 'awaiting the time when the next carrier shall take the property in hand,' it seems improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the action of the first car-

rier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given."

We agree with the views of the court below, as expressed by Judge Shipman. We do not think that the property can be said to await further conveyance the moment it is dragged upon the pier of the railway company and unloaded from its cars, and before any notification is given to the steamship company that the cotton has arrived and awaits transportation by ship. In one sense it might be said that property awaited further conveyance if anywhere along the line of the railway company an engine of the train should break down, and the train be brought to a standstill for several hours, awaiting a new engine. In such case the cotton would not have arrived at the termination of the road of the railway company, and in one sense it would certainly be awaiting further conveyance, because it had not arrived at the end of the route; but no one would suppose for a moment that during the time that the train was thus at a standstill the eleventh clause of the bill of lading would be applicable. No court would give such a construction to the clause as would exempt the company under the circumstances stated.

We are then to look for some fair and reasonable meaning to be given to the term, and we think that the court below has given such meaning to it. It cannot reasonably be said that within the meaning of that clause the property awaits further conveyance the moment it has been unloaded from the cars on to the pier of the defendant. As is stated by the Circuit Court, at that time the property awaits the further action of the defendant, and does not await further conveyance until it has become the duty of the succeeding carrier to take it further, after notification that it has arrived and awaits delivery to it. After that time it may be said to await further conveyance, but up to that time it awaits the further action of the railway company.

This meaning of the clause is not altered even if the language used in other clauses might also grant exemption upon the same

facts. We are not for that reason bound to find some other and different meaning for the eleventh clause than such as we think is obvious and plain upon its face. The various propositions mentioned in these different clauses and the many contingencies provided for therein under which the company might claim exemption render it not surprising that the same ground of exemption should possibly be covered by more than one provision in the bill, or that, in other words, the defendant should upon the same facts be exempt under more than one of its various and perhaps somewhat indefinite clauses. No rule of construction binds us to find some hidden or obscure meaning for a particular clause, because the simple and plain one which is seen upon its face provides for contingencies which may be also provided for in another clause of the same bill.

Reference was made in the opinion of the court below and also upon the argument in this court to the case of *McKinney* v. *Jewett*, 90 N. Y. 267, in relation to a delivery of goods at the termination of the carriage, where the meaning of the phrase "awaiting delivery" was under consideration, the court holding that the phrase implied not only the arrival of the goods but the completion of whatever on the part of the carrier is necessary to be done to leave the risk of further delay upon the consignee; that the goods were "awaiting delivery" only after the duty of the common carrier is done and he is entitled to remain passive awaiting the action of the consignee.

It was objected on the argument at the bar that the case was not in point because of the distinction between awaiting delivery and awaiting carriage, and it is urged that this difference is substantial; that conveyance and delivery are different acts and relate to different parts of the service; that there could be no delivery to the consignee under the New York case until there had been notice in some form to the consignee, while the element of notice had no connection with the act of conveyance of the cotton, which might be entirely complete regardless of notice. The two cases differ, in that the New York case, as counsel says, relates to a delivery at the end of the route, and the case at bar relates to goods awaiting conveyance by a connecting carrier, but in both the question arises as to the mean-

ing of the term "await," and the New York case holds that goods do not await delivery within the meaning of that term as used in the bill of lading until notice of their arrival has been given the consignee, and it seems to us that the same reasoning holds here, and that goods are not awaiting further conveyance by a connecting carrier until the preceding carrier has given him notice of their existence at the place where further conveyance is to be continued. We do not dispute that there is a distinction between the position of goods awaiting delivery and those awaiting further conveyance, and the fact of such distinction is recognized in *Railroad Company* v. *Manufacturing Company*, 16 Wall. 318, 327, and it is therein stated that there is a clear distinction between property in a state to be delivered free to the consignee on demand and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it might be said to be awaiting delivery; in the latter to be awaiting transportation. But the analogy between goods awaiting delivery at the end of the route and goods awaiting further conveyance by a connecting carrier, so far as the requisite of notice in each case is concerned, we think exists and should be recognized.

There having been in this case no notification to the steamship company, without which clauses 3 and 12 do not apply, and we being of the opinion that clause 11 has also no application without notification to the steamship company, it follows that the exemption claimed under the bill of lading is not sustained; that the defendant at the time of the fire was under obligation as a common carrier and liable for the destruction of the cotton, and that the judgment in favor of the plaintiff below was right, and must be

Affirmed.

Syllabus.

TEXAS & PACIFIC RAILWAY COMPANY *v.* CALLENDER.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 78. Argued December 3, 1901.—Decided January 13, 1902.

This action was brought by defendants in error to recover the value of 187 bales of cotton destroyed in the fire mentioned in *Texas & Pacific Railway Company* v. *Reiss*, *ante*, 621. The facts as to the manner of doing business at Westwego are the same as those stated in that case, and also in the case of the same company v. *Clayton*, 173 U. S. 348. The bill of lading contained the following clauses: "1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; . . . or for loss or damage to property of any kind at any place occurring by fire or from any cause except the negligence of the carrier." "3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . ." "4. . . . Cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire. . . ." "11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer, of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer. 12. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company." *Held:*

(1) That the measure of the common law liability between connecting carriers is properly stated in the opinion in the next preceding case, and the cases therein referred to;

(2) That under the wording of the fourth clause in the bill of lading the defendant was properly held liable;

(3) That there was nothing to go to the jury upon the question of a delivery of the cotton to the steamship company under the twelfth clause of the bill of lading;

Opinion of the Court.

(4) That upon the facts stated it was clear that at the time when the cotton was lost there had been no delivery, actual or constructive, to the steamship company, so as to divest the defendant of its common law liability for the loss of this cotton.

Whatever may generally be the effect of a notice to a connecting carrier, upon the question of terminating or altering the liability of a preceding carrier for the goods, it is quite clear that it has no effect in diminishing the liability until actual delivery in a case where the preceding carrier still continues to have full control over the goods and has a choice as between connecting carriers, and may, notwithstanding such general notice, deliver the goods under certain circumstances to another carrier for further transportation.

THE case is stated in the opinion of the court.

Mr. Arthur H. Masten for plaintiff in error. *Mr. Rush Taggart* was on his brief.

Mr. Treadwell Cleveland for defendants in error. *Mr. Frederic E. Mygatt* and *Mr. George Richards* were on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was brought by the defendants in error, who are aliens, in the Circuit Court of the United States for the Southern District of New York, to recover the value of one hundred and eighty-seven bales of cotton destroyed in the same fire at Westwego, Louisiana, November 12, 1894, mentioned in the immediately preceding case. As in that case, the defence here is based upon certain clauses of the bill of lading providing exemption from common law liability in the contingencies mentioned. There was a verdict for the plaintiffs by the direction of the court, and the judgment entered thereon having been affirmed in the Circuit Court of Appeals, 98 Fed. Rep. 538, the railway company has brought the case here by writ of error.

The facts as to the manner of doing business at Westwego are the same as those stated in the foregoing case, and also in the *Clayton Case*, 173 U. S. 348. The cotton arrived at Westwego between October 17 and 29, and had been so placed on the pier that it was only necessary for the steamship company to send a ship there and take the cotton when pointed out to

its master or other officer. In this case there had been sent a notification to the steamship company, by means of the "transfer sheets" mentioned in the statement of facts in the other case, of the arrival of the cotton as early as November 2, for most of it, and for a few bales as late as November 10. After the evidence was in the defendant requested to go to the jury upon the question whether the cotton was awaiting further conveyance at the time of its destruction, and also upon the question of whether the cotton had been delivered to the steamship company, and also upon the whole case. The request was refused. The clauses of the bill of lading to which reference is made are the following:

"1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; . . . or for loss or damage to property of any kind at any place occurring by fire or from any cause except the negligence of the carrier."

"3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . ."

"4. . . . Cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire. . . ."

"11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer, of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"12. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company."

The claim of the railway company is that the language of the fourth clause in the bill of lading, which excepts cotton from any clause therein on the subject of fire, and which renders the carrier liable as at common law for loss or damage by fire, is limited in its application to those clauses in the bill of lading which speak of fire, and that the common law liability of the company existing under the fourth clause is subject to the provisions of the other clauses mentioned in the bill, which provide for exemption or reduction of liability under the facts stated in them. In other words, that if the company might otherwise be liable for the loss of cotton by fire by reason of the fourth clause, yet, if at the time of the loss the property was ready for delivery, although not delivered, to the next carrier, as provided for in clause 3, or if it awaited further conveyance, though not actually delivered to the connecting carrier, as stated in clause 11, that then it would be exempted under the third or its liability reduced under the eleventh clause of the bill of lading, and the plaintiff could not therefore recover, on the proof in this case. Of course, if under the twelfth clause the property had actually been delivered to the succeeding carrier, its destruction by fire thereafter would not render the preceding carrier liable for that loss.

The measure of the common law liability between connecting carriers is stated in the opinion in the preceding case and the cases therein referred to, and need not be here repeated.

Now what is the true construction of the fourth clause? In relation to that it was stated by Judge Shipman, in delivering the opinion of the Circuit Court of Appeals herein, as follows:

"The principal question in the case is upon the proper construction of the sentence in clause 4 in relation to the liability of the defendant for loss of cotton by fire. The bill of lading was prepared for a contract in regard to property of any kind, and in clause 1 the carrier was exempted from liability from loss by fire except through his negligence. The part of the sentence in clause 4, 'Cotton is excepted from any clause herein on the subject of fire,' probably refers only to clauses wherein fire is mentioned, but the concluding part of the sentence, 'and the carrier shall be liable as at common law for loss or damage

of cotton by fire,' has a wider sweep, and means that the carrier, notwithstanding limitations of its common law liability which are provided in the bill of lading, retains such liability in regard to damage to cotton by fire. The clause, as a whole, intended to leave and did leave unaltered the implied liability of the carrier for loss to cotton by fire. The limitations which the parties did permit were contained in clauses 3 and 11, which said that the carrier should not be liable for damage after a readiness to deliver, or otherwise than as a warehouseman after the property waited further conveyance. Whatever may be the extent of these limitations, they were to a certain degree, modifications of the common law liability of the first carrier, but its liability at common law for loss to cotton by fire remained intact. The request of the defendant to go to the jury upon the question of delivery of the cotton was properly refused. There was no evidence of a delivery. The cotton was never in the actual or constructive possession of either of the steamship companies and neither was ready to take it from the defendant's possession, and, therefore, clause 12 has no bearing upon the question of the defendant's liability."

We think this view of the Circuit Court of Appeals is the correct one, and that under the wording of the fourth clause in the bill of lading the defendant was properly held liable. The first part of that clause in terms takes cotton out of any clause on the subject of fire, and as if such language might possibly render it doubtful as to what the status of cotton would be by merely excepting it from any clause on the subject of fire contained in the bill of lading, it is further provided that "the carrier shall be liable as at common law for loss or damage of cotton by fire." The whole is a special and specific provision which applies to cotton alone and to the loss of cotton by fire. The other provisions apply generally to all property, whatever its character and wherever taken. In other words, these other clauses are of a general nature, while the fourth clause refers to cotton alone and to the specific cause of the loss, viz., by fire. We are of opinion that the specific clause takes effect to the exclusion of the general clauses containing matters of general exemption, and that therefore the carrier remains liable as

at common law for a loss of cotton by fire while in the possession of the carrier, although it was ready for delivery to the next carrier within the meaning of the third clause, or was awaiting further conveyance within the meaning of the eleventh clause, but that if it had been actually delivered before the loss the railway company would not have been responsible therefor. The defendant's claim, if allowed, would leave the shipper without recourse for loss by fire after the notification had been given to the steamship company and before the delivery of the cotton had been made to it, because the railway company would be under no liability for the loss of the cotton by fire, excepting by reason of its own negligence, and the insurance of the cotton, while in the possession of the steamship company, would not attach, and so the shipper would be without any adequate protection during that time. True, he might obtain special insurance during this intermediate period, but it would add to the expense of the transit which under the terms of the bill he would naturally not feel called upon to make, and it would be inconvenient and troublesome to do it, and the court ought not to unduly limit the plain language of the clause for the purpose of thereby enabling the company to escape a liability cast upon it by the common law, and which it voluntarily assumed.

As cotton was the subject of the special provision, its language should be given full sway, and should not be curtailed by other provisions in other clauses of a general nature referring to all kinds of property.

We are also of opinion that there was nothing to go to the jury upon the question of a delivery of this cotton to the steamship company under the twelfth clause of the bill of lading. It may be assumed that the pier of the railway company was the place understood and agreed upon between that company and the steamship company to make delivery, when it was made, of the cotton to be thereafter carried by the steamship company, but upon the uncontradicted evidence in this case we are of opinion that the simple arrival of the cotton at the pier and notice thereof given to the steamship company by means of the "transfer sheets," spoken of in the other case, did not in and

of itself amount to a delivery of the cotton to the steamship company, constructive or otherwise. Nor was it a delivery on the steamship's pier, as between the shipper and the railway company, within the language of clause twelve, and for the reasons herein stated the notice to the steamship company did not relieve the railway carrier from liability.

The uncontradicted evidence shows that the cotton came to the railway pier under these circumstances: The pier was built by the railway company and was in its sole and absolute control and possession. Not a bale of cotton could be taken from it without the action of that company; its own watchmen were in charge of the pier at all times, and when a steamship came to the pier it was only under a permit or an order from an officer of the railway company that the cotton was taken. It was pointed out by the servants of the railway company and, within the custom of the port of New Orleans, it had to be brought within the reach of the ship's tackle before the ship was called upon to take it. The expression, "ship's tackle," means "where the ship's ropes can get on to it so that the ship's winches can pull the cotton in." The custom was that after a steamship company returned the transfer sheets which had been sent it by the railway company, an order was made out by the railway officials on the Westwego office of the defendant, to deliver to the steamship company's agents such cotton as was ordered. It does not appear that any such order was given. Prior to the time of the arrival of the vessel which was to take the cotton and the arrival of the stevedores, the steamship company had no charge of any of the cotton on the pier. There was no particular spot on the pier at which, if cotton were there deposited, it was understood between defendant and the steamship companies to have been deposited in the care, control or possession of any of such companies, but, on the contrary, the whole pier was covered by cotton destined indiscriminately for transportation to different European ports by different lines of steamers, not one of which could take a bale of cotton away without the order of the railway company.

Before the ship took the cotton it gave a mate's receipt for it, although sometimes the receipt would not come as soon as

that, and the cotton would be delivered before the receipt was given. The cotton which came in on the cars of the defendant was placed all along the pier, and that which was destined for any particular company had to be pointed out and selected from a large mass of cotton on the pier. The railway company had contracts with various steamship companies; with the West India and Pacific, the French line, the lines for which Miller & Company were agents, the Hamburg-American line, and some others, and the cotton for all these various lines was unloaded upon this pier of the railway company and was distributed all over the wharf, so that, when a steamship came to the dock upon which the cotton was, that which was intended for the particular steamship then at the pier would be brought out to it or within reach of its tackle by the railway employés, depending upon where the cotton was and how far away from the ship, and it was understood between the steamship and railway companies that the railway company would get out the cotton when necessary to do it, and by getting out the cotton was meant dragging it from where it was stored on the wharf out in front or near enough in front to enable the steamship people to get it without having to go around through the bales of cotton.

The connection of the steamship companies with the transportation of the cotton was the subject of special contracts between those companies and the railway company. The initiation would be an agreement between a steamship company and the railway company for a certain charge for freight across the ocean for a stated amount of cotton from New Orleans to Liverpool or Bremen, or whatever other foreign port it might be, and no particular cotton was specified. Having obtained this agreement as to price and number of bales, the railway company would then agree with the shipper in Texas for a through rate from the point in Texas at which the cotton was to be taken to the port abroad, and it would then give a bill of lading such as was given in evidence in this case, providing for the through rate and the liabilities of the various carriers by rail and by sea; but it was only after an arrangement had been made and a contract entered into between the railway and a

steamship company that the latter company would send a steamer to the Westwego pier. The evidence is uncontradicted in regard to what the steamship lines had to do under the agreements they had with the defendant; in some cases they were not under any obligation to come to the pier unless the defendant had at least 1500 or 2000 bales of cotton ready for them, while in another case the steamship company which had a contract to take 20,000 bales of cotton from the railway company was not to be called on to go to the wharf unless there were at least five hundred bales ready to deliver to it, and by the bill of lading the railway company might, under certain contingencies, if it deemed necessary, forward the cotton by some steamer of another line than that mentioned in the bill. The steamship companies took their own time in coming to the Westwego pier for the cotton. If they had no special contract with the railway company, they did not come at all. It was not the case of a regular delivery by the railway company to a connecting carrier at the pier of the latter.

Now upon these facts we regard it as entirely clear that at the time this cotton was lost there had been no delivery, actual or constructive, to the steamship company so as to divest the defendant of its common law liability for the loss of this cotton.

Within clause 12 of this bill of lading there was no delivery of the property by the defendant either to the steamship, her master, agents or servants, or to the steamship company or on the steamship company's pier at the port of New Orleans, even upon the assumption that the pier at Westwego was the point agreed upon between the railway and the steamship companies where the delivery of the cotton was to be made when it was delivered. How can it be said that there was a delivery to this steamship company upon the facts above detailed when, by agreement between the parties, the company was not to take the property until it sent a steamship to the pier for that purpose? Until it was delivered to it at the steamer's side the steamer had neither possession nor control over it. By the bill of lading the defendant could in certain contingencies and at any time before delivery to the ship send the cotton by another

steamer. Until the ship did come to the pier, there can be no question of actual delivery in this case.

Nor does the notification to the steamship company that there was cotton at the pier awaiting or ready for delivery to it, make such notification a constructive delivery of the cotton and terminate the liability of the railway company. Here was a pier containing thousands of bales of cotton, destined to various European ports, and by various lines of steamers, with a special right to the railway company, mentioned in clause 11, to send the cotton mentioned in any particular bill of lading by a steamer of a line other than the one mentioned in the bill, and no obligation of the steamship company to send for the cotton until there was a quantity of 500 bales in some cases, and in others until there were from 1500 to 2000 bales ready for the particular steamer. A notification to a steamship company by means of a "transfer sheet," which was taken to be a notice that there was cotton at the pier ready for delivery to a steamer when it came, did not necessarily take away the right of the railway company to send that cotton by another steamer, and the company which was notified and sent a steamer would have no ground of complaint if, upon the arrival of the steamer at the pier, other cotton consigned to the same port were given it to the same amount. There being only this conditional obligation to send for cotton on the part of the steamship company, and none upon the part of the defendant to at all events deliver the specified cotton to the former, and the steamship company not having sent a ship to the pier, there was no limitation of the defendant's liability wrought by the notification.

Whatever may generally be the effect of a notice to a connecting carrier, upon the question of terminating or altering the liability of a preceding carrier for the goods, it is quite clear that it has no effect in diminishing the liability until actual delivery in a case where the preceding carrier still continues to have full control over the goods and has a choice as between connecting carriers, and may, notwithstanding such general notice, deliver the goods under certain circumstances to another

carrier for further transportation. Until actual delivery in such case, the preceding carrier is not divested of his liability.

The case *Pratt* v. *Railway Company*, 95 U. S. 43, and the other cases referred to by counsel in his argument at the bar, have no application in the view we take of the facts. The *Pratt* case was fully commented upon in *Texas &c. Company* v. *Clayton*, 173 U. S. *supra*, in the course of the opinion of the court, and it seems to be too clear for argument that the case does not justify an inference that the facts which we have just detailed in regard to this cotton constitute a delivery, either constructive or actual, to the steamship company or to the pier of that company.

We are, therefore, of opinion that the court below did not err in directing a verdict for the plaintiffs for the value of the cotton, and the judgment in their favor is,

Affirmed.

SUN PRINTING AND PUBLISHING ASSOCIATION *v.* MOORE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 49. Argued October 24, 1901.—Decided January 13, 1902.

The trustees of The Sun Association are to be charged with knowledge of the extent of the power usually exerted by its managing editor, and must be held to have acquiesced in the possession by him of such authority, even though they had not expressly delegated it to him, and he is held to have been vested with such power.

An authority to charter a yacht for the purpose of collecting news was clearly within the corporate powers of the association.

It is impossible to assume in this case that the relation of The Sun Association to the hiring of the yacht was simply that of a security for Lord as a hirer of the yacht on his personal account, and the two papers in evidence are in legal effect but one contract, and must be interpreted together.

As the trustees of The Sun Association must be presumed to have exercised a supervision over the business of the corporation, they are to be charged

Statement of the Case.

with knowledge of the extent of the power usually exercised by its managing editor.

The fixing of the value of the vessel in the contract can have but one meaning that the value agreed on was to be paid in case of default in returning.

The decision of the court below that the sum due in consequence of a default in the return of the ship was not to be diminished by the amount of the hire which had been paid at the inception of the contract, was correct.

The naming of a stipulated sum to be paid for the non-performance of a covenant, is conclusive upon the parties in the absence of fraud or mutual mistake.

Parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement.

The law does not limit an owner of property from affixing his own estimate of its value upon a sale thereof.

As the stipulation for value in this case was binding upon the parties, the court rightly refused to consider evidence tending to show that the admitted value was excessive.

The yacht Kanapaha, the property of the respondent Moore, was let on April 1, 1898, for the term of two months, by a charter party, in which Chester S. Lord was recited to be the hirer, but which was signed by him as follows: "Chester S. Lord, for The Sun Printing and Publishing Association." At the time Mr. Lord was, and for many years prior thereto had been, the managing editor of The Sun newspaper, and had special charge of the collection of news for The Sun Printing and Publishing Association, the publisher of the newspaper aforesaid. We shall hereafter speak of this corporation as The Sun Association and of the newspaper as The Sun.

In the body of the charter party the hirer agreed to furnish security, and cotemporaneously with the execution of the contract a paper was signed, which is described in the body thereof as the "understanding or agreement of suretyship" required by the charter party. This paper recited on its face that it was made by "The Sun Printing and Publishing Association," and it also was signed by Lord exactly as he had signed the charter party. Before the time fixed in the charter party had expired, that is to say, about the middle of May, 1898, a second charter party and a second agreement of suretyship were executed.

Counsel for Parties.

These agreements were substantially identical with the previous ones, except that they provided for a new term to begin at the expiration of the previous one and to continue for four months thereafter, that is, up to October 1, 1898.

On the execution of the first papers the yacht was delivered to The Sun Association, was by it immediately manned, equipped and provisioned, and one or more of its reporters were placed on board with authority to direct the movements of the vessel, and she was sent to Cuban waters, to be used as a dispatch boat for the purpose of gathering news concerning the events connected with the hostilities between the United States and Spain.

Early in September, 1898, the yacht was wrecked and became a total loss. For a breach of an alleged covenant, to return the vessel, asserted to be contained in the charter party, this libel *in personam* was filed against The Sun Association and the damages were averred to be the value of the vessel, which it was alleged was fixed by the charter party at the sum of $75,000. The District Court held that the writings were contracts of The Sun Association through Lord, its authorized agent, and were virtually one agreement; that by them that corporation was responsible for the non-return of the ship, whether or not the vessel had been lost by the fault of its agents or employés, and that there was a liability to pay the value of the vessel as fixed by the charter. Construing the two writings as a whole, this value, it was held, was subject to be diminished by the extent of the charter hire, paid when the charter party was executed. A judgment was entered for the sum of $65,000, with interest and costs. 95 Fed. Rep. 485. On appeal the Circuit Court of Appeals coincided with the District Court, except it disapproved the conclusion that the value of the vessel should be reduced by the sum of the charter hire. The decree of the District Court was reversed, and the cause remanded with instructions to enter a decree for $75,000, with interest and costs. 101 Fed. Rep. 591. The case was then brought here by certiorari.

Mr. James Russell Soley and *Mr. Franklin Bartlett* for The Sun Printing and Publishing Association.

Mr. George Zabriskie for Moore. *Mr. J. Archibald Murray* was on his brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

All the issues involved are to be determined by ascertaining the nature of the writings, the obligations which arose from their execution, and the conduct of the parties in connection therewith. It is essential, then, to bear in mind the exact form of the writings and their text. They are annexed in the margin.[1]

---

[1] Memorandum of agreement made and entered into this 14th day of May, 1898, by and between William L. Moore of the city of New York, by Thomas Manning, his agent, party of the first part, hereinafter called the owner, and Chester S. Lord of the city of New York, party of the second part, hereinafter called the hirer, witnesseth:

That the said William L. Moore, being the owner of the steam yacht Kanapaha, enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the hirer agrees to hire and hereby does hire the said yacht as she is now for the term of four months from the first day of June, expiring on the first day of October now next ensuing, for the sum of ten thousand dollars ($10,000.00), payable on the signing of this agreement.

That the hirer will carry out the provisions of the charter party made on the first day of April last, and will until the expiration of this contract keep said yacht in repair and will pay all its running expenses, including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues, and any and all other dues and charges, and will surrender said yacht with all its gear, furniture and tackle, at the expiration of this contract, to the owner or his agent, at Manning's basin, foot 26th street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only, and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same do anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000.00), and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00), to secure any and all losses and damages which may occur to said boat or its belongings,

It would seem to be necessary on the threshold to ascertain whether there was both a principal contract and an accessory contract of suretyship. The two writings are both signed by

---

which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage and shall pay demurrage to the owner at the rate of five hundred dollars ($500.00) per day for each and every day's detention.

The hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like.

That the hirer during the continuance of this agreement shall at all times and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING,
CHESTER S. LORD,
For The Sun Printing and Publishing Association.

Whereas by agreement or charter party dated May 14th, 1898, William L. Moore, of the city of New York, hereinafter called the owner, did or is about to hire or charter unto Chester S. Lord, of the city of New York, hereinafter called the hirer, the steam yacht Kanapaha, enrolled in the Atlantic Yacht Club, as will more fully and at large appear by a copy of said agreement or charter party hereunto annexed and hereby made part hereof.

Now at the request of the said hirer and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said owner received, and receipt whereof is hereby acknowledged:

We, The Sun Printing and Publishing Company, of the city of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

First. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

Second. That we expressly waive and dispense with notice of any demand, suit or action at law against the hirer, and expressly waive any and all notice of non-performance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

Third. That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars ($75,000.00.)

Lord in exactly the same character. Judging, by the signatures alone, it is impossible to conceive of two contracts, the one principal and the other accessory thereto, as, in the nature of things, if the first evidenced the obligations of the one who hired and the second manifested the agreement of the same person to fulfill his own duty resulting from the hiring, there could be no accessory contract of suretyship, since both documents but expressed the covenants of the same person relating to one and the same transaction. There is, however, this difference between the two papers. In the body of the first, "Chester S. Lord" is recited to be the hirer, whilst in the body of the second paper it is recited that it is made by The Sun Printing and Publishing Association.

The first question to be determined is, assuming for the present that Lord had authority to bind The Sun Association, Was the first document the individual contract of Lord or that of The Sun Association?

The rule of law to be applied in the determination of this question is thus expressed in *Whitney* v. *Wyman*, (1880) 101 U. S. 392, 395:

"Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. *Stanton* v. *Camp*, 4 Barb. (N. Y.) 274.

In witness whereof we have hereunto set our hands this 14th day of May, 1898.

CHESTER S. LORD,
For Sun Printing and Publishing Association.

State of New York, }
County of New York, } *ss:*

On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the managing editor of The Sun Printing and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm, under authority of said company, as its act and deed.

[SEAL]

A. H. BRADLEY,
Notary Public, New York.

"In the latter cases the question is always one of intent; and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent, or otherwise.

"The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

Now, while Lord is referred to in the body of the first writing as an individual, he signed the agreement "*for* The Sun Printing and Publishing Association." Clearly this was a disclosure of the principal, and an apt manner of expressing an intent to bind such principal. *Bradstreet* v. *Baker*, 14 Rhode Island, 546, 549; *Tucker Manufacturing Company* v. *Fairbanks*, 98 Mass. 101.

It results that the first paper or charter party manifested the intent to bind The Sun Association as hirer, if Lord possessed the authority which he assumed to exercise, and consequently that the two papers are in legal effect but one contract, must be interpreted together, and the obligations of the parties arising from them be enforced according to their plain import, seeking always to give effect to the intention of the parties.

It is not denied that Lord was in some respects the agent of the corporation; but it is asserted that he had not the power or authority to make a contract of the character here involved. The charter of The Sun Association provided for no other officers to manage its concerns but a board of trustees. In the by-laws provision was made for the election of a president and secretary, whose duties were not prescribed, except as to the signing of certificates of stock and the transferring of stock on the books of the company. An examining committee as also an executive committee were provided for in article VII

of the by-laws, as amended June 27, 1893, a copy of which is excerpted in the margin.[1] The provisions relating to such committees, however, were omitted in the by-laws as amended June 28, 1898.

At the time of the hiring of the Kanapaha, Mr. Paul Dana was the president of The Sun Association, he having been elected to that office on October 26, 1897. Long prior to the last-mentioned date, however, from about 1879, Lord had been the managing editor of The Sun. As such, the evidence establishes, he exercised an unlimited discretionary authority in the collection of news for The Sun, making all pecuniary and other arrangements in respect thereto. Prior to the hiring of the Kanapaha he had, solely on his own volition, hired vessels for the use of The Sun for periods of a week at a time. By whom he was vested with this authority does not appear with certainty, but in the absence of direct evidence we are authorized to presume that the authority was conferred, either directly or indirectly, by the trustees of the association in whom was lodged the power to manage the concerns of the company. *United States* v. *Dandridge*, 1827, 12 Wheat. 64. In the *Dandridge* case, speaking through Mr. Justice Story, the court said (p. 69):

"By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances."

After illustrating the application of the principle to cases of public duty and many others, it was said (p. 70):

---

[1] The executive committee shall have the supervision of all the property of the association contained in their building, and of the building itself. It shall be their duty to rent such portion of the same as is not required for the use of the association, and to see that all necessary alterations and repairs are faithfully and economically executed; but no expenditure shall be made by the committee exceeding the sum of five hundred dollars unless by authority of the trustees. They shall report their doings to the trustees at each regular meeting.

It shall be the duty of the examining committee to examine the accounts of the association, and to inquire into both the receipts and disbursements of money. They shall report to the trustees at each regular meeting.

"The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think, that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty."

See, also, *Jacksonville &c. Railway Company* v. *Hooper*, (1896) 160 U. S. 514, 519, and cases cited.

As said in *Mining Co.* v. *Anglo-California Bank*, 104 U. S. 19, speaking through Mr. Justice Harlan:

"An agency may be established by proof of the course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business, and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation."

As, therefore, the trustees of The Sun Association must be presumed to have exercised a supervision over the business of the corporation, they are to be charged with knowledge of the

extent of the power usually exerted by its managing editor, and must be held to have acquiesced in the possession by him of such authority, even though they had not expressly delegated it to him.

It being then within the scope of the general authority possessed by Lord to hire the yacht, the contention that in its exercise he must be assumed to have been without right to incur an absolute liability for the return of the vessel or become responsible for the value thereof, and to stipulate as to such value, is without merit. As Lord was charged with the full control of the business of collecting news and impliedly vested with power to enter into contracts in respect thereto, he was, in effect, a general officer of the corporation as to such matters, and it is well settled that the president or other general officer of a corporation has power *prima facie* to do any act which the directors or trustees of the corporation could authorize or ratify. *Oakes* v. *Cattaraugus Water Company*, 143 N. Y. 430, 436, and cases cited. The burden was on The Sun Association to establish that Lord did not possess the authority he assumed to exercise in executing the contracts. *Patterson* v. *Robinson*, 116 N. Y. 193, 200, and cases cited. As the trustees of The Sun Association were unrestrained by the charter, and might have authorized Lord to execute the writings in question, and the association failed to rebut the *prima facie* presumption, he must be held to have been vested with such power.

The argument that if it be granted that the writings embodied an absolute obligation to return and a stipulation as to value in the event of non-return, such conditions were so extraordinary that it must be assumed that authority had not been conferred to agree to them, is equally unfounded. The proposition must rest on the assumption that to charter a yacht upon the conditions referred to was *ultra vires* of the corporation, which, as we have seen is not correct. Certainly an authority to charter a yacht for the purpose of collecting news was clearly within the corporate powers of The Sun Association; the mere signing of a charter party in execution of such a contract was not illegal, nor can it, we think with any plausibility, be said where, in a case like this, the vessel chartered was to be manned, equipped

and operated by the hirer, to be taken far from her home port, in time of threatened or actual war, on a presumably hazardous venture, that the agreement to absolutely return or, in default, to pay a fixed value, was so beyond the means incidental to the exercise of the power to charter as to cause the act to be beyond the corporate power. For, if the corporation could have done these things, the agent having the broad powers possessed by Lord had a similar right.

But the case in this regard does not depend upon legal presumptions arising from the general course of business in other matters, for the following reasons: The evidence clearly justifies the inference that the president and secretary and the other trustees of The Sun Association knew that Lord had exercised the authority to hire the vessel in question; that the possession of the vessel was pursuant to a contract, and that some obligation had been entered into for its safe return. Mr. Hitchcock was one of the four trustees and the secretary of The Sun Association. It was his duty to affix the seal of the corporation to instruments, directed by the trustees, to be executed in a formal manner. He was requested by Lord to execute the writings in question, but he declined to do so. The reasons actuating him in refusing do not appear; but, as he testified that he had nothing to do with the collection of news, it may well be that he felt he could not execute formal documents in a matter not within his department. He does not, however, appear to have regarded the signing of such documents by Lord as improper; for he subsequently, in conjunction with the business manager, who was also a trustee of The Sun Association, signed a check on behalf of the corporation for a $10,000 payment, as recited on the books of the association, for "charter Kanapaha to October 1."

President Dana testified that he was not consulted in regard to the drawing of the papers, and did not in April or May, 1898, know of their execution. He, however, was aware in those months that dispatch boats were being used by The Sun to obtain news in regard to the progress of events in Cuban waters, such information having been acquired from several sources, including Mr. Lord. President Dana testified that Lord had

charge of the getting of information as to the progress of events in Cuban waters and in connection with the war; that he had talked with him about the matter early in April, 1898, and had inquired if his arrangements were satisfactory. He further testified that if the arrangements made were satisfactory to Lord, they were to the witness, and that that was understood in The Sun office and by the other trustees. Lord attempted no concealment of his actions in respect to the hiring of the Kanapaha. The payments for the hire of the boat, the expenses connected with its management, sundry premiums paid out of the moneys of The Sun Association for insurance upon the yacht, in the sum of nearly $60,000, covering the first five months of the use of the vessel — the later policies expiring only a few days before the loss of the ship — were entered in the books of The Sun. Besides, the association received, under arrangements made by its business manager and trustee, Laffan, money from various newspapers for accommodations furnished to their reporters on board the Kanapaha. All these matters must be presumed to have been brought to the notice of the board, whose duty it was to manage the concerns of the association. The deductions fairly to be drawn from them are susceptible only of the construction that full discretion in the premises had been vested in the managing editor. The strongest possible confirmation of this arises from the fact that Lord, who, under oath, acknowledged when executing the alleged agreement of suretyship, that he possessed the authority to do so, and who was at the time of the trial below in the service of the defendant and able to be produced in court, was not called to the witness stand.

The contract then being that of The Sun Association, made by its agent, duly empowered to that end, and inuring to its benefit, we are not concerned with the questions of ratification discussed at bar, and we are thus brought to consider the obligations which the contract imposed. And, before passing from the subject just considered, it is to be observed that the facts to which we have referred, if there be ambiguity in the writings, confirm the conclusion that the two writings embodied but one contract made by the agent of The Sun in its behalf and for its benefit. This is manifest, because the taking charge

of the ship by the employés of the association, the payment of all the expenses of the vessel, the payment of the rent, the charging of the amount thereof in the books of the association, the use of the vessel for the purposes of the association, the receipt of revenues derived from such use, and the other facts previously stated, when considered together, cause it to be impossible in reason to assume that the relation of The Sun Association to the hiring was simply that of a security for Lord as a hirer of the yacht on his personal account.

It is elementary that, generally speaking, the hirer in a simple contract of bailment is not responsible for the failure to return the thing hired, when it has been lost or destroyed without his fault. Such is the universal principle. This rule was tersely stated by Mr Justice Bradley in *Clark* v. *United States*, 95 U. S. 539, where it was said (p. 542):

"A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law on the subject. See Jones, Bailm. p. 88; Story, Bailm. secs. 398, 399; Domat, Lois Civiles, lib. 1, tit. 4, sec. 3, pars. 3, 4; 1 Bell, Com. pp. 481, 483, 7th ed."

But it is equally true that where by a contract of bailment the hirer has either expressly or by fair implication assumed the absolute obligation to return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling and must be enforced according to its terms. In *Strum* v. *Boker*, (1893) 150 U. S. 312, both the elementary principles above stated were clearly expressed by the court, through Mr. Justice Jackson. It was said (p. 330):

"The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, *express or fairly implied*, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."

This statement of the binding effect of contracts upon those who enter into them was, in substance, but a reiteration of the principle clearly announced in *Dermott* v. *Jones*, (1865) 2 Wall. 1, where it was said:

"It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him."

Among the cases approvingly referred to in *Dermott* v. *Jones* were *Bullock* v. *Dommitt*, 6 T. R. 650, and *Brecknock Co.* v. *Pritchard*, Ib. 750, holding that an agreement to keep the property in repair created a binding obligation to rebuild and restore the property, even though its destruction had been caused by inevitable accident.

It is to be observed in passing that the principle sustained by these last mentioned authorities is supported by many adjudications. *Young* v. *Leary*, 135 N. Y. 569, 578, and cases cited.

We approach, then, the contract for the purpose of determining whether by express agreement or by fair implication it put the positive duty on the hirer to surrender the vessel at the expiration of the charter and to be responsible for the value, even although impossibility of return was brought about without his fault. The obligation was expressly imposed upon the hirer to keep "said yacht in repair and to pay all its running expenses, and to surrender said yacht with all its gear, furniture and tackle at the expiration of this contract to the owner or his agent . . . in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted." Not only this, but the charter party contained the further provision that the hirer "shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like." This provision is immediately followed by a reiteration of the duty to repair, previously stated, by again stipulating "that the hirer during the continuance of this agreement shall at all times and at his own cost and expense keep the said yacht, its hull, machinery, tackle, spars, furniture, gears, boats and the like, in repair."

Pausing for a moment to consider the foregoing stipulations it is difficult to conceive how language could more aptly express the absolute obligation, not only to repair and keep in good order to the end of the hiring and to return, but, moreover, to be responsible for any and all loss and damage to the vessel, her fixtures and appointments. These stipulations seem to us to leave no doubt of the absolute liability to return; in other words, of the putting of the risk of damage or loss of the vessel upon the hirer. But if there could be doubt after considering the provisions just above referred to, such doubt is dispelled when it is considered that the contract proceeds to say that "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of $75,000. And the said hirer shall procure security or guarantee to and for the owner" in the sum stated, "to secure any and all loss and damage which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract." In other words, having provided for all repairs, having stipulated absolutely for the return of the vessel in full repair, having put the risk of any and all loss on the hirer, the contract then in express terms fixes the value of the vessel, and makes provision for security to protect against any and all loss or damage sustained by a failure of the hirer to fulfill each and all of the positive obligations which the contract imposed.

Concluding, as we do, that by the charter party the absolute obligation to return was placed on the hirer, and that by that contract the risk was hence cast upon him of loss, even be it without his fault, we are led to determine the amount which the owner of the yacht is entitled to recover.

Before passing to this question, however, we remark that we have not entered into any extended review of the case of *Young* v. *Leary*, 135 N. Y. 569, and the conflict of view asserted in argument to exist between the ruling in that case and that made in *Steele* v. *Buck*, 61 Illinois, 343; *Drake* v. *White*, 117 Massachusetts, 10, and *Harvey* v. *Murray*, 136 Massachusetts, 377. We have not done so, because, as we have seen in

the opinion in *Young* v. *Leary*, the absolute duty to repair and keep in repair was conceded to import an obligation to restore the property, even if the impossibility of doing so was brought about without the fault of the bailee. Whatever differences there may be, if any, in the opinions in the cases referred to, arises, not because they expound a discordant view of the law of bailment, but from different applications made of that law to the contract which was under consideration in the particular case. But not only the legal principles announced in the cases referred to, but also the application made of such principles in each and all of the cases, render it necessary to construe a contract like the one we have before us as meaning that which we find it to mean.

Recurring to the amount of liability, it appears that there are two inquiries involved in deciding it; the first, was the obligation imposed by the first writing to pay the agreed value of the vessel in the event of her non-return, and second, if yes, did any modification thereof arise from the second writing? The answer to the first inquiry is afforded by what we have already said in discussing the nature of the obligations assumed by the hirer. As they were to return the vessel in any event, and in default to make good any and all loss arising from a failure to return, the fixing of the value of the vessel can have but one meaning, that is, that the value agreed on was to be paid in case of default in returning. Unless the agreement as to the value meant this it had no import whatever, and its presence in the contract is inexplicable. That the obligation to return or pay the agreed value was not modified by the second writing we think is clear.

In that writing it is provided that The Sun Association bound itself that the hirer would faithfully fulfill and perform all the obligations expressed in the previous writing. Certainly, because of the contract that all the previous agreements are to be fulfilled, it cannot be that some of them were destroyed. But proceeding to make its significance if possible clearer, the second writing adds that the intention of the parties to it is to hold The Sun Association "primarily liable" for the obligations

created by the prior writing. To stipulate primary liability for prior obligations cannot be so construed as to destroy them.

True, the provisions just referred to are followed by the stipulation that "all our liability hereunto shall, in no case, exceed the sum of $75,000." This cannot mean that the obligations expressly assumed were destroyed, but that in case they were not fulfilled, the damage brought about by each and every breach should not exceed $75,000. The contrary cannot be said without holding that a provision, which was manifestly intended to add sanction to the obligations, in effect abrogated them. And the import of the clause under consideration is demonstrated by the provision in the first writing, by which it was agreed that the second paper should be signed. The provision is, "The said hirer shall procure security or guarantee, in and for The Sun, in the sum of $75,000, to secure any and all loss and damage which may occur to said boat, or its belongings, which may be sustained by the owner, by reason of such loss or damage and by reason of the breach of any of the terms or conditions of the contract."

The second writing unquestionably stipulated a penalty for the performance of each and all the obligations, but, fixing a penalty, in case of a default, did not extinguish them. The meaning of the provision becomes quite clear when all the provisions are taken into view in their proper connection. They all naturally divide themselves into two classes, the one relating to the payment of the hire, the payment of the expenses of the operation of the vessel, the making of repairs, etc.—from which we may eliminate the hire, as it was to be paid on the execution of the contract; and the other to the duty to return, or pay in default, the value agreed on. We say they naturally so divide themselves, because in no reasonable probability could a default in both cases simultaneously exist. Thus, if the vessel was not returned and the owner got the value as fixed in the contract, he could suffer no loss for any default of the hirer in failing to pay for repair, etc., or for a breach of the covenant to pay the running expenses of the vessel, as no personal liability therefor could attach to him. And in the event of a return of the vessel, lessened in value by the failure to repair,

or burdened with charges, because of default in paying running expenses, no loss could come to the owner if he was indemnified up to the extent of $75,000, the value of the vessel, which, it will be seen, was, hence in any probable event, the maximum sum of liability which the parties supposed might result from a breach of the covenants contained in the charter party.

The contract arising from the two writings having this import, the court below correctly decided that the sum due, as a consequence of a default in the return of the ship, was not to be diminished by the amount of the hire which had been paid at the inception of the contract. To have otherwise ruled would have destroyed in part the express agreement that the failure to return should be compensated by the payment of the agreed value. Such would have been its inevitable result, as it would have reduced the sum due for the default in not returning the ship, by crediting the hirer with the amount of the hire he had paid without default on an independent and distinct liability.

The foregoing considerations are adequate to dispose of the case, if it be that the rights of the parties are to be administered according to the contract into which they voluntarily entered. In substance, however, it is pressed with much earnestness and sought to be supported by copious reference to authority that the intent of the contracting parties should not be given effect to, because it is our duty to disregard the contract and substitute our will or our conception of what the parties should have done for that which they did plainly do. This contention thus arises.

Upon the trial, The Sun Association introduced some evidence tending to show that the value of the yacht was a less sum than $75,000, and it claimed that the recovery should be limited to such actual damage as might be shown by the proof. The trial judge, however, refused to hear further evidence offered on this subject, and in deciding the case disregarded it altogether. The rulings in this particular were made the subject of exception and error was assigned in relation thereto in the Circuit Court of Appeals. That court held that the value fixed in the contract was controlling, especially in view of the fact that a yacht had no market value.

The complaint, that error in this regard was committed, is

thus stated in argument: "The naming of a stipulated sum to be paid for the non-performance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that, *if the amount is disproportioned to the loss*, the court has the right and the duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though it is specifically said to be liquidated damages." Now it is to be conceded that the proposition thus contended for finds some support in expressions contained in some of the opinions in the cases cited to sustain it. Indeed, the contention but embodies the conception of the doctrine of penalties and liquidated damages expressed in the reasoning of the opinions in *Chicago House Wrecking Co.* v. *United States*, (1901) 106 Fed. Rep. 385, 389, and *Gay Manufacturing Co.* v. *Camp*, (1895) 25 U. S. App. 134, 65 Fed. Rep. 794, 68 Fed. Rep. 67, viz., that "where actual damages can be assessed from testimony," the court must disregard any stipulation fixing the amount and require proof of the damage sustained. We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court. And we shall, as briefly as we can consistently with clearness, proceed to so demonstrate.

At common law prior to the statute of 8 & 9 William III, c. 11, in actions "upon a bond, or on any penal sum, for non-performance of any covenants or agreements, contained in any indenture, deed, or writing," judgment, when entered for the plaintiff, was for the amount of the penalty, as of course. *Watts* v. *Camors*, 115 U. S. 360; Story, Eq. Jur. sec. 1311. Equity, however, was accustomed to relieve in cases of penalties annexed to bonds and other instruments, the design of which was to secure the due fulfillment of a principal obligation. Story, Eq. Jur. sec. 1313. The effect of the passage of the statute was to restrict suitors in actions for penalties to a collection of the actual damages sustained. As a result, also, courts of law were thereafter frequently under the necessity of determining whether or not an agreed sum stipulated in a bond

or other writing to be paid, in the event of a breach of some condition, was in reality a penalty or liquidated damages.

Of course, courts of common law, merely by reason of the statute of 8 & 9 William III, referred to, did not acquire the power to give relief in cases of contract, where a court of equity would not have exercised a similar power. Now courts of equity do not grant relief in cases of liquidated damages—that is, cases "when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum, as the just, appropriate and conventional amount of the damages sustained by such act or omission." Story, Eq. Jur. sec. 1318. And, as long ago as 1768, Lord Mansfield, in *Lowe* v. *Peers*, 4 Burr. 2225, said—italics in original (p. 2228): "Courts of equity will *relieve against a penalty*, upon a *compensation;* but where the covenant is to pay a particular *liquidated* sum, a court of equity can *not* make a *new* covenant for a man; nor is there any *room* for *compensation* or *relief*." Commenting upon the judgment of Lord Eldon in one of the leading cases on the subject of liquidated damages, (*Astley* v. *Weldon*, 2 Bos. & Pul. 346, 350,) Jessel, Master of the Rolls, in *Wallis* v. *Smith*, 21 Ch. D. 243, 256, said (p. 260):

"He perfectly well knew that whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief on the ground that agreements were oppressive where the parties were of full age and at arm's length. It is very likely, and I believe it is true historically, that the doctrine of equity did arise from a general notion that these acts were oppressive. At all events, long before his time, it had been well settled in equity that equity did relieve from forfeiture for non-payment of money, and I think I may say, in modern times, from nothing else."

The doctrine of equity as respects the withholding of or granting relief against a contract because of inadequacy of consideration, illustrates the conservative disposition of equity not to interfere unnecessarily with the contracts of individuals. Equity declines to grant relief because of inadequacy of price, or any other inequality in the bargain; the bargain must be so uncon-

scionable as to warrant the presumption of fraud, imposition or undue influence. Story, Eq. Jur. secs. 244, 245.

Whilst the courts of the United States, in actions at law, undoubtedly possess the power conferred upon the courts of common law by the statute of 8 & 9 William III, and whilst recognition of such power was embodied in the judiciary act of 1879, reproduced in section 961 of the Revised Statutes, the duty of such courts to give effect to the plainly expressed will of contracting parties is as imperatively necessary now as it was at common law after the adoption of the English statute, as will be made manifest by a reference to some of the adjudications of this court.

The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not *bona fide*, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. Thus, Chief Justice Marshall, in *Tayloe* v. *Sandiford*, 7 Wheat. 11, although deciding that the particular contract under consideration provided for the payment of a penalty, clearly manifested that this result was reached by an interpretation of the contract itself. He said (p. 17):

"In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is, to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties. Much

stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention. These writings appear to have been drawn on great deliberation; and no slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms they have employed."

And, after having thus established that on the face of the contract it stipulated a penalty and not liquidated damages, the opinion proceeded to refute the construction relied on to sustain the contrary view that the contract manifested the intention to assess liquidated damages. In connection therewith the Chief Justice observed (p. 18):

"The plaintiff in error relies on the case of *Fletcher* v. *Dycke*, reported in 2 T. R. 32, in which an agreement was entered into to do certain work within a certain time, and if the work should not be done within the time specified, 'to forfeit and pay the sum of £10 for every week,' until it should be completed.

"But the words 'to forfeit and pay' are not so strongly indicative of a stipulation in the nature of a penalty, as the word 'penalty' itself; and the agreement to pay a specified sum weekly during the failure of the party to perform the work partakes much more of the character of liquidated damages than the reservation of a sum in gross."

In *Van Buren* v. *Digges*, 11 How. 461, also construing a building contract, it was said (p. 477):

"The clause of the contract providing for the forfeiture of ten per centum on the amount of the contract price, upon failure to complete the work by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. *Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is*

never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz., that of a penalty." [Italics not in original.]

See, also, *Quinn* v. *United States*, 99 U. S. 30; *Clark* v. *Barnard*, 108 U. S. 436, 454; *Watts* v. *Camors*, 115 U. S. 353, 360; *Bignall* v. *Gould*, 119 U. S. 495. The last cited case illustrates the character of disproportion apparent on the face of a contract which has influenced a court when endeavoring to ascertain the meaning of parties to a contract in a stipulation for the payment of a designated sum for the breach of a condition. There the penal sum was $10,000, several breaches of the conditions of the bond might be committed, to each of which the stipulated sum would be applicable, and one such breach might be the failure to obtain a release of a claim of but ten dollars.

The courts in England, as already intimated, consistently maintain the right of individuals, when contracting with each other, to estimate the value of property or otherwise determine the quantum of damages for a breach of an agreement, where the damage is of an uncertain nature. *Irving* v. *Manning*, (1847) 1 H. L. Cas. 287, 307, 308; *Ranger* v. *Great Western Ry. Co.*, (1854) 5 Ib. 72, 94, 104, 118; *Dimech* v. *Corlett*, (1858) 12 Moore's P. C. 199, 229; *Lord Elphinstone* v. *Monkland Iron & Coal Co.*, (1886) App. Cas. 332, 345, 346; *Price* v. *Green*, (1847) 16 M. & W. 346, 354.

We content ourselves with a few brief excerpts from some of the decisions just referred to. In *Ranger* v. *Great Western Railway Co.*, in the course of his opinion Lord Cranworth said (p. 94):

"There is no doubt that where the doing of any particular act is secured by a penalty, a court of equity is, in general, anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid. On the other hand, it is certainly open to parties who are entering into contracts to stipulate that, on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation."

In *Lord Elphinstone* v. *Monkland Iron & Coal Co.*, (1886)

App. Cas. 332—a Scotch appeal—Lord Fitzgerald, in the course of his opinion, said (p. 436):

"I am not aware that there is any enactment in force in Scotland corresponding to our statute of 8 and 9 Wm. III, c. 11, s. 8; nor does the Scotch law seem to have required such aid. We may take it, then, that by the law of Scotland the parties to any contract may fix the damages to result from a breach at a sum estimated as liquidated damages, or they may enforce the performance of the stipulations of the agreement by a penalty.

"In the first instance, the pursuer is, in case of a breach, entitled to recover the estimated sum as pactional damages, irrespective of the actual loss sustained. In the other, the penalty is to cover all the damages actually sustained, but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way. In determining the character of these stipulations we endeavor to ascertain what the parties must reasonably be presumed to have intended, having regard to the subject-matter, and certain rules have been laid down as judicial aids."

In *Irving* v. *Manning*, (1847) 1 H. L. Cas. 287, it was recognized that a policy of assurance was a contract of indemnity, but it was declared that in a valued policy the agreed value was conclusive, and each party must be held to have conclusively admitted that the sum fixed by agreement should be that which the other was entitled to receive in case of a total loss. In that case the opinion of the judges was delivered by Mr. Justice Patterson, and we excerpt from the opinion of that justice in *Price* v. *Green*, (1847) 16 M. & W. 346, on error from the Court of Exchequer, as follows (p. 354):

"The £5000 is expressly declared by the covenant to be 'as and by way of liquidated damages, and not of penalty.' It is a sum named in respect of the breach of this one covenant only, and the intention of the parties is clear and unequivocal. The courts have indeed held that, in some cases, the words 'liquidated damages' are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language

used, it is plain from the whole instrument that the intention was different."

In *Wallis* v. *Smith*, (1882) 21 Ch. D. 243, the leading cases in England on the subject of penalties and liquidated damages were commented upon by the Court of Appeal. Jessel, Master of the Rolls, classified the decisions and *dicta* on the subject. His summary will be found in the margin,[1] and measuring the contract in this case, by the rules which are embodied in the recapitulation, it follows that the stipulated sum is embraced in the category of liquidated damages.

---

[1] 1. Where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the court will not sever the stipulations.

2. Cases "in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will, in all human probability, be small—that is, where it is not absolutely necessary that they should be small; but it is so near to a necessity, having regard to the probabilities of the case, that the court will presume it to be so.

Then the question is whether in that class of cases the same rule applies. Now, upon this there is no decision. There are a great many *dicta* upon the question, and a great many *dicta* on each side. I do not think it is necessary to express a final opinion in this case, but I do say this, that the court is not bound by the *dicta* on either side, and the case is open to discussion. It is within the principle, if principle it be, of a larger sum being a penalty for non-payment of a smaller sum; but, at the same time, it is also within another class of cases to which I am now going to call attention.

3. The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are *dicta* there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance the sum has always been treated as liquidated damages.

4. A class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does apply and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases.

In *Strickland* v. *Williams*, (1899) 1 Q. B. 382, Lord Justice A. L. Smith appears to have stated an additional class to those mentioned by Jessel, M. R. He said (p. 384): "In my opinion, it is the law that where payment is conditioned on one event, the payment is in the nature of liquidated damages." This but seems to reiterate the proposition of Justice Patterson in *Price* v. *Green*, previously cited. It was undoubtedly meant that the "event" should not be the mere non-performance of an *ordinary* agreement for the payment of money. See, also, per Bramwell, B., in *Sparrow* v. *Paris*, (1862) 7 Hurl. & N. 594, 599.

Now the stipulation here being considered, obviously would be within the last class, for it was a promise to pay a stipulated sum on the breach of a covenant to return the yacht to its owner.

With the exception of the more recent decisions, the cases generally on liquidated damages and penalties, as well those decided in England as in this country, are reviewed in 2 Evans-Pothier on Obligations, pp. 88 to 111, and in a note to *Graham* v. *Bickham*, 1 American Decisions, 328, 331, *et seq.* A list of some of the later decisions of the state courts is found in the margin.[1]

The character of the stipulation under consideration, renders it unnecessary to review in detail the decisions of the state courts. There is in them much contrariety of opinion on some phases of the doctrine, but our attention has not been called to

---

[1] *Hoagland* v. *Segur*, (1876) 38 N. J. Law, (9 Vroom) 230; *Wolf* v. *Des Moines & Fort Dodge Railway Co.*, (1884) 64 Iowa, 380, 386; *Burrill* v. *Daggett*, (1885) 77 Maine, 545; *Jaqua* v. *Headington*, (1888) 114 Indiana, 309; *Wibaux* v. *Grinnell Live Stock Co.*, (1889) 9 Montana, 154; *Wilhelm* v. *Eaves*, (1891) 21 Oregon, 194; *Hennessy* v. *Metzger*, (1894) 152 Illinois, 505; *Willson* v. *Mayor &c. of Baltimore*, (1896) 83 Md. 203, 210; *May* v. *Crawford*, (1898) 142 Missouri, 390; *Garst* v. *Lockey Piano Case Co.*, (1900) 177 Mass. 91; *Illinois Central R. R. Co.* v. *Southern Seating & Cabinet Co.*, (1900) 104 Tenn. 568; *Weedon* v. *American Bonding & Trust Co.*, (1901, North Carolina,) 38 So. E. 255; *Young* v. *Gaut*, (1901, Arkansas,) 61 S. W. 372; *Knox Rock-Blasting Co.* v. *Grafton Stone Co.*, (1901, Ohio) 60 N. E. Rep. 563; *Johnson* v. *Cook*, (1901, Washington) 64 Pacific Rep. 729; *Taylor* v. *Times Newspaper Co.*, (1901, Minnesota) 86 N. W. Rep. 760; *Emery* v. *Boyle*, (1901, Pennsylvania) 49 Atlantic Reporter, 779.

any case which sustains the contention that a valuation clause, such as that we are considering, contained in a contract made under circumstances like those which existed when this contract was executed, must be disregarded despite the evident intention of the parties to treat the sum named as estimated and ascertained damages for a breach of the covenant to return the yacht. That the courts of the State of New York do not lend any support to such a contention—which it was strenuously argued at bar they do—we will make evident.

The case of *Ward* v. *Hudson River Building Co.*, (1891) 125 N. Y. 230, is not an authority for the contention in question. Equitable relief was sought in that case against the enforcement of a stipulation, which the court, however, held to be liquidated damages and binding on the parties. True the court did say, on page 235, that "where, however, a sum has been stipulated as a payment by the defaulting party, which is disproportioned to the presumable or probable damage, or to readily ascertainable loss, the courts will treat it as a penalty and will relieve, on the principle that the precise sum was not of the essence of the agreement, but was in the nature of a security for performance." There is nothing, however, in this excerpt to countenance the claim that where it is clear from the terms of the contract that the precise sum *was* of the essence of the agreement and *was* the agreed amount of estimated damages, no fraud or imposition having been practiced, either a court of equity or of law might rightfully decline to give effect to the stipulation. Nor does the quoted statement support the further claim that a court of law in an action on a contract to recover a stipulated sum as damages might let in evidence to establish that a mere disproportion existed between the agreed sum and the actual damage, for the purpose of avoiding the stipulation. The meaning of the court is made clear by the following statement, appearing on the same page with the above excerpt: "We may, at most, say that where they have stipulated for a payment in liquidation of damages, which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, *on the face of the contract*, out

of all proportion to the probable loss. it will be treated as liquidated damages." An inspection of the opinion in the *Ward* case also shows that the New York court approvingly referred to prior decisions of the courts of that jurisdiction, *Dakin* v. *Williams*, 17 Wend. 447, and 22 Wend. 201, where it was emphatically recognized that parties might embody in their contract an agreed valuation of property or any other quantum of damages, where the damage was uncertain in its nature. We quote, in this connection, from the opinion as reported in 17 Wend. delivered by Chief Justice Nelson, afterwards a member of this court. It was said (p. 454):

"The next question presented upon the above conclusion is whether the sum of $3000 is to be viewed as damages liquidated by the contract of the parties, or only in the light of a *penalty?* There are many cases in the English books in which this question has been very fully examined and considered, but it would be an unprofitable consumption of time to go over them with a view or expectation of extracting any useful general principle that could be applied to this case. The following are the leading cases: *Astley* v. *Weldon*, 2 Bos. & Pul. 346; *Burton* v. *Glover*, Holt's N. P. R. 43, and note; *Reilley* v. *Jones*, 1 Bing. 302; *Davies* v. *Penton*, 6 Barn. & Cres. 216; *Crisdee* v. *Bolton*, 3 Carr. & Payne, 240; *Randall* v. *Everest*, 2 Id. 577; *Kemble* v. *Farren*, 6 Bing. 141. In our court are the following: *Dennis* v. *Cummins*, 3 Johns. Cas. 297; *Slosson* v. *Beadle*, 7 Johns. R. 72; *Spencer* v. *Tilden*, 5 Cowen, 144, and note, p. 150; *Nobles* v. *Bates*, 7 Id. 307; *Knapp* v. *Maltby*, 13 Wendell, 587. From a critical examination of all these cases and others that might be referred to, it will be found that the business of the court, in construing this clause of the agreement, as in respect to every other part thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used, it must be carried into effect. A court of law possesses no dispensing powers; it cannot inquire whether the parties have acted wisely or rashly, in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules the law has fixed as to parties, and there has been

no fraud, circumvention or illegality in the case, the court is bound to enforce the agreement. Men may enter into improvident contracts where the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away if they please without an equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance, a measure of compensation, however extravagant it may be, for a violation of their covenant, (they surely may after it has accrued,) without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not; and regarding the intent of the parties, it is not to be doubted but that the sum of $3000 was fixed upon by them 'mutually and expressly,' as they say, 'as the measure of damages for the violation of the covenant, or any of its terms or conditions.' If it be said that the measure is a hard one, it may be replied, that the defendants should not have stipulated for it; or having been thus indiscreet, they should have sought the only exemption, which was still within their power, namely, the faithful fulfillment of their agreement."

Chancellor Walworth, in the opinion rendered in the same case by the Court for the Correction of Errors, embodied in his opinion the following (22 Wend. 201, 213):

"In *Hubbard* v. *Grattan and wife*, Alcock & Nap. R. 389, in which an action was brought to recover the stipulated damages which the defendant agreed to pay if he did not remove a lime kiln adjacent to the plaintiff's premises, Bushe, Ch. J., says: 'The stipulation consists of two parts, one affirmative that the lime kiln should be prostrated before a particular day; the other negative that the assignee shall not at any future time erect another lime kiln; and upon those the breaches are assigned. Both bear on one object, to be relieved from the lime kiln altogether, and both are essential to that object being accomplished; and both parties agree in measuring beforehand the damages consequent upon a breach of either agreement. Such stipulations as to damages are upheld by courts of law upon two grounds: 1st. Because a man may set a value, not

only upon matters connected with his property, which value is capable of being ascertained, but upon matters of taste and fancy, such as prospect or ornament, which he alone can appreciate; and, 2dly, because even in matters capable of ascertainment, great difficulties might occur in some cases; and, in all cases, it is prudent in both parties to provide against the trouble and expense of a future investigation; and the cases which seem to have interfered with such compacts, are those in which the subject matter of the stipulation shews that, whatever the form of it may be, the parties could not have contemplated any more than a penalty to secure against actual damage."

So, also, the case of *Bagley* v. *Peddie*, (1857) 16 N. Y. 469, 471, makes clear the fact that the New York courts recognize the right of parties to agree beforehand upon damages to be sustained by the breach of a contract, and that evidence *aliunde* the instrument declared on cannot be received respecting the amount of damage. The last two of what were termed "artificial rules" on the subject of liquidated damages and penalties, recited in the opinion as being peculiar to contracts of this character, were as follows:

"Sixth. If, independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated if they are so denominated in the instrument; Seventh. If the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects."

Following a review of several decided cases in England, the court said (p. 474):

"The above cases will serve to illustrate the kind of certainty as to the sum to be paid as damages for breach of an agreement in order to hold the larger sum agreed to be paid on such breach a mere penalty. They are cases where the lesser sum is named specifically in the instrument itself, or depends on the award of arbitrators. These and similar cases are the cases of certain damages to which the courts allude in the third rule."

The court then quoted approvingly the prior decision of the Supreme Court in *Dakin* v. *Williams*, *supra*, and concluded as follows (p. 475):

"The case at bar seems to me to fall within the sixth rule, the damages being wholly uncertain and depending entirely on proof *aliunde* the instrument declared on."

And in connection with the New York cases it becomes pertinent to notice the case of *Gay Manufacturing Co.* v. *Camp*, (1895) 25 U. S. App. 134, on rehearing, 376; 68 Fed. Rep. 67, much relied upon in argument. As we have previously observed, language is employed in that opinion which, broadly interpreted, seems to countenance the idea that if a jury can ascertain the damages suffered by the breach of a stipulation, an agreement by the parties, embodied in a written contract, fixing such damages, will be treated as a nullity. This deduction appears to have been drawn from certain rules of construction respecting liquidated damages and penalties enunciated by the trial judge in *Bagley* v. *Peddie*, 5 Sanford, 192, 194, the judgment in which case, it is proper to remark, was reversed by the appellate court in 16 N. Y. 469, already referred to. We do not think, however, the interpretation we have noticed as having been put upon the rules in question was warranted; at least, as we have shown, such a doctrine is altogether untenable. Nor do the other authorities cited in the opinion in the *Gay* case lend support to the asserted doctrine. Those authorities were *Harris* v. *Miller*, 11 Fed. Rep. 118, 121, and a note to *Spencer* v. *Tilden*, (1825) 5 Cowen, 144, 150. *Harris* v. *Miller* is referred to because of the statement by Judge Deady, that the courts, "instead of giving effect to the contract of the parties according to their intentions, assumes to control them according to their standard of justice." The note to 5 Cowen need not be commented upon, in view of the reference we have made to later decisions of the courts of New York.

It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract*, and the question of disproportion has been

simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security.

In the case at bar, aside from the agreement of the parties, the damage which might be sustained by a breach of the covenant to surrender the vessel was uncertain, and the unambiguous intent of the parties was to ascertain and fix the amount of such damage. In effect, however, the effort of the petitioner on the trial was to nullify the stipulation in question by mere proof, not that the parties did not intend to fix the value of the yacht for all purposes, but that it was improvident and unwise for its agent to make such an agreement. Substantially, the petitioner claimed a greater right than it would have had if had made application to a court of equity for relief, for it tendered in its answer no issue concerning a disproportion between the agreed and actual value, averred no fraud, surprise or mistake, and stated no facts claimed to warrant a reformation of the agreement. Its alleged right to have eliminated from the agreement the clause in question, for that is precisely the logical result of the contention, was asserted for the first time at the trial by an offer of evidence on the subject of damages.

The law does not limit an owner of property, in his dealings with private individuals, respecting such property, from affixing his own estimate of its value upon a sale thereof, or on being solicited to place the property at hazard by delivering it into the custody of another for employment in a perilous adventure. If the would-be buyer or lessee is of the opinion that the value affixed to the property is exorbitant, he is at liberty to refuse to enter into a contract for its acquisition. But if he does contract and has induced the owner to part with his property on the faith of stipulations as to value, the purchaser or hirer, in the absence of fraud, should not have the aid of a court of equity or of law to reduce the agreed value to a sum which others may deem is the actual value. And, as pertinent to these observations, we quote from the opinion delivered by Wright, J., in *Clement* v. *Cash*, 21 N. Y. 253, where it was said (p. 257):

"When the parties to a contract, in which the damages to be

ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages, in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts, that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damages, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. In such cases, there would be room for construction; but certainly none where the meaning of the parties was evident and unmistakable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be $500.00, or any other sum, to be paid by either party failing to perform, it seems absurd for a court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended; but that the intention was to name the sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement."

As the stipulation for value referred to was binding upon the parties, the trial court rightly refused to consider evidence tending to show that the admitted value was excessive, and the Circuit Court of Appeals properly gave effect to the expressed intention of the parties.

The decree of the Circuit Court of Appeals was right, and it is therefore

Affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* BELL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 20. Argued and submitted December 5, 6, 1901.—Decided January 13, 1902.

The Atlantic and Pacific Railroad Company took no title to lands within the indemnity limits of its grant until the deficiency in the place limits had been ascertained, and the company had exercised its right of selection.

The Secretary of the Interior had no authority, upon the filing of a plat in the office of the Commissioner of the General Land Office, to withdraw lands lying within the indemnity limits of the grant from sale or preemption; and a patent issued to a settler under the land laws, prior to the selection made by the railroad company, of the land in dispute as lieu lands, was held to be valid, notwithstanding the lands lay within the forty-mile strip ordered by the act to be surveyed, after the general route of the road had been fixed.

The case of *Hewitt* v. *Schultz*, 180 U. S. 139, followed and applied to the facts of this case.

THIS was a complaint in the nature of a bill in equity filed by the Southern Pacific Railroad Company in the Superior Court of Fresno County, California, against Isaac T. Bell, praying to be declared the rightful owner of a certain quarter section of land in that county, and that it be adjudged that the defendant Bell holds the legal title to said land in trust for the plaintiff, and requiring him to convey the same to it free of all encumbrances.

The facts of the case, as set forth in the complaint, are substantially as follows: By "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," act of July 27, 1866, c. 278, 14 Stat. 292, such road being incorporated under the name of The Atlantic and Pacific Railroad Company, there was granted to such railroad company—

"SEC. 3. . . . Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side

of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved or occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections," etc.

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or preemption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and the Act entitled 'an act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those thereby granted to said company."

By section 18 of the same act authority was given to the Southern Pacific Railroad Company, incorporated under the laws of California, "to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its

road on like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

On November 26, 1866, the plaintiff accepted the terms and conditions of the charter and grant of July 27, 1866, as above set forth, and on January 3, 1867, duly fixed the general route of its line of road, designating the same by a plat thereof filed in the office of the Commissioner of the General Land Office. This plat and designation having been duly approved and accepted by the Commissioner and Secretary of the Interior on March 22, 1867, all the odd-numbered sections of land lying within thirty miles of the railroad, as shown upon the plat, were withdrawn from sale or location, preëmption or homestead entry, and have ever since remained so withdrawn.

Thereafter, and prior to November 8, 1889, the company duly constructed and equipped the entire railroad provided for in said act, and along the line designated upon the plat filed on January 3, 1867, and the road so constructed, except that part which extends from Mojave to the Needles, was duly accepted and approved by the President and Secretary of the Interior.

A certain quarter section of land within the granted limits of the railroad, as constructed and shown on the map, having been granted and otherwise disposed of, prior to the time when the line of the route was designated by the plat filed with the Commissioner of the General Land Office, the quarter section of land in dispute in this case, which was within the indemnity, but not within the granted limits of the road, being more than twenty but within thirty miles on one side of the road as constructed, was selected by the railroad, in lieu of the quarter section above described as having been granted and otherwise disposed of by the United States. The land so selected was at the time the act of July 27, 1866, was passed, vacant and unappropriated public land of the United States, not mineral, to which the United States then had full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, and such land has ever since so remained, except as it has been affected by the acts of the parties to this suit. The company had not, at the time the selection was made, nor has it since, selected or re-

ceived lands to the extent or amount earned and acquired by it in virtue of the grant and the provisions of the granting act.

The complaint further alleged that notwithstanding the rights of the company secured to it by the act of July 27, 1866, the United States issued a patent for the quarter section so selected in lieu of the other, to the defendant, who claims the legal title to said land in fee simple and free from any trust or obligation to the plaintiff.

To this complaint the defendant interposed a general demurrer, which was sustained, and the plaintiff having refused to amend his complaint, a final judgment was entered against it and an appeal taken to the Supreme Court of California, where the judgment of the Superior Court of Fresno County was affirmed upon the authority of another case against one Wood. 124 California, 475. Whereupon plaintiff sued out a writ of error from this court.

Mr. Maxwell Evarts for the Southern Pacific Railroad Company. *Mr. L. E. Payson* was on his brief.

Mr. Joseph H. Call for Bell, submitted on his brief.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case involves a priority of right to certain lands within the indemnity limits of the grant to plaintiff by act of Congress of July 27, 1866, as against a patent for the same lands issued to the defendant as a settler under the land laws of the United States.

It presents the single question whether the railroad company had a right, on July 26, 1893, to select the land in dispute as lieu lands, notwithstanding the defendant had nearly one year before and on September 15, 1892, received a patent for the same. This involves the further question whether the lands in dispute were subject to preëmption and sale after the filing of the plat designating the line of the road; and this turns upon the meaning of the words, "land hereby granted," used in sec-

tion 6, wherein it is enacted that the "odd sections of land *hereby granted* shall *not* be liable to sale or entry or preëmption, before or after they are surveyed, except by said company, as provided in this act," which language must also be construed in connection with the further proviso in the same section, that the preëmption act of 1841, the homestead act of 1862, and the acts amendatory thereof, "shall be and the same are hereby extended to all *other* lands on the line of said road when surveyed, excepting those *hereby granted* to said company."

There is no dispute that the land "hereby granted" extends to all the odd-numbered sections within the place limits; that is, within twenty miles of each side of the road. The real question is whether it extends to the indemnity lands, ten miles beyond this limit, so much of which the company was authorized to select in lieu of lands unavailable to it within the granted limits.

The relative rights of railroads and of settlers under these Congressional grants, all of which are couched in similar language, have been the subject of much litigation in this court, the main object of which has been to fix the time when the right of the roads to particular lands within both the place limits and the indemnity limits finally attaches as against both prior and subsequent settlers. Although at the last term of this court the question involved in the case under consideration was practically settled in *Hewitt* v. *Schultz*, 180 U. S. 139, the progressive steps by which the conclusion in that case was reached will show the difficulties which have attended the solution of these questions, and, as we think, indicate the logical necessity of affirming this case. Two objects have been kept steadily in view: First, securing to the railroad the benefit of the lands actually granted; second, protecting, as far as possible, the right of the public to lands not actually granted, or necessary to indemnify the roads for lands which have become unavailable to it within its granted limits, by reason of the fact that they had been otherwise disposed of prior to the designation of the line of the road.

In the first of these cases, *Schulenberg* v. *Harriman*, 21 Wall. 44, it was held that the act of June 3, 1856, granting lands to

the State of Wisconsin, to aid in the construction of railroads, was a grant *in præsenti* of lands within the granted limits, and passed the title to the odd sections designated to be afterwards located; but, until such designation, the title did not attach to any specific tracts, and that when the route was fixed the title which was previously imperfect acquired precision, and became attached to the lands as of the date of the grant. There was no question of indemnity lands involved.

In *Leavenworth &c. Railroad Co.* v. *United States*, 92 U. S. 733, it was held that a similar grant, though operating *in præsenti*, did not apply to lands set apart for the use of an Indian tribe under a treaty, and that it was immaterial that they subsequently became a part of the public lands by the extinguishment of the Indian rights. This doctrine was extended in the next case, *Newhall* v. *Sanger*, 92 U. S. 761, to lands within the boundaries of an alleged Mexican or Spanish grant, which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road.

In *Ryan* v. *Railroad Company*, 99 U. S. 382, the rule laid down in the last two cases was qualified and limited to lands within the place limits, and it was held that, as the lands in *Ryan* v. *Railroad Company* were within the indemnity, but not within the place limits, "the railroad company had not and could not have any claim to it until specially selected." The land in dispute was within a tract formerly covered by a Mexican claim, which, although *sub judice* at the date of the act, had been finally rejected as invalid before the railroad company had selected it as part of its lieu lands. When so selected "there was no Mexican or other claim impending over it." This case practically holds that the title to indemnity lands inures to the railroad company only when selection is made.

This view, that the act conferred no rights to specified tracts within the indemnity limits until the grantees' right of selection had been exercised, was subsequently confirmed in *Cedar Rapids &c. Railroad Co.* v. *Herring*, 110 U. S. 27, and *Kansas Pacific* v. *Atchison &c. Railroad*, 112 U. S. 414, although it had been stated only as a suggestion in *Grinnell* v. *Railroad Company*, 103 U. S. 739.

In *Van Wyck* v. *Knevals*, 106 U. S. 360, it was again held that the grant of the place lands was *in præsenti*, and attached to the sections as soon as a map showing the definite location of the road was filed, and that a party who had subsequently entered a portion of the land covered by the grant, and procured a patent for the same, might be required to execute a release of the premises to the company. It was said by Mr. Justice Field, in that case, (p. 365,) that the grant cut off all subsequent claims from the date of this act, with certain exceptions specifically named, and passed the title as fully as if they had been then capable of identification.

The principle of this case was still further applied in *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720, to two conflicting grants, and it was held that as the title to the lands was within the place limits, it related back, after the road was located, to the date of the grant, priority of date of the act of Congress, and not priority of location of the line of the road, giving priority of title. A distinction was drawn in this case between the land within the place limits and land within the indemnity limits and it was said that in case of the latter neither priority of grant, nor priority of location, nor priority of construction gave priority of right; but this was determined by priority of selection.

The case of *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, is in seeming conflict with *Leavenworth &c. Railroad Co.* v. *United States*, 92 U. S. 733, inasmuch as it was held that the grant by act of July 2, 1864, to the Northern Pacific Railroad, of lands to which the Indian title had not been extinguished, operated to convey the fee to the company subject to the right of occupancy by the Indians; but the case is distinguishable, as there was in the second section of the act a proviso that the United States "should extinguish, as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands falling under the operation of this act, and acquired in the donation to the road." The prior case was not cited in the opinion.

The conclusions to be deduced from these cases are—

(1) That as to lands within the primary limits, the grant

takes immediate effect, and attaches to particular lands when the map of definite location is filed; that the Secretary of the Interior may, upon the filing of such map, give notice of a withdrawal from sale of all the odd-numbered sections within the granted limits, and that the title so acquired by the railroad company relates back to the date of the grant and takes precedence of all titles subsequently acquired, except those specifically named.

(2) That to lands within the indemnity limits, the company takes no title until a deficiency in the place limits has been ascertained and the company has exercised its right of selection, with perhaps some rare exceptions. See *St. Paul & Pacific* v. *Northern Pacific*, 139 U. S. 1.

The last case upon this subject is *Hewitt* v. *Schultz*, 180 U. S. 139, which involved the title to a quarter section of land in North Dakota within the indemnity limits, that is (as applied to Territories), between the forty and fifty-mile limits of the Northern Pacific Railroad land grant. Plaintiff Hewitt claimed title as a settler under the preëmption laws; defendant as a purchaser from the railroad company, under its grant of July 2, 1864, c. 217, 13 Stat. 365. The third and sixth sections of this act were, except as to the name of the railroad and a few immaterial words, identical with the corresponding sections of the Atlantic and Pacific act of July, 1866.

On March 30, 1872, the railroad company filed a map of its general route through the Territory of Dakota, and the local land office was thereupon directed to withhold from sale or location all the odd-numbered sections within the place limits of *forty* miles, as designated on such map. On June 11, 1873, the company having filed a map of the definite location of its line, the local land office was directed to withhold from sale, or entry, all the odd-numbered sections within the *fifty*-mile limits. This action was taken pursuant to the practice at that time prevailing in the General Land Office.

The land in dispute was more than forty, but within fifty, miles of the line of definite location; that is, was within the indemnity limits, and the controlling question in the case was whether it was competent for the Secretary of the Interior to withdraw

the odd-numbered sections within such indemnity limits; that is, between the forty and fifty-mile limits.

Hewitt settled upon the land April 10, 1882, more than a year before the withdrawal was made, and it was not until March 19, 1883, that the railroad company filed in the local land office its selection of land, embracing the land in dispute within the indemnity limits.

On April 4, 1883, Hewitt submitted his final proofs for the land, tendered the price, and demanded a patent; but his proof was rejected on the ground that the land had been withdrawn from entry under the act of July 2, 1864. Hewitt appealed to the Commissioner of the General Land Office, who affirmed the decision of the local land office, October 5, 1883. He was ousted of his possession the following year by the defendant Schultz, who had taken a deed from the railroad company. On August 15 1887, the order of withdrawal of the indemnity lands was revoked, and upon a review by the Commissioner of the General Land Office of his former decision, the ruling of the local land office was set aside, Hewitt's final proofs admitted, and the selection by the railroad held for cancellation. The company appealed from the decision in favor of Hewitt to the Secretary of the Interior, who affirmed the decision of the Commissioner, and a patent was issued to Hewitt, June 22, 1895.

It was contended upon the argument in this court that the words "the odd sections of land *hereby granted*," used in the sixth section, referred to the lands described in the "first" (third) section of the act; that is, to those within the place limits, which were free from preëmption and other claims, and unappropriated prior to the definite location of the road; and that, as to "all other lands on the line of said road, when surveyed," the act expressly declared that the preëmption and homestead acts should extend to them; "that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road which were unappropriated when the line of the railroad was definitely fixed; and that if at the time such line was 'definitely fixed,' it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted

or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the forty-mile and within the fifty-mile line, and under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits."

The court, treating the question as one of grave doubt, based its views largely upon the practice of the Land Office since 1888, and of the opinions of Secretary Lamar in the *Atlantic & Pacific Railroad*, 6 Land Dec. 84, and of Secretary Vilas in *Northern Pacific Railroad* v. *Miller*, 7 Land Dec. 100. The opinion of Secretary Lamar indicated that some of his predecessors had assumed that the power to withdraw lands within the indemnity limits could be exercised upon a definite location of the railroad before the loss in the place limits had been ascertained, but treating it as an original proposition, he thought the words of the act, "that the odd-numbered sections of land *hereby granted* shall not be liable to sale, or entry, or preëmption," indicated clearly the legislative will that none other should be withdrawn than the odd-numbered sections within the *granted* limits. Mr. Secretary Vilas, considering the same subject, said: "In my opinion, and it is with great deference that I present it, the granting act not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it. The difference between lands in the granted limits and land in indemnity limits, and between the time and manner in which the title of the United States changes to and vests in the grantee, accordingly as lands are within one or the other of these limits, has been clearly defined by the Supreme Court, and it is sufficient to state the well-settled rules upon this subject."

The same question arose in *Northern Pacific Railroad* v. *Davis*, 19 Land Dec. 87, and in *Northern Pacific Railroad* v. *Ayers*, wherein Secretaries Smith and Francis expressed their concurrence in the views announced by Secretaries Lamar and Vilas.

The court rested its decision largely upon this concurrence of views and long continued practice of the Land Department, and summed up its opinion in the following words: "If this were

done," (that construction overthrown,) "it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired under the preëmption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. . . . If the practice in the Land Department could, with reason, be held to be wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864."

It is attempted to distinguish the case under consideration from that of *Hewitt* v. *Schultz*, by the fact that the land in controversy in this case is within the indemnity limits of a grant to a railroad passing through a *State*, and within the department's withdrawal of a thirty-mile strip under the sixth section of the act, while the land in the *Hewitt* case fell within the indemnity limits of the grant within a *Territory*, and was beyond the forty-mile withdrawal, and was not withdrawn from sale by the sixth section, but was expressly declared to be still subject to the operations of the preëmption laws. It is true that the lands withdrawn in that case lay within a Territory and outside of the forty-mile strip required to be surveyed, while in this case the withdrawal of all the lands within the thirty-mile strip operates as a withdrawal of all lands within the indemnity, as well as within the place limits, because the line ran through a State instead of a Territory. But the real question is not whether the indemnity lands lay within or beyond the forty-mile limit, but whether the withdrawal can operate upon indemnity lands at all. It makes no difference in principle whether the indemnity lands are within or beyond the forty-mile limit, which is not a limit of withdrawal but of *survey*, and the whole argument in *Hewitt* v. *Schultz* is directed to the question whether it is within the power of a Secretary of the Interior to withdraw indemnity as well as place lands from settlement. The quantity of lands to be surveyed seems to have been arbitrarily fixed by Congress, with little attention to the actual limits of the grant, so as to include all lands within forty miles of each side of the railroads, that is, ten miles beyond the indemnity limits within the States, but

ten miles inside of those limits within the Territories; but the question of withdrawal is not necessarily dependent upon the question of survey, and the fact that in that case the indemnity lands were beyond the forty-mile limit was an incident rather than a dominant fact. As said by Mr. Secretary Lamar: "It is manifest that the said act gave no especial authority or direction to the executive to withdraw said lands, and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior and in the exercise of his discretion." The power of the Secretary to withdraw lands is exercised for the purpose of carrying out the grant to the railroad, and to prevent lands covered by said grant from being taken up by settlers before the road is completed and the patents issued to the company; but clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of the grant. It was said by Secretary Smith to have been exercised for many years, "but the right of this asserted power on the part of the executive is involved in obscurity." *Northern Pacific R. R.* v. *Davis*, 19 Land Dec. 87, 88.

That the object of section six was to direct a survey and not a withdrawal of lands within the forty-mile strip, seems to have been the opinion of this court in *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720, in which Mr. Justice Miller, delivering the opinion says, (p. 732):

"The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company, or any one for it. Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation, and forbidden to cultivation?

"It is true that in some cases the statute requires the Land Department to withdraw the lands within these secondary limits from the market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections.

"It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits. Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected."

If the command of the statute were to withdraw from the market, instead of survey, all odd-numbered sections within the forty-mile strip, the position of the railroad company in this case would be impregnable; but as the withdrawal only extends to the lands "hereby granted," we must look elsewhere to ascertain the meaning of those precise words. There is good reason for withdrawing lands within the place limits, since these lands already belong to the railroad company, as soon as they are identified by the location of the line, while lands within the indemnity limits may never be required at all, and in most cases are required only to a limited extent. Undoubtedly the company acquires title to both classes of lands by the third section of the granting act; but it acquires a title to lands within the place limits by a present grant while to land within the indemnity limits, only by a future power of selection. In both cases the statute is the origin of the title; but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words "hereby granted" evidently refer to the former.

Treating this case as a reargument of the question involved in *Hewitt* v. *Schultz*, and it practically comes to that, we still adhere to the principle there announced. It seems to us the more reasonable, if not the necessary, inference to be deduced from the language of sections 3 and 6. By the former there is

"*hereby granted* . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State." These words terminate the grant, the remainder of the clause being immaterial in this connection, and if the whole clause had been followed by a period, instead of a semicolon, the meaning, perhaps, would have been clearer. But there follows another clause, that "whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be *selected* by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections," etc. There is here a clear distinction between the lands *granted in præsenti* in the first clause, and lands to be thereafter *selected* by the company, whenever the deficiency in the granted lands shall be ascertained.

The sixth section carries out the same idea. It requires a survey of forty miles in width on both sides of the entire line, whether passing through States or Territories. This would include only the granted or place limits within a Territory, but within a State would cover the indemnity limits as well. There was no order in the act to withdraw any lands from settlement or sale, but such withdrawal seems to have been made in pursuance of the practice of the Interior Department, and for the purpose of preventing lands granted to the railroad company from being taken up by settlers, before the completion of the line and the final issue of patents. As was said by Mr. Secretary Lamar in the *Atlantic & Pacific Railroad Company*, 6 Land Dec. 84, 88: "Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was

made it was made by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken." But as the power to withdraw extends only to the "*lands hereby granted*" and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon section 3 to determine what are the lands "hereby granted."

Now, as already observed, there is a clear distinction in section 3 between granted lands and lands to be selected after the deficiency in the granted lands has been ascertained. It is true that, prior to this selection being made, many of these indemnity lands may be taken up, and an insufficient amount left for the railroad, (and we do not deny the force of the dissenting opinion in *Hewitt* v. *Shultz* in that connection,) but we think this possibility serves rather as a basis for a further action by Congress, such as was made in the Northern Pacific case by the joint resolution of May 31, 1870, (16 Stat. 378,) than as a reason for withdrawing from settlement a vast amount of land which the railroad may never have occasion to require. It was said by Secretary Lamar in the case of the *Atlantic & Pacific Railroad Co*, 6 Land Dec. 84, 87: "As to the lands within the indemnity limits, the contract was based upon two contingencies; that of losing lands within the granted limits, and being able to find sufficient to indemify the company among the odd-numbered sections within a further limit of ten miles. Here the interest of the company was so remote and contingent, being a mere potentiality, and not a grant, that Congress declined to order a withdrawal for the benefit of the same, or even a survey within the Territories." In view of the constant trend of population toward the Western Territories, it is a serious matter to withdraw these enormous tracts from settlement and hold them, as it were, in mortmain against the protest of those who stand ready to enter upon and possess them.

It becomes still more serious when, as in this case, there was a delay of twenty-seven years between the granting act and the act of selection. It seems intolerable that a settler, who had entered and paid for lands in good faith, should be liable to an

ouster after a possible lapse of twenty-seven years, when the very improvements he may have put upon the lands might be the reason for their selection by the company.

We are therefore of opinion that the act of July 27, 1866, did not authorize the withdrawal by the Secretary of the Interior of the indemnity lands; that such lands remained open to homestead and preëmption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, approved by the Interior Department, were valid as conveyances of the land as against the selection by the railroad company.

The judgment of the Supreme Court of California is, therefore,

Affirmed.

GROECK *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 82. Argued December 5, 6, 1901. — Decided January 13, 1902.

This case was argued and submitted with *Southern Pacific Railroad Company* v. *Bell*, *ante*, 675, and by the same counsel, resembles that in all essential particulars, and is controlled by it.

THIS was a bill in equity filed in the Circuit Court for the Southern District of California by the Southern Pacific Railroad Company, plaintiff, against Otto Groeck and another, defendants, to obtain a decree declaring the company to be the rightful owner of the south half of a certain quarter section of land in Kings County, California, and that defendants hold the legal title thereto in trust for it, a conveyance of which was prayed.

The amended bill, as abstracted by the Circuit Court of Appeals, (87 Fed. Rep. 970,) alleged: "That the appellant accepted the terms of the grant, fixed the general route of its road as contemplated by the act, and on January 3, 1867, filed a map thereof

in the office of the Commissioner of the General Land Office; that on that date the Commissioner accepted and approved the map and the route designated by it, and on March 22, 1867, under the direction of the Secretary of the Interior, he withdrew the odd sections of land lying within thirty miles of the line of road from sale or location, preëmption or homestead entry; that on November 2, 1869, the Secretary of the Interior made an order declaring the withdrawal revoked; that on December 15, 1869, the Secretary suspended his order of November 2; that on July 26, 1870, the Secretary restored the withdrawal of March 22, 1867; that on August 15, 1887, the Secretary declared the withdrawal of March 22, 1867, revoked, as to the indemnity sections thereof; that the appellant commenced to build its road during the year 1870, and completed the construction in different sections between that date and the year 1889 — the last section, extending from Huron westerly to Alcalde, having been constructed during the year 1888; that the land in suit is opposite to, and coterminous with that section, and is within the indemnity limits of the grant, and is not included in any exception therefrom; that on September 2, 1885, the appellee Groeck settled on the land in controversy, and during the same month filed his preëmption claim therefor in the proper land office of the United States, and thereafter complied with the land office regulations, and on June 7, 1886, made preëmption proof and payment for the land; that on April 11, 1890, patent was issued from the United States, conveying the land to him; that, as the appellant's road was constructed in several sections, such sections were examined by commissioners appointed by the President, as provided by section 4 of the act, and that said commissioners reported that such sections had been completed as required by the act, and thereupon the President accepted and approved the reports; that a map of the definite location of such section between Huron and Alcalde was filed with and approved by the Secretary of the Interior on April 2, 1889, and the President accepted and approved the commissioners' report on that section on November 8, 1889; that on July 13, 1891, the appellant, acting under the direction of the Secretary of the Interior, selected the land in suit, as granted to it by the act."

Statement of the Case.

To this bill defendants interposed a plea setting up the various steps by which the defendant Groeck obtained the patent of the land as a qualified preëmptor, and thereby, as alleged, obtained a legal and perfect title in fee simple; and further setting up the defence of laches to the claim of the railroad company.

The Circuit Court entered an order sustaining the plea upon the ground of laches, with leave to the company to reply to the plea and take issue as to the matters of fact therein alleged. 74 Fed. Rep. 585. The company having declined to avail itself of this privilege, the Circuit Court ordered the bill to be dismissed. Whereupon the railroad company appealed to the Circuit Court of Appeals, which reversed the decree of the Circuit Court and remanded the case for further proceedings. 87 Fed. Rep. 970. The case coming on again for hearing a decree was rendered for the plaintiff; another appeal taken to the Court of Appeals, and the decree of the Circuit Court affirmed.

Mr. Maxwell Evarts for the Railroad Company. *Mr. L. E. Payson* was on his brief.

Mr. Joseph H. Call for Groeck, submitted on his brief.

Mr. Justice Brown stated the case and delivered the opinion of the court.

This case resembles the one just decided in all its essential particulars and is controlled by it.

The decrees of both courts are therefore,

Reversed and the case remanded to the Circuit Court for the Southern District of California with directions to dismiss the bill.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 339. COLE *v.* GARLAND. Error to the United States Circuit Court of Appeals for the Seventh Circuit. Motion to dismiss submitted October 15, 1901. Decided October 21, 1901. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *German National Bank* v. *Speckert*, 181 U. S. 405. *Mr. Jackson H. Ralston* for the motion. *Mr. Rublee A. Cole* opposing.

No. 353. ARMSTRONG *v.* MAYER. Error to the Supreme Court of the State of Nebraska. Motions to dismiss or affirm submitted October 15, 1901. Decided October 21, 1901. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Eustis* v. *Bolles*, 150 U. S. 361. *Mr. Walter J. Lamb* for the motions. *Mr. Lionel C. Burr*, *Mr. Charles L. Burr* and *Mr. Charles O. Whedon* opposing.

No. 66. WISCONSIN *ex rel.* GATES *v.* COMMISSIONERS OF PUBLIC LANDS. Error to the Supreme Court of the State of Wisconsin. Argued October 29, 1901. Decided November 4, 1901. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Hamblin* v. *Western Land Company*, 147 U. S. 531; *Wilson* v. *North Carolina*, 169 U. S. 595; *Mills County* v. *Railroad Companies*, 107 U. S. 557; *Cook County* v. *Calumet and Chicago Canal Company*, 138 U. S. 635, 655; *Walsh* v. *Railroad Company*, 176 U. S. 479; *Zadig* v. *Baldwin*, 166 U. S. 485; *Chapin* v. *Fye*, 179 U. S. 127; and see *State ex rel. Gates* v. *Commissioners*, 106 Wis. 584. *Mr. Rublee A. Cole* for the plaintiff in error. *Mr. E. R. Hicks* for the defendants in error.

Decisions announced without Opinions.

No. 296. RODLEY *v.* PEOPLE OF THE STATE OF CALIFORNIA. Error to the Supreme Court of the State of California. Motions to dismiss or affirm submitted November 4, 1901. Decided November 11, 1901. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Caldwell* v. *Texas*, 137 U. S. 692; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Powell* v. *Brunswick County*, 150 U. S. 433. *Mr. Tirey L. Ford* and *Mr. C. N. Post* for the motions. *Mr. George D. Collins* opposing.

No. 437. BISSERT *v.* HAGAN, WARDEN. Appeal from the Circuit Court of the United States for the Southern District of New York. Motions to dismiss or affirm submitted November 25, 1901. Decided December 2, 1901. *Per Curiam.* Final order affirmed, with costs, on the authority of *Storti* v. *Commonwealth of Massachusetts*, 183 U. S. 138; *Brown* v. *New Jersey*, 175 U. S. 172; *Markuson* v. *Boucher*, 175 U. S. 184, and cases cited. *Mr. Charles L. Le Barbier* for the motions. *Mr. Roger M. Sherman* opposing.

No. 76. CENTRAL OHIO RAILROAD COMPANY (AS REORGANIZED) *v.* MAHONEY. On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit. Submitted November 27, 1901. Decided December 9, 1901. *Per Curiam.* Question certified answered in the negative, on the authority of *Gableman* v. *Peoria Railway Company*, 179 U. S. 335. *Mr. Hugh L. Bond, Jr.*, and *Mr. J. H. Collins* for the railroad company. *Mr. Thomas Ewing Steele* for Mahoney.

No. 64. UNITED STATES *v.* AMERICAN STEAMSHIP "LAURADA." On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. Argued November 21 and 22, 1901. Decided January 6, 1902. Decree affirmed, by a divided court, and cause remanded to the District Court of the United States for the District of Delaware. *Mr. Attorney General* and *Mr.*

Assistant Attorney General Hoyt for the petitioner. *Mr. Andrew C. Gray* for the respondent.

Decisions on Petitions for Writs of Certiorari.

No. 335. MAYER *v.* FULLER, TRUSTEE. Seventh Circuit. Denied October 21, 1901. *Mr. A. B. Browne*, *Mr. Alexander Britton* and *Mr. Thomas H. Dorr* for the petitioner. *Mr. Charles C. Lancaster* opposing.

No. 394. POWERS *v.* MASSACHUSETTS HOMŒOPATHIC HOSPITAL. First Circuit. Denied October 21, 1901. *Mr. Arthur H. Russell* and *Mr. Theodore H. Russell* for the petitioner. *Mr. Solomon Lincoln* opposing.

No. 399. TOOTLE *v.* COLEMAN. Eighth Circuit. Denied October 21, 1901. *Mr. R. E. Ball* for the petitioners. *Mr. David Smyth* opposing.

No. 404. CITY OF GALVESTON *v.* UNITED STATES MORTGAGE AND TRUST COMPANY. Denied October 21, 1901. *Mr. James B. Stubbs* and *Mr. D. W. Baker* for the petitioner. *Mr. Julian T. Davies*, *Mr. R. S. Lovett* and *Mr. Brainard Tolles* opposing.

No. 425. WHITMAN *v.* MORTON; No. 426. SAME *v.* WATTS, AS RECEIVER, AND No. 427. SAME *v.* CITIZENS BANK AT READING, PENNA. Second Circuit. Denied October 21, 1901. *Mr. William G. Wilson* for the petitioners. *Mr. Charles E. Hughes*, *Mr. Arthur C. Rounds*, *Mr. Wm. B. Hornblower* and *Mr. McCready Sykes* opposing.

No. 431. SOUTHERN PACIFIC COMPANY *v.* YEARGIN, ADMINIS-

TRATRIX. Eighth Circuit. Denied October 21, 1901. *Mr. Thomas T. Fauntloy*, *Mr. Shephard Barclay* and *Mr. L. E. Payson* for the petitioner.

No. 432. STEWART *v.* VILLAGE OF ASHTABULA, OHIO. Sixth Circuit. Denied October 21, 1901. *Mr. Morison R. Waite* for the petitioner. *Mr. J. H. McGiffert* opposing.

No. 433. NELSON, CLAIMANT, *v.* BUCHANAN, CLAIMANT. Ninth Circuit. Denied October 21, 1901. *Mr. Jackson H. Ralston* for the petitioners.

No. 326. KUMLER *v.* HALE, EXECUTOR. Sixth Circuit. Denied October 28, 1901. *Mr. Orville S. Brumback*, *Mr. J. B. Foraker* and *Mr. Arthur Peter* for the petitioner. *Mr. Barton Smith* and *Mr. Rufus H. Baker* opposing.

No. 340. CAMPBELL PRINTING PRESS AND MANUFACTURING COMPANY *v.* DUPLEX PRINTING PRESS COMPANY. Sixth Circuit. Denied October 28, 1901. *Mr. Louis W. Southgate* for the petitioner. *Mr. T. H. Alexander* and *Mr. Arthur E. Dowell* opposing.

No. 352. WILCOX AND GIBBS SEWING MACHINE COMPANY *v.* SHERBORNE. Third Circuit. Denied October 28, 1901. *Mr. Hubert Howson*, *Mr. Preston K. Erdman* and *Mr. George Tucker Bispham* for the petitioner. *Mr. John G. Johnson* and *Mr. Frank P. Prichard* opposing.

No. 374. YELLOW POPLAR LUMBER COMPANY *v.* DANIEL. Sixth Circuit. Denied October 28, 1901. *Mr. John W. M. Stewart*,

Mr. John N. Baldwin and *Mr. John F. Hager* for the petitioner. *Mr. Thomas R. Brown* opposing.

No. 424. Morgan's Louisiana and Texas Railroad and Steamship Company *v.* Schooner "Robert Graham Dun." Second Circuit. Denied October 28, 1901. *Mr. Maxwell Evarts* for the petitioner. *Mr. J. Parker Kirlin* opposing.

No. 435. Herbst *v.* Steamship "Asiatic Prince." Second Circuit. Denied October 28, 1901. *Mr. J. Hubley Ashton* for the petitioner. *Mr. J. Parker Kirlin* opposing.

No. 389. Kokomo Fence Machine Company *v.* Kitselman. Seventh Circuit. Granted October 28, 1901. *Mr. Ephraim Banning*, *Mr. Thomas A. Banning* and *Mr. Cassius C. Shirley* for the petitioner. *Mr. Robert H. Parkinson* opposing.

No. 418. Bank of Topeka *v.* Eaton. First Circuit. Denied November 4, 1901. *Mr. N. H. Loomis* for the petitioner. *Mr. Edward W. Hutchins*, *Mr. Henry Wheeler*, *Mr. Charles T. Gallagher* and *Mr. Mayhew R. Hitch* opposing.

No. 445. Simpson's Patent Dry Dock Company *v.* Atlantic and Eastern Steamship Company. First Circuit. Denied November 4, 1901. *Mr. Eugene P. Carver* and *Mr. Edward E. Blodgett* for the petitioner. *Mr. Lewis S. Dabney* and *Mr. F. Cunningham* opposing.

No. 415. Nashua Savings Bank *v.* Anglo-American Land Mortgage and Agency Co., Limited. First Circuit. Granted November 11, 1901. *Mr. John S. H. Frink* for the petitioner. *Mr. Omar Powell* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 444. BRILL *v.* PECKHAM MOTOR TRUCK AND WHEEL COMPANY. Second Circuit. Granted November 11, 1901. *Mr. Francis Rawle* and *Mr. Frederick P. Fish* for the petitioners. *Mr. Henry P. Wells* opposing.

No. 429. CITY OF AUSTIN *v.* BARTHOLOMEW AND NALLE, RECEIVERS. Fifth Circuit. Denied November 18, 1901. *Mr. S. R. Fisher* for the petitioner.

No. 458. CITY OF NEW ORLEANS *v.* JACKSON. Fifth Circuit. Denied November 18, 1901. (Mr. Justice White and Mr. Justice Peckham took no part in the decision of this application.) *Mr. Samuel L. Gilmore* for the petitioner. *Mr. J. D. Rouse, Mr. William Grant, Mr. Richard De Gray* and *Mr. H. M. Jordan* opposing.

No. 344. ZANE *v.* COUNTY OF HAMILTON, ILLINOIS. Seventh Circuit. Granted November 25, 1901. *Mr. George A. Sanders* for the petitioner. *Mr. J. M. Hamill* opposing.

No. 446. DWYER *v.* NIXON. Second Circuit. Denied November 25, 1901. *Mr. Louis Marshall* and *Mr. James M. Beck* for the petitioner. *Mr. William G. Low* opposing.

No. 448. STUBER *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY. Sixth Circuit. Denied November 25, 1901. *Mr. Thomas B. Turley* and *Mr. Heber J. May* for the petitioner. *Mr. H. W. Bruce* opposing.

No. 450. AMERICAN ORDNANCE COMPANY *v.* DRIGGS-SEABURY GUN AND AMMUNITION COMPANY. Second Circuit. Denied No-

vember 25, 1901. *Mr. William H. Singleton* for the petitioner. *Mr. Ernest Wilkinson* and *Mr. Samuel T. Fisher* opposing.

No. 465. TRACY, EXECUTRIX, *v.* EGGLESTON. Fifth Circuit. Denied November 25, 1901. *Mr. J. D. Rouse, Mr. William Grant* and *Mr. H. M. Jordan* for the petitioners.

No. 463. BELL, CLERK, *v.* COMMONWEALTH TITLE INSURANCE AND TRUST COMPANY. Third Circuit. Granted December 2, 1901. *Mr. Attorney General, Mr. Solicitor General Richards* and *Mr. Assistant Attorney General Beck* for the petitioner. *Mr. John G. Johnson* opposing.

No. 471. EMPIRE TRANSPORTATION COMPANY *v.* PARSONS. Ninth Circuit. Denied December 2, 1901. *Mr. Henry Galbraith Ward* for the petitioner. *Mr. Wilson R. Gay* opposing.

No. 472. CENTRAL STOCK AND GRAIN EXCHANGE OF CHICAGO *v.* BENDINGER. Seventh Circuit. Denied December 2, 1901. *Mr. Jacob J. Kern* and *Mr. William M. Springer* for the petitioner. *Mr. Rufus S. Simmons* opposing.

No. 464. SCOTT *v.* GOSS PRINTING PRESS COMPANY. Third Circuit. Denied December 9, 1901. *Mr. Benjamin F. Lee, Mr. William H. H. Lee* and *Mr. James Gore King Lee* for the petitioner. *Mr. L. L. Bond, Mr. M. B. Philipp* and *Mr. C. E. Pickard* opposing.

No. 479. LAKELAND TRANSPORTATION COMPANY *v.* MILLER. Sixth Circuit. Denied December 9, 1901. *Mr. Harvey D. Goulder* and *Mr. Frank S. Masten* for the petitioners. *Mr. F. H. Canfield* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 481. METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK *v.* MERCANTILE TRUST COMPANY OF THE CITY OF NEW YORK, TRUSTEE. Sixth Circuit. Denied December 9, 1901. *Mr. John G. Johnson* for the petitioners. *Mr. Lawrence Maxwell, Jr.*, *Mr. Paul D. Cravath* and *Mr. Richard Reid Rogers* opposing.

No. 470. HINGSTON *v.* STEAM VESSEL "VULCAN." Second Circuit. Denied January 6, 1902. *Mr. George Clinton* for the petitioners. *Mr. John C. Shaw* opposing.

No. 491. CITY OF NEW YORK *v.* PINE. Second Circuit. Granted January 6, 1902. *Mr. George L. Sterling* for the petitioners. *Mr. Stephen G. Williams* opposing.

No. 492. CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION *v.* DENSON. Fifth Circuit. Granted January 6, 1902. *Mr. Robert Pritchard* for the petitioner. *Mr. Oscar W. Underwood* opposing.

No. 460. S. S. WHITE DENTAL MANUFACTURING COMPANY *v.* DELAWARE INSURANCE COMPANY. Third Circuit. Denied January 13, 1902. *Mr. Richard C. Dale* and *Mr. Joseph C. Fraley* for the petitioner. *Mr. John G. Johnson* opposing.

No. 494. SWEENY *v.* HANLEY. Ninth Circuit. Denied January 13, 1902. *Mr. W. B. Heyburn* for the petitioners. *Mr. John R. McBride* opposing.

No. 499. BAER *v.* KERR. Fifth Circuit. Denied January 13, 1902. *Mr. Horatio Bisbee* and *Mr. H. C. McDougal* for the petitioner. *Mr. R. H. Liggett* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 500. ÆTNA INSURANCE COMPANY OF HARTFORD, CONN., v. LANGAN. Eighth Circuit. Denied January 13, 1903. (Mr. Justice Gray took no part in the disposition of this application.) *Mr. Henry E. Davis* for the petitioner. *Mr. R. C. Langan* opposing.

INDEX.

BANKRUPTCY.

CASES AFFIRMED AND FOLLOWED.

COMMON CARRIER.

to a purpose prescribed by law, and it was for the court martial to determine whether the crime charged was "to the prejudice of good order and military discipline." *Ib.*

EXTRADITION TREATIES.

1. While desertion is not a crime provided for in our ordinary extradition treaties with foreign nations, the arrest and return to their ships of deserting seamen is required by our treaty with Russia and by other treaties with foreign nations. Query: Whether in the absence of a treaty, courts have power to order the arrest and return of seamen deserting from foreign ships? *Tucker* v. *Alexandroff*, 424.
2. While foreign troops entering or passing through our territory with the permission of the Executive are exempt from territorial jurisdiction, it is doubtful whether in the absence of a treaty or positive legislation to that effect, there is any power to apprehend or return deserters. *Ib.*
3. The treaty with Russia containing a convention upon that subject, such convention is the only basis upon which the Russian Government can lay a claim for the arrest of deserting seamen. The power contained in the treaty cannot be enlarged upon principles of comity to embrace cases not contemplated by it. *Ib.*
4. A treaty is to be interpreted liberally and in such manner as to carry out its manifest purpose. *Ib.*

HABEAS CORPUS.

Section 761 of the Revised Statutes provides as to *habeas corpus* cases that "the court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require;" and this mandate is applicable to this court, whether exercising original or appellate jurisdiction. *Storti* v. *Massachusetts*, 138.

INDIANS.

See PUBLIC LAND, 17.

INSURANCE (FIRE).

1. The Potomac Company insured Mitchell in a sum not exceeding five thousand dollars on his stock of stoves and their findings, tins and tinware, tools of trade, etc., kept for sale in a first-class retail stove and tin store in Georgetown, D. C., with a privilege granted to keep not more than five barrels of gasoline or other oil or vapor. The policy also contained the following provisions: "It being covenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only." "Or if gunpowder, phosphorus, naphtha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time without written consent, or if the risk be increased by any means within the control . . . of the assured, this policy shall be void." An extra premium was charged

INSURANCE (LIFE).

PATENT FOR INVENTION.

PHILIPPINES.

See CASES AFFIRMED AND FOLLOWED, 3.

PRACTICE.

PUBLIC LAND.

TRADE-MARK.

TREATIES.

USURY.

WAGES.

See CONSTITUTIONAL LAW, 1.